No. 24-7486

IN THE SUPREME COURT OF THE UNITED STATES

BRUCE STROUD, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is entitled to plain-error relief on his forfeited claim that the Sixth Amendment requires that facts affecting the amount of restitution ordered under the Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, Tit. II, Subtit. A, 110 Stat. 1227, 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. 1-14) is available at 2025 WL 1113223.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 2025. The petition for a writ of certiorari was filed on June 18, 2025. 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 Northern District of Texas, petitioner was convicted on

one count of conspiring to defraud the United States and to pay and receive health care kickbacks, in violation of 18 U.S.C. 371 and 42 U.S.C. 1320a-7b(b)(1), (2); and seven counts of paying and receiving kickbacks in connection with a federal health care program, in violation of 18 U.S.C. 2 and 42 U.S.C. 1320a-7b(b)(2)(A). See Judgment 1. The district court sentenced him to 78 months of imprisonment, to be followed by one year of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-14.

1. From 2017 to 2019, petitioner and two co-defendants orchestrated a multimillion-dollar health care fraud scheme involving the payment of kickbacks to physicians and purported marketing companies to obtain prescriptions for durable medical equipment (DME), which were then used to submit reimbursement claims to Medicare. Pet. App. 2.

Petitioner and his co-defendants owned and operated three DME suppliers: New Horizons Durable Medical Equipment LLC, 4B Ortho Supply, LLC, and Striffin Medical Supplies, LLC (collectively, the DME Suppliers). Pet. App. 2. The DME Suppliers provided Medicare beneficiaries with various orthotics, such as back, knee and wrist braces. Ibid. To procure beneficiaries who would have prescriptions for their orthotic devices, the DME Suppliers entered sham contracts with two Florida-based marketing companies: TrueAlliance Health Group, LLC (TrueAlliance) and U.S. Care Associates, LLC (U.S. Care). Ibid.

"On paper," the contracts were for "marketing and back-office services." Pet. App. 2. But TrueAlliance and U.S. Care's "true business model" involved recruiting Medicare beneficiaries to submit claims for medically unnecessary orthotic braces furnished by the DME Suppliers. Ibid.; Presentence Investigation Report (PSR) ¶ 21. First, the telemarketers would cold call possible Medicare beneficiaries about DME. Pet. App. 2. If the call recipient had verifiable Medicare coverage and expressed an interest in DME, the marketing companies would refer the recipient to a telemedicine doctor involved in the scheme. Id. at 2–3. The referred doctors often had no existing relationship with the beneficiaries and conducted brief, telephonic evaluations that typically lasted "minutes at most." PSR ¶ 21. The doctors would then receive kickbacks for writing prescriptions for DME. Pet. App. 3.

The marketing companies, in turn, provided the doctors' orders and the Medicare beneficiaries' contact information to the DME Suppliers in exchange for kickbacks. Pet. App. 3. The DME Suppliers filled the prescriptions and submitted reimbursement claims to Medicare. Ibid. In total, the DME Suppliers submitted more than $12 million in claims to Medicare and collected more than $6 million in proceeds from the scheme. Id. at 2.

2. A federal grand jury in the Northern District of Texas returned a superseding indictment charging petitioner and his co-defendants with one count of conspiring to defraud the United

States and to pay and receive health care kickbacks, in violation of 18 U.S.C. 371 and 18 U.S.C. 1320a-7b(b)(1)-(2); and seven counts of paying and receiving kickbacks in connection with a federal health care program, in violation of 18 U.S.C. 2 and 42 U.S.C. 1320a-7b(b)(2)(A). Superseding Indictment 5-14. Petitioner proceeded to trial, and the jury found him guilty on all counts. Judgment 1.

The Probation Office prepared a presentence report. To calculate the restitution amount, the Probation Office reviewed Medicare claims data and related summary charts presented at trial. PSR ¶ 43. Based on that evidence, the Probation Office calculated the actual loss to Medicare, consisting of the total claims paid pursuant to the scheme, as $6,603,967.30. PSR ¶ 45. Petitioner did not object to that calculation. At sentencing, the district court stated that the loss amount for purposes of restitution was $6,603,967.30 and inquired of both parties, "did I get those calculations correct?" Sent. Tr. 25-26. Petitioner's counsel responded, "Yes, your Honor." Id. at 26.

Pursuant to the Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, Tit. II, Subtit. A, 110 Stat. 1227, the district court ordered petitioner to pay restitution in the amount of $6,603,967.30, to be paid jointly and severally with his co-defendants. Sent. Tr. 57; Judgment 5.

3. The court of appeals affirmed. Among other things, petitioner contended, for the first time, that "'the amount of restitution imposed must be found by the jury,' not the judge."

Pet. App. 14. The court rejected that contention as "foreclosed by [its] longstanding precedent." Ibid. (citing United States v. Caudillo, 110 F.4th 808, 810-811 (5th Cir. 2024); United States v. Petras, 879 F.3d 155, 169 (5th Cir.), cert. denied, 586 U.S. 944 (2018); and United States v. Rosbottom, 763 F.3d 408, 419-420 (5th Cir. 2014), cert. denied, 574 U.S. 1078 (2015)).

