No. 00-000

IN THE

Supreme Court of the United States

GERALD GREEN AND PATRICIA GREEN
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

HAROLD J. KRENT
IIT CHICAGO-KENT COLLEGE OF LAW
565 West Adams Street
Chicago, Illinois 60661
(312) 906-5010
Attorney for Gerald Green

MARILYN E. BEDNARSKI
KAYE, MCLANE & BEDNARSKI, LLP
234 East Colorado Blvd.
Suite 230
Pasadena, California 91101
(626) 844-7660 Ext. 102
Attorney Patricia Green

[October 9, 2013]

QUESTION PRESENTED

Whether the Sixth Amendment *Apprendi* rule applies to criminal restitution as well as to criminal fines.

RULE 29.6 STATEMENT

The petitioners have no parent company, and there are no publicly held companies that hold any stock of the petitioners.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Supreme Court

Other Courts

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is available at 722 F.3d 1146 (9th Cir. 2013) and is reproduced in the Appendix at App. A. Petitioners filed a petition for rehearing en banc in the Ninth Circuit which was denied by order issued August 21, 2013 (App. B).

JURISDICTION

The decision and judgment of the United States Court of Appeals for the Ninth Circuit were entered on July 11, 2013. This Court's jurisdiction is invoked under 28 U.S.C. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."

The MVRA provides in pertinent part that restitution must be imposed in a class of criminal cases when "an identifiable victim or victims has

suffered a physical injury or pecuniary loss." 18 U.S.C. 3663A(c)(1)(B).

STATEMENT OF THE CASE

This case arose from the trial and conviction of petitioners Gerald and Patricia Green for violation of the Foreign Corrupt Practices Act and anti-money laundering provisions stemming from their operation of a film festival in Thailand. The prosecution's theory of the case was that the Greens transmitted funds to the Thai Governor of Tourism and her affiliates in order that she steer business their way. The prosecution acknowledged that the film festival had been a huge success for Thailand, but pushed for criminal restitution under the MVRA on the theory that the people of Thailand suffered a loss because the Greens channeled approximately 1.8 million dollars to the Thai official. The Greens testified that the 1.8 million dollars reflected investments in different business ventures. At sentencing, in addition to prison terms and forfeiture, the trial court imposed a criminal restitutionary award under the MVRA, finding that the people of Thailand suffered a pecuniary loss from the transactions, presumably because the government contracts were inflated. App. A5. The court's entire finding consisted of "technically I suppose there is a loss in terms of the bribery figure amount." Excerpts of Record 22.

The prosecution never requested a jury instruction on whether the Greens' conduct created a pecuniary loss to an identifiable victim, as required under the MVRA. Indeed, some evidence at the trial

suggested that the Greens *underbid* internationally respected competitors for the work. *See, e.g.*, Excerpts of Record 224-32. The jury verdict under the FCPA was consistent with a finding that there was no identifiable victim, namely that the Greens may have acted wrongly in making the investments, whether corruptly to curry favor with the Governor for future contracts or to bribe the Governor for the contracts, rather than that the money was a kickback from inflated contracts. App. A5-6. All three theories were plausible.

The Greens appealed from the conviction solely on the criminal restitution finding under the MVRA, arguing that the trial court's terse MVRA determination violated their right to jury findings under *Apprendi*. In the court of appeals, the Greens argued that the district court's criminal restitution order under the MVRA should be vacated because the order was predicated on a finding, not made by a jury, that the Greens' conduct resulted in a pecuniary loss to an identifiable victim. The Greens principally relied on this Court's decision in *Southern Union v. United States*, 132 S. Ct. 2344 (2012), decided after the district court's order, which applied the Sixth Amendment *Apprendi* rule in the closely related context of criminal fines. The panel seemingly agreed in part, stating that "*Southern Union* provides reason to believe *Apprendi* might apply to restitution," App. A9, and observed that "it chips away at the theory behind [this Court's] restitution cases." *Id.* Nonetheless, the panel declined to so hold because it deemed the Supreme Court's decision not "clearly irreconcilable" with the Ninth Circuit's prior holdings. *Id.* In the Ninth Circuit, a panel cannot

depart from its precedents unless the intervening case makes the prior precedent "clearly irreconcilable." *Id*.

