No.

IN THE
Supreme Court of the United States

SARA JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether restitution imposed on a criminal defendant is a criminal penalty subject to the requirement under the Sixth Amendment that the government allege in the indictment and prove to a jury beyond a reasonable doubt any fact that increases the amount of criminal sentences, penalties, and punishments.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Sara Johnson respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION AND ORDER BELOW

The opinion of the Sixth Circuit is not published in the Federal Reporter, but is reprinted at 583 F. App'x 503 (6th Cir. 2014), and in the appendix to this petition, Pet. App. 1a-25a. The district court's judgment is unpublished and reprinted at Pet. App. 26a-38a.

JURISDICTION

The Sixth Circuit entered its order on September 22, 2014. On December 1, 2014, Justice Kagan extended the deadline to file a petition for a writ of certiorari to February 19, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reprinted in the appendix to this petition. Pet. App. 45a-46a.

INTRODUCTION

Under this Court's Sixth Amendment jurisprudence, any fact other than a prior conviction "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). This case presents the Court with an ideal opportunity to answer a question that has perplexed and divided the circuit courts since *Apprendi* was decided: Whether restitution imposed on a criminal defendant is exempt from these Sixth Amendment protections.

This Court's decision in *Apprendi* created a "bright-line rule" prohibiting a judge from imposing punishment beyond "the maximum sentence [he or she] 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, 308 (2004) (emphasis in original). In 2012, the Court applied this rule to prohibit judicial fact-finding in the context of criminal fines, explaining that there was no "principled basis" for distinguishing criminal fines from punishments such as imprisonment or death. *So. Union Co. v. United States*, 132 S. Ct. 2344, 2350 (2012). In 2013, the Court further extended that rule to facts that increase a mandatory minimum penalty, even where the facts have no impact on the maximum penalty. *Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013).

In this case, Petitioner asserted her constitutional right to be tried by jury and the jury did not (and was not asked to) make any finding as to the loss caused to

any victims as a result of her crime. Notwithstanding Petitioner's repeated assertion of her Sixth Amendment rights, the trial judge made its own finding that $315,471 "would be the appropriate amount for restitution" and ordered her to pay that much as part of her sentence. Pet. App. 44a. In a decision that directly contravenes this Court's holdings in *Apprendi*, *Blakely*, *Southern Union*, and *Alleyne*, and basic principles of constitutional law, the Sixth Circuit upheld the restitution order.

In so doing, the Sixth Circuit adhered to circuit precedent that predated the Court's decisions in *Southern Union* and *Alleyne* and held that restitution falls outside of the Sixth Amendment's ambit. Other circuits have likewise felt themselves bound by circuit precedent creating an exception to the Sixth Amendment for restitution, even as they recognize the tension between their precedent and this Court's more recent Sixth Amendment decisions. That has led numerous courts to expressly call for this Court's guidance to resolve this critical question. Moreover, the circuits have deeply split on the predicate question of whether restitution even qualifies as a criminal penalty.

This case provides a rare opportunity to squarely address the question presented. In virtually all of the circuit cases raising the issue, and all petitions filed with this Court from those cases, the question presented here has been unpreserved and reviewable only for plain error—and the government has asked the Court to deny certiorari on that basis. Here, however, there can be no dispute that Petitioner's claim was

preserved at every stage of the proceedings, providing a unique opportunity to resolve this question of exceptional importance.

STATEMENT OF THE CASE

I. Indictment & Trial.

In November 2011, Petitioner Sara Johnson and her son, Kevin, were indicted in the United States District Court for the Western District of Michigan on one count of mail fraud. Indictment at 1, ECF No. 1.[1] The indictment alleged that Kevin owned and operated a lawn care company and an engine repair company, for which Petitioner acted as the chief of human resources. Indictment ¶ 7. It further alleged that Kevin and Petitioner fraudulently reported to the Michigan Unemployment Insurance Agency (MUIA) that employees had been laid off from the company and induced the same employees to collect employment benefits in lieu of pay. Indictment ¶ 8.

Petitioner pled not guilty and asserted her constitutional right to a jury. At trial, her primary defense was that she had only limited involvement with Kevin's companies and was not involved in the preparation or filing of unemployment applications.

The jury found Petitioner guilty of mail fraud. It was not asked to, and did not, make any finding that

[1] Kevin was also charged with one count of making a false statement. Indictment at 6. That charge is unrelated to this petition.

Petitioner's crime caused any loss to any victims. *See* Jury Verdict, ECF No. 94.

II. Sentencing.

In preparation for sentencing, a probation officer prepared a presentencing investigation report (PSR) based on information he "obtained from the investigative reports of the U.S. Department of Labor, Office of Inspector General (ULOIG); and from statements of the Assistant United States Attorney and case agent." PSR ¶ 7.[2] Among the information obtained from those government sources was a series of charts that the probation officer used to calculate the alleged overpayment of benefits by the MUIA that was caused by Petitioner's fraud. PSR ¶ 24. Based on those charts and calculations, the probation officer concluded that Petitioner had caused $315,471.00 in losses to the MUIA. PSR ¶ 25. He recommended that Petitioner be ordered to pay restitution in the same amount. PSR ¶ 81.

Petitioner objected to the PSR on the basis that the recommended restitution would violate her constitutional right to a jury trial. She argued:

> [R]estitution is a form of punishment. It is contrary to law that any punishment be imposed upon a defendant when that punishment necessarily involves fact finding by the jury as trier of fact. The fact of the amount of restitution was not submitted

[2] For the convenience of the Court, Petitioner has filed copies of the PSR and Petitioner's objections thereto under seal ("Sealed App."). The PSR is located at Sealed App. 1, and Petitioner's objections to the PSR begin at Sealed App. 20.

> to, nor decided by, the jury. There has been no finding of responsibility by the trier of fact. This is not an issue to be determined by judicial fact finding.

Sealed App. 24. Petitioner also made several objections to the figures and calculations relied upon in the PSR. She pointed out that that the probation officer proceeded from the erroneous assumption that she "owned and operated" Kevin's businesses. Sealed App. 20-21. She also argued that the figures themselves were unreliable and inaccurate. She argued, for instance, that several of the purported amounts of unemployment benefits paid by the MUIA (and used to calculate its loss) "exceed[ed] the maximum weekly benefit available" at the time. Sealed App. 22-23. She argued that other figures went beyond the government's theory at trial or appeared to be incomplete. Sealed App. 22-23. The probation officer – "[a]s advised by the Assistant United States Attorney" – rejected all of these objections. Addendum to PSR at 1-4, ECF No. 136.

Petitioner also raised her Sixth Amendment challenge before the district court, in her written sentencing objections and again at her sentencing hearing. She argued that "[u]nder the reasoning of *Apprendi* and its progeny, a jury must find a restitution amount beyond a reasonable doubt." Defendant's Sentencing Objections at 6, ECF No. 143. She also argued that this Court's decision in *Southern Union* and its pending decision in *Alleyne* provided reason to depart from Sixth Circuit precedent

exempting restitution from the Sixth Amendment. *Id.* at 2-6; Pet. App. 41a-42a.

The district court rejected that argument. It reasoned:

> It could be that the Supreme Court might hold at some point in time, some justices seem to be going that way, that just about every decision has to be made by a jury if there's a jury trial. But right now I think the law is quite clear and certainly the practice is quite clear everywhere you go that restitution is a matter for the Court to determine and not for a jury. If that changes, fine with me.

Pet. App. 44a.

The court observed that the PSR had "come up with a specific number, the $315,740," and, without further explanation, concluded that this "would be the appropriate amount for restitution in this particular case." Pet. App. 44a.

III. Appeal.

Petitioner appealed to the Sixth Circuit. She argued, among other things, that the district court's imposition of restitution based on judicial factfinding violated her Sixth Amendment right to a jury under *Apprendi* and its progeny. Brief of Petitioner-Appellant at 31-39, *United States v. Johnson*, 583 F. App'x 503 (6th Cir. 2014) (No. 13-1375), 2013 WL 6352682.

The Sixth Circuit upheld the restitution order. It reasoned that Petitioner's argument "directly contradict[ed]" circuit precedent holding that

"restitution falls outside the bounds of the Sixth Amendment," Pet. App. 13a (citing *United States v. Sosebee*, 419 F.3d 451, 461-62 (6th Cir. 2005)). The court declined to reconsider that precedent in light of *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012), and *Alleyne v. United States*, 133 S. Ct. 2151 (2013), and adopted its prior case law that restitution is exempt from Sixth Amendment protection because it "'has no statutory maximum and because the [MVRA] mandates that judges determine the amount.'" Pet. App. 13a (quoting *United States v. Jarjis*, 551 F. App'x 261, 261-62 (6th Cir. 2014) (per curiam)).

Judge Rice wrote a separate concurrence to address the impropriety of several comments made by the prosecutor at trial that, among other things, conflated and confused the conduct of Petitioner and her son. Pet. App. 14a-25a.

REASONS FOR GRANTING THE PETITION

This case presents the Court with an ideal opportunity to answer a question that has caused significant disarray among the circuits: Whether the Sixth Amendment requires that the government allege and prove beyond a reasonable doubt the facts underlying a restitution order imposed on a criminal defendant.

This Court has recognized that the constitutional protection afforded to the right to trial by jury is "of surpassing importance." *Apprendi*, 530 U.S. at 476. The foundation for that right "extends down centuries into the common law, when the right was "understood

to require that '*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours.'" *Id.* at 477 (quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)) (emphasis in original) (bracket in original). Based on those principles, this Court held in *Apprendi* that the Sixth and Fourteenth Amendments mandate 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 490.

