No. 23-6966

IN THE
SUPREME COURT OF THE UNITED STATES

ALISON LEE GENDREAU,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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At pages 6 through 8 of its Brief in Opposition (BIO), the government toggles between a straightforward discussion of this Court's ruling in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and the Mandatory Victims Restitution Act of 1996 (MVRA) which requires that " the court shall order, in addition to any other penalty authorized by law, that the defendant make restitution to the victim of the offense". (BIO, at 7, *quoting* 18 USC §3663A(a)(1)). Important to our purposes here this discussion concedes, as it must, that the "penalty" for wire fraud under 18 USC

§1343 is a fine, 20 years imprisonment, or both. Thus, the government admits that "restitution" is indeed "in addition to [the statutory penalty for wire fraud]" as set forth in the MVRA.

From there, however, the government introduces the theory that because the "additional" penalty of restitution for wire fraud is "indeterminate", a sentencing Court could never exceed its constitutional authority by imposing a punishment beyond the statutory maximum. (BIO, pages 7-8). Respectfully, this argument misses the point. Whether restitution is "indeterminate" has no bearing on whether restitution is an "additional" penalty. Simply because the restitution statutes apply to a variety of financial contexts and defendants with no express statutory cap, does not alter the fact that each individual determination of restitution in a given case is "in addition to" the statutory penalty authorized for wire fraud; *i.e.*, a fine and/or 20 years imprisonment.

Furthermore, the government's fixation on the *Apprendi* rule omits the crucial point that what constitutes a criminal conviction sometimes involves not only elements, but also circumstance-specific factors. Which requires the government to charge and prove same beyond a reasonable doubt. *Cf. United States v. Hayes*, 555 U.S. 415, 421 (2009) (in a § 922(g)(9) prosecution, it suffices for the Government to charge and prove a prior conviction that was, in fact, for "an offense ... *committed* by" the defendant against a spouse or other domestic victim); *with* 18 USC

§366A(a)(2) "for purposes of this section, the term victim means a person directly and proximately harmed as a result of the *commission* of an offense for which restitution may be ordered" (emphasis added to each reference).

Next, the government directs criticism towards Petitioner's articulation of the record *vis-à-vis* Petitioner's first question presented involving denial of due process and the grand jury clause. (BIO, page 10, fn. 2). Characterizing these claims as lacking "proper development" the government states that the "argument lacks merit in any event". *Id*. This criticism is overstated and neglects the procedural posture of this case.

First, as Petitioner states in her petition, both before the magistrate judge, who conducted the change of plea hearing, as well as before the Article III Judge, the wide disparity between the scheme alleged in the indictment and the restitution claimed was raised[1].

Furthermore, at the plea hearing, Petitioner never admitted accountability for restitution beyond the figures set forth in the indictment (Appendix, pgs. 156, 198-

[1] The magistrate judge *sua sponte* remarked on the disproportion between the indictment allegations and the restitution being requested (Appendix, pgs. 153-155). And, defense counsel cited to *United States v. Miller*, 471 U.S. 130 (1985), for the rule that although the government is permitted to prove a lesser included scheme in a fraud case, there is no corresponding right for the government to prove a greater scheme, where a lesser one has been alleged. In other words, *Miller* is a one-way rachet. *Id*. at 155.

201). It was only thereafter at sentencing did the district court make findings on the restitution issue under 18 USC §3664(e), without a jury, by a preponderance of evidence (Appendix, pgs. 97-99). Thus, after repeated attempts to secure a jury trial on the issue of restitution, Petitioner was saddled with the equivalent of a civil judgment for approximately 23 times the amount of money pleaded in the indictment based on a judge finding under the more likely than not standard.

Second, and probably more important, Petitioner's consistent arguments in the courts below clearly serve to underscore the systemic realities of how restitution issues are managed in federal courts. Because restitution figures are not considered worthy of jury determination the government can allege a "small" scheme, only to prove a larger more substantial one at the sentencing hearing without a jury or proof beyond a reasonable doubt. Hence, the procedure is that since restitution is not an element or circumstance-specific factor; ergo, there is no need for the government to plead the larger scheme to the grand jury or prove it beyond a reasonable doubt. In addition, the government can clear the grand jury with allegations of a much smaller scheme (as it did here) having the procedural advantage of proving a much larger one at sentencing. This is the "tail which wags the dog of the substantive offense" as Petitioner has repeatedly argued (Appendix, page 133); *also see United States v. Alison Lee Gendreau*, Ninth Circuit Court of Appeals CA No. 22-30136, DktEntry 6, page 14 (showing the same reference).

It is also worth considering that "skimming cash" is not wire fraud. And in fact theft from a business would in any event be classified as a state offense for which Petitioner, and others like her, would be guaranteed the right to jury trial, on proof beyond a reasonable doubt, in the relevant state venue.

Finally, contrary to the government's estimate (BIO, page 12), this case presents a perfect vehicle to decide the important issues surrounding the subject of restitution and its determination in a federal criminal case.

Petitioner pleaded guilty to an indictment that specifically alleged $13,095.56 in wire transactions; therefore, her guilty plea does not stand as an independent basis for the restitution ultimately awarded in this case. However, before a jury, based on proof beyond a reasonable doubt, Petitioner could have mounted a persuasive case that the owner of the business, not only neglected it by defaulting on the proper withholding of employee "payroll taxes" (BIO, page 2); he also laundered money by failing to file a required "tax form" (BIO, page 11). Incentivizing the conclusion that the owner of the business took the money.

Moreover, the wire frauds alleged were directly traceable to Petitioner's bank accounts; as were additional monies traceable to business credit card accounts to which Petitioner had access. Yet the bulk of the restitution awarded in this case was neither sourced to accounts that Petitioner controlled; nor to a lavish lifestyle or

property that Petitioner owned. Reasonable doubt is doubt for which there is a reason. Petitioner could have presented more than one good reason to a jury here.

CONCLUSION

WHEREFORE, Petitioner prays the Court will grant her petition and schedule the case for full briefing and argument.

RESPECTFULLY SUBMITTED this 31st day of May, 2024.

/s/ Michael Donahoe
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