REASONS FOR GRANTING THE WRIT

This Court should grant the petition for a writ of certiorari to consider whether individuals have a right to a jury determination of the statutory predicates for criminal restitution. The courts of appeal have declined to modify their prior precedents with respect to criminal restitution after *Southern Union,* and thus this Court's review is necessary to resolve this recurring and important question in *Southern Union*'s wake.

I. CERTIORARI IS APPROPRIATE TO ENSURE THAT LOWER COURTS ADHERE TO THE SIXTH AMENDMENT PRINCIPLES ARTICULATED IN *APPRENDI* AND *SOUTHERN UNION*

This Court should grant the petition for certiorari to assist the lower courts in resolving criminal restitution issues that have followed *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012). Restitution under the MVRA cannot be imposed absent statutorily directed findings that there is a "victim" who suffered "pecuniary loss." Only after those findings are made can the criminal penalty as in this case be enhanced.

A. *There is no Material Difference Within the Apprendi Framework Between Criminal Fines and Criminal Restitution*

This Court in *Southern Union* held that the *Apprendi* rule applies to criminal fines. The Court stated 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." *Id*. at 2350 (citation omitted). Because the judge instead of the jury determined the duration of the violation in *Southern Union* and set the fine accordingly, this Court vacated the sentence.

Criminal restitution, as with criminal fines, constitutes a criminal penalty. In *Pasquantino v. United States*, 544 U.S. 349, 365 (2005), this Court asserted that "[t]he purpose of awarding restitution [under the MVRA – the same statute at issue here] in this action is . . . to mete out appropriate criminal punishment." *See also Kelly v. Robinson,* 479 U.S. 36, 52-53 (1986) (concluding that restitution is a criminal penalty that is not dischargeable in bankruptcy).[1] With civil restitution, in contrast, there must be a showing of unjust gain, which is not a requirement under the MVRA (*see United States v. Navarette*, 667 F.3d 886, 888-89 (7th Cir. 2012)), and was not demonstrated in this case. This difference is critical

[1] The government as well has characterized restitution under the MVRA as a criminal penalty. *See, e.g., Brief for the United States in Pasquantino v. United States* at 35 ("Restitution remains a criminal punishment that is imposed as part of the sentence for an offense") (2004).

for it thoroughly undermines any argument that restitution in criminal cases represents merely a form of civil process appended to the conviction.

Indeed, this Court in *Southern Union* was clear: "in stating *Apprendi*'s rule, we have never distinguished one form of punishment from another." 132 S. Ct. at 2351. To dispel any doubt, the Court in *Southern Union* stated that *Apprendi* applies to criminal fines when the fine is predicated on "the amount of the defendant's gain or the victim's loss," 132 S. Ct. at 2351, just as the MVRA provides in criminal restitution.[2] There is no plausible reason to think that this Court intended *Apprendi* to apply to criminal fines based on the "victim's loss" but not to the "victim's loss" undergirding criminal restitution.

Moreover, this Court in *Southern Union* was well aware that a number of statutes historically have combined criminal fines and criminal restitution together. *See* 132 S. Ct. at 2354. For instance, in many of the early cases, criminal penalties were to be paid to the victim, not the state. *See e.g., State v. Garner*, 8 Port. 447 (Ala. 1839) (criminal penalty arising out of malicious mischief conviction). The first Congress reflected prior practice in providing that criminal penalties in part would be directed to the victim based on the victim's loss. *See, e.g.*, Crimes Act of 1790 § 16, 1 Stat. 112, 116 (larceny statute capped monetary penalty at four times the value of property stolen and directed that half be paid

---

[2] *See also United States v. Pfaff*, 619 F.3d 172 (2d Cir. 2010) (applying *Apprendi* to a criminal fines provision based on pecuniary loss to an identifiable victim).

to the owner of goods); *see generally* Nancy King, *The Origins of Felony Jury Sentencing in the United States*, 78 Chi-Kent L. Rev. 937, 982 (2003) ("Kentucky juries, not judges, selected the amount of restitution owed a victim of a felony."). Whether denominated as a criminal fine paid to the victim or as criminal restitution should be of no constitutional moment. For *Southern Union* to be coherent, *Apprendi* should apply when criminal penalties are paid to the state, irrespective whether the monetary penalty is distributed in part to the victims as under the Crimes Act of 1790. Indeed, the lower courts' insistence that criminal fines based on victim's losses are different than criminal restitution based on the same measure is so tenuous that defendants will continue to raise the *Apprendi* issue until resolution by this Court. Certiorari is appropriate, therefore, to consider whether *Southern Union* applies to criminal restitution as well as criminal fines based on the victim's loss.