Here, in a decision that directly contravenes this Court's Sixth Amendment jurisprudence, the Sixth Circuit held that "restitution falls outside the bounds of the Sixth Amendment." Pet. App. 13a. The court reached that conclusion for two reasons, each of which violate this Court's case law. First, the court held that restitution is exempt from the Sixth Amendment "'because the [MVRA] mandates" judicial factfinding. Pet. App. 13a. That rationale violates the basic constitutional principle that a statute cannot supersede the Constitution. Second, the court reasoned that restitution is exempt from Sixth Amendment protection because the MVRA specifies "no statutory maximum." Pet. App. 13a. That rationale directly contravenes this Court's decisions in *Blakely*, *Southern Union*, and *Alleyne*.

The circuit courts' difficulty reconciling this Court's recent Sixth Amendment case law with their

longstanding circuit precedent carving out an exception from the Sixth Amendment for restitution has caused numerous panels and individual judges to call for this Court's guidance. Furthermore, it has led to a deep 8-4 split among the circuits as to the threshold Sixth Amendment inquiry of whether restitution is a criminal penalty in the first place.

This case presents a rare instance in which the question presented – which impacts literally *billions* of dollars of restitution imposed each year – has been preserved at all stages below. The Court should not pass up this opportunity to review it.

I. The Sixth Circuit's Conclusion That Restitution "Falls Outside Of The Bounds" Of The Sixth Amendment Directly Contravenes This Court's Precedent.

Notwithstanding the deep divide among the circuits discussed below, the Sixth Circuit has recognized that restitution imposed as part of a criminal sentence is a criminal penalty within the meaning of *Apprendi*. *See United States v. Sosebee*, 419 F.3d 451, 461 (6th Cir. 2005) (citing *United States v. Schulte*, 264 F.3d 656, 662 (6th Cir. 2001)). It has nonetheless repeatedly held, as it did here, that restitution "falls outside of the bounds of the Sixth Amendment" for two reasons. Pet. App. 13a. First, the constitutional right to a jury has no application to restitution "'because the [MVRA] mandates that judges determine the amount.'" Pet. App. 13a (quoting *Jarjis*, 551 F. App'x at 261-62); *see also Sosebee*, 419 F.3d at 462 (holding that restitution is exempt from Sixth Amendment protection because "the [MVRA] specifically state[s] that the amount of

restitution should be equal to the 'amount of each victim's losses as determined by the court'" (citation omitted)). Second, *Apprendi* is inapplicable because "the restitution statutes do not specify a statutory maximum." *Sosebee*, 419 F.3d at 461; Pet. App. 13a (quoting *Jarjis*, 551 F. App'x at 261-62).

Both grounds for denying Petitioner her constitutional right to a jury flatly contravene this Court's precedent. Furthermore, as described below, the court's flawed attempt to distinguish restitution reflects a broader reluctance among the circuits to reconsider longstanding circuit precedent exempting restitution from the Sixth Amendment. Numerous courts have expressly recognized that this exemption rests on questionable grounds in light of this Court's more recent Sixth Amendment jurisprudence and have called for this Court to intervene.

A. The Sixth Circuit's Rationale That The MVRA Override's Petitioner's Constitutional Right To A Jury Violates Basic Principles Of Constitutional Law.

The Sixth Circuit's denial of Petitioner's constitutional right to a jury "because the [MVRA] mandates that judges determine the amount,'" Pet. App. 13a (quoting *Jarjis*, 551 F. App'x at 261-62), runs afoul of basic principles of constitutional law. It is elementary that "[a]n act of congress repugnant to the constitution cannot become a law." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 138 (1803). Thus, while it is true that the MVRA calls for the imposition of restitution in an amount "determined by the court,"

18 U.S.C. 3664(f)(1)(A), that statutory mandate cannot supersede the Constitution. The Sixth Circuit's contrary reasoning violates "the fundamental principle[] of our society" that the Constitution is "the fundamental and paramount law of the nation." 5 U.S. at 177. Petitioner should not be denied her fundamental right to a jury based on such flawed reasoning.

B. The Sixth Circuit's Reasoning That Restitution Is Exempt Because It Has No "Statutory Maximum" Directly Contravenes *Blakely*, *Southern Union*, and *Alleyne*.

The Sixth Circuit's other rationale for exempting restitution from the Sixth Amendment is that the imposition of restitution does not "increase[] the penalty for a crime beyond the prescribed statutory maximum," *Apprendi*, 530 U.S. 490, because the MVRA "has no statutory maximum," Pet. App. 13a. Other circuits have similarly reasoned that restitution is exempt from the Sixth Amendment because the MVRA provides no specific maximum penalty or provides an "indeterminate system." *United States v. Reifler*, 446 F.3d 65, 118-20 (2d Cir. 2006); *United States v. Day*, 700 F.3d 713, 732 (4th Cir. 2012) (same); *United States v. Belk*, 435 F.3d 817, 819 (7th Cir. 2006) (same). That rationale cannot be squared with *Blakely*, *Southern Union* and *Alleyne*.

In *Blakely*, this Court repeatedly emphasized 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 jury verdict or*

admitted by the defendant." *Blakely*, 542 U.S. at 303 (emphasis in original). "In other words, 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.* at 303-04 (emphasis in original); *see also Apprendi*, 530 U.S. at 482-83 (defining "maximum" as the punishment the defendant "would receive if punished according to the facts reflected in the jury verdict alone"); *Ring v. Arizona*, 536 U.S. 584, 602 (2002) (same).

Where, as here, the jury has made no finding regarding any loss caused by the defendant's crime "the maximum sentence a judge may impose . . . *without* any additional findings," *Blakely*, 542 U.S. at 303-04 (emphasis in original), is zero. In order for a sentencing judge to impose the penalty of restitution in "the full amount of each victim's losses," 18 U.S.C. § 3664(f)(1)(A), the judge must necessarily make additional findings regarding the loss caused. *See United States v. Leahy*, 438 F.3d 328, 342, 344 (3d Cir. 2006) (McKee, J., dissenting) ("Notwithstanding the jury's verdict, no restitution can be imposed absent a judicial determination of the amount of loss.... Restitution in any amount greater than zero clearly increases the punishment that could otherwise be imposed.").

That is precisely what happened here: The jury made no finding as to any loss caused by Petitioner's crime and the sentencing judge made his own finding that $315,740.00 "would be the appropriate amount for restitution in this particular case." Pet. App. 44a. That

any loss was caused, let alone this particular amount, finds no support "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*," *Blakely*, 542 U.S. at 303 (emphasis in original), and the imposition of restitution based on that finding thus squarely conflicts with *Blakely*.

Furthermore, if there were any doubt following *Blakely*, *Southern Union* put to rest any question as to whether restitution can be carved out from the Sixth Amendment. That case involved a criminal fine under the Resource Conservation and Recovery Act of 1976 (RCRA), which provided for "a fine of not more than $50,000 for each day of violation" of the statute. 132 S. Ct. at 2349 (quotation marks omitted). The Court held that the Sixth Amendment reserved for the jury the determination of facts underlying criminal fines. 132 S. Ct. at 2357. It explained: "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. Just as this Court found no principled means of distinguishing criminal fines from imprisonment, there is no principled way to distinguish restitution from criminal fines and imprisonment.

Southern Union belies the explanation that a criminal penalty is taken beyond the reach of the Sixth Amendment because the relevant statute lacks a specific maximum or is "indeterminate." The RCRA itself prescribed an "indeterminate" penalty of "*not more* than $50,000 *for each day* of violation." 132 S. Ct. at 2349 (emphasis added). The statute set no limit on

the number of days that a defendant could be found in violation and thus prescribed no minimum or maximum penalty. *See id.* at 2356 ("the fact that will ultimately determine the maximum fine Southern Union faces is the number of days the company violated the statute"). Indeed, it is precisely *because* of that indeterminacy that fines under the RCRA – just like restitution orders under the MVRA – are contingent on additional findings, which must be found by a jury, not a judge.

What is more, the Court in *Southern Union* specifically acknowledged that fines imposed under other statutes, much like restitution, are calculated by reference to "the amount of . . . the victim's loss." 132 S. Ct. at 2350-51. It made clear that "*[i]n all such cases*" the facts required to determine the amount of the penalty must be found by a jury "to implement *Apprendi*'s 'animating principle.'" *Id.* at 2351. Thus, contrary to the Sixth Circuit's decision, the fact that the MVRA mandates calculation of restitution based on "the full amount of each victim's losses," 18 U.S.C. § 3664(f)(1)(A), provided no basis for denying Petitioner her fundamental right to have a jury determine the loss caused, if any. *See also Southern Union*, 132 S. Ct. at 2356 (expressly rejecting the government's argument that "'judicially found facts [that] involve only quantifying the harm caused by the defendant's offense' – for example, how long did the violation last, or how much money did the defendant gain (or the victim lose)?" should be exempt from *Apprendi* (quoting Br. for the United States at 25)). Indeed, in *Southern Union*, the government itself acknowledged that extending *Apprendi* to criminal fines would make it

"hard to justify" the rationale of the lower courts that restitution is exempt from *Apprendi* because it "has no maximum." Transcript of Oral Argument at 31-32, *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012) (No. 11-94).

The Sixth Circuit's rationale that *Apprendi* does not apply where a statute specifies no maximum is also difficult to reconcile with this Court's more recent decision in *Alleyne*, 133 S. Ct. 2151. In *Alleyne*, the Court held that a judicial finding that the defendant had "brandished" his firearm violated *Apprendi* even though the finding had no impact on the maximum sentence prescribed by statute. *Id.* at 2161-63.

