No. 23-5835

IN THE SUPREME COURT OF THE UNITED STATES

SEAN CHRISTOPHER FINNELL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court violated the First Amendment by imposing a special condition of supervised release allowing petitioner, who was convicted of possessing child pornography, to access a computer only in connection with authorized employment and with the prior approval of the court.

2. Whether the Sixth Amendment requires that facts affecting the amount of restitution ordered under 18 U.S.C. 2259 be charged in the indictment, submitted to the jury, and proved beyond a reasonable doubt.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is not published in the Federal Reporter but is available at 2023 WL 6577444.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 2023. The petition for a writ of certiorari was filed on October 16, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possessing child pornography in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2). Pet. App. 16a. The district court sentenced petitioner to 160 months of imprisonment, to be followed by lifetime supervised release. Id. at 17a-18a. The court ordered petitioner to pay a $5000 special assessment under the Justice for Victims of Trafficking Act (JVTA), 18 U.S.C. 3104, and $106,500 in restitution under 18 U.S.C. 2259. Pet. App. 22a. The court of appeals affirmed in part, vacated the JVTA special assessment, and remanded for further proceedings. Id. at 1a-15a.

1. In January 2020, the internet service provider Yahoo! reported that petitioner's e-mail address had transmitted images of child pornography. Presentence Investigation Report (PSR) ¶¶ 3-4. Law-enforcement officers obtained a warrant and searched petitioner's e-mail account, which contained e-mails with attachments showing pornographic images of children, as well as information confirming that petitioner was the user of the account. PSR ¶¶ 7-8. Officers subsequently searched petitioner's residence, where they seized his computer and several phones, iPads, and external hard drives, several of which contained images of children engaged in sexually explicit acts. PSR ¶ 10.

Petitioner waived his Miranda rights and admitted to law enforcement that he had found the child pornographic materials by

searching in an internet browser and clicking on links. PSR ¶ 16. Petitioner "offered multiple explanations for his possession of the" material, including "his belief that the material should be legal." Ibid. In total, petitioner possessed more than 11,000 image and video files depicting child pornography. PSR ¶ 15.

A federal grand jury in the Southern District of Florida indicted petitioner for possessing child pornography in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2). Indictment 1. Petitioner proceeded to trial, and the jury found him guilty. Pet. App. 16a.

2. The Probation Office's presentence report calculated an advisory Sentencing Guidelines range of 135 to 168 months of imprisonment, followed by a supervised release term of five years to life. PSR ¶¶ 88, 90-91. The Probation Office also recommended several special conditions for supervised release, including that petitioner "shall not possess or use any computer; except that [he] may, with the prior approval of the Court, use a computer in connection with authorized employment." PSR ¶ 107.

The Probation Office also observed that restitution to child pornography victims is mandatory. PSR ¶ 99; see 18 U.S.C. 2259. Section 2259 requires a court to determine "the full amount of the victim's losses," and then "order restitution in an amount that reflects the defendant's relative role in the causal process that underlies the victim's losses, but which is no less than $3,000." 18 U.S.C. 2259(b)(2)(A) and (B). The government proposed restitution in the amount of $106,500, based on requests from 17

of the 188 victims who had been identified in the images that petitioner possessed. Pet. 9; see D. Ct. Doc. 88, at 2 (Nov. 9, 2022).

Petitioner objected both to the proposed conditions of supervised release and to the imposition of restitution. See D. Ct. Doc. 73, at 1-9, 11-17 (May 11, 2022). He contended, based on Packingham v. North Carolina, 582 U.S. 98 (2017), that the computer-use supervised-release condition "violates the First Amendment" by "burden[ing] substantially more speech than is necessary, and prevent[ing petitioner] from 'engaging in the legitimate exercise of First Amendment rights.'" D. Ct. Doc. 73, at 12, 17 (quoting Packingham, 582 U.S. at 108). And, relying on Apprendi v. New Jersey, 530 U.S. 466 (2000), and its progeny, he argued that he has a Sixth Amendment "right to have a jury to determine beyond a reasonable doubt the amount of restitution he owes, if any." D. Ct. Doc. 73, at 1 (emphasis omitted).