B. *Apprendi Does not Turn on Whether the Maximum Sentence is Spelled Out in the Statute*

Some lower courts have held, however, that *Apprendi* only applies to statutes that spell out statutory maxima or, in their parlance, are "uncapped." App. A10-11; *Accord*, *United States v. Day*, 700 F.3d 713, 732 (4th Cir. 2012); *United States v. Sosebee,* 419 F.3d 451, 454 (6th Cir. 2005). The uncapped argument is plainly wrong – there is no requirement that the number of years in prison or the exact amount of fine be specified. The MVRA constrains the government by providing that

restitution cannot exceed the amount of "loss." Indeed, in *Southern Union* itself, the amount of fine was not capped in a numeric sense but rather could vary with a determination of how many days the defendant violated the statute. The district court there selected 762 days, but it could have selected a single day or 381 days. The monetary penalty turned on the number of days of violation, just as in this case the penalty turns on the amount of the victim's loss. Moreover, *Southern Union* explicitly stated that the *Apprendi* rule applies in fines cases based on the victim's loss, 132 S. Ct. at 2350-51, which should compel the conclusion that no numerical maximum need be ascertainable from the face of the statute for *Apprendi* to apply. More fundamentally, those lower courts have never explained why, from the perspective of the Sixth Amendment jury trial right, it should matter whether the statute is capped numerically or not.

Review is warranted to determine whether this lingering "uncapped" argument survives *Southern Union*.[3] The key should not be whether the legislature prescribed a precise number of years or dollar amount, but rather whether the legislature predicated increased or additional punishment on specific factfinding. This Court explained in *Southern Union* that "the statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the

---

[3] Commentators agree. *See, e.g.*, Judge William M. Acker, Jr., The Mandatory Victims Restitution Act is Unconstitutional. Will The Courts Say So After *Southern Union?*, 64 Ala. L. Rev. 803 (2013).

jury verdict or admitted by the defendant. Thus, while judges may exercise discretion in sentencing, they may not inflict punishment that the jury's verdict alone does not allow." (citation omitted). 132 S. Ct. at 2350.[4] This Court should reaffirm, as in *Southern Union,* that the statutory maximum sentence refers to the maximum sentence that a judge can impose without finding the further facts specified by the legislature.

C. *Alleyne Provides Further Reason for Issuing a Writ of Certiorari*

After oral argument in the case below, this Court in *Alleyne v. United States,* 133 S. Ct. 2344 (2012), held that *Apprendi* applies whenever the legislature predicates a more serious penalty on additional factfinding, irrespective whether the same penalty could have been imposed previously. There, the question turned on whether the mandatory minimum for using a firearm during a robbery triggered the *Apprendi* guaranties.

---

[4] Deputy Solicitor General Drebeen at oral argument in *Southern Union* conceded that "if one is applying an algebraic understanding of the relevant statutory maximum from the Blakely decision, restitution would be hard to justify because the jury verdict does not contain findings about harm to victims. The jury verdict finds guilt. Afterwards, the judge finds an additional fact, namely the amount of harm and imposes restitution." Transcript at 32. That is precisely why the *Apprendi* rule should apply to criminal restitution. The government had written that monetary penalties should be viewed along the same spectrum, whether based on days of violation or the victim's loss. *See, e.g., Brief in Southern Union* at 9, 17, 25, 47.

