No. ____

IN THE

Supreme Court of the United States

ELVIS REYES,
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

In *Apprendi v. New Jersey,* this Court held 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." 530 U.S.466, 490 (2000). Four years later, *Blakely v. Washington*, clarified that *Apprendi* was not limited to cases where a sentence exceeded the maximum number of years of imprisonment permitted by Congress when the law was enacted, but rather 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." 542 U.S. 296, 303 (2004). Then in *Southern Union Co. v. United States*, this Court extended *Apprendi* beyond sentences of imprisonment to also apply to monetary penalties holding "that the rule of *Apprendi* applies to the imposition of criminal fines." 567 U.S. 343, 360 (2012). However, the circuit courts have all declined to apply the rule of *Apprendi* (and *Southern Union*) to criminal restitution. In Mr. Reyes' case, the Eleventh Circuit has held that *Apprendi* is inapplicable to restitution because the restitution statute does not have a monetary limit. *United States v. Reyes*, 2022 WL 4476660 (11th Cir. 2022). The question presented is:

> Whether the Sixth and Fifth Amendments are violated by the imposition of restitution based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner is Elvis Reyes, defendant-appellant below. Respondent is the United States of America, plaintiff-appellee below. Petitioner is not a corporation.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Elvis Reyes, 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.

OPINIONS BELOW

The U.S. District Court for the Middle District of Florida, Tampa Division, adjudicated Mr. Reyes guilty of two counts and sentenced him to 249 months of imprisonment. (Appendix A). The district court also ordered Mr. Reyes to pay restitution in the amount of $442,368. *Id.* Mr. Reyes appealed his judgment and sentence to the Eleventh Circuit Court of Appeals, and it affirmed the district court in its opinion which was reported at *United States v. Elvis Reyes,* 2022 WL 4476660 (11th Cir. 2022). (Appendix B).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The opinion of the Eleventh Circuit Court of Appeals was issued on September 27, 2022. (Appendix B).

CONSTITUTIONAL PROVISION INVOLVED

U.S. CONST. Amend. V:

> 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 offence 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.

U.S. CONST. Amend. VI:

> 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 defense

STATEMENT OF THE CASE

Mr. Reyes entered into a plea agreement and pled guilty to one count of mail fraud and one count of aggravated identity theft. The plea agreement had an appeal waiver provision, but it permitted Mr. Reyes to appeal his sentence if it exceeded the statutory maximum. The district court sentenced Mr. Reyes to 249 months' imprisonment and ordered that he pay $442,368 in restitution. While Mr. Reyes had agreed—as part of his plea agreement—to pay restitution to his victims, he objected to the amount ordered by the district court because the loss calculation was not supported by reliable and specific evidence. On appeal, the Eleventh Circuit Court of Appeals held Mr. Reyes's arguments were barred by the appeal waiver "because the restitution statute does not have a maximum." *Reyes*, 2022 WL 4476660, at *2 (citing *Dohrmann v. United States*, 442 F.3d 1279, 1281 (11th Cir. 2006)). In *Dohrmann*, the Eleventh Circuit held that *Apprendi* is inapplicable to restitution because the restitution statutes, 18 U.S.C. §§ 3663 and 3663A, do not have a monetary limit and therefore, the court reasoned the statutes do not have a statutory maximum for purposes of *Apprendi*. *Dohrmann*, 442 F.3d at 1281.

A. District Court Proceedings

Mr. Reyes was charged with eight counts of mail fraud in violation of 18 U.S.C. §§ 1341, 1349, and 2; eight counts of making false statements in Form I-589 Applications to USCIS in violation of 18 U.S.C. §§ 1546(a) and 2; and nine counts of identity theft in violation of 18 U.S.C. §§ 1028A(a) and 2. He entered into a plea agreement, and, in exchange for his plea of guilty to one count of mail fraud and one

count of aggravated identity theft, the government agreed to dismiss the remaining counts and recommend that Mr. Reyes be sentenced within his applicable guidelines range. As part of the plea agreement, Mr. Reyes agreed to make full restitution to the victims of his fraudulent scheme pursuant to 18 U.S.C. §§ 3663 and 3663A. Mr. Reyes also acknowledged that the amount of restitution would be at least $265,627.00, and that the final amount of restitution would be determined by the district court at sentencing. The plea agreement also contained an appeal waiver provision in which Mr. Reyes waived his right to appeal his sentence unless his appeal came under one of four exceptions, which included "the ground that the sentence exceeds the statutory maximum penalty."