In his allocution at sentencing, petitioner informed the district court that he "fail[ed] to see the criminality in [his] actions and, thus, need for punishment." D. Ct. Doc. 106, at 36 (Jan. 9, 2023). He expressed the view "that young persons, minority Americans, have every right to express themselves, including their sexuality, as their majority counterparts," and that the "images" of child pornography that he possessed were of "persons expressing their freedom of speech and freedom of religion." Ibid. He further asserted that he "ha[d] not harmed

anyone" and that "any victimization or hurt that's been incurred upon anyone only exists in the speculative imagination and the diluted minds of the U.S. legislation and the U.S. Attorney's Office." Ibid.

The district court imposed a sentence of 160 months of imprisonment, to be followed by a lifetime of supervised release. D. Ct. Doc. 106, at 41. The court found that such a sentence was "sufficient but not greater than necessary" to promote "deterrence" and to reflect the seriousness of petitioner's conduct, which the court described as "very egregious." Id. at 37, 39, 47. The court emphasized that petitioner had shown "[n]o remorse, none whatsoever," for his actions. Id. at 40. It explained that "anything short of" a lifetime of supervised release would present "a danger to society, to the public, and to the children beyond," in light of petitioner's refusal to "accept responsibility" and his "belie[f] that * * * child pornography should be legalized" and that "there's nothing wrong with his behavior." Id. at 41-42. The court adopted the computer-use restriction of supervised release. Id. at 7.

The district court also ordered petitioner to pay $106,500 in restitution. D. Ct. Doc. 126, at 11 (Mar. 7, 2023). The court found the government's evidentiary "submission more than reasonable." Ibid. Finally, the court ordered petitioner to pay a JVTA special assessment of $5000. Pet. App. 22a.

3. The court of appeals affirmed in part, vacated in part, and remanded for further proceedings. Pet. App. 1a-15a.

The court of appeals affirmed the special condition of supervised release prohibiting petitioner from using or possessing a computer except in connection with authorized employment and with the permission of the district court. Pet. App. 4a-9a. Petitioner contended that the condition runs afoul of Packingham, which held that a law barring registered sex offenders from accessing social networking websites violates the First Amendment, but the court of appeals found that "Packingham does not apply to this type of supervised release condition." Id. at 5a. The court explained that, unlike the sex-offender restriction in Packingham, the condition imposed on petitioner (1) does not restrict petitioner beyond the completion of his sentence; (2) is narrowly tailored to petitioner's use of a computer in committing his crimes and the serious threat that he will reoffend; and (3) allows petitioner to obtain court permission to use a computer for his employment. Id. at 6a-8a. The court also observed that petitioner may move to modify the conditions of release when his term of imprisonment ends, though it stated that he could not challenge the legality of the conditions at that time. Id. at 8a-9a.

The court of appeals also affirmed the restitution order. Pet. App. 10a-12a. Petitioner contended that a jury must determine the amount of a restitution award under Apprendi, which held that "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." Id. at 10a (quoting Apprendi, 530 U.S. at 490). Relying on circuit precedent, however, the court observed that Apprendi and its progeny do not "apply to restitution orders," given the "absence of a maximum award in the restitution statute." Id. at 11a.

Lastly, the court of appeals vacated the special assessment under the JVTA and remanded for further proceedings on that issue, concluding that the district court had not adequately explained its reasons for imposing the assessment. Pet. App. 13a-14a.

ARGUMENT

Petitioner renews his contentions that the special condition of supervised release restricting his computer access violates the First Amendment (Pet. 11-25), and that the Sixth Amendment guarantees a right to jury factfinding on criminal restitution (Pet. 26-38). The court of appeals correctly rejected both contentions, and its judgment does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. Petitioner challenges (Pet. 22-25) the special condition of supervised release prohibiting him from "possess[ing] or us[ing] any computer," except "in connection with authorized employment" and with the "prior approval" of the court, Pet. App. 20a, as violative of this Court's decision in Packingham v. North Carolina, 582 U.S. 98 (2017). That argument lacks merit, and no

court of appeals or state court of last resort has reached a contrary conclusion on comparable facts. And the Court has denied certiorari in other cases presenting similar issues.[1]

a. In Packingham, this Court invalidated a state law that categorically prohibited all registered sex offenders from accessing certain social-media websites, reasoning that "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." 582 U.S. at 108; see id. at 101, 105-108. The Court found that the State had not "met its burden to show that [its] sweeping law," id. at 108 -- which was applicable even to those "who already ha[d] served their sentence and [we]re no longer subject to the supervision of the criminal justice system," id. at 107 -- was "necessary or legitimate to serve" the State's "preventative purpose of keeping convicted sex offenders away from vulnerable victims," id. at 108.