In resolving that issue, the Court stressed that, even though the sentence meted fell within the sentencing range set by the legislature, the mandatory minimum was predicated on a legislative determinant or element of the offense and therefore had to be resolved by the jury – "When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." 133 S. Ct. at 2162. Moreover, "[t]his reality demonstrates that the core crime and the fact triggering the mandatory minimum sentence together constitutes a new, aggravated crime, each element of which must be submitted to the jury." *Id.* at 2161. Such are the circumstances under the MVRA – the district court finding "triggering the mandatory minimum" was that an identifiable victim suffered pecuniary loss from the Greens' conduct. Moreover, the Court in *Alleyne* explained that requiring the prosecution to present such issues in the indictment for jury consideration "enables the defendant to predict the legally applicable penalty from the face of the indictment." 133 S. Ct. at 2161. *Alleyne* therefore reinforces the Greens' reading of *Southern Union,* which makes the case for certiorari that much more compelling.

II. GRANTING CERTIORARI WOULD RESOLVE THE SPLIT IN THE CIRCUITS AS TO WHETHER A RESTITUTIONARY PENALTY UNDER THE MVRA IS CRIMINAL IN NATURE

A significant split of authority among the circuits exists as to whether restitutionary penalties under

the MVRA should be considered criminal. For instance, Ninth Circuit precedent plainly provides that a restitutionary award under the MVRA is criminal in nature. *United States v. Dubose,* 146 F.3d 1141, 1145 (8th Cir. 1998). *See also United States v. Leahy,* 438 F.2d 328, 330 (3d Cir. 2006) (en banc); *United States v. Ziskind*, 471 F.3d 266, 270-71 (1st Cir. 2006). Other circuits, however, have declined to follow this Court's *Pasquantino* guidance and ruled that restitution must be considered civil and thus should not be subject to Sixth Amendment protections. *See, e.g., United States v. Wolfe* , 701 F.3d 1206, 1217 (7th Cir. 2012) ("restitution is not a criminal penalty"); *United States v. Millot*, 433 F.3d 1057, 1062 (8th Cir. 2006); *United States v. Westover*, 435 F.3d 1273, 1277 n.5 (10th Cir. 2006). Even though the Court in *Wolfe* noted that its circuit was in the "minority" on the issue and against the "trend," 701 F.3d at 1217, it continued its stance.

Although no appellate court has held that *Southern Union* compels application of *Apprendi* to criminal restitution, the split over whether restitution is in fact criminal raises fundamental questions such as whether the Eighth and Sixth Amendments cover restitution. Consider the larceny statute discussed previously passed by the First Congress in 1790. If the legislature directs that a monetary penalty be distributed to the victim based on the victim's loss, would the defendant be entitled to a jury trial, to the protections against excessive punishment, or to the safeguard of Double Jeopardy? An Eighth Amendment claim in the criminal restitution context is now before the Court in *Paroline v. United States,* No. 12-8561, discussed

below. Granting the petition for a writ of certiorari would permit reconciliation among the circuits of whether restitution should be considered criminal and ensure that defendants among the circuits are treated similarly with respect to the protections of the Sixth and Eighth Amendments.

III. SUPREME COURT REVIEW WOULD PROVIDE GUIDANCE TO LOWER COURTS IN DETERMINING THE RIGHT TO JURY FINDINGS IN OTHER CRIMINAL RESTITUTIONARY CONTEXTS

Resolving the restitutionary issue under the MVRA would clarify proceedings in closely related restitutionary contexts. For instance, this Court earlier granted certiorari to examine the nature of the criminal restitutionary penalty in child pornography cases under 18 U.S.C. 2259. *Paroline v. United States,* No. 12-8561. Section 2259, like the MVRA, predicates relief upon finding a "victim." 18 U.S.C. 2259(c). Under Section 2259 as under the MVRA, a "victim" must be ascertained before restitution can be imposed. Moreover, in both contexts, some entity must determine the amount of "loss." *Id*. 2259(b)(3).[5] Petitioner in *Paroline* in fact argued (Br. at 38-39) that Section 2259 should be harmonized with the MVRA. In deciding cases under Section 2259, therefore, similar questions of the Sixth Amendment's allocation of factfinding role between jury and judge arise. Criminal restitution cases have

[5] The causation issue in *Paroline* is not at issue in this case, but the *Apprendi* issue likely will arise under Section 2259 as well as under the MVRA.

arisen with frequency in other contexts as well. *See, e.g., United States v. Robers,* 698 F.3d 937 (7th Cir. 2012) (mortgage fraud); *United States v. Engelman,* 720 F.3d 1005 (8th Cir. 2013) (bank fraud); *Fumo v. United States* 513 Fed Appx 215 (3d Cir. 2013) (government corruption). This case, in tandem with *Paroline*, therefore, would help settle which aspects of restitutionary penalties must be submitted to the jury in order to preserve the Sixth Amendment right and provide needed guidance in the countless cases of criminal restitution arising under the MVRA and related statutes, such as Section 2259.

