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Nos. 03-4490, 03-4542 & 03-4560

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

United States of America,

Appellee,

v.

Paul J. Leahy, Timothy Smith, and Dantone, Inc.

Appellants.

ON APPEAL FROM JUDGMENT IN A CRIMINAL CASE
ENTERED DECEMBER 15, 2003, IN No. 01-260-03 (Joyner, J.)
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUPPLEMENTAL BRIEF OF APPELLANTS REGARDING FORFEITURE AND RESTITUTION

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Appellants Paul J. Leahy, Timothy Smith, and Dantone, Inc. respectfully submit this supplemental brief to address forfeiture and restitution issues.

I. The Supreme Court's Decision in *Booker* Applies to Forfeiture

The language of 18 U.S.C. § 982(a)(2) provides that the district court in imposing sentence "shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as a result of such violation." This mandatory requirement is properly understood as being part of the sentence in a criminal case. Since the appellants declined a jury trial on forfeiture, the issue before the Court is the burden of proof. Neither the applicable statute nor Fed. R. Crim. P. 32.2 outlines the burden of proof. Since the statutory framework can be construed to avoid the constitutional question, the Court may on non-constitutional grounds require proof beyond a reasonable doubt in this criminal forfeiture proceeding. Alternatively, forfeiture is a form of enhanced penalty for a crime.[1] See United States v. Voigt, 89 F.3d 1050, 1082-83 (3d Cir. 1996). Because the facts warranting forfeiture were not

[1] For appellants' prior briefs on this issue, see Joint Supplemental Briefs of Appellants, 8/24/2004 at 47-52, 11/4/2004 at 14-18; letter brief (6/28/2005). The most significant intervening forfeiture case is United States v. Burnette, __ F.3d __, No. 02-1814, 2005 WL 2178817 (1st Cir. Sept. 9, 2005). Burnette, however, has not added meaningfully to the debate, since it declined to decide the issue in light of the facts of that case.

elements of the bank fraud offenses charged, the district court's failure to make findings as to criminal forfeiture violates the Booker[2]/Blakely[3] precepts.

There can be no serious debate that criminal proceeds forfeiture is an aspect of enhanced punishment for a crime, as this Court held in Voigt. Forfeiture – even when expressly civil in nature – "serves, at least in part, to punish the owner." Austin v. United States, 509 U.S. 602, 618 (1993).

When one reaches criminal forfeiture, the Supreme Court has held that in personam criminal forfeiture under RICO is a "form of monetary punishment no different, for Eighth Amendment purposes, from a traditional 'fine.'" Alexander v. United States, 509 U.S. 544, 558 (1993). Without exception, the Supreme Court has "characterized criminal forfeiture as an aspect of punishment imposed following conviction of a substantive criminal offense." Libretti v. United States, 516 U.S. 29, 39 (1995).

The criminal forfeiture in this case occurred under the seldom-used 18 U.S.C. § 982(a)(2). The Supreme Court has already held that a criminal forfeiture under Section 982(a)(1), a sister provision, "constitutes punishment." United States v. Bajakajian, 524 U.S. 321, 328 (1998). "The forfeiture serves no remedial purpose, is designed to punish the offender, and cannot be imposed on innocent

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[2] United States v. Booker, 543 U.S. __, 125 S.Ct. 738 (2005).

[3] Blakely v. Washington, 542 U.S. 296 (2004).

owners." Id. at 332. Criminal forfeiture under Section 982(a)(2) is functionally indistinguishable from that under Section 982(a)(1).

The government's argument to exempt forfeiture from the reach of Booker and Blakely is to fall back on the notion that a maximum fine – complete with a specific dollar figure – normally is specified in the statute of conviction. The government will emphasize that there is no express "statutory maximum" in the forfeiture statute, which is "'open-ended in that all property representing proceeds of illegal activity is subject to forfeiture.'" United States v. Fruchter, 411 F.3d 377, 383 (2d Cir. 2005) (quoting United States v. Messino, 382 F.3d 704, 713 (7th Cir. 2004)). The purported logic is that Blakely and Booker are triggered only where there exists a "previously specified range" of maximum punishment. Fruchter, 411 F.3d at 383.[4] This logic is not viable for several reasons.

