No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARQUISE THOMAS,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

A. Fitzgerald Hall, Esq.
Federal Defender

Katherine Howard, Esq.
Counsel of Record
Assistant Federal Defender
201 S. Orange Avenue, Suite 300
Orlando, Florida 32801
Telephone: (407) 648-6338
Email: Katherine_Howard@fd.org

QUESTION PRESENTED

In 2018, Congress enacted the Amy, Vicky, and Andy Child Pornography Victim Assistance Act, which established a mandatory minimum restitution amount of $3,000 per victim for certain child exploitation offenses. *See* 18 U.S.C. § 2259(b)(2)(B).

As this Court has repeatedly held, the Sixth Amendment guarantees a right to have a jury find all the facts necessary to criminal punishment. Thus, a jury must find any fact that increases the statutory maximum penalty, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), as well as any fact that increases the mandatory minimum, *Alleyne v. United States*, 570 U.S. 99, 103 (2013). This bedrock constitutional rule applies "broadly" to all forms of criminal punishment, including monetary penalties like fines. *Southern Union Co. v. United States*, 567 U.S. 343, 350 (2012).

The question presented is: Does the Sixth Amendment require a jury to find the facts needed to justify a restitution order meeting or exceeding § 2259(b)(2)(B)'s $3,000 mandatory minimum?[1]

---

[1] This petition presents a similar issue as *Shah v. United States*, No. 24-25, which asks "[w]hether the Sixth Amendment reserves to juries the determination of any fact underlying a criminal restitution order."

RELATED PROCEEDINGS

United States District Court (M.D. Fla.)

United States v. Thomas, Case No. 2:20-cr-00122-TPB-NPM-1

United States Court of Appeals (11th Cir.)

United States v. Thomas, No. 23-10386

TABLE OF CONTENTS

Question Presented i

Related Proceedings ii

Table of Authorities v

Petition for a Writ of Certiorari 1

Order and Opinion Below 1

Jurisdiction 1

Relevant Constitutional and Statutory Provisions 1

Introduction 6

Statement of the Case 8

Reasons for Granting the Writ 11

I. The decision below contravenes this Court's Sixth Amendment precedent. 11

A. Under the Sixth Amendment, facts triggering a mandatory minimum restitution order must be proved to a jury beyond a reasonable doubt. 11

B. The decision below, like all the circuit court decisions refusing to apply the Sixth Amendment jury trial right to restitution, is wrong. 15

II. The question presented is important, recurring, and unlikely to be resolved without this Court's intervention. 24

III. This case is an excellent vehicle. 27

Conclusion 29

Appendices

Appendix A: Eleventh Circuit's Opinion 1a

Appendix B: Eleventh Circuit's Order Denying Rehearing..... 10a

Appendix C: District Court's Restitution Order..... 12a

Appendix D: Amended Judgment 14a

TABLE OF AUTHORITIES

Cases **Page(s)**

Alleyne v. United States,
570 U.S. 99 (2013) .....i, 7, 11, 12, 22

Apprendi v. New Jersey,
530 U.S. 466 (2000) .....i, 7, 11, 22

Blakely v. Washington,
542 U.S. 296 (2004) 11, 16, 22

Dohrmann v. United States,
442 F.3d 1279 (11th Cir. 2006) 9, 10, 15

Erlinger v. United States,
144 S. Ct. 1840 (2024) 12, 22, 25, 29

Hester v. United States,
139 S. Ct. 509 (2019) 14, 17, 21, 24, 25, 26

Kelly v. Robinson,
479 U.S. 36 (1986) 20

Manrique v. United States,
581 U.S. 116 (2017) 20

Oregon v. Ice,
555 U.S. 160 (2009) 13

Paroline v. United States,
572 U.S. 434 (2014) 20, 23

Pasquantino v. United States,
544 U.S. 349 (2005) 13, 20

Southern Union Co. v. United States,
567 U.S. 343 (2012) .....i, 7, 12, 13, 22, 23

Cases **Page(s)**

United Statas v. Carruth,
418 F.3d 900 (8th Cir. 2005) 27

United States v. Bajakajian,
524 U.S. 321 (1998) 20

United States v. Behrman,
235 F.3d 1049 (7th Cir. 2000) 10

United States v. Bengis,
783 F.3d 407 (2d Cir. 2015) 15, 26

United States v. Burns,
800 F.3d 1258 (10th Cir. 2015) 15, 26

United States v. Caudillo,
No. 23-4060, ---F.4th ----,
2024 WL 3688472 (5th Cir. Aug. 7, 2024) 18, 19, 26