C. Lower Courts Have Repeatedly Expressly Called On This Court To Provide Guidance On The Question Presented.

Like the Sixth Circuit in this case, the courts of appeal have uniformly declined to reconsider their longstanding circuit precedent exempting restitution from the Sixth Amendment in light of *Blakely*, *Southern Union*, and *Alleyne*. *See, e.g.*, *United States v. Basile*, 570 F. App'x 252, 258 (3d Cir. 2014) ("declin[ing] to explore" the issue after *Southern Union* and *Alleyne* because "these holdings are not directly applicable to restitution"); *Day*, 700 F.3d at 732 (declining to overrule its precedent because "*Southern Union* does not discuss restitution" and resorting to the indeterminacy argument); *United States v. Elliott*, No. 13–20560, __ F. App'x __, 2015 WL 327648, at *2 (5th Cir. Jan. 27, 2015); *United States v. Jarjis*, 551 F. App'x 261, 261-62 (6th Cir.) (per curiam), *cert. denied*,

134 S. Ct. 1571 (2014); *United States v. Wolfe*, 701 F.3d 1206, 1216-17 (7th Cir. 2012); *United States v. Green*, 722 F.3d 1146, 1149 (9th Cir.), *cert. denied*, 134 S. Ct. 658 (2013); *United States v. Kieffer*, No. 13-1371, __ F. App'x __, 2014 WL 7238565, at *11 & n.3 (10th Cir. Dec. 22, 2014); *United States v. Bane*, 720 F.3d 818, 830 (11th Cir.), *cert. denied*, 134 S. Ct. 835 (2013). In doing so, however, the circuits have repeatedly recognized that the rationale for the free pass given to restitution has been undermined.

Judge Kozinski, for instance, has observed that *Southern Union* "chips away at the theory behind our restitution cases" and "provides reason to believe *Apprendi* might apply to restitution." *Green*, 722 F.3d at 1150. He openly acknowledged the possibility that those cases are wrong:

> 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.

Id. at 1151. He nonetheless found it appropriate to follow circuit precedent absent intervention from this Court, effectively limiting *Southern Union* to its facts in the process. *Id.* at 1150-51 (reasoning that *Southern Union* is not so "clearly irreconcilable" with circuit precedent because "*Southern Union* deals with criminal fines, not restitution").

Numerous other circuits have similarly recognized that their precedent rests on questionable grounds, but have concluded that their hands are tied absent this Court's intervention. *See Elliott*, 2015 WL 327648, at *2 (5th Cir.) (observing "that there is some tension between statements of the Supreme Court in *Southern Union Co. v. United States* and our court's conclusion that the Sixth Amendment does not require a jury to find the amount of restitution," but concluding that it was "not a matter for this panel to resolve . . . in light of this circuit's precedent" (footnote omitted)); *Wolfe*, 701 F.3d at 1215, 1217 (7th Cir.) (observing that its precedent is "against" this Court's "recent trend . . . to submit more facts to the jury," but concluding that it lacked the requisite "compelling reason . . . to overturn [its] long-standing Circuit precedent"); *Kieffer*, 2014 WL 7238565, at *11 (10th Cir.) (acknowledging "compelling reasons" that its precedent exempting restitution from the Sixth Amendment may be wrong and observing that the case for applying *Apprendi* to restitution may be *even stronger* than for the fines considered in *Southern Union*, but concluding that it remained "bound by [its] ample precedent").[3]

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[3] *See also Leahy*, 438 F.3d at 340 (3d Cir.) (McKee, J., dissenting) (arguing that circuit precedent exempting restitution was "fatally undermine[d]" by *Blakely*); *United States v. Carruth*, 418 F.3d 900, 906 (8th Cir. 2005) (Bye, J., dissenting) ("While many in the pre-*Blakely* world understandably subscribed to the notion *Apprendi* does not apply to restitution because restitution statutes do not prescribe a maximum amount, this notion is no longer viable in the post-*Blakely* world which operates under a completely different understanding of the term prescribed statutory maximum." (footnote and citation omitted)).

And numerous courts have effectively called for this Court's guidance. *See United States v. Cannon*, 560 F. App'x 599, 605 (7th Cir. 2014) (suggesting that Petitioner "petition the Supreme Court for a writ of certiorari"); *United States v. Holmich*, 563 F. App'x 483, 485 (7th Cir. 2014) (advising defendant "to seek review of this question in the Supreme Court"), *cert. denied*, No. 14-337, 2015 WL 231975 (U.S. Jan. 20, 2015); *Kieffer*, 2014 WL 7238565, at *11 ("we are bound by our ample precedent unless the Supreme Court instructs otherwise"); *United States v. Serawop*, 505 F.3d 1112, 1122-23 & n.4 (10th Cir. 2007) ("We are without power to revisit this precedent[.]"); *People v. Kyle*, No. B244023, 2014 WL 1024250, at *9 (Cal. Ct. App. Mar. 17 2014) (declining to depart from precedent "[u]ntil either of the Supreme Courts directs otherwise").

The Court should answer the call of the circuits for guidance and grant review of this case to make clear that the Sixth Circuit's decision denying Petitioner her fundamental right to have the facts necessary to increase her punishment submitted to a jury was wrong.

II. The Court's Review Would Resolve The Deep Circuit Split Over The Threshold Question Of Whether Restitution Is Criminal Penalty Or Civil Remedy.

The Court should also grant review to resolve a deep split that has arisen among the circuits regarding the threshold Sixth Amendment question of whether restitution is a criminal penalty or civil in nature. *See Apprendi*, 530 U.S. at 490 (stating its application to

"any fact that increases *the penalty for a crime*" (emphasis added)); *see also* U.S. Const. amend. VI (limiting the right to "an impartial jury . . . and to be informed of the nature and cause of the accusation" to "criminal prosecutions").

The Seventh, Eighth, Ninth, and Tenth Circuits have held that the Sixth Amendment's protections do not apply to restitution because it is not a criminal penalty. *See Wolfe*, 701 F.3d at 1217 (recognizing the "Circuit's well-established precedent that restitution is not a criminal penalty"); *United States v. Millot*, 433 F.3d 1057, 1062 (8th Cir. 2006) (holding that *Apprendi* "does not affect restitution orders since . . . they are not in the nature of a criminal penalty" (quotation marks omitted)); *Green*, 722 F.3d at 1150-51 (declining to apply *Apprendi* to the MVRA in part because "it's not even clear that restitution's a form of punishment");[4] *United States v. Visinaiz*, 428 F.3d 1300, 1316 (10th Cir. 2005) (holding that *Apprendi* does not apply to restitution imposed under the MVRA because "[i]n the Tenth Circuit, restitution is not a criminal punishment").

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[4] In contrast with its recent decisions, the Ninth Circuit has previously held that restitution imposed under the MVRA is a criminal penalty. *Compare United States v. Dubose*, 146 F.3d 1141, 1144 (9th Cir. 1998) ("[R]estitution under the MVRA is punishment because the MVRA has not only remedial, but also deterrent, rehabilitative, and retributive purposes.") *with United States v. Phillips*, 704 F.3d 754, 771 (9th Cir. 2012) ("The purpose of restitution . . . 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))), *cert. denied*, 133 S. Ct. 2796 (2013).

The Sixth Circuit, along with the First, Third, Fourth, Fifth, and Eleventh Circuits, have squarely held that restitution *is* a criminal penalty. *See United States v. Ziskind*, 471 F.3d 266, 270 (1st Cir. 2006) (holding that "restitution ordered as part of a criminal sentence [under the MVRA] is a criminal penalty, not a civil remedy"); *Leahy*, 438 F.3d at 335 ("restitution ordered as part of a criminal sentence is criminal rather than civil in nature"); *United States v. Cohen*, 459 F.3d 490, 496 (4th Cir. 2006); *United States v. Adams*, 363 F.3d 363, 365 (5th Cir. 2004); *Sosebee*, 419 F.3d at 461 (6th Cir.); *Creel v. Comm'r*, 419 F.3d 1135, 1140 (11th Cir. 2005).

Though the Second and D.C. Circuits have not directly addressed whether restitution ordered under the MVRA is a criminal penalty, their case law holding that the Ex Post Facto Clause of the Constitution (which, like the Sixth Amendment, applies only in the case of criminal sanctions) prevents retroactive application of the MVRA strongly suggests that they likewise view restitution as a criminal penalty. *See United States v. Thompson*, 113 F.3d 13, 15 n.1 (2d Cir. 1997); *United States v. Bapack*, 129 F.3d 1320, 1327 n.13 (D.C. Cir. 1997).[5]

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[5] The circuits have generally recognized that the question of whether restitution is criminal or civil is the same with respect to both the Ex Post Facto Clause and the Sixth Amendment. *See, e.g.*, *United States v. Garcia-Castillo*, 127 F. App'x 385, 390 (10th Cir. 2005) (noting that the "principle" that restitution is criminal in Ex Post Facto cases "does not change simply because we are examining the issue in a Sixth Amendment context").

There is thus an 8-4 split among the circuits as to whether restitution is exempt from the Sixth Amendment on the basis that it not a criminal penalty. This case – which squarely presents the question of whether the Sixth Amendment's protections apply to restitution – provides the Court with an opportunity to resolve this deep split in authority among the circuits.

