No. 24-5366

IN THE SUPREME COURT OF THE UNITED STATES

MARQUISE THOMAS, 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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QUESTION PRESENTED

Whether the Sixth Amendment requires that 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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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is unreported but is available at 2024 WL 706205.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 2024. A petition for rehearing was denied on May 23, 2024 (Pet. App. 10a-11a). The petition for a writ of certiorari was filed on August 20, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of possessing child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). Pet. App. 2a, 14a. The district court sentenced him to 78 months of imprisonment, to be followed by a lifetime of supervised release. Id. at 15a-16a. The court also ordered petitioner to pay restitution in the amount of $15,000. Id. at 12a-13a, 19a. The court of appeals affirmed. Id. at 1a-9a.

1. In 2018, FBI agents determined that a computer at petitioner's home was sharing child pornography on a publicly available online peer-to-peer file sharing program. Pet. App. 2a. The agents connected to petitioner's computer and downloaded files depicting a child engaged in sexually explicit conduct. Id. at 2a-3a. Pursuant to a search warrant, the agents seized three laptops and a cell phone from petitioner's home. Id. at 3a. The investigation revealed that petitioner had knowingly possessed, or accessed with intent to view, child pornography between September 2017 and January 2019. Ibid. Some of the material depicted bondage, bestiality, and sadism, including the sexual abuse and torture of toddlers and very young children. Presentence Investigation Report (PSR) ¶¶ 9, 13-18; see Pet. App. 3a.

2. a. A grand jury in the Middle District of Florida returned an indictment charging petitioner with possessing child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). Indictment 1-2. Petitioner waived his right to a jury trial and proceeded to a bench trial. Pet. App. 2a. The district court found him guilty. Id. at 14a.

b. At sentencing, the district court determined that 116 pictures and 35 videos had been recovered from petitioner's devices. Pet. App. 3a; Sent. Tr. 11. The court described the materials as "[w]orse than child pornography" because they depicted "children being tortured." Sent. Tr. 25-26; see Pet. App. 3a. The court sentenced petitioner to 78 months of imprisonment, to be followed by a lifetime term of supervised release. Pet. App. 15a-16a.

c. Before a subsequent hearing on restitution, petitioner moved to empanel a jury to determine the amount of restitution, arguing that such a jury determination was constitutionally required. D. Ct. Doc. 153, at 2-12 (Mar. 21, 2023). In the alternative, petitioner sought an order limiting restitution to the amount authorized by the facts found by the court at the bench trial, which according to petitioner was $0. Id. at 12. The district court rejected petitioner's requests and declined to empanel a jury for the restitution hearing. 5/12/23 Hr'g Tr. 3.

The government sought $3000 in restitution for each of five of petitioner's victims who had requested restitution. See PSR ¶¶ 21, 23; 5/12/23 Hr'g Tr. 3, 7, 9. Under 18 U.S.C. 2259(b)(2)(B), "[i]f the defendant was convicted of trafficking in child pornography, 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." The provision further specifies that "[a] victim's total aggregate recovery pursuant to this section shall not exceed the full amount of the victim's demonstrated losses." 18 U.S.C. 2259(b)(2)(C).

Here, the government provided psychological reports and cost estimates, as well as analyses of the victims' diminished earning capacity and reduction in value of life attributable to their victimization. 5/12/23 Hr'g Tr. 3-9. Petitioner did not contest any of this evidence. See ibid. Each victim established losses of at least $1 million. Id. at 9. In accordance with the government's request, id. at 3, the district court ordered petitioner to pay $3000 in restitution to each of the five victims, for a total of $15,000. Pet. App. 12a-13a, 19a.

3. The court of appeals affirmed. Pet. App. 1a-9a. As relevant here, the court rejected petitioner's argument "that the district court's imposition of a mandatory minimum without findings from a factfinder beyond a reasonable doubt violates his constitutional rights under Alleyne v. United States, 570 U.S. 99

(2013)." Id. at 7a. The court explained that in Alleyne, this Court held that "any fact that increases the mandatory minimum [punishment] is an 'element' that must be submitted to the jury" and "found beyond a reasonable doubt." Ibid. (quoting 570 U.S. at 103). The court observed (Pet. App. 7a) that Alleyne "extended" this Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), 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 490. See Pet. App. 7a-8a. And the court noted that under circuit precedent, Apprendi does not "appl[y] to restitution." Id. at 8a (citing Dohrmann v. United States, 442 F.3d 1279, 1281 (11th Cir. 2006)). The court thus reasoned that "[b]ecause Alleyne is an extension of Apprendi, it follows that Alleyne, too, would not apply to restitution orders." Ibid.

The court of appeals also observed that "restitution in child pornography cases is mandatory," and "the facts that would trigger" a mandatory restitution order "are the same facts necessary for a defendant to be found guilty" of child pornography possession in the first place. Pet. App. 8a. And here, the court found that the district court did not err by "issu[ing] an order, as mandated by § 2259(b)(2)(B), requiring that [petitioner] pay $15,000 in restitution -- $3,000 to each of the five identified victims." Id. at 9a.