Finally, this case presents an ideal vehicle to examine the extent to which *Apprendi* applies to criminal restitution. The restitution issue here involved conclusory factfinding by a sentencing court even though there were serious factual questions about whether the people of Thailand were indeed victims and, even if so, by what measure. Petitioners only appealed their conviction based on the criminal restitutionary penalty, and the decision below squarely focused on *Apprendi*. Finally, the court below itself suggested that *Southern Union* calls for reexamination of prior appellate court holdings permitting judicial factfinding in criminal restitutionary cases. App. A11 ("our case law . . [is not] well harmonized with *Southern Union*").

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari to determine whether *Apprendi* applies to criminal restitution.

Respectfully submitted,

HAROLD J. KRENT
IIT CHICAGO-KENT
COLLEGE OF LAW
565 West Adams Street
Chicago, Illinois 60661
(312) 906-5010
hkrent@kentlaw.iit.edu
Attorney for Gerald Green

MARILYN E. BEDNARSKI
KAYE, MCLANE &
BEDNARSKI, LLP
234 East Colorado Blvd.
Suite 230
Pasadena, California
91101
(626) 844-7660 Ext. 102
mbednarski@kmbllaw.com
Attorney Patricia Green

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GERALD GREEN,
Defendant-Appellant.

No. 10-505-19

D.C. No. 2:08-cr-00059-GW-1

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PATRICIA GREEN,
Defendant-Appellant.

No. 10-505-24

D.C. No. 2:08-cr-00059-GW-2

JEFFREY F. ALLEN,
Movant.

Appeals from the United States District Court
for the Central District of California
George H. Wu, District Judge, PresidingArgued and Submitted
January 9, 2013—Pasadena, California

Filed July 11, 2013

Before: Alex Kozinski, Chief Judge, M. Margaret McKeown and Milan D. Smith, Jr., Circuit Judges.

Opinion by Chief Judge Kozinski

SUMMARY*

Criminal Law

The panel affirmed a restitution order in a case in which the defendants claimed that the district court violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000), when it ordered them to pay restitution without a jury's finding that there was an identifiable victim who suffered a pecuniary loss.

The panel held that *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012), which held that *Apprendi* applies to the fact-finding need to trigger criminal fines, is not clearly irreconcilable with this court's precedent holding that *Apprendi* does not apply to restitution orders.

*This summary constitutes no part of the opinion of the court.

COUNSEL

Harold J. Krent (argued), Chicago-Kent College of Law, Chicago, Illinois; Marilyn E. Bednarski, Kaye, McLane & Bednarski, LLP, Pasadena, California, for Defendants-Appellants.

Scott A. C. Meisler (argued), Criminal Division, Appellate Section, Lanny A. Breuer, Assistant Attorney General, John D. Buretta, Acting Deputy Assistant Attorney General,United States

Department of Justice, Washington, D.C.; André Birotte, Jr., United States Attorney, Los Angeles, California, for Plaintiff-Appellee.

Steve Cochran, Katten Muchin Rosenman, LLP, Los Angeles, California, for Movant Jeffrey F. Allen.

OPINION

KOZINSKI, Chief Judge:

Forget life and liberty. This appeal concerns another precious thing we take from criminal defendants: their money.

Defendants Gerald and Patricia Green claim the district court violated *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), when it ordered them to pay restitution without a jury's finding that there was "an identifiable victim or victims" who suffered a "pecuniary loss"—findings required to trigger restitution under the Mandatory Victims Restitution Act.

Though our caselaw holds that *Apprendi* doesn't apply to restitution orders, the Greens invite us to distinguish our cases or else overrule them in light of the Supreme Court's recent decision in *Southern Union Co.* v. *United States*, 132 S. Ct. 2344 (2012).