As Mr. Reyes' case proceeded, the amount of restitution sought by the government kept increasing. The Initial Presentence Investigation Report (PSR) stated that the amount due in restitution was $366,920. The Final PSR listed an even higher amount of restitution, $407,868. The government's sentencing memorandum claimed that the amount was $411,868.

At the restitution hearing, the government again increased the calculation for the actual loss amount and the requested restitution amount to $442,368. The government's agent testified that the amount had increased because the government had received additional requests for restitution after the sentencing hearing. But, according to the agent, not all of the new requests were corroborated with any type of supporting documentation. The agent admitted that there were currently 137 separate claims for restitution, but approximately 10 to 15 percent of

all the claims had zero corroborating documents. No other evidence was introduced by the government to support the restitution claim, save the agent's testimony and a spreadsheet which summarized the victim claims. No other exhibits were introduced and no other witnesses were called to testify (while several victims testified at sentencing, no new victims testified at the restitution hearing). Defense counsel argued that a large portion of the restitution figure was unsupported by reliable and specific evidence and that a lesser amount of restitution would be appropriate. The district court rejected the argument and ordered Mr. Reyes to pay $442,368 in restitution.

B. Appellate Court Proceedings

Mr. Reyes appealed his judgment and sentence to the United States Court of Appeals for the Eleventh Circuit. (Appendix B). As a threshold matter, he argued that the appeal waiver provision should not apply as the order of restitution exceeded the statutory maximum permitted sentence. He argued that while it is true that there is no "monetary maximum" under 18 U.S.C. § 3663 and 3663A, there are, however, other statutory limitations as to the amount of restitution that can be imposed. In particular, restitution cannot be imposed to compensate anyone other than a victim, unless the parties agree to do so in the plea agreement. *See* 18 U.S.C. § 3663(a)(1)(A). The statute defines "victim," when the offense involves a scheme, as a "person directly harmed by the defendant's criminal conduct in the course of the scheme." 18 U.S.C. § 3663(2). Mr. Reyes argued that the government had failed to provide sufficient evidence to prove that each of the alleged victims were actually

victims given that the government's own witness's admission that 10 to15 percent of the claims had zero documentation.

The Eleventh Circuit rejected Mr. Reyes' argument and affirmed holding:

> To avoid his appeal waiver, Reyes attempts to recast his argument that the court relied on insufficient evidence in calculating restitution as an argument that the amount of restitution exceeded the statutory maximum. We can make short work of that argument because the restitution statute does not have a maximum. *See* 18 U.S.C. §§ 3663, 3663A; *Dohrmann v. United States*, 442 F.3d 1279, 1281 (11th Cir. 2006). To the extent that Reyes challenges the district court's findings regarding the number of victims or the amount of loss per victim, those arguments are barred by his appeal waiver. *See United States v. Grinard-Henry*, 399 F.3d 1294, 1295–96 (11th Cir. 2005) (appeal waiver barred challenge to sentence based on court's drug-quantity findings); *see also United States v. Johnson*, 541 F.3d 1064, 1067–68 (11th Cir. 2008) (sentence appeal waiver barred challenge to untimely restitution order).

Reyes, 2022 WL 4476660, at *1.

REASONS FOR GRANTING THE PETITION

Whether the Sixth Amendment is violated by the imposition of restitution based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant?

A defendant's Fifth Amendment right to due process and Sixth Amendment right to a trial by jury extend far beyond merely having a jury determine guilt or innocence. The right to a trial by jury is also the right to have one's punishment—both physical and financial—determined by a constitutional jury rather than by judicial fact-finding. The circuit courts have erroneously rejected the application of this Court's holding in *Apprendi* to the restitution statutes 18 U.S.C. §§ 3663 and 3663A. Petitioner requests that the Court grant this petition because this error is an "important question of federal law that has not been, but should be, settled by this Court." S. Ct. R. 10(c)

In *Apprendi*, this Court made clear 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." *Apprendi v. New Jersey*, 530 U.S.466, 490 (2000). Despite this clear directive, it was necessary for this Court to clarify, just four years later, that *Apprendi* was not limited to cases where a sentence exceeded the maximum number of years of imprisonment set forth in the text of the statute, but rather 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." *Blakely v. Washington*, 542 U.S. 296, 303 (2004)." But *Blakely* is not the only time this Court has had to restate the essential holding of *Apprendi.* One year later, in 2005, this Court had to explain that the holding of *Apprendi* also applies to this federal sentencing guidelines. *United States v. Booker*, 543 U.S. 220 (2005). In 2002, this Court also had to explain that *Apprendi* applied to capital cases. *Ring v. Arizona*, 536 U.S. 584, 585 (2002).