United States v. Churn,
800 F.3d 768 (6th Cir. 2015) 15, 26

United States v. Day,
700 F.3d 713 (4th Cir. 2012) 15, 26

United States v. Green,
722 F.3d 1146 (9th Cir. 2013) 15, 26, 27

United States v. Haymond,
139 S. Ct. 2369 (2019) 12

United States v. Leahy,
438 F.3d 328 (3d Cir. 2006) 21, 26

United States v. Milkiewicz,
470 F.3d 390 (1st Cir. 2006) 17, 21, 26

United States v. Millot,
433 F.3d 1057 (8th Cir. 2006) 15, 19, 26

Cases **Page(s)**

United States v. Rosbottom,
763 F.3d 408 (5th Cir. 2014) 15, 26

United States v. Serawop,
505 F.3d 1112 (10th Cir. 2007) 19

United States v. Wolfe,
701 F.3d 1206 (7th Cir. 2012) 19, 26

Constitutional Provisions

U.S. Const., amend. VI. 20

Statutes

18 U.S.C. § 2259(a) 20

18 U.S.C. § 2259(b)(2) 16, 20

18 U.S.C. § 2259(b)(2)(A) 6

18 U.S.C. § 2259(b)(2)(B) ..... i, 6, 10, 17

18 U.S.C. § 2259(b)(4)(B) 25

18 U.S.C. § 2259(c)(2) 6

18 U.S.C. § 2259(c)(3) 8

18 U.S.C. § 2259(c)(4) 6, 23

18 U.S.C. § 3664(m)(1)(A)(i) 25

18 U.S.C. § 924(e) 12

28 U.S.C. § 1254(1) 1

Other Authorities **Page(s)**

Finnell v. United States,
U.S. Br. in Opp. (No. 23-5835) (March 4, 2024) 28

James Barta,
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 (2014) 13

LaFave,
Criminal Procedure § 26.6(c) 25

Shah v. United States,
Pet. for Writ of Cert. (No. 24-25) (July 8, 2024) ..... i, 28

U.S. Sentencing Comm'n,
2023 Annual Report and Sourcebook
of Federal Sentencing Statistics 24

PETITION FOR A WRIT OF CERTIORARI

Marquise Thomas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

ORDER AND OPINION BELOW

The Eleventh Circuit's unpublished opinion affirming Mr. Thomas's sentence is provided in Appendix A. Its denial of Mr. Thomas's timely filed petition for rehearing en banc is provided in Appendix B.

JURISDICTION

The Eleventh Circuit denied Mr. Thomas's petition for rehearing en banc on May 23, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution states in relevant part: "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 . . . ."

Section 2259 of Title 18 of the United States Code states in relevant part:

(a) In General.—

Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.

(b) Scope and Nature of Order.—

. . . .

(2) Restitution for trafficking in child pornography.—If the defendant was convicted of trafficking in child pornography, the court shall order restitution under this section in an amount to be determined by the court as follows:

(A) Determining the full amount of a victim's losses.—

The court shall determine the full amount of the victim's losses that were incurred or are reasonably projected to be incurred by the victim as a result of the trafficking in child pornography depicting the victim.

(B) Determining a restitution amount.—

After completing the determination required under

subparagraph (A), the court shall 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.

(C) Termination of payment.—

A victim's total aggregate recovery pursuant to this section shall not exceed the full amount of the victim's demonstrated losses. After the victim has received restitution in the full amount of the victim's losses as measured by the greatest amount of such losses found in any case involving that victim that has resulted in a final restitution order under this section, the liability of each defendant who is or has been ordered to pay restitution for such losses to that victim shall be terminated. The court may require the victim to provide information concerning the amount of restitution the victim has been paid in other cases for the same losses.

(3) Enforcement.—

An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an

order under section 3663A.

(4) Order mandatory.—

(A) The issuance of a restitution order under this section is mandatory.

(B) A court may not decline to issue an order under this section because of—

(i) the economic circumstances of the defendant; or

(ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

(c) Definitions.—

. . . .

(2) Full amount of the victim's losses.—For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred, or that are reasonably projected to be incurred in the future, by the victim, as a proximate result of the offenses involving the victim, and in the case of trafficking in child pornography offenses, as a proximate result of all trafficking in child pornography offenses involving the same victim, including—

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) reasonable attorneys' fees, as well as other costs incurred; and

(F) any other relevant losses incurred by the victim.

. . . .

(4) Victim.—

For purposes of this section, the term "victim" means the individual harmed as a result of a commission of a crime under this chapter. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the crime victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

INTRODUCTION

Section 2259 of Title 18 of the United States Code creates a mandatory restitution scheme for child exploitation offenses. When a defendant is convicted of trafficking in child pornography, the court "shall order restitution" for any victim in an amount that is "no less than $3,000." 18 U.S.C. § 2259(b)(2)(B). That restitution order, however, does not flow automatically from the facts needed to convict the defendant.