Facts

Gerald and Patricia Green sure knew how to put on a show. Movie industry veterans, the husband-

and-wife team won a slew of contracts from the Tourism Authority of Thailand to run the Bangkok International Film Festival and to direct other promotional projects. The film festival, the largest of the contracts, flourished during the Greens' four years at the helm, generating large profits—$140 million by one marketing firm's estimates—and ranking among the top 15 film festivals in the world. More than 1600 journalists attended the events in 2006, when one industry insider predicted the festival "will become the Cannes Film Festival of the East within a year or two."

The Greens looked to be on their way to silver-screen success, but there was a dark secret that would get in the way: The Greens had secured their lucrative contracts thanks, at least in part, to $1.8 million in payments to the governor of Thailand's Tourism Authority. The Greens sometimes paid the governor directly, other times through the governor's daughter or one of the governor's friends. In all, the illicit payments amounted to roughly 13 percent of the total value of the Greens' contracts.

In 2006, a confidential informant alerted the FBI to these payments, leading to a year-long investigation and a 22-count indictment on Foreign Corrupt Practices Act (FCPA), money laundering, conspiracy and tax charges. The Greens were convicted by a jury. At sentencing, the district court imposed six months' imprisonment, three years' supervised release and $250,000 in restitution, for which Gerald and Patricia are jointly and severally liable.

The Greens' appeal concerns only the restitution.

Discussion

I. Restitution's Triggers

To impose restitution under the Mandatory Victims Restitution Act (MVRA), there must be a showing that "an identifiable victim or victims has suffered a physical injury or pecuniary loss." 18 U.S.C. § 3663A(c)(1)(B).[1] The district judge found there was a victim and that "[t]echnically . . .there [was] a loss in terms of the bribery figure amount."[2] So did the Presentence Investigation Report. But the jury never had a chance to make these findings, as there was no special verdict. Nor do the convictions necessarily imply a victim or a loss. For example, the FCPA jury instructions allowed for a conviction if the jury found the Greens had acted "corruptly" in making a payment to a foreign official "for the purpose of . . . securing any improper advantage." As the Greens argue, the FCPA convictions would be "consistent with findings that the payments were investments" or "bribes drawn from the Greens' own profits." Nor do the Greens' other convictions require

---

[1] The parties dispute whether restitution was ordered under the MVRA or the Victim and Witness Protection Act (VWPA), 18 U.S.C. § 3663. But both statutes require a finding that there was a victim who suffered a loss, so the *Apprendi* question is in play either way.

[2] The Greens didn't raise an *Apprendi* objection to these findings or the restitution order. The government argues we should review for plain error. We decline to do so because the legal issues in this case fall within the exceptions to plain error review described by *United States* v. *Saavedra-Velazquez*, 578 F.3d 1103, 1106 (9th Cir. 2009).

finding a victim or a pecuniary loss.[3] Because the findings triggering restitution weren't made by the jury, we must decide whether Apprendi applies.

II. *Apprendi*'s Application to Restitution

Apprendi 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. "[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) (emphasis omitted). *Apprendi* applies to the factfinding needed to trigger capital punishment, *Ring* v. *Arizona*, 536 U.S. 584, 609 (2002), and criminal fines, *Southern Union*, 132 S. Ct. at 2357, but not the fact-finding needed to make concurrent sentences consecutive, *Oregon* v. *Ice*, 555 U.S. 160, 164 (2009).

While the Supreme Court has yet to hold whether *Apprendi* applies to restitution, it has said in dictum that "[i]ntruding *Apprendi*'s rule into" decisions to impose "statutorily prescribed fines and orders of restitution" would "cut the rule loose from its moorings." *Id.* at 171–72. That's some indication the Court would not apply *Apprendi* to restitution,

---

[3] Patricia Green's convictions for false subscription of two tax returns do necessarily imply a pecuniary loss to a victim—the federal government. But the prosecution elected not to seek restitution for these convictions.

although the recent *Southern Union* decision declined to follow this dictum, at least as it concerned criminal fines. 132 S. Ct. at 2352 n.5 ("[O]ur statement in *Ice* was unnecessary to the judgment and is not binding.").