The Court specifically cautioned, however, that its "opinion should not be interpreted as barring a State from enacting more specific laws than the one at issue." Packingham, 582 U.S. at 107. Concurring in the judgment, Justice Alito elaborated on the point, observing that "[b]ecause protecting children from abuse is a compelling state interest and sex offenders can (and do) use the internet to engage in such abuse, it is legitimate and entirely

[1] See, e.g., Alegre v. United States, 144 S. Ct. 344 (2023) (No. 22-7471); Bobal v. United States, 141 S. Ct. 2742 (2023) (No. 20-7944).

reasonable for States to try to stop abuse from occurring before it happens." Id. at 112-113.

b. The computer-use restriction in this case complies with the First Amendment and does not run afoul of Packingham. The regulation invalidated in Packingham applied across the board to registered sex offenders, without regard to the precise nature of their criminal conduct or likely future conduct. See 582 U.S. at 101-102. The special condition here, in contrast, is a component of petitioner's sentence tailored to petitioner specifically. Pet. App. 20a; see United States v. Knights, 534 U.S. 112, 119 (2001) (observing that individuals on probation "do not enjoy 'the absolute liberty to which every citizen is entitled,'" and "a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens") (citation omitted).

The special condition here is specifically based on petitioner's own conduct in using a computer both to access and store child pornography, see Pet. App. 8a, not any generalized suppositions about the undifferentiated class of registered sex offenders. The district court found that the likelihood of recidivism, in the absence of protective measures, was high. See D. Ct. Doc. 106, at 39-40. The court described petitioner's behavior as "very egregious," id. at 39, and emphasized that he had shown "[n]o remorse, none whatsoever," for his actions, id. at

40. The court accordingly found that petitioner "is a clear and present danger to children all across the world." Id. at 39.

In addition, unlike the permanent ban in Packingham, which imposed "severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system," 582 U.S. at 107, the condition here is coterminous with petitioner's supervised release. And it is not a blanket ban on computer use. Compare id. at 101 (generalized ban on social-media services matching statutory description). Instead, it permits petitioner to use a computer for employment-related purposes with the prior approval of the district court. See Pet. App. 20a. And petitioner retains the right to ask the district court to modify the challenged condition when he is released from prison. See id. at 8a-9a.

In short, the computer-use restriction is neither irrevocable nor absolute, but instead flexible and tailored to the future dangers that petitioner poses to the public. In any event, petitioner's First Amendment arguments would not meaningfully alter the analysis in this case. To begin with, petitioner does little to identify any First Amendment infringement on his specific rights in light of the district court's findings, and instead appears to challenge supervised-release conditions like his as a facial matter. And in the First Amendment context, as in others, "[f]acial challenges are disfavored." Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 450 (2008).

Furthermore, Packingham assumed that intermediate scrutiny -- requiring the law to be "narrowly tailored to serve a significant governmental interest" -- governed there, 582 U.S. at 105-106 (citation omitted), and the sentencing statutes already required the district court to undertake a similar analysis in this case.

Under those statutes, a district court is authorized to impose any special condition of supervised release that "it considers to be appropriate," as long as the condition is "reasonably related" to the nature and circumstances of the offense and the history and characteristics of the defendant, as well as the need to deter and protect the public from future crimes. 18 U.S.C. 3583(d)(1) (incorporating general sentencing factors from 18 U.S.C. 3553(a)); see 18 U.S.C. 3553(a)(1), (2)(B) and (C). A condition must also involve "no greater deprivation of liberty than is reasonably necessary" to achieve statutory purposes. 18 U.S.C. 3583(d)(2). Even if intermediate scrutiny differs in some respects from those criteria, petitioner does not explain how it would make a difference in this or a significant number of other cases.

c. Petitioner is mistaken in asserting (Pet. 12-18) that the decision below implicates a conflict among the circuits. As petitioner recognizes (Pet. 12-13), the Fifth, Eighth, and D.C. Circuits have all rejected similar challenges. And although he cites (Pet. 15-18) decisions from the Second, Third, and Fourth Circuits, petitioner does not show that any have reached a contrary result on similar facts.