Rather, additional facts—not reflected in the jury verdict or admission of guilt—must be found before restitution can be ordered. First, a victim or victims must be identified. *See id.* § 2259(b)(2)(A); *id.* § 2259(c)(4) (defining "victim"). Second, the full amount of the victim's losses caused by the trafficking must be determined. *Id.* § 2259(b)(2)(A); *see id.* § 2259(c)(2) (defining "full amount of the victim's losses"). Third, if there is an identified victim with losses, the restitution order must reflect the defendant's relative role in causing the losses. *Id.* § 2259(b)(2)(B). Nevertheless, that restitution order must be for no less than $3,000. *Id.*

This Court's Sixth Amendment precedent makes clear that relying on judicial factfinding to trigger § 2259(b)(2)(B)'s mandatory minimum restitution violates the Sixth Amendment. A jury must find the facts

necessary to justify an increased mandatory minimum penalty. *Alleyne v. United States*, 570 U.S. 99 (2013); *see also Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that jury must find facts that increase statutory maximum). And that principle applies not only to increased statutory ranges of imprisonment but also to any form of criminal punishment, including monetary penalties. *Southern Union Co. v. United States*, 567 U.S. 343 (2012).

Yet in the decision below, the Eleventh Circuit exempted restitution from this fundamental jury trial right. Its reasoning contradicts this Court's precedent and is irreconcilable with a historic understanding of the Sixth Amendment. And while only the Eleventh Circuit has specifically rejected that judicial factfinding to trigger § 2259(b)(2)(B)'s mandatory minimum violates *Alleyne*, all the courts of appeals to consider whether a restitution order based on judge-found facts violates the Sixth Amendment have similarly misapplied this Court's precedent. At the same time, the imposition of onerous restitution awards is increasing nationwide. This Court's intervention is urgently needed to protect the fundamental right to a criminal jury trial.

STATEMENT OF THE CASE

1. Following a bench trial, the district court found Marquise Thomas guilty of a single count of possessing child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B) and imposed a 78-month term of imprisonment, followed by a lifetime of supervised release. Doc. 175.[2] The district court reserved on restitution. Doc. 169 at 22.

After Mr. Thomas's sentencing, the government announced its intention to seek $31,000 in restitution for seven victims. Doc. 153 at 2. Mr. Thomas objected and asked the district court to either empanel a jury to determine the restitution amount or limit the restitution to the amount authorized by the stipulated facts from his bench trial—$0. *Id.* at 1. Among other Sixth Amendment objections, he explained that the Supreme Court's decision in *Alleyne* required a factfinder to determine each restitution-related fact beyond a reasonable doubt because the restitution statute, 18 U.S.C. § 2259(b)(2), established a mandatory minimum of $3,000 per victim. *Id.* at 10–12.[3]

---

[2] "Doc." references the district court docket entries in this case.

[3] Section 2259(b)(2) applies when a defendant is convicted of "trafficking in child pornography," a defined term that includes possession of child pornography under 18 U.S.C. § 2252(a)(4). *See* 18 U.S.C. § 2259(c)(3).

At the restitution hearing, the district court overruled Mr. Thomas's request to empanel a jury. Doc. 180 at 3, 9. The government modified its restitution request to $15,000 for five victims (representing the mandatory minimum amount per alleged victim) and presented exhibits supporting its request, including descriptions of the images, victim impact statements, and psychological evaluations. *Id.* at 3–9. The district court determined that the documents "establishe[d] everything that need[ed] to be established," *id.* at 9, and ordered Mr. Thomas to pay $15,000 in restitution, Docs. 158, 175.

2. On appeal, Mr. Thomas renewed his challenge to the restitution order, arguing that it violated his constitutional rights under *Alleyne*. The Eleventh Circuit rejected his argument, articulating three reasons for its decision. *See* App. A.

a. First, the Eleventh Circuit relied on prior circuit precedent holding that *Apprendi* does not apply to restitution. App. 8a. (citing *Dohrmann v. United States*, 442 F.3d 1279, 1281 (11th Cir. 2006)). The Eleventh Circuit reasoned that because *Alleyne* is an extension of *Apprendi*, it "follows" that *Alleyne* does not apply to restitution orders, either. *Id.* In a footnote, the Eleventh Circuit explained that *Dohrmann*

based its decision on the reasoning of other circuits, which had concluded that *Apprendi* was inapplicable because the restitution statute did not have a "prescribed statutory maximum." App. 8a n.2; *Dohrmann*, 442 F.3d at 1281.

b. Second, the Eleventh Circuit noted that at least one out-of-circuit decision relied on in *Dohrmann* stated that *Apprendi* does not apply because restitution is a civil penalty and *Apprendi* is a "rule of criminal procedure." App. 8a n.2 (citing *United States v. Behrman*, 235 F.3d 1049, 1054 (7th Cir. 2000)).

c. Third, the Eleventh Circuit reasoned that because restitution in child pornography cases is mandatory, and the statutory minimum amount of restitution is $3,000, *see* 18 U.S.C. § 2259(b)(2)(B), "the facts that would trigger § 2259(a) and (b)'s applicability are the same facts necessary for a defendant to be found guilty beyond a reasonable doubt." App. 8a.

