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In the Wake of Southern Union, Do Juries Need to Determine Criminal Restitution?

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In June, the U.S. Supreme Court declared in *Southern Union v. United States*, 132 S. Ct. 2344 (2012), that the Sixth Amendment of the Constitution prohibits a sentencing judge from making factual findings that cause a criminal fine to be increased beyond the statutory fine maximum, in the absence of necessary facts found in a jury verdict or the defendant's admissions. In *Southern Union*, the court explained that its landmark holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) – which holds that, under the Sixth Amendment, "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" – applies to criminal fines just as it does to imprisonment.

Shortly before the holding in *Southern Union*, we wrote in *The Legal* that a defense victory in that case could affect the parties' respective plea bargaining positions in federal prosecutions of corporations and other white-collar defendants, in the defendants' favor. (See "The 6th Amendment Flexes Its Muscles: Change May Be Coming to Corporations' Federal Sentencing," April 6, 2012.) With the defense victory in *Southern Union* now a reality, and with a majority of the justices continuing to embrace the rule set forth in Apprendi, federal courts are turning to the next potential application of the principles that animated the *Southern Union* holding: criminal restitution.

Southern Union and Application of Apprendi to Restitution

The *Southern Union* case did not mention the issue of restitution, which is subject to the *Apprendi* rule only if it constitutes a "criminal punishment." However, the language of *Southern Union* is expansive and suggests

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that restitution – consistent with previous dicta in *Pasquantino v. United States*, 544 U.S. 349, 365 (2005) – does qualify as a "criminal punishment." "In stating *Apprendi*'s rule," Justice Sonia Sotomayor wrote for the majority in *Southern Union*, "we have never distinguished one form of punishment from another. Instead, our decisions broadly prohibit judicial fact-finding that increases maximum criminal 'sentence[s],' 'penalties,' or 'punishment[s]' — terms that each undeniably embrace fines." In language that also could apply to restitution, Sotomayor further observed that the amount of a fine "is often calculated by reference to particular facts. Sometimes, [the relevant fact is] the amount of the defendant's gain or the victim's loss[.]"

The *Southern Union* court also rejected concerns that the government had raised before when unsuccessfully defending a mandatory federal sentencing regime, and that the government likely will raise again regarding the application of *Apprendi* to restitution: requiring juries to determine the necessary facts will create confusion, potentially require expert testimony, and be impractical because the government will not necessarily know all of the facts that it would like to know by time of trial.

At least one justice has offered clues that he would be inclined to extend *Apprendi* to restitution. During oral argument for a different case, *Dolan v. United States*, 130 S. Ct. 2533 (2010), which involved a court's power to order restitution after a certain statutory deadline, Justice Antonin Scalia remarked, "I think it's bad enough to have the issue of whether this victim suffered $100,000 damages decided by the judge." Later, during the same argument, Scalia peppered government counsel with a series of questions apparently aimed at the ability of courts to determine facts that set the amount of restitution, and relented only after being reminded that the issue was not within the question presented.

Scalia's apparent distaste for judicial fact-finding in support of restitution is perhaps not surprising. He has been in the majority of the *Apprendi* decision and its progeny, and himself authored the key opinion in *Blakely v. Washington*, 542 U.S. 296 (2004). The *Blakely* opinion contains one of the most expansive expressions of the Apprendi rule: "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." For this reason, according to Scalia, "when a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority." This language, quoted in part by the *Southern Union* majority, will be important to the debate regarding restitution, because the government typically argues that restitution is not subject to the *Apprendi* rule because restitution lacks any statutory maximum.

The Seventh and Fourth Circuits Weigh In

The federal courts now have begun to address whether the *Southern Union* holding means that the *Apprendi* rule also applies to criminal restitution.

On December 5, the U.S. Court of Appeals

for the Seventh Circuit issued it decision in *United States v. Wolfe*, 2012 U.S. App. LEXIS 24937 (7th Cir. Dec. 5, 2012), which involved a defendant convicted of an alleged scheme to steal copper who was ordered to pay more than $3 million in restitution. On appeal, he challenged the restitution order on *Apprendi* grounds, arguing that the dollar amount was not supported by the jury's factual findings. The Seventh Circuit rejected the defendant's argument because of longstanding Seventh Circuit precedent holding that restitution is not a "criminal penalty" for the purposes of the Sixth Amendment, not withstanding the Supreme Court's language in Pasquantino and the contrary views of most other federal circuits (including the Third Circuit). Because the *Apprendi* rule applies only to criminal penalties, and because the *Wolfe* court was not prepared to overrule the Seventh Circuit precedent noted above, the *Wolfe* court had no need to decide whether, after *Southern Union*, facts determining the amount of restitution must be proven to a jury beyond a reasonable doubt.