Our own court, however, has categorically held that *Apprendi* and its progeny—*Blakely* and *United States* v. *Booker*, 543 U.S. 220 (2005)—don't apply to restitution. In *United States* v. *Bussell*, 414 F.3d 1048, 1060 (9th Cir. 2005), we held that "the district court's orders of restitution and costs" under the VWPA "are unaffected by the changes worked by *Booker*." *See also United States* v. *DeGeorge*, 380 F.3d 1203, 1221 (9th Cir. 2004) (VWPA restitution "is unaffected by *Blakely*"); *United States* v. *Gordon*, 393 F.3d 1044, 1051 n.2 (9th Cir. 2004) (defendant's "*Blakely* argument is foreclosed by our recent decision in *United States* v. *DeGeorge*"). Under the existing law of the circuit, then, defendants' *Apprendi* claim must fail.

Defendants nonetheless advance two reasons for breaking with precedent:

A. The "Trigger" Argument

The Greens say our cases have rejected *Apprendi*'s application to determinations of the *amount* of restitution, not to determinations of *whether* restitution is triggered at all. As a result, they insist, we can apply *Apprendi* to the trigger determination without running afoul of our caselaw. At oral argument the Greens theorized a regime under which *Apprendi* would apply to the determination of the trigger but not the amount.

We are not persuaded. First, this approach contravenes the categorical nature of our statements that restitution is "unaffected" by *Apprendi*. *See* page 7 *supra*. These categorical statements control even though the cases from which they issued didn't specifically address the trigger argument. A panel may adopt a categorical rule as circuit law without explicitly rejecting every conceivable counterargument. We further hesitate to adopt the trigger argument because the Greens can't cite any case—state or federal—that has accepted it, and because the two circuits that considered it, rejected it. *See United States* v. *Milkiewicz*, 470 F.3d 390, 403 (1st Cir. 2006); *United States* v. *Reifler*, 446 F.3d 65, 115–18 (2d Cir. 2006).

Finally, applying *Apprendi* to the determination of the trigger but not the determination of the amount would result in unacceptable cognitive dissonance. If *Apprendi* covers the determination whether there are any victims at all, shouldn't it also cover the determination whether there's one victim who suffered a $1000 loss as opposed to 1000 victims who suffered a combined $1,000,000 loss? It's hard to justify *Apprendi* protections for the determination of the first victim but not the 999 to follow, each of which would increase the amount of restitution imposed upon the defendant. And if we treat each victim-determination as a separate trigger, we're effectively applying *Apprendi* to the determination of the amount. That's not so much distinguishing our precedent as overruling it.

B. *Southern Union* and the *Miller* v. *Gammie* Standard

The Greens next urge us to overrule our caselaw in light of the Supreme Court's recent decision in *Southern Union*, where a gas company was charged with violating the Resource Conservation and Recovery Act (RCRA), which provides for a maximum criminal fine of $50,000 per day of violation. 132 S. Ct. at 2349. The indictment alleged the company had violated RCRA for a period of 762 days, but the jury was instructed that it could convict if it found even a single day's violation. *Id.* And convict the jury did. *Id.* At sentencing, the court calculated a "maximum potential fine of $38.1 million"—$50,000 x 762 days—"from which it imposed a fine of $6 million and a 'community service obligatio[n]' of $12 million." *Id.* Defendant objected that it had been convicted of just one day's violation, so any fact resulting in a fine over the daily maximum had to be found by a jury. *Id.* The Supreme Court agreed, applying *Apprendi* to criminal fines. *Id.* at 2349, 2357.

Southern Union provides reason to believe *Apprendi* might apply to restitution. As the Court held: "In stating *Apprendi*'s rule, we have never distinguished one form of punishment from another. Instead, our decisions broadly prohibit judicial factfinding that increases maximum criminal 'sentence[s],' 'penalties,' or 'punishment[s]'—terms that each undeniably embrace fines." *Id.* at 2351. The Greens say that "by applying *Apprendi* to criminal fines, *Southern Union* strongly signals that *Apprendi* applies to criminal restitution as well." But "strong[] signals" aren't enough. For a three-judge panel to overrule circuit precedent, the intervening case must "undercut the theory or reasoning underlying the

prior circuit precedent in such a way that the cases are *clearly irreconcilable*." *Miller* v. *Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (emphasis added). *Southern Union* doesn't cross that threshold. Even if it chips away at the theory behind our restitution cases, it's not "clearly irreconcilable" with our holdings that restitution is "unaffected" by *Apprendi*.