REASONS FOR GRANTING THE WRIT

I. The decision below contravenes this Court's Sixth Amendment precedent.

A. Under the Sixth Amendment, facts triggering a mandatory minimum restitution order must be proved to a jury beyond a reasonable doubt.

In *Apprendi*, this Court held that, except for the fact of a prior conviction, the Sixth Amendment requires that any fact that would increase the punishment for a crime beyond the prescribed statutory maximum must be presented to the factfinder and proven beyond a reasonable doubt. 530 U.S. at 490. "[T]he '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).

The Court later extended *Apprendi's* rule to mandatory minimums. *Alleyne*, 570 U.S. at 103, 116. The Court clarified that although *Apprendi* had been limited to facts increasing the statutory maximum, *Apprendi*'s underlying principle carries the same weight when it comes to facts that elevate the mandatory minimum. *See id.* at 111–12. *Alleyne*'s reasoning was based on the recognition that a fact triggering a mandatory minimum alters the prescribed sentencing range for a criminal

defendant. *Id.* at 112. Because the legally prescribed range represents the penalty associated with the offense, it follows that a fact affecting either end of the range results in a new penalty and constitutes an essential element of the offense. *See id.*

In the years since, this Court "has not hesitated to strike down" sentencing procedures "that fail to respect the jury's supervisory function." *United States v. Haymond*, 139 S. Ct. 2369, 2377 (2019) (plurality opinion). For example, just last term the Court held that to impose an enhanced statutory range under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), the statute's "different occasions" requirement must be proved to a unanimous jury beyond a reasonable doubt. *Erlinger v. United States*, 144 S. Ct. 1840 (2024).

The Court has also explained that this bedrock constitutional rule is not limited to facts that increase terms of imprisonment—it applies "broadly" to "prohibit judicial factfinding that increases maximum criminal sentences, penalties, or punishments." *Southern Union*, 567 U.S. at 350 (cleaned up). Indeed, this Court "ha[s] never distinguished one form of punishment from another" for purposes of *Apprendi*. *Id.* Thus,

in *Southern Union*, the Court held that a jury must find the facts necessary to impose criminal fines. *Id.*

Like fines, restitution ordered in criminal cases is a monetary criminal penalty whose "purpose" is "to mete out appropriate criminal punishment." *Pasquantino v. United States*, 544 U.S. 349, 365 (2005). And like the fine in *Southern Union*, restitution orders under 18 U.S.C. § 2259(b) require additional factfinding. *See supra* at 6. Because those facts increase the statutory minimum (and maximum) penalty a defendant faces, the Sixth Amendment demands the government prove them to a jury.

This result is not only compelled by the Court's precedent, it is consistent with the "historical role of the jury at common law." *Southern Union*, 567 U.S. at 353 (quoting *Oregon v. Ice*, 555 U.S. 160, 170 (2009)). A review of the historical record supports that facts affecting the statutory maximum or minimum amount of restitution must be admitted by the defendant or submitted to a jury and proven beyond a reasonable doubt. *See* James Barta, *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 (2014).

Indeed, "as long ago as the time of Henry VIII, an English statute entitling victims to the restitution of stolen goods allowed courts to order the return only of those goods mentioned in the indictment and found stolen by a jury." *Hester v. United States*, 139 S. Ct. 509, 511 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from the denial of certiorari); *see also Southern Union*, 567 U.S. at 354 (discussing authority suggesting that English juries had to find value of property taken to authorize pecuniary punishment). "In America, too, courts held that in prosecutions for larceny, the jury usually had to find the value of the stolen property before restitution to the victim could be ordered." *Hester*, 139 S. Ct. at 511. As two Justices of this Court have opined, "it's hard to see why the right to a jury trial should mean less to the people today than it did to those at the time of the Sixth . . . Amendment's adoption." *Id.*

In short, a historical understanding of the Sixth Amendment confirms what this Court's precedent compels: a jury must find the facts necessary to order restitution. This result is especially clear as applied to an order under § 2259(b)(2), where the factfinding triggers a $3,000 mandatory minimum restitution order.

B. The Eleventh Circuit's decision that a jury need not find the facts necessary to trigger § 2259(b)(2)(B)'s $3,000 mandatory minimum—like all the circuit court decisions refusing to apply the Sixth Amendment jury trial right to restitution—is wrong.