ARGUMENT

Petitioner contends (Pet. 6-15) that the Sixth Amendment requires that the amount of restitution be charged in the indictment, submitted to the jury, and proved beyond a reasonable doubt. The court of appeals correctly rejected that contention, and the decision below does not conflict with any decision of this Court or another court of appeals. This Court has repeatedly denied petitions for writs of certiorari presenting similar questions,[1] and it should follow the same course here. This case

[1] See, e.g., Rimlawi v. United States, 145 S. Ct. 518 (2025) (Nos. 24-23, 24-25, 24-5032); 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 States, 577 U.S. 852 (2015) (No. 14-10204); Printz v. United States, 577 U.S. 845 (2015) (No. 14-10068); Johnson v.

would be an unsuitable vehicle for reviewing the question presented, because petitioner forfeited his claim below and it is therefore reviewable only for plain error. Further review is unwarranted.

1. The court of appeals correctly rejected petitioner's contention that, under the rule of Apprendi v. New Jersey, 530 U.S. 466 (2000), the amount of restitution must be charged in an indictment and proved to a jury beyond a reasonable doubt. Pet. App. 14.

a. Apprendi does not apply to restitution. In Apprendi, 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." 530 U.S. 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).

Here, the district court ordered petitioner to pay restitution pursuant to the MVRA. Section 3663A provides that, "when sentencing a defendant convicted of an offense described in

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United States, 576 U.S. 1035 (2015) (No. 14-1006); Basile v. United States, 575 U.S. 904 (2015) (No. 14-6980).

subsection (c)," which includes a conspiracy to defraud the United States, "the court shall order, in addition to * * * any other penalty authorized by law, that the defendant make restitution to the victim of the offense." 18 U.S.C. 3663A(a)(1); see 18 U.S.C. 3663A(c)(1)(A)(ii). The MVRA requires that restitution be ordered "in the full amount of each victim's losses." 18 U.S.C. 3664(f)(1)(A); see 18 U.S.C. 3663A(d) ("An order of restitution under this section shall be issued and enforced in accordance with section 3664."); see also 18 U.S.C. 3663A(b)(1)(A) and (B) (providing that "[t]he order of restitution shall require" the defendant to "return the property" or "pay an amount equal" to the value of the lost or destroyed property).

By requiring restitution of a specific sum -- "the full amount of each victim's losses" -- rather than prescribing a maximum amount that may be ordered, the MVRA establishes an indeterminate framework. 18 U.S.C. 3664(f)(1)(A); see, e.g., United States v. Day, 700 F.3d 713, 732 (4th Cir. 2012) ("[T]here 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); United States v. Reifler, 446 F.3d 65, 118-120 (2d Cir. 2006) (the MVRA "is an indeterminate system") (citing cases). 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); see Southern Union Co. v. United States, 567 U.S. 343, 353 (2012) (explaining that there can be no "Apprendi violation where no maximum is prescribed"). Thus, when a sentencing court determines the amount of the victim's loss, 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).

Nearly every court of appeals with criminal jurisdiction -- and every court of appeals to have considered the question -- has held that Apprendi does not apply to criminal restitution, whether under the MVRA or under the other primary federal restitution statute, the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 5(a), 96 Stat. 1253-1255 (18 U.S.C. 3663). See, e.g., United States v. Milkiewicz, 470 F.3d 390, 403-404 (1st Cir. 2006); Reifler, 446 F.3d at 114-120 (2d Cir.); Leahy, 438 F.3d at 337-338 (3d Cir.); Day, 700 F.3d at 732 (4th Cir.); United States v. Rosbottom, 763 F.3d 408, 420 (5th Cir. 2014), cert. denied, 574 U.S. 1078 (2015); United States v. Churn, 800 F.3d 768, 782 (6th Cir. 2015); United States v. George, 403 F.3d 470, 473 (7th Cir.), cert. denied, 546 U.S. 1008 (2005); United States v. Carruth, 418 F.3d 900, 902-904 (8th Cir. 2005); United States v. Brock-Davis, 504 F.3d 991, 994 n.1 (9th Cir. 2007); United States

v. Visinaiz, 428 F.3d 1300, 1316 (10th Cir. 2005), cert. denied, 546 U.S. 1123 (2006); United States v. Williams, 445 F.3d 1302, 1310-1311 (11th Cir. 2006), abrogated on other grounds by United States v. Lewis, 492 F.3d 1219 (11th Cir. 2007) (en banc).