III. This Case Presents An Important And Recurring Question That Merits This Court's Review.

The question presented here is undoubtedly one "of surpassing importance." *Apprendi*, 530 U.S. at 476. As occurred in the proceedings below, trial judges almost uniformly impose restitution orders by simply adopting the amount of losses stated in the defendant's PSR. Thus, "[a]s it now stands, the imposition of restitution, mandated as an integral part of a defendant's sentence, is, as a practical matter, controlled by the probation officer in accordance with his levels of integrity, intelligence, and workload." William M. Acker, Jr., *The Mandatory Victims Restitution Act Is Unconstitutional. Will the Courts Say So After* Southern Union v. United States?, 64 Ala. L. Rev. 803, 819 (2013). Furthermore, the PSR is routinely based on "otherwise inadmissible hearsay, facts neither presented to nor found by a jury during trial, and facts not admitted to by the defendant in his or her plea agreement." James M. Bertucci, Note, Apprendi-*land Opens Its Borders: Will the Supreme Court's Decision in* Southern Union Co. v. United States *Extend* Apprendi*'s Reach to Restitution?*, 58 St. Louis U. L.J. 565, 570 (2014) (footnotes omitted); *see also* Acker, Jr.,

supra, 64 Ala. L. Rev. at 819 ("[t]rial judges are virtually forced to adopt 'bureaucratically prepared, hearsay-riddled presentence reports.'" (quoting *United States v. Booker*, 543 U.S. 220, 304 (2005) (Scalia, J., dissenting)). As a result, judges "routinely mandate restitution for harms that, while occurring during or as a result of the defendant's conduct, were not elements of the underlying offense the defendant was either convicted of or pleaded guilty to committing." Bertucci, *supra*, at 570.

This case is exemplary of the problem with the imposition of restitution based on judicial factfinding. Petitioner asserted her constitutional right to a jury. Notwithstanding Petitioner's repeated assertion of her right to a jury, the loss caused to the MUIA was determined by the probation officer, in direct consultation with the prosecutor. PSR ¶¶ 7, 24-25. The probation officer proceeded on his own understanding of the scope of Petitioner's offense, which may have had no relation to the jury's. Indeed, the probation officer proceeded from the erroneous assumption that Petitioner "owned and operated" the relevant companies, which the prosecution never argued, let alone proved, at trial. PSR ¶ 12. Furthermore, when Petitioner sought to challenge the accuracy of the figures and calculations relied upon by the PSR, the probation officer rejected her objections "[a]s advised by the Assistant U.S. Attorney." Addendum to PSR at 1-4, ECF No. 136. Then, at sentencing, the court simply observed that the PSR had "come up with a specific number, the $315,740," and, without addressing any of Petitioner's challenges to the accuracy of that

number, concluded: "I think that would be the appropriate amount for restitution in this particular case." Pet. App. 44a. The Constitution demands more.

Furthermore, because restitution is mandatory under the MVRA, *see* 18 U.S.C. § 3663A(a)(1), this sort of injustice is happening multiple times every day. According to a survey by the U.S. Sentencing Commission, in 2013 alone, federal judges imposed restitution in 14.2 percent of all criminal sentences (i.e., over 11,000 cases).[6] Of these sentences, the mean amount ordered to be paid was $742,000.[7] In fraud cases, like this one, restitution was ordered in 70.5% of cases, with a mean of over $1.7 million.[8] The question presented thus carries enormous practical implications that merit this Court's attention.

IV. This Is The Right Case To Resolve These Issues.

This case provides an excellent vehicle to resolve the question presented. The relevant facts are straightforward and uncontroverted: The jury made no finding as to (and Petitioner never admitted to) the amount of loss caused by her offense. The trial judge imposed restitution based on its own finding that $315,740 "would be the appropriate amount."

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[6] U.S. Sentencing Comm'n, *2013 Sourcebook of Federal Sentencing Statistics*, tbl. 15, *available at* http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2013/sourcebook-2013.

[7] *Id.*

[8] *Id.*

Moreover, this case presents what Petitioner believes to be the unprecedented instance in which the issue of whether restitution is exempt from the Sixth Amendment is perfectly preserved. There is no doubt that Petitioner expressly asserted her constitutional right to a jury and argued at every stage of these proceedings that imposition of the additional punishment of restitution based on judicial factfinding violates that right. Both the district court and the Sixth Circuit squarely addressed the issue.

The Court should not underestimate the uniqueness of this posture. In virtually all of the circuit court cases in which this issue has been raised (and thus all of the petitions that have been filed in this Court to date), the issue has been unpreserved and has thus reviewable only for plain error. *See, e.g.*, Brief in Opposition to Certiorari at 4, *Holmich v. United States*, 2015 WL 231975 (U.S. Jan. 20, 2015) (No. 14-337), 2014 WL 7336431 ("*Holmich* Opp."); *United States v. Ligon*, 580 Fed. App'x 91, 96 (3d Cir. 2014), *petition for cert. filed*, No. 14-7989 (U.S. Jan. 12, 2015); *United States v. Rosbottom*, 763 F.3d 408, 419 (5th Cir. 2014), *cert. denied*, No. 14-570, 2015 WL 133043; *Basile*, 570 F. App'x at 258; Pet. for Writ of Certiorari at 34 n.16, *Dhafir v. United States*, 134 S. Ct. 544 (2013) (No. 13-418), 2013 WL 5498082; Pet. for Writ of Certiorari at 6, *Wolfe v. United States*, 133 S. Ct. 2797 (2013) (No. 12-1065), 2013 WL 785623. And on the two occasions in which the government was ordered to respond to past petitions, the government asked the Court to deny certiorari primarily on the basis that the issue was reviewable only for plain error. *See Holmich* Opp. at 4;

Brief in Opposition to Certiorari at 6, *Wolfe v. United States*, 13 S. Ct. 2797 (2013) (No. 12-1065), 2013 WL 1945146.

The dearth of cases in which this issue has been preserved is not a matter of coincidence, but a consequence of practical realities. As Judge Acker observes, only a defendant with great "fortitude" would act "at his peril to dispute the victim's claim, the probation officer's report, or both" and risk "upset[ting] the prosecutor, or even worse, the judge." Acker, Jr., *supra*, 64 Ala. L. Rev. at 819. This is especially the case given that the defendant would have to take that risk knowing that the objection is doomed to fail given that—unless and until this Court intervenes—the circuits feel bound by their longstanding precedent exempting restitution from the protections of the Sixth Amendment. The Court should not pass up this opportunity to squarely address this issue of exceptional importance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

United States Court of Appeals
Sixth Circuit

UNITED STATES of America,
Plaintiff–Appellee,

v.

Sara JOHNSON (13–1375) and
Kevin Romando Johnson (13–1387),
Defendants–Appellants.

Nos. 13–1375, 13–1387.
Sept. 22, 2014.

Before COOK and GRIFFIN, Circuit Judges; RICE, District Judge.[*]

COOK, Circuit Judge.

1. A jury convicted Kevin and Sara Johnson of mail fraud, *see* 18 U.S.C. § 1341, and Kevin of making a false statement to a federal agent during an investigation, *see* 18 U.S.C. § 1001. In addition to imposing prison sentences, the district court ordered each defendant to pay restitution. The Johnsons appeal, pointing to prejudicial remarks by the prosecutor throughout trial; the district court's failure to cure that prejudice with an

[*] The Honorable Walter H. Rice, United States District Judge for the Southern District of Ohio, sitting by designation.

appropriate jury instruction; and the district court's determination of the amount of restitution without placing the issue before the jury. Kevin also challenges the district court's denial of his motion for a continuance so that he could seek new counsel, and Sara contends that the district court improperly excluded certain evidence. Discerning no reversible error, we affirm.

I.

Kevin Johnson owned a landscaping/snow-removal company, Lansing Total Lawn Care ("LTLC"), in Michigan. The indictment charged him and his mother Sara (the company's Human Resources officer) with orchestrating a scheme to "cause[ ] the payment of [unemployment] benefits to LTLC ... employees who had not in fact been laid off ."

The morning prior to voir dire, Kevin moved the court to postpone trial to allow him to seek new counsel, asserting that his attorney's lack of preparedness caused a breakdown of trust. The court questioned the attorney and Kevin before denying the motion, assessing the situation as not sufficiently egregious to justify delaying trial.

At trial, the government presented voluminous evidence of Kevin and Sara's fraud. Several former LTLC employees testified that Kevin or Sara typically would (1) apply for unemployment benefits on the employees' behalf (R. 170, Trial Tr. (Husband) at 172–73; *see also* R. 119, Trial Tr. (Heddens) at 15–16; *id.* (Graham) at 91–92; *id.* (Therrian) at 112–13; *id.* (Alfaro) at 160–63); (2) report inflated past wages on the

applications in order to increase the employees' benefit (*see, e.g.*, R. 171, Trial Tr. (Bognar) at 112); (3) require the employees to continue working without a regular paycheck, sometimes threatening to "cut [the employees] off unemployment" for failing to come to work or reporting the scheme to authorities (R. 170, Trial Tr. (Husband) at 175; *see also* R. 119, Trial Tr. (Heddens) at 25–27; *id.* (Graham) at 94); and (4) instruct the employees to report biweekly to the Michigan Unemployment Insurance Agency (UIA) to describe themselves as "unemployed" and thus eligible for continuing benefits (*see, e.g.*, R. 170, Trial Tr. (Kellogg) at 62; R. 119, Trial Tr. (Alfaro) at 162–63). According to a federal investigator who prepared a chart analyzing LTLC's false representations, UIA overpaid $315,471 to LTLC employees.

Kevin and Sara attempted to downplay their role in the scheme. Sara painted herself as absent from the office; and after several witnesses mentioned that her husband suffered from an illness during the relevant time period, she requested that the court admit his hospitalization records so that "the jury can take into consideration ... her focus and attention not necessarily being directed to the[ ] business." (R. 120, Trial Tr. at 11.) The court excluded the records as irrelevant.