The Second Circuit's decision in United States v. Eaglin, 913 F.3d 88 (2019), relied on the absence of record evidence establishing that a "total Internet ban" was "warranted by [the defendant's] criminal history or characteristics" or "the need for deterrence or to protect the public." Id. at 97, 99. Significantly, the defendant had not been "charged with or convicted of a sex crime involving Internet use," and "the record contain[ed] no evidence that [the defendant] accessed child pornography online." Id. at 97. But the court recognized that even a "total Internet ban" might be justified in certain circumstances. Ibid.

The condition of supervised release at issue in the Third Circuit's decision in United States v. Holena, 906 F.3d 288 (2018), did not permit the defendant to use or possess a computer at all -- even to prepare a resume. Id. at 290, 292. And the court emphasized that its holding was "fact-specific," acknowledging that, "[i]n appropriate cases" involving a different "record," a district court "may" "impose sweeping restrictions" on a defendant's computer usage. Id. at 292-293.

Lastly, in the Fourth Circuit's decision in United States v. Ellis, 984 F.3d 1092 (2021), the district court imposed a "total ban on internet access." Id. at 1102. And given the absence of any "evidence connecting the internet to any [of the defendant's] criminal conduct," the court of appeals determined that the condition was not narrowly tailored. Id. at 1102-1103; see id. at

1102-1105. The court also faulted the ban for impeding the defendant's ability to "secur[e] * * * employment." Id. at 1105.

Eaglin, Holena, and Ellis thus do not suggest that a supervised-release condition like the one here is inappropriate in petitioner's circumstances. And petitioner is equally mistaken in asserting (Pet. 17-18) that the decision below conflicts with three state court decisions. Like the court of appeals cases already discussed, those decisions rested on circumstance-specific determinations. See Mutter v. Ross, 811 S.E.2d 866, 873 (W.Va. 2018) (reasoning that the defendant's "underlying offense did not involve the internet, and he has no history of using the internet to engage in criminal behavior"); People v. Morger, 160 N.E.3d 53, 70 (Ill. 2019) (noting that the challenged mandatory condition of probation "unnecessarily sweeps within its purview those who never used the Internet -- much less social media -- to commit their offenses"); Aldape v. State, 535 P.3d 1184, 1192 (Nev. 2023) (invalidating mandatory probation condition prohibiting internet access imposed on "each sexual offender, regardless of crime, rehabilitative needs, history of internet usage, or victim").

2. Petitioner separately contends (Pet. 26-38) that the district court erred in determining the amount of restitution by a preponderance, because the Sixth Amendment requires a jury to make that determination beyond a reasonable doubt. Petitioner's argument lacks merit, and as he recognizes (Pet. 25), the courts of appeals have unanimously rejected it. This Court has repeatedly

denied petitions for writs of certiorari raising similar questions,[2] and it should follow the same course here.

a. In Apprendi v. New Jersey, 530 U.S. 466 (2000), 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." Id. at 490; see United States v. Cotton, 535 U.S. 625, 627 (2002) (making clear that, in a federal prosecution, "such facts must also be charged in the indictment"). 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) (emphasis omitted).

The district court ordered petitioner to pay restitution pursuant to 18 U.S.C. 2259. Pet. App. 10a. That statute requires

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[2] See, e.g., Arnett v. Kansas, 142 S. Ct. 2868 (2022) (No. 21-1126); Flynn v. United States, 141 S. Ct. 2853 (2021) (No. 20-1129); Gilbertson v. United States, 141 S. Ct. 2793 (2021) (No. 20-860); George v. United States, 141 S. Ct. 605 (2020) (No. 20-5669); Budagova v. United States, 140 S. Ct. 161 (2019) (No. 18-8938); Ovsepian v. United States, 140 S. Ct. 157 (2019) (No. 18-7262); Hester v. United States, 139 S. Ct. 509 (2019) (No. 17-9082); Petras v. United States, 139 S. Ct. 373 (2018) (No. 17-8462); Fontana v. United States, 583 U.S. 1134 (2018) (No. 17-7300); Alvarez v. United States, 580 U.S. 1223 (2017) (No. 16-8060); Patel v. United States, 580 U.S. 883 (2016) (No. 16-5129); Santos v. United States, 578 U.S. 935 (2016) (No. 15-8471); Roemmele v. United States, 577 U.S. 904 (2015) (No. 15-5507); Gomes v. United States, 577 U.S. 852 (2015) (No. 14-10204); Printz v. United States, 577 U.S. 845 (2015) (No. 14-10068); Johnson v. United States, 576 U.S. 1035 (2015) (No. 14-1006); Basile v. United States, 575 U.S. 904 (2015) (No. 14-6980).

a court to determine "the full amount of the victim's losses," and then "order restitution in an amount that reflects the defendant's relative role in the causal process that underlies the victim's losses, but which is no less than $3,000." 18 U.S.C. 2259(b)(2)(A) and (B).

