

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2023

ALISON LEE GENDREAU,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT**

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SUBMITTED: February 14, 2024

QUESTIONS PRESENTED

WHETHER THE FIFTH AMENDMENT GRAND JURY RIGHT AND THE SIXTH AMENDMENT RIGHT TO JURY TRIAL ON PROOF BEYOND A REASONABLE DOUBT APPLY NOT ONLY TO IMPRISONMENT, FINES AND CAPITAL PUNISHMENT ELEMENTS BUT ALSO TO RESTITUTION SOUGHT IN A CRIMINAL CASE.

WHETHER THE PROOF WAS SUFFICIENT TO SUPPORT THE DISTRICT COURT'S LOSS/RESTITUTION FINDINGS.

STATEMENT OF DIRECTLY RELATED CASES

There are no directly related cases pending before the Court to petitioner's knowledge.

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Petitioner, Alison Lee Gendreau, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

1. The memorandum disposition of the Ninth Circuit Court of Appeals styled as *United States v. Gendreau* (9th Cir. 2023) is unpublished. A copy of that decision is in the Appendix to this petition, which is preceded by its own table of contents. (*See* Appendix, pages 1-7).

2. The district court entered a written judgment after hearing, which requires petitioner to pay restitution. (Appendix, page 9, Special Condition #4). There is no written decision of the district court containing findings in support of that judgment. However, the district court did enter oral findings on the record supporting its restitution determination at the sentencing hearing. (Appendix, page 108, ln. 13, through page 110, ln. 6).

JURISDICTION AND TIMELINESS OF THE PETITION

The Ninth Circuit's memorandum disposition affirming petitioner's conviction and 12-month and 1-day prison sentence was filed on November 17, 2023. This Court's jurisdiction arises under 28 USC §1254(1). Petitioner's petition is timely because it was both electronically filed and placed in the United States mail, first class postage pre-paid, on February 13, 2024, within the 90 days for filing under the Rules of this Court (*see* Rule 13, ¶¶ 1 and 3) *as amended* by the Court's July 19, 2021, order.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution 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, . . . 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.

The Sixth Amendment to the United States Constitution 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 defense.

The Seventh Amendment to the United States Constitution provides:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

STATUTORY PROVISIONS INVOLVED

Relevant federal statutory provisions involved are set forth in the Appendix attached to this petition.

INTRODUCTION

In the Memorandum disposition published in this matter on Friday, November 17, 2023, the Ninth Circuit rules based on circuit precedent that petitioner is not entitled to a jury finding on the issue of restitution. (*See* Appendix, p.3, *citing United States v. Dadyan*, 76 F.4th 955, 961 (9th Cir. 2023)). In a related context, however, this Court is prepared to address whether a jury finding is required to determine whether certain prior convictions were “committed on occasions different from one

another” under 18 USC §924(e). A question left open in this Court’s decision in *Wooden v. United States*, 595 U.S. 360, 365 n.3 (2022). See *Paul Erlinger v. United States*, this Court’s Docket No. 23-370. Moreover, as the petition for certiorari in *Erlinger* points out when any fact other than the fact of prior conviction increases the minimum or maximum penalty for an offense that fact or facts must be determined by a jury beyond a reasonable doubt. (See *Erlinger* Petition for Certiorari at p. 14). Also see *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (“Other 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”).

Important to our purposes here both the Ninth Circuit and this Court have ruled that restitution is a penalty. See e.g., *United States v. Miguel*, 49 F.3d 505, 509 (9th Cir. 1995); and *Pasquantino v. United States*, 544 U.S. 349, 365 (2015) (“[t]he purpose of awarding restitution . . . is not [to compensate the victim], but to mete out appropriate criminal punishment for [fraudulent] conduct”). This view places mandatory sentencing restitution within the orbit of *Apprendi* rule. Which we predict the anticipated *Erlinger* decision will further clarify.

In addition, a question that *Erlinger* decision will of necessity have to address is whether a guilty plea or verdict alone authorizes the sentencing Judge to impose an increased statutory penalty under the Armed Career Criminal Act (ACCA) where

the issue is whether the prior convictions were committed on occasions different from one another. A fact intensive question that should be subject to the triumvirate of rights that *Apprendi* affords. (See e.g., *United States v. Tighe*, 266 F.3d 1187, 1193 (2001)). In other words, if the government makes an increase in an offender’s punishment contingent on fact finding, that fact or facts must be found by a jury beyond a reasonable doubt. *Ring v. Arizona*, 536 U.S. 584, 586 (2002), quoting *Apprendi*.