In wrongly holding that *Alleyne* does not apply to mandatory minimum restitution orders under § 2259(b)(2), the Eleventh Circuit gave three reasons, each of which defies this Court's precedent and mirrors the misguided analysis applied across the other circuits.

1. First, the Eleventh Circuit relied on its prior precedent in *Dohrmann*, which held that a different restitution statute—18 U.S.C. § 3663—had no "statutory maximum" and thus did not implicate *Apprendi*. *Dohrmann*, 442 F.3d at 1281. Other circuits have similarly held that criminal restitution orders are exempt from *Apprendi* because restitution statutes prescribe no statutory maximum. *See, e.g.*, *United States v. Bengis*, 783 F.3d 407, 412–13 (2d Cir. 2015); *United States v. Day*, 700 F.3d 713, 732 (4th Cir. 2012); *United States v. Rosbottom*, 763 F.3d 408, 420 (5th Cir. 2014); *United States v. Churn*, 800 F.3d 768, 782 (6th Cir. 2015); *United States v. Millot*, 433 F.3d 1057, 1062 (8th Cir. 2006); *United States v. Green*, 722 F.3d 1146, 1150 (9th Cir. 2013); *United States v. Burns*, 800 F.3d 1258, 1261–62 (10th Cir. 2015). In the decision

below, the Eleventh Circuit reasoned that it "followed" that restitution, including under § 2259(b)(2)(B), did not implicate *Alleyne*. App. 8a. This reasoning is doubly wrong.

a. As an initial matter, the circuits' "no statutory maximum" reasoning is wrong in the first instance, ignoring the statutory scheme and fundamentally misunderstanding the Sixth Amendment and this Court's precedent. Restitution statutes do prescribe a "statutory maximum": the full amount of a victim's losses caused by the offense. *See, e.g.*, 18 U.S.C. § 2259(b)(2).

That prescribed maximum is beside the point, however. As this Court has explained, "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*, 542 U.S. at 303–04. That is, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." *Id.*

Applying the correct understanding of the term, the "statutory maximum" amount of restitution is zero because "a court can't award any restitution without finding additional facts about the victim's loss."

Hester, 139 S. Ct. at 510 (Gorsuch, J., joined by Sotomayor, J., dissenting from the denial of certiorari); *see United States v. Milkiewicz*, 470 F.3d 390, 403 (1st Cir. 2006) ("If the question is whether the verdict '*alone*' allows the judges to impose restitution with no additional finding of fact, obviously it doesn't."). Whether a restitution statute has a "prescribed statutory maximum" is thus irrelevant for Sixth Amendment purposes.

b. But even if the circuits were correct that restitution statutes like § 3663 and the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A, lack a prescribed statutory maximum and thus do not implicate *Apprendi*—so courts may find the facts necessary to impose restitution orders under those statutes—the Sixth Amendment would still prohibit judicial factfinding under § 2259(b)(2)(B), the statute at issue here.

That's because, regardless of whether § 2259(b)(2)(B) has a separate "statutory maximum," the statute has a separate statutory minimum. *See* 18 U.S.C. § 2259(b)(2)(B) (setting $3,000 statutory minimum). And under *Alleyne*, the factfinding required to impose that statutory minimum must be found by a jury. *See supra* at 6–7, 11–12.[4]

[4] Section 2259(b)(2)(C), which states that the liability of a defendant ordered to pay restitution shall be terminated after a victim's total aggregate recovery meets the full amount of her losses, doesn't

In holding to the contrary, the Eleventh Circuit relied on a non sequitur fallacy: because *Apprendi* does not apply to restitution statutes without a "prescribed statutory maximum," it "follows" that *Alleyne* does not apply to § 2259(b)(2)(B). *See* App. 8a. This reasoning is not only wrong for the reasons explained above, it has been rejected by at least one other circuit. *See United States v. Caudillo*, No. 23-4060, --- F.4th ----, 2024 WL 3688472, at *2–3 (5th Cir. Aug. 7, 2024).

In *Caudillo*, the government argued that prior decisions holding that *Apprendi* is inapplicable to restitution statutes without a statutory maximum resolved that § 2259(b)(2)(B) did not implicate *Alleyne*. *Id.* at *2–3. The Fifth Circuit disagreed. Like the Eleventh Circuit's *Dorhmann* decision, those earlier Fifth Circuit decisions concerned a different restitution statute with no mandatory minimum, and so did "not govern whether factual determinations that increase the statutory *minimum*

---

change that constitutional command. That liability may later be "terminated" is distinct from the restitution order itself, which is a criminal penalty subject to the $3,000 mandatory minimum. And *Alleyne* requires a jury find all the facts to support a mandatory minimum penalty, even if that minimum can be broken through the application of other statutes, such as substantial assistance under 18 U.S.C. § 3553(e) or the safety valve under 18 U.S.C. § 3553(f).

amount of restitution [under § 2259(b)(2)(B)] must be admitted by a defendant or found beyond a reasonable doubt." *Id.* at *3.