By requiring restitution of a specific sum rather than prescribing a maximum amount that may be ordered, Section 2259 establishes an indeterminate framework. 18 U.S.C. 2259(b)(2)(B); see, e.g., United States v. Day, 700 F.3d 713, 732 (4th Cir. 2012) ("Critically, * * * there is no prescribed statutory maximum in the restitution context; the amount of restitution that a court may order is instead indeterminate and varies based on the amount of damage and injury caused by the offense.") (emphasis omitted), cert. denied, 569 U.S. 959 (2013). A "judge cannot exceed his constitutional authority by imposing a punishment beyond the statutory maximum if there is no statutory maximum." United States v. Fruchter, 411 F.3d 377, 383 (2d Cir.) (addressing forfeiture), cert. denied, 546 U.S. 1076 (2005). Thus, when a sentencing court determines the amount of the victim's loss, it "is merely giving definite shape to the restitution penalty born out of the conviction," not "imposing a punishment beyond that authorized by jury-found or admitted facts." United States v. Leahy, 438 F.3d 328, 337 (3d Cir.) (en banc), cert. denied, 549 U.S. 1071 (2006).

Moreover, while restitution is imposed as part of a defendant's criminal conviction, Pasquantino v. United States, 544

U.S. 349, 365 (2005), "[r]estitution is, at its essence, a restorative remedy that compensates victims for economic losses suffered as a result of a defendant's criminal conduct," Leahy, 438 F.3d at 338. "The purpose of restitution" is "to 'make the victim[] whole' again by restoring to him or her the value of the losses suffered as a result of the defendant's crime." United States v. Hunter, 618 F.3d 1062, 1064 (9th Cir. 2010) (citation omitted) (discussing Mandatory Victims Restitution Act of 1996). In that additional sense, restitution "does not transform a defendant's punishment into something more severe than that authorized by pleading to, or being convicted of, the crime charged." Leahy, 438 F.3d at 338.

As petitioner acknowledges (Pet. 28-29 & n.2), every court of appeals to have considered the question has held that Apprendi does not apply to criminal restitution. See, e.g., United States v. Churn, 800 F.3d 768, 782 (6th Cir. 2015); United States v. Rosbottom, 763 F.3d 408, 420 (5th Cir. 2014), cert. denied, 574 U.S. 1078 (2015); Day, 700 F.3d at 732 (4th Cir.); United States v. Brock-Davis, 504 F.3d 991, 994 n.1 (9th Cir. 2007); United States v. Milkiewicz, 470 F.3d 390, 403-404 (1st Cir. 2006); United States v. Reifler, 446 F.3d 65, 114-120 (2d Cir. 2006); Leahy, 438 F.3d at 337-338 (3d Cir.); United States v. Visinaiz, 428 F.3d 1300, 1316 (10th Cir. 2005), cert. denied, 546 U.S. 1123 (2006); United States v. Carruth, 418 F.3d 900, 902-904 (8th Cir. 2005);

United States v. George, 403 F.3d 470, 473 (7th Cir.), cert. denied, 546 U.S. 1008 (2005).

Those courts have relied primarily on the absence of a statutory maximum for restitution in determining that, when the court fixes the amount of restitution based on the victim's losses, it is not increasing the punishment beyond what is authorized by the conviction. See, e.g., Leahy, 438 F.3d at 337 n.11 ("[T]he jury's verdict automatically triggers restitution in the 'full amount of each victim's losses.'"). Some courts have additionally reasoned that "restitution is not a penalty for a crime for Apprendi purposes," or that, even if restitution is criminal, its compensatory purpose distinguishes it from purely punitive measures. United States v. LaGrou Distrib. Sys., Inc., 466 F.3d 585, 593 (7th Cir. 2006); see Visinaiz, 428 F.3d at 1316; Carruth, 418 F.3d at 904; see also Leahy, 438 F.3d at 337-338.

b. This Court's holding in Southern Union Co. v. United States, 567 U.S. 343 (2012), "that the rule of Apprendi applies to the imposition of criminal fines," id. at 360, does not undermine the uniform line of precedent holding that restitution is not subject to Apprendi.