The Fourth Circuit also recently addressed the same issue in *United States v. Day*, 2012 U.S. App. LEXIS 24590 (4th Cir. Nov. 29, 2012). In *Day*, the defendant was convicted of various substantive and conspiracy offenses for his alleged role in a multimillion-dollar scheme to defraud the Department of Defense. Among other penalties, the district court imposed restitution of more than $6 million. The Fourth Circuit, like the Seventh, rejected the defense argument that *Southern Union* required the jury to find facts setting the restitution amount. Unlike the Seventh Circuit, however, the *Day* court did not address the issue of whether restitution represents a criminal penalty. Rather, it held that *Apprendi* – which requires the jury to find facts increasing the defendant's penalty beyond the statutory maximum – does not affect fact-finding relating to restitution because "there is no prescribed statutory maximum in the restitution context." Thus, according to the Fourth Circuit, "the rule of *Apprendi* is simply not implicated to begin with by a trial court's entry of restitution."

Restitution and Southern Union in the Third Circuit

Inevitably, the Third Circuit will address whether *Southern Union* has signaled that restitution is similarly subject to the rule of Apprendi. It will not be writing on an entirely clean slate. In *United States v. Leahy*, 438 F.3d 328 (3d Cir. 2006) (en banc), the defendants challenged the district court's $408,970 restitution order, arguing that the facts underlying the order should have been established by a jury beyond a reasonable doubt. Sitting en banc, the Third Circuit first held that restitution is a criminal, not a civil, penalty under the Sixth Amendment. Thus, and consistent with most federal courts to have addressed this issue, the Third Circuit reached the opposite conclusion of the Seventh Circuit in the recent *Wolfe* case.

However, and similar to the Fourth Circuit in *Day*, the *Leahy* court nonetheless reasoned that a restitution award cannot exceed any "statutory maximum," thereby rendering *Apprendi* inapplicable:

"When a defendant is convicted of certain specified offenses, restitution is authorized as a matter of course 'in the full amount of each victim's losses.' Hence, under a plain reading of the governing statutory framework, the restitution amount authorized by a guilty plea or jury verdict – the full amount of loss – may not be exceeded by a district court's restitution order. … Though post-conviction judicial fact-finding determines the amount of restitution a defendant must pay, a restitution order does not punish a defendant beyond the 'statutory maximum.'"

The continued vitality of this reasoning, in light of *Southern Union* and related pronouncements by the Supreme Court regarding the reach of the *Apprendi* rule, is subject to debate. Indeed, this reasoning was questioned by the government during oral argument in *Southern Union*. When arguing that a defense holding in *Southern Union* would result impermissibly in juries confronting increasingly complex sentencing issues, government counsel apparently referred to *Leahy* and similar decisions when stating that "[one] way in which lower courts have said that restitution isn't swept up by *Apprendi* is to say that it's a rule that has no maximum." However, while attempting to convince the *Southern Union* court not to rule as it did, government counsel continued that, "if one is applying an algebraic understanding of the relevant statutory maximum from the *Blakely* decision, restitution would be hard to justify because the jury verdict does not contain findings about harm to victims."

The reference by government counsel to *Blakely* is appropriate. As noted, that decision states 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." Further, and as government counsel acknowledged, a restitution order often depends on factual findings beyond any facts reflected in a jury verdict or admitted by the defendant: the precise amount of loss to the victim.

Other considerations suggest that *Southern Union* may have altered the landscape regarding restitution. The "alternative" criminal fine provision under 18 U.S.C. §3571(d) also lacks a definitive statutory maximum penalty. Instead, and like restitution, it represents an uncapped punishment that had allowed courts to impose any fine equal to an amount of twice the gross gain to the defendant or gross loss to the victim, based upon the court's own calculations and independent of any fact-finding from a jury. Even before the holding in *Southern Union*, however, other federal circuits already had applied *Apprendi* to Section 3571(d). Further, the Mandatory Victims Restitution Act, or MVRA, 18 U.S.C. §3663A, shares an important trait with the version of the Federal Sentencing Guidelines struck down by the Supreme Court in *United States v. Booker*, 543 U.S. 220 (2005): the MVRA imposes a consequence that is, of course, mandatory, once the sentencing court makes the predicate factual findings leading to the final mandatory consequence.

These considerations and others will figure prominently as this debate unfolds and federal courts determine whether the Supreme Court has altered importantly the federal regime for restitution.

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