The Fifth Circuit ultimately did not resolve the *Alleyne* issue because the defendant had waived his Sixth Amendment argument. *Id.* But its acknowledgment that § 2259(b)(2)(B)'s mandatory minimum raises distinct Sixth Amendment concerns conflicts with the decision below. And it highlights why this Court's intervention is needed to clarify the Sixth Amendment jury trial right for criminal restitution, especially for restitution orders under a statute like § 2259(b)(2), which contains both a statutory maximum and minimum.

2. Second, the Eleventh Circuit implicitly agreed with the premise, adopted by a minority of circuits, that restitution does not implicate the Sixth Amendment jury trial right because it is not a criminal penalty. App. 8a n.2; *see United States v. Wolfe*, 701 F.3d 1206, 1206 (7th Cir. 2012); *Millot*, 433 F.3d at 1062 (8th Cir.); *see also United States v. Serawop*, 505 F.3d 1112, 1122 (10th Cir. 2007) (holding that rule of lenity does not apply to Mandatory Victims Restitution Act because restitution does not inflict criminal punishment).

This too is wrong. The jury trial right applies "[i]n all criminal prosecutions." U.S. Const., amend. VI. And restitution is "imposed by the Government 'at the culmination of a criminal proceeding and requires conviction of an underlying' crime." *Paroline v. United States*, 572 U.S. 434, 456 (2014) (quoting *United States v. Bajakajian*, 524 U.S. 321, 328 (1998)); *see Manrique v. United States*, 581 U.S. 116, 118 (2017) ("Sentencing courts are required to impose restitution as part of the sentence for specified crimes.").

This Court has repeatedly recognized that restitution is a criminal penalty with "punitive purposes." *Paroline,* 572 U.S. at 456; *see Pasquantino*, 544 U.S. 349 at 365 ("The purpose of awarding restitution . . . is . . . to mete out appropriate criminal punishment for that conduct."); *Kelly v. Robinson*, 479 U.S. 36, 40 n.10, 50–53 (1986) (describing restitution as "effective rehabilitative penalty" and stating that "restitution [has] a more precise deterrent effect than a traditional fine").

The statutory scheme confirms that the restitution ordered in Mr. Thomas's case is a criminal penalty. Section 2259 classifies restitution as a "penalty" for the "offense" that is triggered when a defendant is "convicted" of certain crimes. 18 U.S.C. § 2259(a), (b)(2); *see Hester*, 139

S. Ct. at 511 (Gorsuch, J. joined by Sotomayor, J., dissenting from denial of certiorari) ("Federal statues, too, describe restitution as a penalty' imposed on the defendant as part of his criminal sentence . . . .").

3. Third, the Eleventh Circuit held that because restitution under § 2259 is mandatory, the facts needed to convict an individual of a qualifying child pornography offense were "the same facts necessary" to trigger the $3,000 mandatory minimum. App. 8a. This reasoning echoes the Third Circuit in *United States v. Leahy*, 438 F.3d 328, 335–38 (3d Cir. 2006) (en banc), which held—over a five-judge dissent—that a restitution order based on judicial factfinding comports with the Sixth Amendment because a conviction automatically authorizes restitution in the "full amount of loss." The First Circuit has also adopted this approach. *See Milkiewicz*, 470 F.3d at 404 ("[I]n *every* case in which such punishment is imposed, 'the jury's verdict automatically triggers restitution in the 'full amount of each victim's losses.'" (quoting *Leahy*, 438 F.3d at 338 n.11)). But the reasoning fundamentally misunderstands the statutory scheme and this Court's Sixth Amendment precedent.

Imposing restitution under § 2259(b)(2)—even an order at the mandatory minimum—requires additional factfinding beyond the facts

needed to convict the defendant of a child pornography offense. *See supra* at 6.[5] The Sixth Amendment's command is clear: those facts must be admitted by the defendant or proven to a jury beyond a reasonable doubt. *See Alleyne*, 570 U.S. at 103; *see also Apprendi*, 530 U.S. at 490; *Blakely*, 542 U.S. at 303–04; *Southern Union*, 567 U.S. at 350.

Contrary to the decision below, penalty provisions are not exempted from this rule simply because they are "mandatory" consequences of a conviction. For example, under 18 U.S.C. § 924(e), the ACCA enhancement is mandatory: any defendant who violates 18 U.S.C. § 922(g)(1) and has three predicate offenses committed on different occasions is subject to an enhanced penalty scheme. But because factfinding is required to satisfy the "different occasions" requirement, this Court held that the government must prove "different occasions" to a unanimous jury beyond a reasonable doubt. *Erlinger*, 144 S. Ct. at 1852. The same reasoning applies here: additional factfinding is necessary to impose the statutory minimum restitution order, so those facts must be found by a jury.