In Southern Union, the Court found that a $6 million criminal fine imposed by the district court -- which was well above the $50,000 fine that the defendant argued was the maximum supported by the jury's verdict -- violated the Sixth Amendment. 567 U.S. at 347. The Court explained that criminal fines, like imprisonment

or death, "are penalties inflicted by the sovereign for the commission of offenses." Id. at 349. Observing that, "[i]n stating Apprendi's rule, [it] ha[d] never distinguished one form of punishment from another," id. at 350, the Court concluded that criminal fines implicate "Apprendi's 'core concern' [of] reserv[ing] to the jury 'the determination of facts that warrant punishment for a specific statutory offense,'" id. at 349 (quoting Oregon v. Ice, 555 U.S. 160, 170 (2009)). The Court also examined the historical record, explaining that "the scope of the constitutional jury right must be informed by the historical role of the jury at common law." Id. at 353 (quoting Ice, 555 U.S. at 170). Finding that "the predominant practice" in early America was for facts that determined the amount of a fine "to be alleged in the indictment and proved to the jury," the Court concluded that the historical record "support[ed] applying Apprendi to criminal fines." Id. at 353-354.

Contrary to petitioner's argument (Pet. 27-28), Southern Union does not require applying Apprendi to restitution. Southern Union's application of Apprendi concerned only "the imposition of criminal fines," 567 U.S. at 360, which are "undeniably" imposed as criminal penalties in order to punish illegal conduct, id. at 350. The Court had no occasion to, and did not, address restitution, which has compensatory and remedial purposes that fines do not, and which is imposed pursuant to an indeterminate scheme that lacks a statutory maximum. Indeed, Southern Union

supports distinguishing restitution from the type of sentences subject to Apprendi because, in acknowledging that many fines during the founding era were not subject to concrete caps, the Court reaffirmed that there cannot "be an Apprendi violation where no maximum is prescribed." Id. at 353. Unlike the statute in Southern Union, which prescribed a $50,000 maximum fine for each day of violation, Section 2259 sets no maximum amount of restitution, but instead requires that restitution be ordered according to the defendant's role in the victim's losses. See 18 U.S.C. 2259(b)(1) and (2); see also Day, 700 F.3d at 732 (stating that, "in Southern Union itself, the Apprendi issue was triggered by the fact that the district court imposed a fine in excess of the statutory maximum that applied in that case," and distinguishing restitution on the ground that it is not subject to a "prescribed statutory maximum") (emphasis omitted).

Petitioner contends (Pet. 28) that, as in Southern Union with respect to fines, the historical record supports extending Apprendi to restitution. He argues that a victim could recover restitution for certain property crimes at common law only if the stolen property was listed in the indictment. Ibid. But petitioner's argument provides no sound basis for extending Apprendi to grant additional rights to defendants themselves in the context of restitution. Unlike facts that determined the amount of a criminal fine, the historical consequence of omitting facts from the indictment relevant only to restitution was not

that the indictment was defective or that the defendant was permitted to retain the stolen property. Rather, the stolen property was simply "forfeit[ed], and confiscate[d] to the king," instead of to the victim. 1 Matthew Hale, The History of the Pleas of the Crown 538 (1736); see id. at 545; James Barta, Note, 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 (2014) ("Any goods omitted from the indictment were forfeited to the crown.").

Since Southern Union, at least eight courts of appeals have addressed in published opinions whether to overrule their prior precedents declining to extend the Apprendi rule to restitution. Each determined, without dissent, that Southern Union did not call its previous analysis into question. See, e.g., United States v. Vega-Martínez, 949 F.3d 43, 55 (1st Cir. 2020) (observing that Southern Union "is clearly distinguishable" with respect to restitution); United States v. Sawyer, 825 F.3d 287, 297 (6th Cir.) (observing that "Southern Union did nothing to call into question the key reasoning" of prior circuit precedent), cert. denied, 580 U.S. 967 (2016); United States v. Thunderhawk, 799 F.3d 1203, 1209 (8th Cir. 2015) (finding "nothing in the Southern Union opinion leading us to conclude that our controlling precedent * * * was implicitly overruled"); United States v. Bengis, 783 F.3d 407, 412-413 (2d Cir. 2015) ("adher[ing]" to the court's prior precedent after observing that "Southern Union is inapposite"); United