2. Moreover, the defendants pointed the finger at a non-defendant co-manager, Amanda Evans, because many witnesses tied her to the fraud. During closing arguments, Kevin's attorney asked the jury rhetorically, "Why did we not hear from [Evans]?" (R. 121, Trial Tr. at 47.) The prosecutor rebutted by questioning "why *they* didn't call Amanda Evans." (*Id.*

at 61–62 (emphasis added).) "Maybe," the prosecutor continued, "because Amanda Evans knew where all the bodies were buried and they wouldn't have liked the answers she was going to give you." (*Id.* at 62.)

The jury found the Johnsons guilty as charged. Sara then moved for a new trial, arguing that many of the prosecutor's comments constituted misconduct. The court denied her motion, finding that no comment reflected both impropriety and flagrancy.

The district court sentenced Kevin to 48 months' imprisonment, Sara to 36 months, and ordered the defendants to pay restitution in the amount shown on the federal investigator's chart, $315,470, without placing the issue before the jury.

This appeal followed.

II.

A. Kevin's Motion to Continue His Trial

Kevin first argues that the district court abused its discretion in denying his motion to postpone the start of trial to allow him to seek new counsel. The trial judge enjoys "broad discretion" in deciding not to delay trial when a defendant requests a change of an attorney. *See Morris v. Slappy*, 461 U.S. 1, 11–12, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983) ("[O]nly an unreasoning and 'arbitrary insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel."). In *United States v. Mack*, 258 F.3d 548 (6th Cir.2001), we identified the relevant considerations that guide our review of the issue:

> [W]e generally must consider (1) the timeliness of the motion, (2) the adequacy of the court's inquiry into the matter, (3) the extent of the conflict between the attorney and client and whether it was so great that it resulted in a total lack of communication preventing an adequate defense, and (4) the balancing of these factors with the public's interest in the prompt and efficient administration of justice.

Id. at 556. Assessing these factors, each weighs in favor of upholding the court's exercise of its discretion to deny the motion.

First, Kevin waited until the start of voir dire to request a change of lawyers, and we find motions untimely under such circumstances. *See United States v. Vasquez*, 560 F.3d 461, 467 (6th Cir.2009) (request made a week prior to the original trial date and again two weeks before the rescheduled trial date); *United States v. Chambers*, 441 F.3d 438, 447 (6th Cir.2006) (request made one and a half months before trial). Kevin counters that the day of voir dire was the first reasonable opportunity after the government disclosed, just 72 hours earlier, "witnesses and the Jencks Act material." But he fails to explain what information in those materials ignited a sudden disagreement with his attorney.

3. Second, the district court thoroughly questioned both Kevin and his attorney about the alleged conflict between them. (*See* R. 169, Trial Tr. at 4–21.) Kevin thus "had ample opportunity to discuss in detail his complaints regarding [his attorney] and to respond to

[the attorney]'s representations regarding their relationship." *See Vasquez*, 560 F.3d at 467.

Third, nothing in the record reflects that the conflict could "result in a total lack of communication between attorney and client, preventing an adequate defense." *See United States v. Mooneyham*, 473 F.3d 280, 292 (6th Cir.2007). When asked to articulate his conflict with counsel, Kevin offered only vague complaints that, for example, "nothing has been investigated" and the attorney "didn't do what he's supposed to do." (R. 169, Trial Tr. at 9–10.) *See United States v. Jennings*, 83 F.3d 145, 149 (6th Cir.1996) (noting that "some dissatisfaction with counsel" is not enough to sustain motion). And though counsel expressed a general concern that the case was "not set ... up properly" and "under-funded," he assured the court that he was "prepared to go forward."

Fourth, "the public's interest in the prompt and efficient administration of justice" supports the court's decision. "When the granting of the defendant's request would almost certainly necessitate a last-minute continuance, the trial judge's actions are entitled to extraordinary deference." *Vasquez*, 560 F.3d at 461 (internal quotation marks and brackets omitted). Prior to the time Kevin moved to replace counsel, an entire jury venire traveled to Grand Rapids for selection, and the government incurred considerable costs to transport witnesses to the area. Under these circumstances, we defer to the district court's decision to deny a continuance.

B. Admissibility of Sara's Husband's Medical Records

Next, Sara argues that the district court abused its discretion in excluding her husband's medical records because they supported her defense of being distracted from work during the relevant time frame. "Evidence is relevant if ... (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed.R.Evid. 401. "If a district court incorrectly excludes evidence, we will not reverse unless the error affected the defendant's 'substantial rights,' Fed.R.Crim.P. 52(a), asking whether it is 'more probable than not that the error materially affected the verdict,' " *United States v. Dimora*, 750 F.3d 619, 628 (6th Cir.2014) (quoting *United States v. Davis*, 577 F.3d 660, 670 (6th Cir.2009)).

Even if the district court erred in excluding the records that showed the "number of [her husband's] hospitalizations," the jury heard ample testimony that Sara attended work "pretty much every day" and that she "[d]id [not] seem confused or distracted" at the office. (R. 119, Trial Tr. (Heddens) at 12; R. 170, Trial Tr. (Husband) at 168–69.) Witnesses testified that she "ran a lot of the business" (R. 170, Trial Tr. (Boak) at 7), often threatening workers to participate in the scheme (*see, e.g.*, R. 170, Trial Tr. (Husband) at 175). Any error therefore did not prejudice Sara.

C. Prosecutorial Misconduct

4. The Johnsons together argue that various comments made by the prosecution violated due process, warranting the court's declaring a mistrial.

Sara also contends that the court abused its discretion in denying her new-trial motion premised on prejudicial comments. "To prevail, [the defendants] must show that the prosecutor's remarks were not just improper but that they were 'flagrant.' " *Bedford v. Collins*, 567 F.3d 225, 233 (6th Cir.2009) (quoting *United States v. Carson*, 560 F.3d 566, 574 (6th Cir.2009)). Flagrancy turns on "(1) whether the comment was likely to mislead the jury or otherwise prejudice the defendant; (2) whether it was an isolated occurrence or part of an extensive pattern; (3) whether it was made deliberately or by accident and (4) whether the prosecution's other evidence was strong." *Bedford*, 567 F.3d at 233. Though the Johnsons provide a litany of allegedly improper and flagrant prosecutorial comments, we distill them into four categories, none of which requires a new trial.

1. Comments conflating the defendants. Kevin and Sara first argue that various prosecutor comments "lump[ed] the two defendants together to paint the picture that the evidence offered was against both of them." But much of the evidence *was* against both of them, and neither defendant points to anything in the record that actually was improper. For example, the prosecutor's closing comment that "[t]he two of them were running this business" (R. 121, Trial Tr. at 66) comports with evidence that Kevin owned the company and Sara ran much of the business. Kevin cites a remark that incorrectly tied Sara to Kevin's lie to the investigator, but the prosecutor promptly corrected his mistake by saying, "I'll leave [Sara] out of that one." (R. 121, Trial Tr. at 64.)

2. Comment regarding Amanda Evans. The Johnsons next argue that the prosecutor's rebuttal comment about Evans—noting the possibility that the Johnsons did not call Evans because she would have offered unfavorable testimony—shifted the burden of proof to the defendants. But the prosecutor never suggested that the burden of proof belonged to the Johnsons and, instead, merely rebutted a similar comment made by Kevin's attorney. When a defendant "implie[s] at closing that the government failed to call a witness because the evidence would be favorable to the defendant," the prosecutor may properly comment that the "defense [too] could have called the witness if desired." *United States v. Newton*, 389 F.3d 631, 638 (6th Cir.2004) (vacated on other grounds); *see also United States v. Henry*, 545 F.3d 367, 381 (6th Cir.2008) ("[I]f the prosecutor's remarks were 'invited,' and did no more than respond substantially in order to 'right the scale,' such comments would not warrant reversing a conviction."). Kevin's counsel insinuated in his closing argument that the government failed to call Evans because her testimony would undermine its case.[1] (R.

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[1] Sara argues that the government's comment prejudiced her more than Kevin because it was *Kevin's attorney* who insinuated that Evans would testify against the government. But because Kevin's attorney did not limit his comment to Kevin specifically, the government's rebuttal affected both defendants equally. Similarly, Kevin contends that the comment prejudiced him more because the prosecutor commented that Evans was "under ... defense subpoena" even though only *Sara* issued the subpoena. This comment lacked relevance, however, because the key point of the government's contention was that neither defendant called Evans—not that defendants subpoenaed Evans.

121, Trial Tr. at 48.) So the prosecutor's rebutting suggestion "was ... fair comment designed to meet the defense counsel's argument." *United States v. Clark*, 982 F.2d 965, 969 (6th Cir.1993).[2]

5. Kevin and Sara also insist that the prosecutor "bolstered" Evans's hypothetical testimony and implied that the prosecutor bore specialized knowledge that Evans would testify in favor of the government. But the prosecutor raised only the common-sense notion that "[m]aybe" Evans would testify unfavorably. (R. 121, Trial Tr. at 62.)

Even if we were to consider the prosecutor's comment improper, it prejudiced neither of the defendants given the overwhelming evidence against them. Several witnesses offered personal knowledge of Kevin and Sara participating in the scheme—that they placed employees on unemployment, threatened them into coming to work anyway, and taught employees how to lie to the U IA. No evidence suggested that Evans played an overriding role.