The government’s response brief in *Erlinger* at page 8 supports the view that a jury trial is required in the ACCA context of determining “occasions different from one another”. (See especially the government’s response brief quoting *Wooden* and the fact intensive nature of the inquiry *vis-à-vis* determination of scheme or purpose). Which is particularly relevant in the situation presented here. Put differently, “victim” status under 18 USC §3363A(a)(1) requires the same “holistic” and “multi-factored” assessment set forth in *Wooden* and referenced by the government at page 8 of its response brief in *Erlinger*. Thus, we predict that the upcoming *Erlinger* opinion will by extension require that all such penalty assessments take place before a jury or be admitted by the defendant at the change of plea hearing, to include mandatory restitution.

Consequently, we predict that a broader ruling is likely in the *Erlinger* case. One that will clarify that if mandatory restitution is an intended aspect of the penalty

in a given case facts supporting such an award must be alleged; and either proved beyond the reasonable doubt before a jury, or admitted by the defendant at the change of plea hearing. And since neither of those scenarios is present here the loss/restitution award in this case ought to be reviewed based on a potentially broader holding in *Erlinger*. Which, again, we predict will clarify whether restitution must be alleged and proved beyond a reasonable doubt or admitted at the guilty plea hearing.

STATEMENT OF THE CASE

On July 28, 2021, petitioner was indicted for five counts of wire fraud in violation of 18 USC §1343. Each of the five counts alleged listed five separate wire transmissions, which in the aggregate totaled specific wire money transfers amounting to \$13,095.56. (Appendix, page 201). On November 23, 2021, petitioner served notice that she intended to plead guilty to all five counts of the indictment. There was no plea agreement. On November 29, 2021, the district court issued an order remanding the matter to the magistrate judge for a change of plea hearing to be accompanied by that judge's findings and recommendations under 28 USC §636(b).

In its written proof offer leading up to the magistrate judge conducted plea hearing, the government filed a written offer of proof setting forth its anticipated evidence. (Appendix, pages 195-197). For four of the five counts alleged in the

indictment the government simply restated the amounts listed in Counts I, II, IV, and V in its offer of proof. For Count III the arithmetic was a little different in the proof offer; that is, over and against the amount listed in the indictment. However, the amounts for Count III in both the proof offer and indictment were still almost identical.

Another important aspect of this government's written proof offer was that under the heading **PENALTY** the government stated:

Each count of the indictment charges the crime of Wire Fraud, in violation of 18 U.S.C. § 1343. Each count carries a maximum term of imprisonment of 20 years, a \$250,000 fine, up to three years supervised release, and a \$100 special assessment. The defendant is also responsible for restitution, which the United States estimates is approximately \$377,468.40.

(Appendix, page 195).

At the change of plea hearing (Appendix, pages 154-158), the parties and the court discussed at some length the wide disparity between the restitution amount contained in the **PENALTY** section of the government's proof offer (Appendix, page 195) and aggregate dollar amount set forth in Counts I through V of the indictment (Appendix, page 201).

After petitioner's guilty plea was accepted by the magistrate judge and approved by the district court, the draft Presentence Investigation Report (PSR) recommended that both the loss amount under the guidelines and the restitution

amount under the 18 USC §3663A essentially be the same. Petitioner objected to these figures in the PSR, followed by formal objections in her sentencing memorandum (Appendix, pages 133-135). Next, at a contested sentencing hearing, the district court took evidence on the loss amount and restitution issues. (Appendix, pages 12-131). Two things are important about the evidence generated by this hearing.

First, although the accounting evidence offered through Dan Fry (partner and business owner) showed that a significant amount of money was apparently missing from the business; there was no proof that petitioner had taken all of that money. Or stated more precisely, no proof relative to the manner petitioner had taken the money. Consider by contrast that the five counts of wire fraud that petitioner pled guilty to, were each and all tied to wire transmissions associated with each transaction to an identifiable account. (Appendix, page 201).

Second, the government's evidence also showed that the day-to-day manager/owner of the business, Joshua Fry (Dan Fry's son), had engaged in fraud himself by directing petitioner to take possession of \$42,000.00 in cash without

declaring same as required by federal law¹. (Appendix page 71-72).

Despite these facts the district court awarded restitution in the amount of \$306,419.72 (Appendix, page 10). Petitioner then appealed that ruling to the Ninth Circuit Court of Appeals, whose jurisdiction arose under 28 USC §1291. The Ninth Circuit affirmed in a Memorandum disposition, without oral argument. (Appendix, pages 1-4).

REASONS FOR GRANTING THE WRIT

This case presents an excellent opportunity for the Court to address an issue that two members of the Court have already expressed is important and worthy of review. (*Hester v. United States*, 139 S. Ct. 509, 509-11 (Jan. 7, 2019) (Gorsuch, J., and Sotomayor, J. *dissenting from the denial of certiorari*) (arguing that the Court should decide whether the Sixth and Seventh Amendments require a jury to find facts necessary to support a restitution order).