[5] Ordering restitution under other statutes, like § 3663 or § 3663A, similarly requires additional factfinding.

Or consider the Resource Conservation and Recovery Act of 1976 ("RCRA"), the statute at issue in *Southern Union*. Violations of RCRA are subject to a fine of $50,000 per day. *Southern Union*, 567 U.S. at 347. This Court held that when a jury finds a defendant violated the RCRA but does not find the number of days the defendant engaged in a violation, judicial factfinding to determine the number of days enlarges the punishment beyond what the jury's verdict allowed, in violation of the Sixth Amendment. *Id.* at 352. Again, the Sixth Amendment compels the same result here. Just as a jury must find the number of days a defendant violated the RCRA, under § 2259(b) a jury must find the identity of the victims, their total losses, and the portion of those losses attributable to the defendant.

To the extent that the Eleventh Circuit suggested that the $3,000 mandatory minimum is a legislative determination of the per se harm a child pornography victim suffers, it misses that imposing even the mandatory minimum requires an additional finding—not established by the fact of conviction—that an individual is a "victim" of the offense. *See* 18 U.S.C. § 2259(c)(4); *Paroline*, 572 U.S. at 445 ("[I]f the defendant's offense conduct did not cause harm to an individual, that individual is by

definition not a 'victim' entitled to restitution under § 2259."). In Mr. Thomas's case, the district court found by a preponderance of the evidence that there were five such "victim[s]." And based solely on that judicial factfinding, the district court ordered Mr. Thomas to pay $15,000 in restitution as part of the penalty for his crime.

II. The question presented is important, recurring, and unlikely to be resolved without this Court's intervention.

"Restitution plays an increasing role in federal criminal sentencing today." *Hester*, 139 S. Ct. at 510 (Gorsuch, J., joined by Sotomayor, J., dissenting from the denial of certiorari). Before enactment of the Mandatory Victims Restitution Act in 1996, "restitution orders were comparatively rare. *Id.* But "between 1996 and 2016, the amount of unpaid federal criminal restitution rose from less than $6 billion to more than $110 billion." *Id.* And "from 2014 to 2016 alone, federal courts sentenced 33,158 defendants to pay $33.9 billion in restitution." *Id.* Criminal restitution continues to shape our justice system. In 2023, federal courts ordered over 8,000 defendants to pay over $13 billion in restitution, with a mean award of more than $1.6 million. U.S. Sentencing Comm'n, 2023 Annual Report and Sourcebook of Federal Sentencing Statistics tbl. 17.

And when defendants do not comply with their restitution orders—which is a common occurrence, *see* LaFave, *Criminal Procedure* § 26.6(c)—they face severe consequences. "Failure or inability to pay restitution can result in suspension of the right to vote, continued court supervision, or even reincarceration." *Hester*, 139 S. Ct. at 510 (Gorsuch, J., joined by Sotomayor, J., dissenting from the denial of certiorari); *see* 18 U.S.C. § 3664(m)(1)(A)(i) (providing that restitution may be enforced in same manner as fines). The consequences are particularly troubling for indigent defendants, as restitution is often imposed without regard for the individual's ability to pay. *See, e.g.*, 18 U.S.C. § 2259(b)(4)(B).

These penalties are not just onerous; under the Sixth Amendment, they are unconstitutional. As this Court recently explained, it's not "too much to ask the government to prove its case . . . with reliable evidence" before exposing criminal defendants to enhanced punishments, especially considering the "practical reality" that defendants face as a result. *Erlinger*, 144 S. Ct. at 1852 n.1 (alteration adopted).

Yet, while the Eleventh Circuit appears to be the only circuit to address whether § 2259(b)(2)(B)'s $3,000 mandatory minimum violates

Alleyne,[6] every court of appeals to have considered whether the Sixth Amendment's jury trial right applies to restitution has used similar faulty reasoning to hold that it does not. *See, e.g.*, *Milkiewicz*, 470 F.3d at 403–04 (1st Cir.); *Bengis*, 783 F.3d at 412–13 (2d Cir.); *Leahy*, 438 F.3d 328, 335–38 (3d Cir.); *Day*, 700 F.3d at 732 (4th Cir.); *Rosbottom*, 763 F.3d at 420 (5th Cir.); *Churn*, 800 F.3d at 782 (6th Cir.); *Wolfe*, 701 F.3d at 1206 (7th Cir.); *Millot*, 433 F.3d at 1062 (8th Cir.); *Green*, 722 F.3d at 1149–51 (9th Cir.); *Burns*, 800 F.3d at 1261–62 (10th Cir.). Specifically, each of these courts has concluded that judicial factfinding to justify criminal restitution orders comports with the Sixth Amendment for one or more of the three reasons discussed in Part I.B, *supra.*