3. Comment regarding defense counsel's tactics. In his closing rebuttal argument, the prosecutor commented on defense counsels' aggressive cross-examination technique, calling it "the same thing"

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[2] Kevin makes a similar argument regarding a prosecutor's comment that Kevin could have played the end of a tape recording that formed the basis for his false-statement conviction. (R. 121, Trial Tr. at 63–64.) Kevin's attorney invited this comment, too, by saying to the jury, "Why did we not hear the rest of the tape?" and thus insinuated that the end of the tape would hurt the government's case. (*Id.* at 47.)

as the "threat[s]" the employees faced from Kevin and Sara at LTLC.[3] Citing no authority, the defendants interpret this comment as "suggesting it was trial counsel themselves who had been engaged with the defendants in some kind of protective scheme." The prosecutor merely drew an analogy to Kevin and Sara's conduct, however, and the comment falls within its " 'wide latitude' [permitted] during closing argument to respond to the defense's strategies, evidence and arguments." *Bedford*, 567 F.3d at 233 (finding no impropriety in comment that defense attorney tried to "confuse" the jury by "fill[ing] the courtroom with ... smoke" (citations omitted)).

4. Comment that the defendants abused a "sacred trust." The final challenged comment involves a prosecutor's remark that "[u]nemployment is a sacred trust" and that the "two defendants abused that trust for their own greed." (R. 121, Trial Tr. at 71.) Case law makes clear that "[n]othing prevents the government from appealing to the jurors' sense of justice." *Bedford*, 567 F.3d at 234. Though the defendants analogize to a case where the prosecutor suggested that a conviction would maintain national security during World War II,

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[3] Sara also quotes the prosecutor's comments that Kevin's attorney "basically ... called [one witness] stupid" and that Sara's attorney "called [another witness] a crack-head over and over again." She offers no separate argument, however, that these fleeting comments deprived her of a fair trial. Moreover, though she complains that the prosecutor said she "seems to have been trying to evade paying her taxes, she develops no argument that this comment mischaracterized the evidence or prejudiced her in any way.

see Viereck v. United States, 318 U.S. 236, 247–48, 63 S.Ct. 561, 87 L.Ed. 734 (1943), this case reflects a more innocuous appeal to "send a message," *see United States v. Wiedyk*, 71 F.3d 602, 610–11 (6th Cir.1995) (finding that "send a message" remarks do not rise to the level of denying a fair trial); *see also Bedford*, 567 F.3d at 234 (finding no impropriety in prosecutor's comment that each juror could say, "I did [the victim] justice").

D. Jury Instruction

The Johnsons' penultimate contention concerns the court's failure to issue a curative instruction regarding the Evans aspect of the prosecutor's comments. During jury deliberations, the judge gathered the parties to propose a curative instruction because he "became a bit concerned" about the Evans comment. (R. 122, Trial Tr. at 4.) The judge's proposal would have told the jury that (1) "the government bears the burden of proving guilt beyond a reasonable doubt," (2) the jury "must make [its] decisions based only on the evidence ... heard in this courtroom," and (3) the jury "may not engage in speculation as to what Ms. Evans may have said had she been called as a witness." (R. 97–2, Proposed Jury Instruction.) Kevin's attorney wanted the instruction, but Sara's attorney disagreed because "the instructions that the Court gave previously were quite clear as is." The judge agreed with Sara's attorney and offered no curing instruction.

6. Refusal to deliver a proposed jury instruction warrants reversal only if it is "not substantially covered by the charge actually delivered to the jury." *United States v. Carson*, 560 F.3d 566, 578 (6th

Cir.2009). Here, the judge told that jury that (1) "It is up to the government to prove that [the defendants] are guilty, and this burden stays on the government from start to finish," (2) "the lawyers' statements and arguments are not evidence," and (3) "Do not speculate about what a witness might have said...." (R. 121, Trial Tr. at 7–8.) The proposal covered no new ground, and the district court thus committed no error in not delivering it.

E. Restitution

Last, the Johnsons contend that the district court violated the Sixth Amendment by determining the amount of restitution on its own without presenting the issue to the jury. *See Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Kevin and Sara acknowledge that their argument directly contradicts our holding in *United States v. Sosebee*, 419 F.3d 451, 461–62 (6th Cir.2005), that restitution falls outside the bounds of the Sixth Amendment.

The Johnsons instead argue that *Southern Union Co. v. United States*, ____ U.S. ____, 132 S.Ct. 2344, 183 L.Ed.2d 318 (2012)—which held that a jury must determine the amount of a fine to the extent that the amount exceeds a statutory maximum—calls *Sosebee* into question. We recently rejected an identical contention in *United States v. Jarjis*, 551 F. App'x 261, 261–62 (6th Cir.2014) (per curiam) (citing cases from three other circuits), "because restitution has no statutory maximum and because the Mandatory Victim Restitution Act mandates that judges determine the amount."

Kevin and Sara similarly cite *Alleyne v. United States*, ____ U.S. ____, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). But that case, which held that facts *increasing the statutory minimum* sentence of imprisonment must be presented to a jury, lacks relevance for reasons similar to those noted in *Jarjis*. The district court thus committed no error in calculating restitution.[4]

III.

We AFFIRM.

RICE, District Judge, concurring.

I concur fully with the conclusions reached by the majority. I write separately only to discuss the comments made by the prosecutor. Like the majority, I ultimately conclude that his comments did not violate either defendant's right to a fair trial. I do, however, believe that several of them were improper, even if they were not flagrant enough to constitute prosecutorial misconduct. My discussion is confined to the following four categories of comments: 1) the prosecutor's comments regarding the absence of testimony from Amanda Evans and his invocation of the invited reply doctrine; 2) the prosecutor's

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[4] Sara also attempts to extend *Apprendi* beyond statutory penalties to *guideline calculations*, arguing that the jury should have determined the loss amount attributable to her and whether a sentencing enhancement for managing a criminal scheme applied. But she again cites no authority for this novel proposition, and case law clearly dictates that *Apprendi* applies only to statutory penalties. *See, e.g. United States v. Johnson*, 732 F.3d 577, 584 (6th Cir.2013) ("*Alleyne* did not extend *Apprendi* to facts that do not increase the prescribed statutory penalties.").

comments about the tactics of defense counsel; 3) the prosecutor's reference to unemployment insurance as "a sacred trust"; and 4) the prosecutor's insinuation that Sara had evaded paying her taxes.

The Sixth Circuit applies a two-step test to claims of prosecutorial misconduct. *United States v. Carson*, 560 F.3d 566, 574 (6th Cir.2009) (citing *United States v. Gardiner*, 463 F.3d 445, 459 (6th Cir.2006)). First, the court determines if the prosecutor's statements were "improper." *Id.* Second, if the statements were improper, a determination must be made as to "whether the remarks were flagrant and thus warrant reversal." *Id.*

7.*1. Comments regarding Amanda Evans and the invocation of the "invited response" doctrine.* "Under the 'invited response' rule, a 'reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo.' " *United States v. Henry*, 545 F.3d 367 (6th Cir.2008) (quoting *United States v. Young*, 470 U.S. 1, 11–12, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)). If the defendant "invites" the prosecutor's remarks, which only "respond substantially in order to 'right the scale,' such comments would not warrant reversing a conviction." *Id.* Thus, a prosecutor's "legitimate reply to defense assertions that the government hid evidence from the jury" would not constitute improper burden shifting. *United States v. Newton*, 389 F.3d 631, 638 (6th Cir.2004), *rev'd on other grounds by Newton v. United States*, 546 U.S. 803, 126 S.Ct. 280, 163 L.Ed.2d 35 (2005) (rejecting defendant's argument that the "prosecutor improperly shifted the burden during

closing argument by arguing to the jury that [defendant] could have played an audiotape that the government chose not to play for the jury" where the prosecutor's argument "was made to rebut defense insinuations that the government intentionally kept evidence away from the jury"); *see also United States v. Clark*, 982 F.2d 965 (6th Cir.1993) (holding that no improper burden shifting occurred when prosecutor remarked upon defendant's failure to call a witness in response to defense counsel's assertion that the witness would not have corroborated testimony of another government witness).

J. Nicholas Bostic, Kevin's attorney, made repeated references to Amanda Evans during his closing arguments. The first thing that Bostic said after greeting the jury was "reasonable doubt in this case has a name and that name is Amanda Evans." On several occasions, Bostic asked "Why did we not hear from Amanda?" Bostic also stated:

> The reasonable doubt in this case is Amanda Evans. They want you to do the heavy lifting for them. They want you to make logical leaps that are unsupported by the evidence or any inferences from it. They have simply failed to prove their case. They have left open the entire question of who is Amanda Evans, what did she do, *where is she and why is she not here.* (emphasis added)

"In every criminal case, the mosaic of evidence that comprises the record before a jury includes both the evidence *and* the lack of evidence on material matters. Indeed, it is the absence of evidence upon such matters

that may provide the reasonable doubt that moves a jury to acquit." *United States v. Poindexter*, 942 F.2d 354, 360 (6th Cir.1991) (reversing trial court's decision to prevent defense counsel from commenting on prosecution's failure to introduce fingerprint test results that did not reveal defendant's prints on contraband). In this instance, Kevin's counsel cannot be faulted for attempting to leverage the absence of testimony from a person that was repeatedly referred to by Defendants' testifying employees into a jury finding of reasonable doubt. However, his remarks also invited the jury to speculate on the Government's motive for not calling Amanda Evans as a witness, and to infer that her testimony would have been unfavorable to the Government. This "opening salvo" justified some response by the Government. *United States v. Young*, 470 U.S. 1, 12, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985).