States v. Green, 722 F.3d 1146, 1148-1149 (9th Cir.), cert. denied, 571 U.S. 1025 (2013); United States v. Read, 710 F.3d 219, 231 (5th Cir. 2012) (per curiam), cert. denied, 569 U.S. 1031 (2013); United States v. Wolfe, 701 F.3d 1206, 1216-1217 (7th Cir. 2012), cert. denied, 569 U.S. 1029 (2013); Day, 700 F.3d at 732 (4th Cir.) (explaining that the "logic of Southern Union actually reinforces the correctness of the uniform rule adopted in the federal courts" that Apprendi does not apply because restitution lacks a statutory maximum); see also Pet. App. 10a-11a; United States v. Kieffer, 596 Fed. Appx. 653, 664 (10th Cir. 2014), cert. denied, 576 U.S. 1012 (2015); United States v. Basile, 570 Fed. Appx. 252, 258 (3d Cir. 2014), cert. denied, 575 U.S. 904 (2015).

c. Petitioner's reliance (Pet. 30-31) on this Court's decision in Blakely v. Washington is similarly misplaced. The Court in Blakely found an Apprendi violation in a state sentencing scheme that authorized a trial court to increase a defendant's sentence of incarceration beyond the statutory maximum on the basis of facts found by the judge. 542 U.S. at 303. Because Blakely, like Apprendi, involved only a maximum term of incarceration, it does not conflict with the courts of appeals' determinations about restitution.

"[T]he maximum sentence a judge may impose" under Section 2259 based on the jury's verdict, Blakely, 542 U.S. at 303, is the "amount that reflects the defendant's relative role in the causal process that underlies the victim's losses," 18 U.S.C.

2259(b)(2)(B). Thus, although "post-conviction judicial fact-finding determines the amount of restitution a defendant must pay, a restitution order does not punish a defendant beyond the 'statutory maximum' as that term has evolved in [this Court's] Sixth Amendment jurisprudence." Leahy, 438 F.3d at 337 (rejecting Blakely argument). Contrary to petitioner's contention, see Pet. 30, "there is no restitution range * * * that starts at zero and ends at" an amount reflecting the defendant's role in the victim's losses; "rather, the single restitution amount triggered by the conviction" is an amount reflecting the defendant's role. Leahy, 438 F.3d at 337-338.

d. Petitioner also invokes (Pet. 31-32) Alleyne v. United States, 570 U.S. 99 (2013), which concluded that Apprendi applies to facts that increase a statutory minimum sentence, because such facts "alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment," id. at 108 (plurality opinion). But Alleyne, unlike this case, involved a fixed statutory minimum. Id. at 103-104.[3] As every

[3] In passing, petitioner contends (Pet. 32) that Section 2259 imposes a $3000 minimum restitution award. See 18 U.S.C. 2259(b)(2)(B). But that provision does not establish a true statutory minimum, as the very next subparagraph allows for a lower award, depending on the victim's losses and the amount of compensation that she has received from others. See 18 U.S.C. 2259(b)(2)(C). In any event, this case would be a poor vehicle for resolving that question, as it presents distinct issues from petitioner's principal contention, see Pet. i, and he does not show that the district court relied on a statutory minimum -- as opposed to the victims' actual losses -- in imposing restitution.

court of appeals to have considered the question has recognized, Alleyne does not undermine the uniform line of precedent holding that restitution is not subject to Apprendi. See, e.g., Pet. App. 12a; United States v. Tartaglione, 815 Fed. Appx. 648, 652-653 (3d Cir. 2020) ("[T]he jury's charge was to determine whether the evidence established the elements of her charged criminal offenses[, a]nd here, the amount of restitution is not an element of any of the charges against Tartaglione.") (citation and footnote omitted); United States v. Odak, 802 Fed. Appx. 153, 154 (5th Cir. 2020) (per curiam) (rejecting argument that prior circuit precedent holding that the Sixth Amendment does not apply to restitution findings was abrogated by Alleyne); United States v. Ovsepian, 674 Fed. Appx. 712, 714 (9th Cir. 2017); Kieffer, 596 Fed. Appx. at 664 (10th Cir.); United States v. Agbebiyi, 575 Fed. Appx. 624, 632-633 (6th Cir. 2014); Basile, 570 Fed. Appx. at 258 (3d Cir.); United States v. Holmich, 563 Fed. Appx. 483, 484-485 (7th Cir. 2014), cert. denied, 574 U.S. 1121 (2015).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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