There are four good reasons which support granting this petition:

1. At the restitution hearing in the district court below the government put on affirmative proof that petitioner's supervisor and owner of the business (Josh Fry)

¹ To take the sting out of damaging cross-examination a tried-and-true prosecution tactic, the government elected to first present this evidence during the friendly process of direct examination. *See, e.g.*, *United States v. Montani*, 204 F.3d 761, 765 (7th Cir. 2000); *United States v. Gignac*, 119 F.3d 67, 70 (1st Cir. 1997) (both discussing this strategy).

had directed petitioner to essentially launder money through the business. Directing petitioner to funnel proceeds of a transaction through an active business in violation of Currency Transaction Report (CTR) requirements is a serious crime. But more important is the fact that the government's proof at sentencing clearly showed that the primary on-site owner of the family-owned business (Josh Fry) engaged in deceptive accounting practices by admitting that he sold a motorcycle to a customer from Denver and accepted \$42,000.00 in cash for it. Thereafter directing petitioner to take possession of the \$42,000.00 and show on the business books that it came into the company by way of a check. Furthermore, according to this testimony, petitioner was told to trickle the \$42,000.00 slowly into the business account over time. For the apparent purpose of concealing this substantial cash transaction; and/or avoiding the bank requirement that it file a Currency Transaction Report (CTR). That form (IRS Form 8300), which is part of the district court record, consists of five (5) pages. On page four (4) it states in part:

Penalties. You may be subject to penalties if you fail to file a correct and complete Form 8300 on time and you cannot show that the failure was due to reasonable cause. You may also be subject to penalties if you fail to furnish timely a correct and complete statement to each person named in a required report. A minimum penalty of \$25,000 may be imposed if the failure is due to an intentional or willful disregard of the cash reporting requirements.

Penalties may also be imposed for causing, or attempting to cause, a trade or business to fail to file a required report; for causing, or attempting to cause, a trade or business to file a required report containing a material omission or misstatement of fact; or for structuring, or attempting to structure, transactions to avoid the reporting requirements. These violations may also be subject to criminal prosecution which, upon conviction, may result in imprisonment of up to 5 years or fines of up to \$250,000 for individuals and \$500,000 for corporations or both.

(Appendix, page 205).

Clearly, the purpose of the CTR is to maintain accuracy on how cash money comes in and goes out of a business. It is no mere formality to be charged to oversight. Conduct of this nature committed by the owner of the business and petitioner's day-to-day supervisor is unlawful. Not to mention that Josh Fry involved petitioner in criminal activity by directing her to trickle the cash into the business over time. Form 8300 provides valuable information to the IRS and the Financial Crimes Enforcement Network in their efforts to combat money laundering. A person who would do this is likewise equally capable of skimming cash out of the business. *Cf. United States v. Gaev*, 24 F.3d 473, 477 (3rd Cir. 1994) (collecting cases regarding disclosure of plea agreements relative to co-conspirator testimony and credibility concluding, in part, that when conspirator testifies, he took part in the crime with which the defendant is charged his credibility is automatically implicated).

Also, restitution amount and loss amount under the Sentencing Guidelines are not the same. The latter is designed to measure culpability in applying the Sentencing Guidelines. The former is intended to protect victims and ensure they receive compensation for their injuries. *Cf. United States v. Binkholder*, 832 F.3d 923, 929 (8th Cir. 2016). Relevant here are two arguments petitioner preserved for review. That she has a right to a jury trial on the government's restitution claim; and that in any case the gross disproportion between the specific amounts set forth in the indictment in counts I through V and the total loss/restitution amounts found by the district court represents a due process violation and/or a grand jury/variance violation.

2. Petitioner clearly raised both the Fifth Amendment grand jury clause issue and the Sixth Amendment restitution issue in the district court at the change of plea hearing (Appendix, page 157, ln. 22, through page 158, ln. 20; and page 154, ln. 22, through page 158, ln. 20); and then again in her sentencing memorandum (Appendix, page 133-135), as well as before the Ninth Circuit.

3. In his dissenting opinion from denial of certiorari in *Hester*, in which Justice Sotomayor joined, at least two members of the Court suggest that “if restitution really fell beyond the reach of the Sixth Amendment’s protections in *criminal* prosecutions, we would then have to consider the Seventh Amendment and its independent protection of the right to a jury trial in *civil* cases.” 139 S.Ct. at 511

(Gorsuch, J., and Sotomayor, J. *dissenting from the denial of certiorari*) (emphasis original). Which makes sense, inasmuch as relevant parts of the federal restitution statutes involve enforcement of federal restitution orders as civil judgments. 18 USC §3664(m)(1)(B) (Appendix, page 216).

4. Congress provides that, at least in a criminal forfeiture context, defendants have a jury trial right. *See* Rule 32.2(b)(5), Fed.R.Crim.P. (Appendix, pages 220-221).

CONCLUSION

WHEREFORE, Petitioner prays the Court will grant this petition and set the case down for full briefing and argument.

RESPECTFULLY SUBMITTED this 14th day of February, 2024.

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