4. The court of appeals denied rehearing en banc. Pet. App. 11a.

ARGUMENT

Petitioner renews (Pet. 11-24) his contention that the Sixth Amendment guarantees a right to jury factfinding on criminal restitution. For the reasons explained in the government's brief in opposition to the petitions for writs of certiorari in Rimlawi v. United States, No. 24-23, Shah v. United States, No. 24-25, and Jacob v. United States, No. 24-5032, that contention lacks merit and does not warrant this Court's review. See Br. in Opp. at 10-18, Rimlawi, supra (Nos. 24-23, 24-25, 24-5032).[1] This Court has repeatedly denied petitions for writs of certiorari presenting similar questions, including in two cases earlier this year.[2] The same result is warranted here.

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[1] A copy of the government's brief in opposition in those cases is being served on petitioner.

[2] See, e.g., Gendreau v. United States, 144 S. Ct. 2693 (2024) (No. 23-6966); Finnell v. United States, 144 S. Ct. 2529 (2024) (No. 23-5835); 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, 586 U.S. 1104 (2019) (No. 17-9082); Petras v. United States, 586 U.S. 944 (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

Similar to the Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, Tit. II, Subtit. A, 110 Stat. 1227, which governed the restitution award in Rimlawi, the provision at issue in this case requires the 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). And 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 losses, it "is merely giving definite shape to the restitution penalty [that is] 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).

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).

Moreover, restitution is not punishment for a criminal offense but is instead a restorative remedy that compensates victims for economic losses suffered as a result of the defendant's criminal conduct. See Br. in Opp. at 13, Rimlawi, supra. And contrary to petitioner's assertions (Pet. 12-14), nothing in this Court's decision in Southern Union Co. v. United States, 567 U.S. 343, 353 (2012), or in the history of the Sixth Amendment, undermines the uniform line of precedent holding that restitution is not subject to Apprendi. Br. in Opp. 14-18, Rimlawi, supra. Indeed, petitioner himself acknowledges (Pet. 26) that "every court of appeals to have considered" the question has held that Apprendi does not apply to criminal restitution. See Br. in Opp. at 13-14, Rimlawi, supra (citing decisions from eleven circuits).

Petitioner also invokes (Pet. 17-18) this Court's decision in 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. The $3000 minimum restitution amount in Section 2259(b)(2)(B) does not establish a true statutory minimum, as the very next subparagraph allows for a lower amount, depending on the victim's demonstrated losses and the amounts of restitution that

the victim has already received from other defendants, see 18 U.S.C. 2259(b)(2)(C). As every court of appeals to have considered the question has recognized, Alleyne does not undermine the uniform line of precedent holding that criminal restitution is not subject to Apprendi.[3]

Contrary to petitioner's suggestion (Pet. 18), the decision below does not conflict with the Fifth Circuit's decision in United States v. Caudillo, 110 F.4th 808 (2024). In Caudillo, the court simply left for "another day" whether Alleyne applies to a $3000 restitution award under Section 2259(b)(2)(B), because the defendant there had "explicitly waived any Sixth Amendment challenge to the district court's restitution award." Id. at 812. And the Fifth Circuit's brief discussion of the issue ignored that Section

[3] See, e.g., United States v. Finnell, No. 22-13892, 2023 WL 6577444, at *4 (11th Cir. Oct. 10, 2023) (per curiam), cert. denied, 144 S. Ct. 2529 (2023); 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); United States v. Kieffer, 596 Fed. Appx. 653, 664 (10th Cir. 2014), cert. denied, 576 U.S. 1012 (2015); United States v. Agbebiyi, 575 Fed. Appx. 624, 632-633 (6th Cir. 2014); United States v. Basile, 570 Fed. Appx. 252, 258 (3d Cir. 2014), cert. denied, 575 U.S. 904 (2015), cert. denied, 575 U.S. 904 (2015); United States v. Holmich, 563 Fed. Appx. 483, 484-485 (7th Cir. 2014), cert. denied, 574 U.S. 1121 (2015).

2259(b)(2)(C) contemplates that restitution amounts may be lower than $3000.

Finally, this case would be a poor vehicle in which to address the question presented because petitioner "waived his right to a jury trial." Pet. App. 2a; see D. Ct. Doc. 89. Although petitioner later sought to empanel a jury for the restitution hearing, see D. Ct. Doc. 153 (Mar. 21, 2023), he identifies no authority that would allow him to selectively waive his Sixth Amendment right so that a judge determines some factual issues and a jury determines others. And in any event, the government presented evidence to the district court -- which was uncontested by petitioner -- that each victim had suffered harm in an amount of at least $1 million, far more than the $3000 per victim that was awarded. 5/12/23 Hr'g Tr. 3-9.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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