8. Sara's counsel, Richard Stroba, also mentioned Amanda Evans, but he did not launch a comparable "opening salvo." Rather, his comments were only directed towards testimony that the jury had heard or evidence in the record:

> ... the only evidence in this record is that [exhibits] H and I weren't signed by Sara Johnson; they were signed by somebody else. We don't know who. I would suggest the reasonable inference, based upon the testimony you heard, is Amanda Evans or perhaps Kevin Johnson, but not Sara.

> Ms. Heddens testified that from time to time she would put things in these binders. I suspect, too, that Amanda Evans put things in the binders.
>
> Every other employee who testified essentially similarly, and I think that you can find this to be true, that Amanda Evans was the one who filled out the UI forms and filed them, took their information, inputted it into the computer, sent it off and brought them back their PIN number and told them what to do, not Sara Johnson.

In contrast to Bostic's remarks, Stroba's remarks did not invite a comparable response from the Government. Rather, his references to Evans all attempted to cast reasonable doubt on his client's participation in the scheme. Stroba never mentioned Evan's absence as a witness, much less associated it with the prosecution's strategy. Thus, although the Government may have been warranted in responding to Bostic's statements, it was not proper for the prosecutor to state that he was responding to what *both* Defendants' attorneys had said when he stated the following in his rebuttal:

> First and foremost, you heard both defense counsel repeatedly say, "Where is Amanda Evans? Why haven't you heard from her?" And this is what we call the Invited Reply Doctrine. This is where I get to tell you she was right out there under defense subpoena and they didn't call her. So ask yourselves why they didn't call Amanda Evans. Maybe the same reason Kevin and Sara didn't fire Amanda Evans even two years after she supposedly did everything and

> got them in all this trouble, because Amanda Evans knew where all the bodies were buried and they wouldn't have liked the answers she was going to give you.

It was improper for the prosecutor to invoke the invited response doctrine with regards to comments made by Sara's counsel. It was only Bostic, Kevin's attorney, who made comments suggesting that the Government made a strategic decision to not call Amanda Evans as a witness. Thus, it was also improper for the prosecutor to assert that the "defense" had subpoenaed Evans, when only Sara had done so.

2. Comments regarding the conduct of Defendants' attorneys.

On rebuttal, the prosecutor also stated:

> Now, both defense attorneys have been telling you that you shouldn't believe any of these workers, that they're all suspect. You know what? You're hearing the same thing in the courtroom that was happening to these workers the whole time they were there: You don't play along, you get cut off, you get no paycheck, you get no job. And what did you hear these people say? "Nobody will believe you because we have good lawyers." And you saw that threat playing out right in front of you. Mr. Bostic, you saw him cross-examining Angela Heddens who got up here and seemed pretty upset to basically be called stupid. Mr. Bostic stood up here and said, "Can you read the English language?" That's the

kind of treatment she could expect and why she probably kept her mouth shut.

9. You heard Mr. Stroba saying to Mike Husband, who admitted to you that he used to use drugs, that he had a criminal history, that's why he couldn't find another job, and Mr. Stroba called him a crack-head over and over again. "Were you using crack that day, the day before? Are you a crack-head now?" That's the treatment he could expect.

It is true that "[t]he prosecution necessarily has 'wide latitude' during closing argument to respond to the defense's strategies, evidence and arguments." *Bedford v. Collins*, 567 F.3d 225, 234 (6th Cir.2009) (citing *United States v. Henry*, 545 F.3d 367, 377 (6th Cir.2008)). But such latitude does not allow the prosecutor to equate the criminal conduct of the Defendants with their attorneys' cross-examination of the witnesses. In this instance, the association carried particular force because part of the Government's theory of the case was that the witness-employees were vulnerable people that Kevin and Sara had preyed upon in order to carry out their fraud scheme. The prosecutor even referred to the former testifying employees as "victims" of Defendants' fraud ("You've heard from all those people and the ways in which they were victimized"). It was improper for the prosecutor to suggest that the witnesses' treatment by defense counsel during cross-examination fulfilled a threat that Sara made to them during the execution of the fraud. The prosecutor's rhetoric risked undermining the jurors' perception of the integrity of the cross-examination process by blurring the distinction

between the conduct that Kevin and Sara were accused of with the defense tactics of their attorneys.

3. The Government's appeal to civic duty. Defendants argue that the following comments of the prosecutor amount to an improper appeal to civic duty:

> You've heard from all those people and the ways in which they were victimized, but let me suggest to you there's another victim, too. The Unemployment Insurance Agency. All that money is the people's money, it's the taxpayers' money, and I'm not suggesting to you that you should feel bad for the Unemployment Insurance Agency because it's some big government program. Unemployment is more than that. Unemployment is all of us caring for each other, reaching a hand out to a neighbor who's down on their luck and helping them up, helping out a worker who needs to get back up on their feet. Some of us in this room have been there before. Many of us will be there again or people we love will be there again. Unemployment is a sacred trust.

"Nothing prevents the government from appealing to the jurors' sense of justice" during closing arguments. *Bedford*, 567 F.3d at 234 (citing *Coe v. Bell*, 161 F.3d 320, 351 (6th Cir.1998)). Certain appeals are patently improper, however, such as encouraging jurors to identify with crime victims. *Johnson v. Bell*, 525 F.3d 466 (6th Cir.2008). "The prosecutor must avoid 'undignified and intemperate' arguments and arguments that may contain 'improper insinuations and assertions calculated to mislead the jury' by inciting

passion and prejudice." *United States v. Lawrence*, 735 F.3d 385, 432 (6th Cir.2013) (quoting *United States v. Solivan*, 937 F.2d 1146, 1150 (6th Cir.1991)).

10. Here, the prosecutor's remarks walk a fine line between appealing to the jurors' sense of justice and identifying with the victim. By describing the Unemployment Insurance Agency, the victim of the Johnson's fraud, as a "sacred trust" comprised of "all of us caring for each other," and that has helped "[s]ome of us in this room," the prosecutor's remarks appear designed to align the jury, as members of society, with the victim. Nevertheless, the remarks were not calculated to mislead, nor do they seem likely to have resulted in juror passion that might have overcome the ability to make a reasoned determination of Kevin and Sara's guilt. While the prosecutor's remarks certainly gave the jury reason to connect the effects of their crimes to society at large, the remarks were not an improper appeal to civic duty.

4. Comment about Sara not paying taxes. Sara argues that the following statement of the prosecutor was improper:

> You know why she was getting paid under the table and not on the official payroll. When you're on the official payroll, the IRS gets a W–2. So the fact she seems to have been trying to evade paying her taxes doesn't make her innocent, does it?

These remarks were improper. Sara was on trial for mail fraud, not the unrelated offense of tax evasion. Furthermore, the prosecutor's statement suggested

that her alleged failure to pay taxes was somehow probative of her guilt for the offense of mail fraud, and its strength relied upon a suggestion of Sara's bad character. "A fundamental rule of evidence is that a defendant's 'bad character' cannot be used to argue that the defendant committed the crime for which he is being tried, or had the propensity to commit that crime." *Washington v. Hofbauer*, 228 F.3d 689, 699 (6th Cir.2000) (citing Fed.R.Evid. 404(a)); *see also Hodge v. Hurley*, 426 F.3d 368 (6th Cir.2005) (finding prosecutor's suggestion improper that child rape defendant "regularly drank alcohol illegally by passing himself off as being over twenty-one years of age—a claim that in no way relates to the crime charged" because it emphasized the defendant's "bad character"). The prosecutor's remarks suggested that Sara was a tax evader and was therefore not "innocent." The suggestion was wholly improper.

5. *No comment was sufficiently flagrant to warrant a new trial.* Even if several of the prosecutor's remarks were improper, however, they were not sufficiently flagrant to grant either defendant a new trial when considered within the context of the trial as a whole.

The following four factors are used to evaluate flagrancy: "(1) whether the conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the conduct or remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; and (4) whether the evidence against the defendant was strong." *United States v. Carson*, 560 F.3d 566 (6th Cir.2009) (quoting *United States v. Carter*, 236 F.3d 777, 783 (6th

Cir.2001). Considering the first factor, the prosecutor's remarks may have misled the jury as to which of the defense attorneys' statements warranted the invited reply. As discussed, only Kevin's attorney made comments that invited a reply. However, none of the other improper comments could have misled the jury in their consideration of the actual evidence the jurors considered.

11. The comments were "isolated," which weighs against a finding of flagrancy under the second factor, because the prosecutor made them only in the rebuttal to Bostic's closing argument. The remarks were clearly "deliberate," and not "accidentally made," as the prosecutor was directly addressing Bostic's remarks. This weighs in favor of flagrancy under the third factor.

The fourth factor, which asks "whether the evidence against the defendant was strong," decidedly does not weigh in the Defendants' favor. *Id.* The former employees testified that Sara had given them instructions on how to fill out unemployment insurance paperwork and operate its phone system, threatened the employees that they would go to jail if they reported the scheme, and even demanded kickbacks from the checks. The evidence also showed that Sara contacted the unemployment agency and the payroll companies and kept two sets of binders in her office that evidenced the fraud. Kevin went to the unemployment office in person to pose as an employee and applied for benefits himself, in addition to taking an unemployment check from an incarcerated employee's mailbox. The Government had strong, compelling evidence of Sara and Kevin's guilt. In short, although

the prosecutor made several improper comments during the trial, they were not flagrant enough to warrant a new trial.

As the foregoing discussion indicates, my only difference with the majority concerns the propriety of several of the prosecutor's comments. None of them amounted to prosecutorial misconduct, however. In that conclusion and in all others reached in the majority's opinion, I wholly concur.