Later, this Court held that *Apprendi* applied to criminal fines in *Southern Union Co. v. United States*, 567 U.S. 343, 360 (2012). In *Southern Union*, this Court explained that *Apprendi* is not limited to sentences of imprisonment but also applies to monetary penalties holding that the rule of *Apprendi* applies to the imposition of criminal fines, because "[c]riminal fines, like . . . other forms of punishment, are penalties inflicted by the sovereign for the commission of offenses." 567 U.S. at 349. The Court noted 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." *Id*. at 350 (citations omitted).

Petitioner argues that given the reasoning of the line of *Apprendi* cases, it logically follows that the Sixth Amendment applies to punishment by restitution. The circuit courts of appeal, however, do not agree. The Eleventh Circuit and eight

other circuits that have addressed the issue, have concluded that *Southern Union* does not overrule prior circuit precedent holding that *Apprendi* does not apply to criminal restitution. *United States v. Kachkar,* 2022 WL 2704358 (11th. 2022). Courts have given two reasons for that conclusion[1]: (1) the circuit courts have held that criminal restitution is actually civil in nature;[2] and (2) the circuit courts have held that criminal restitution does not have a limit as to the dollar amount, therefore it does not have a statutory maximum.[3]

The civil-penalty argument is logically inconsistent. Criminal restitution is only imposed as penalty after a criminal conviction. 18 U.S.C. §§ 3663(a)(1)(A), 3663A(a)(1), 3572(d)(1). Furthermore, this Court's precedent explicitly describes restitution as a 'penalty' that imposed upon a criminal defendant. *See Paroline v. United States*, 572 U.S. 434, 456 (2014); *Pasquantino v. United States*, 544 U.S. 349, 365 (2005).

The second argument, that the restitution statutes lack a statutory maximum and are therefore outside the scope *Apprendi,* flies in the face of this Court's holding in *Blakely.* As Justice Gorsuch explained:

> Seizing on this language, the government argues that the Sixth Amendment doesn't apply to restitution orders because the amount of

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[1] The Ninth and Tenth circuits have applied both reasons. *United States v. Burns*, 800 F.3d 1258, 1261 (10th Cir. 2015); *United States v. Keifer*, 596 Fed. App'x 653, 664 (10th Cir. 2014); *United States v. Green*, 722 F.3d 1146, 1150 (9th Cir. 2013).
[2] *See United States v. Thunderhawk*, 799 F.3d 1203, 1209 (8th Cir. 2015); *United States v. Wolfe*, 701 F.3d 1206, 1216-17 (7th Cir. 2012).
[3] *See United States v. Bengis*, 783 F.3d 407, 412-13 (2d Cir. 2015); *United States v. Rosbottom*, 763 F.3d 408, 420 (5th Cir. 2014); *United States v. Jarjis*, 551 Fed. App'x 261 (6th Cir. 2014); *United States v. Day*, 700 F.3d 713, 731 (4th Cir. 2012); *United States v. Kachkar*, 2022 WL 2704358 (11th. 2022).

> restitution is dictated only by the extent of the victim's loss and thus has no "statutory maximum." But the government's argument misunderstands the teaching of our cases. We've used the term "statutory maximum" to refer to the harshest sentence the law allows a court to impose based on facts a jury has found or the defendant has admitted. *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In that sense, 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. And just as a jury must find any facts necessary to authorize a steeper prison sentence or fine, it would seem to follow that a jury must find any facts necessary to support a (nonzero) restitution order.

Hester v. United States, 139 S.Ct. 509, 510 (2019) (Gorsuch, J., dissenting from denial of certiorari).

Mr. Reyes' case is an appropriate vehicle for review of this issue because it is clear on the face of the record that his order of restitution was imposed without sufficient evidence, and therefore, without meeting the statutory requirements. The government's own agent admitted on the stand that 10 to 15 percent of the restitution claims filed against Mr. Reyes were without any documentation. Despite this admission, the Eleventh Circuit declined to hear the appeal because the appeal waiver could only be overcome by showing that the sentence exceeds the statutory maximum. Had the Eleventh Circuit properly applied the holdings of *Apprendi* and *Blakely*, it would have found that the statutory maximum was not a monetary amount but the largest amount that could be legally imposed based upon meeting statutory requirements.

CONCLUSION

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

Respectfully submitted,

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