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.'").[2] And here, the court of appeals below adhered to circuit precedent that has relied on that ground. See Pet. App. 14 & n.24 (citing Rosbottom, 763 F.3d at 419-420);

[2] The Seventh, Eighth, and Tenth Circuits 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. Each of those courts has also relied on the additional argument that restitution under the MVRA "does not include a 'statutory maximum' that could be 'increased' by a given finding" as to the amount of restitution. United States v. Behrman, 235 F.3d 1049, 1054 (7th Cir. 2000); see Carruth, 418 F.3d at 904 ("neither Apprendi nor Blakely prohibit judicial fact finding for restitution orders" because "[u]nder the MVRA there is no specific or set upper limit for the amount of restitution"); Visinaiz, 428 F.3d at 1316 ("MVRA does not prescribe a statutory maximum[] and * * * therefore Blakely and Booker do not apply to restitution on that ground either").

ibid. ("Apprendi is inapposite because no statutory maximum applies to restitution" (citation omitted)).[3]

b. Contrary to petitioner's contention (Pet. 14-15), this Court's holding in Southern Union "that the rule of Apprendi applies to the imposition of criminal fines," 567 U.S. at 360, does not undermine the uniform line of precedent recognizing that restitution is not subject to Apprendi. Southern Union's application of Apprendi concerned only "the imposition of criminal fines." Ibid. The Court had no occasion to, and did not, address restitution, which is imposed pursuant to an indeterminate scheme that lacks a statutory maximum.

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. Observing that "the amount of a fine, like the maximum

[3] For that reason, this Court need not hold the petition for a writ of certiorari in this case pending the resolution of Ellingburg v. United States, 145 S. Ct. 2696 (2025) (No. 24-482) (argued Oct. 14, 2025), in which the Court is considering whether restitution under the MVRA is a criminal punishment for purposes of the Ex Post Facto Clause. Even if this Court construes restitution as criminal punishment for Sixth Amendment purposes, Apprendi does not apply to restitution for the independent reason that the MVRA establishes an indeterminate framework not subject to any statutory maximum. See U.S. Br. at 26 n.3, Ellingburg, supra (No. 24-482). Because the court below has adopted that independent ground for its decision in binding precedent, see pp. 9-10, supra, it would have no basis to revisit the decision below regardless of the resolution of the question presented in Ellingburg.

term of imprisonment or eligibility for the death penalty, is often calculated by reference to particular facts," the Court concluded that "requiring juries to find beyond a reasonable doubt facts that determine the fine's maximum amount is necessary to implement Apprendi's 'animating principle': the 'preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense.'" Id. at 349-350 (quoting Oregon v. Ice, 555 U.S. 160, 168 (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 pre-dominant 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.

As opposed to suggesting that restitution orders are subject to Apprendi, Southern Union in fact reinforces the difference between restitution and the types of penalties to which Apprendi applies. In particular, 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." Southern Union, 567 U.S. at 353. Unlike the statute in Southern Union, which prescribed a $50,000 maximum fine for each day of violation, id. at 347, the MVRA sets no

maximum amount of restitution, but instead requires that restitution be ordered "in the full amount of each victim's losses." 18 U.S.C. 3664(f)(1)(A); see Day, 700 F.3d at 732 (observing 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 emphasizing that restitution is not subject to a "prescribed statutory maximum") (emphasis omitted).

Since this Court's decision in 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 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).

2. Given that petitioner does not (and could not) contend that the courts of appeals are divided on the question presented, see pp. 8-13, supra, this Court's review is not warranted. And this case would be an unsuitable vehicle for considering the question presented because, as petitioner acknowledges (Pet. 17), he did not raise his Apprendi claim in the district court. Petitioner's Apprendi claim is therefore reviewable only for plain error. See Fed. R. Crim. P. 52(b); Puckett v. United States, 556 U.S. 129, 135 (2009).

On plain-error review, petitioner would be entitled to relief only if he could show (1) an error, (2) that is "clear or obvious, rather than subject to reasonable dispute," (3) that "affected [his] substantial rights," and (4) that "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings."

United States v. Marcus, 560 U.S. 258, 262 (2010) (citation omitted); see Cotton, 535 U.S. at 631-632 (applying plain-error review to a claim of Apprendi error). In light of the unanimous rejection by the courts of appeals of petitioner's Sixth Amendment argument, he cannot demonstrate any error that is "clear or obvious, rather than subject to reasonable dispute." Marcus, 560 U.S. at 262 (citation omitted).

Nor can petitioner demonstrate that any error affected his substantial rights or seriously affected the fairness, integrity, or public reputation of judicial proceedings. See, e.g., United States v. Cotton, 535 U.S. 625, 632-633 (2002) (finding that claim of Apprendi error in the failure to submit drug quantity to the jury did not satisfy the fourth element of plain-error review). Petitioner did not object to the Probation Office's report that the actual loss to Medicare was $6,603,967.30. PSR ¶ 45. The Probation Office based its information on evidence admitted at trial, PSR ¶ 43, which the jury indicated, through its verdict, that it found credible. At sentencing, petitioner agreed that the Probation Office's figure was correct. See Sent. Tr. 26. Thus, although petitioner points (Pet. 15-17) to various hypothetical problems with judicial determination of the amount of restitution, he offers no reason to believe that the jury in this case would have found some other, lesser amount of loss. Petitioner therefore cannot demonstrate any error at all in his restitution obligation, much less an error that affected his substantial rights and also

seriously affected the fairness, integrity, or public reputation of the proceedings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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