Appendix B

United States District Court

Western District of Michigan

UNITED STATES OF AMERICA	JUDGMENT IN A CRIMINAL CASE
-vs-	
SARA JOHNSON	Case Number: 1:11 -CR 306-02
	USM Number 6218-040
	Richard D Stroba Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to _____.

☐ pleaded nolo contendere to Count(s) , which was accepted by the court.

☒ was found guilty on Count 1 of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offense(s):

Title & Section	Offense Ended	Count No.
18 U.S.C. § 1341	May 6, 2010	One

Nature of Offense

Mail Fraud

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence
March 26, 2013

DATED: March 26, 2013

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **thirty-six (36) months**.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The Defendant shall surrender to the United States Marshal for this district:

- ☐ at _____ on _____.
- ☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before 2: 00 P. M. on _____.
- ☒ notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By:_____
Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **two (2) years.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☒ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer.

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U S C § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration

agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.

☐ The defendant shall participate in an approved program for domestic violence.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;
2. the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training or other acceptable reasons;
6. the defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment;

7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. the defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant s compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall provide the probation officer with access to any requested financial information.

2. The defendant shall not apply for, nor enter into, any loan or other credit transaction without the approval of the probation officer.

3. The defendant shall timely file and pay income taxes to the IRS.

4. The defendant shall execute an IRS Form 8821 authorizing the disclosure of tax return information to the probation officer.

5. The defendant shall spend five (5) months in home confinement with electronic tether with time to leave her abode for doctor's appointments, church, and other matters approved in advance by her Probation Officer. She shall pay the cost of monitoring.

CRIMINAL MONETARY PENALTIES[1]

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on the following pages.

Assessment	Fine	Restitution
$100.00	waived	**$315,470.00**

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

☒ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U S C § 3664(i), all nonfederal victims must be paid before the United States is paid.

---

[1] Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

Name of Payee	Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Michigan Unemployment Insurance Agency Benefit OP Control PO Box 9045 Detroit, Ml 48202	$315,470	$315,470	

☐ Restitution amount ordered pursuant to plea agreement: $

☐ The defendant must pay interest on restitution and/or a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options in the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U S C § 3612(g).

☒ The Court determined that the defendant does not have the ability to pay interest and it is ordered that:

- ☐ the interest requirement is waived for the fine.
- ☒ the interest requirement is waived for the restitution.
- ☐ the interest requirement for the fine is modified as follows:
- ☐ the interest requirement for the restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay payment of the total criminal monetary penalties is due as follows

A ☒ Lump sum payment of **$100.00** due immediately, balance due

☐ not later than _____, or

☒ in accordance with ☐ C, ☒ D, ☐ E, and ☒ F, below, or

B ☐ Payment to begin immediately (may be combined with C, D, or F, below), or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $___ _____ over a period of _____ (e.g., months or years), to commence _____ _____ (e.g., 30 or 60 days) after the date of this judgment, or

D ☒ Remaining restitution to be paid in monthly installments of $500 00 during the term of supervision, and

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time, or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

The defendant shall apply all monies received from income tax refunds, lottery winnings, judgments, and/or any other anticipated or unexpected financial gains to any outstanding court-ordered financial obligations.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court, 399 Federal Building, 110 Michigan N W , Grand Rapids, Ml 49503, unless otherwise directed by the court, the probation officer, or the United States Attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☒ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Joint and Several Amount, and corresponding payee, if appropriate:

Kevin Romando Johnson, 1:11:CR:306-01; $315,470.00

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Appendix C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

_____

UNITED STATES OF AMERICA,

Plaintiff,

v. File No. 1:11-CR-306

SARA JOHNSON,

Defendant.
_____/

Sentencing

Before

THE HONORABLE GORDON J. QUIST
United States District Judge
March 26, 2013

APPEARANCES

NILS R. KESSLER
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Attorneys for Defendant

Digital audio recording transcribed by:

Kevin W. Gaugier, CRS-3065
U.S. District Court Reporter

Grand Rapids, Michigan

March 26, 2013

4:01 p.m.

P R O C E E D I N G S

THE COURT: Okay. This is the case of *United States of America against Sara Johnson*, 1:11-CR-306-02. Docket number 1:11-CR-306-02. I guess I said that. This is the time set for consideration of any factual or legal dispute arising out of the presentence report and the imposition of sentence. Can I have the appearance of counsel, please?

MR. KESSLER: Yes, Your Honor. Nils Kessler for the United States.

THE COURT: Thank you.

MR. STROBA: Good afternoon, Your Honor. Richard Stroba on behalf of the defendant, Ms. Johnson. She's also present. Along with me is Ms. Clare Freeman from our office.

Mr. Kessler, has the government received a copy of the Presentence Investigation Report?

MR. KESSLER: We have, Your Honor.

THE COURT: And does the government have any objection to anything in there?

MR. KESSLER: We do not.

THE COURT: All right. Mr. Stroba — you may remain seated, Mr. Stroba, when we go through this. Have you received a copy of the report, sir?

MR. STROBA: We have, Your Honor.

THE COURT: And have you gone over it with your client, Ms. Johnson?

MR. STROBA: We have.

THE COURT: Is that correct, Ms. Johnson?

DEFENDANT JOHNSON: Yes.

THE COURT: All right. Then the report will be made part of the record. Does the defendant have any objection to anything in the report, Mr. Stroba?

MR. STROBA: We do, Your Honor.

THE COURT: Why don't you stand up here and tell me.

MR. STROBA: Ms. Freeman is going to address those for us.

THE COURT: Okay. I've read them, Ms. Freeman, so you can get to it.

MS. FREEMAN: Of course, Your Honor. I won't belabor the points. I think our brief set out most of the material.

As we've said, we would object to ordering restitution without a jury finding on that account as the Sixth Circuit has held that restitution is punitive. We have the *Alleyne* cert. petition pending, and I think that regardless of *Alleyne*, the *Southern Union* decision by the Supreme Court in 2012 makes

reviewing the *Sosebee* decision in the Sixth Circuit from 2005 necessary here. And I would argue that given the trend and the cases from the —

THE COURT: What's the current law? That's what I'm bound by, Ms. Freeman.

MS. FREEMAN: And I recognize that, Your Honor. I think *Sosebee* from 2005 is the closest we have to current law on it, but I would say that the *Southern Union* decision by the Sixth Circuit has put the *Sosebee* holding in doubt. I don't think that we can rely on that in the same way we could have pre-2012. I think post-*Southern Union* this situation is unsettled. I think that the dicta in *Southern Union* strongly suggests here that a restitution order like this would require a jury finding. The *Southern Union* court looked at a long history of the common law in this matter.

THE COURT: Has any court anywhere bought your position?

MS. FREEMAN: Pardon?

THE COURT: Has any court anywhere bought your position?

MS FREEMAN: No, Your Honor. As I noted in our brief, I think that the *Wolfe* and the Fourth Circuit decision of *Day* both address the situation post-*Southern Union* and have rejected it. But as I pointed out in that brief, the Seventh Circuit has held that restitution is not punitive, which would clearly distinguish our situation where the Sixth Circuit held that it is punitive.

THE COURT: All right. Next?

MS. FREEMAN: And then I would address the issue of joint and several liability. I don't think that Ms. Johnson should be jointly and severally liable for these losses here. Under 3664(h) this Court has the power to apportion the restitution order in this case, and the Court may consider the economic circumstances of Ms. Johnson and her relative culpability. And I think that both of those factors militate in favor of an order that would not include joint and several liability and that would militate in favor of an order that's significantly lower than that of co-defendant Kevin Johnson here, significantly lower than the 315,000-odd dollars suggested in the presentence report, which would then bring us into the sub-issue that she is not the direct and proximate cause of the losses caused by Amanda Evans and Kevin Johnson in this case, and so she shouldn't be held responsible for their potential restitution amounts at all.

Basically that wrongdoing would have happened regardless of Ms. Johnson's role in these allegations. I mean, those two I think the testimony at trial is quite clear were, for lack of a more refined way to put it, up to their ears in this and they were going to proceed on that course with or without Ms. Johnston's assistance here, and so she's definitely not the proximate cause of any injury the UIA has suffered in regard to those two participants.

THE COURT: Anything else?

MS. FREEMAN: Not on the restitution issue. I think that covers our restitution arguments.

* * * * *

[14] THE COURT: All right.

MS. FREEMAN: Thank you, Your Honor.

THE COURT: Thank you.

Regarding the argument on restitution, I'm going to overrule that objection. It could be that the Supreme Court might hold at some point in time, some justices seem to be going that way, that just about every decision has to be made by a jury if there's a jury trial. But right now I think the law is quite clear and certainly the practice is quite clear everywhere you go that restitution is a matter for the Court to determine and not for a jury. If that changes, fine with me.

Regarding proximate cause, I'll handle that when I go to Ms. Johnson's role, and it will be handled a the same time as I handle joint and several because I think joint and several liability is totally appropriate here.

Regarding the charts, I think the charts — the parties were here for Kevin Johnson's sentencing, and the charts show the out-of-pocket for the Unemployment Insurance Agency and come up with a specific number, the $315,740, and I think that would be the appropriate amount for restitution in this particular case.

* * * * *

Appendix D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, 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, and to be informed of the nature and cause of the accusation . . . .

The Mandatory Victims Restitution Act, 18 U.S.C. § 3663A, provides in relevant part:

> (a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense . . . .
>
> (c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense—
>
> . . .
>
> (B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

Section 3664 of Title 18 of the United States Code provides, in relevant part:

> (f)(1)(A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.