First, the obvious: *Southern Union* deals with criminal fines, not restitution. It's far from "clear[]"—*Miller*'s term—that a rule governing one would govern the other. Indeed, it's not even clear that restitution's a form of punishment. We've held in some contexts that "restitution under the MVRA is punishment." *United States* v. *Dubose*, 146 F.3d 1141, 1145 (9th Cir. 1998); *see United States* v. *Ballek*, 170 F.3d 871, 876 (9th Cir. 1999). But in other contexts, we've held it's not. *See United States* v. *Phillips*, 704 F.3d 754, 771 (9th Cir. 2012) ("[F]orfeiture and restitution serve entirely distinct purposes: 'Congress conceived of forfeiture as *punishment* . . . . The purpose of restitution . . . , however, is not to punish the defendant, but to *make the victim whole again*.'" (quoting *United States* v. *Newman*, 659 F.3d 1235, 1241 (9th Cir. 2011))); *Gordon*, 393 F.3d at 1052 n.6 ("[T]he MVRA's purpose is to make the victims whole; conversely, the Sentencing Guidelines serve a punitive purpose."). Sometimes we've held it's a hybrid, with "both compensatory and penal purposes." *United States* v. *Rich*, 603 F.3d 722, 729 (9th Cir. 2010). Even if *Apprendi* covers all forms of punishment, restitution's not "clearly" punishment, so we can't rely on *Southern Union* to overrule our restitution precedents.

Second, *Southern Union* concerned a determinate punishment scheme with statutory maximums: "[O]ur decisions broadly prohibit judicial factfinding that increases *maximum* criminal 'sentence[s],' 'penalties,' or 'punishment[s].'" 132 S. Ct. at 2351 (emphasis added). Restitution carries with it no statutory maximum; it's pegged to the amount of the victim's loss. A judge can't exceed the non-existent statutory maximum for restitution no matter what facts he finds, so *Apprendi*'s not implicated.

The Fourth Circuit has already held that *Southern Union* doesn't apply to restitution because "*there is no prescribed statutory maximum* in the restitution context." *United States* v. *Day*, 700 F.3d 713, 732 (4th Cir. 2012) (emphasis in original). And, prior to *Southern Union*, other circuits came to the same conclusion. *See Milkiewicz*, 470 F.3d at 404 (1st Cir.); *Reifler*, 446 F.3d at 117–20 (2d Cir.); *United States* v. *Sosebee*, 419 F.3d 451, 454 (6th Cir. 2005). Similarly, our own court held last December that *Southern Union* doesn't apply to criminal forfeiture because, like restitution, forfeiture lacks a statutory maximum: "The *Southern Union* Court explicitly held . . . that there could be no '*Apprendi* violation where no maximum is prescribed.'" *Phillips*, 704 F.3d at 770 (quoting *Southern Union*, 132 S. Ct. at 2353). *But see Southern Union*, 132 S. Ct. at 2350–51 (*Apprendi* applies to fines where the maximum is based on "the amount of . . . the victim's loss."). This difficulty with applying *Southern Union*—and, by extension *Apprendi*—to an indeterminate scheme further undermines any claim that *Southern Union* is "clearly irreconcilable" with our restitution caselaw.

III. Conclusion

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. Such rewriting of doctrine is the sole province of the court sitting en banc. Faced with the question whether *Southern Union* has "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable," we can answer only: No.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GERALD GREEN,
Defendant-Appellant.

No. 10-505-19

D.C. No. 2:08-cr-00059-GW-1

ORDER

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PATRICIA GREEN,
Defendant-Appellant.

No. 10-505-24

D.C. No. 2:08-cr-00059-GW-2

JEFFREY F. ALLEN,
Movant.

Before: KOZINSKI, Chief Judge, McKEOWN and M. SMITH, Circuit Judges.

The petition for rehearing en banc is denied. See Fed. R. App. P. 35.