After years of percolation, the courts of appeals have held tight to their precedent, despite Justices of this Court and federal circuit judges highlighting that precedent's inconsistencies with this Court's Sixth Amendment jurisprudence. *See, e.g.*, *Hester*, 139 S. Ct. at 509–11 (Gorsuch, J., and Sotomayor, J., dissenting from denial of certiorari); *Leahy*, 438 F.3d at 339–48 (McKee, J., dissenting, joined by four other

[6] As noted *supra*, the Fifth Circuit was recently presented with this issue but did not address it. *See Caudillo*, 2024 WL 3688472 at *2–3.

judges) ("A finding of loss necessarily is a condition precedent to an order of restitution, and . . . it is the judge who makes the finding. As I have explained, the imposition of this additional criminal penalty based on a fact not found by a jury violates the Sixth Amendment."); *United Statas v. Carruth*, 418 F.3d 900, 904–06 (8th Cir. 2005) (Bye, J., dissenting) ("Once we recognize restitution as being a "criminal penalty" the proverbial *Apprendi* dominoes begin to fall.").

In short, the courts of appeals are stuck. As the Ninth Circuit explained, "Our precedents are clear that *Apprendi* doesn't apply to restitution, but that doesn't mean our caselaw's well-harmonized with *Southern Union*. Had *Southern Union* come down before our cases, those cases might have come out differently. Nonetheless, our panel can't base its decision on what the law might have been." *Green*, 722 F.3d at 1146. What the courts of appeals can't or won't do, this Court must.

III. This case is an excellent vehicle.

This case is an ideal vehicle to finally correct course and uphold the criminal jury trial right. The issue is well preserved and has a real impact for Mr. Thomas, an indigent defendant now facing an onerous criminal penalty based solely on judicial factfinding.

Mr. Thomas raised his Sixth Amendment argument—including that relying on judicial factfinding to trigger § 2259(b)(2)(B)'s mandatory minimum violates *Alleyne*—in the district court, requesting a jury trial or that the district court impose a restitution order supported by the facts from his bench trial: zero dollars. Doc. 152. The district court rejected his request and expressly based the $15,000 restitution order (the $3,000 mandatory minimum for five victims) on its own factfinding from a handful of documents that it thought "establishe[d] everything that need[ed] to be established." Doc. 180 at 9. Mr. Thomas renewed the Sixth Amendment *Alleyne* issue before the Eleventh Circuit, where it was rejected by the panel and then again through the denial of his rehearing petition.[7]

A pending petition for certiorari in *Shah v. United States*, No. 24-25, asks "[w]hether the Sixth Amendment reserves to juries the determination of any fact underlying a criminal restitution order." On July 31, 2024, the Court requested the United States respond to the

[7] This case thus does not present the procedural problems the government identified in the recently denied *Finnell v. United States,* No. 23-5835. Unlike *Finnell*, this case directly raises the *Alleyne* issue, and the district court relied on the statutory minimum when ordering restitution. *See Finnell*, U.S. BIO at 22 n.3 (No. 23-5835) (March 4, 2024).

petition in *Shah*. At a minimum, this Court should hold Mr. Thomas's petition pending the disposition of *Shah*. But if the Court denies the petition in *Shah*, it should grant Mr. Thomas's petition, which is an excellent vehicle and directly poses the distinct *Alleyne* mandatory minimum issue.

* * *

The right to a trial by jury is "at the heart of our criminal justice system." *Erlinger*, 144 S. Ct at 1849. Yet judges continue to find for themselves the facts necessary to trigger criminal penalties in the form of restitution orders. This practice cannot be squared with the Court's precedent or a historical understanding of the Sixth Amendment. But until this Court clarifies that it meant what it said in *Southern Union*—that the Sixth Amendment prohibits judicial factfinding for all forms of criminal punishment—judges will continue to usurp the jury's critical role and impose punishment in the form of onerous restitution orders.

CONCLUSION

The Court should grant the petition for writ of certiorari. Alternatively, the Court should hold the petition pending its decision in *Shah*, No. 24-25.

Respectfully submitted,

A. Fitzgerald Hall, Esq.
Federal Defender, MDFL

/s/ Katherine Howard
Katherine Howard, Esq.
Assistant Federal Defender
201 S. Orange Avenue, Suite 300
Orlando, FL 32801
Telephone 407-648-6338
Email: Katherine_Howard@fd.org
Counsel of Record for Petitioner

August 20, 2024