First, under non-constitutional law principles, this Court has held that proof beyond a reasonable doubt applies to criminal forfeiture matters. In United States v. Pelullo, 14 F.3d 881 (3d Cir. 1994), this Court held that in RICO "proceeds" forfeitures proof beyond a reasonable doubt is required. There is no way to

[4] As occurred in Fruchter, we anticipate that the government will point out the Supreme Court's statement in Booker that "[m]ost of the statute is perfectly valid," citing Section 3554 (forfeiture). Booker, 125 S.Ct. at 764. Section 3554, which governs RICO and narcotics forfeitures, is inapplicable to this bank fraud conviction. Even apart from the fact that this was a passing reference in dicta, an order of criminal forfeiture is not invalid per se but only if the forfeiture occurs on findings not made beyond a reasonable doubt.

distinguish the RICO statute at issue in Pelullo, 18 U.S.C. § 1963(a), from the almost identical 18 U.S.C. § 982(a)(2) proceeds forfeiture statute employed here. Thus, the Court may decide this issue on non-constitutional grounds. See United States v. Lopez, 514 U. S. 549, 562 (1995).

Second, criminal forfeiture is no different from a criminal fine, an aspect of punishment that the government has not – and could not – contend falls outside the ambit of Blakely and Booker. A "fine" (for purposes of the Excessive Fines Clause) has always been understood to mean "'a payment to a sovereign as punishment for some offense.'" Bajakajian, 524 U.S. at 327 (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 265 (1989)). This is precisely what is being extracted here: a "payment to a sovereign as punishment for some offense."

The argument that the maximum criminal fine, unlike the maximum amount of forfeiture, is established in the statute of conviction, is a nothing more than a proverbial red herring in light of the alternative statutory maximum fine set forth in 18 U.S.C. § 3571(d).[5] Section 3571(d) provides for an alternative fine based on gain or loss and allows for a fine of twice the gross gain to the defendant or twice the gross loss caused by the offense. Just as criminal forfeiture operates based

[5] 18 U.S.C. §§ 3571(b)(2) and (c)(2), which govern individual and organizational fines, provide that a fine may be the greatest of several options, including "the applicable amount under subsection (d) of this section."

upon the particular facts of the case – the amount of the proceeds determined to have been derived from the criminal activities of the defendant – the alternative fine based on gain or loss is established in open-ended fashion depending upon the gain to the defendant or the loss caused by the offense. There is no magic number; the alternative fine, in fashion indistinguishable from an 18 U.S.C. § 982(a)(2) forfeiture, has no statutory maximum amount.

Third, Fruchter/Messino ignore the central feature of Booker and Blakely that the constitutionally-mandated reasonable doubt standard is not limited to elements included in the definition of the offense with which the defendant is charged. Rather, if a "State makes an increase in a defendant's authorized punishment contingent on [a] finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." Ring v. Arizona, 536 U.S. 584, 602 (2002). The Messino/Fruchter approach overlooks the now-recognized fallacy of the position that the "jury need only find whatever facts the legislature chooses to label elements of the crime, and that those it labels sentencing factors – no matter how much they may increase punishment – may be found by the judge." Blakely, 124 S.Ct. at 2539.

Fourth, this approach ignores the meaning of the phrase "statutory maximum." For purposes of Apprendi v. New Jersey, 530 U.S. 466 (2000), it no longer means the maximum punishment set forth in the statute of conviction, but

rather has a functional meaning, namely, "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, 124 S.Ct. at 2537. The "statutory maximum" in this forfeiture setting is a figure set by the value of "property constituting, or derived from, proceeds" the person obtained as the result of a violation of the statute of conviction. 18 U.S.C. §982(a)(2). The jury's finding beyond a reasonable doubt convicting the defendants did not require, under the theory submitted by the government, any actual loss to the banks. (The government contends that "risk of loss" is sufficient. See Appellee's Brief at 47.) That finding, without further findings that ultimately were made by the judge on a preponderance standard, established a baseline forfeiture of zero dollars. Like the term of imprisonment imposed by the judge in Blakely, it depended upon findings other than those required for the bank fraud crimes charged.

Fifth, the only remaining argument is that somehow this Court would need to overrule Libretti to require proof beyond a reasonable doubt in a forfeiture proceeding. As noted, the forfeiture was tried to the court by consent, so the only issue impacted by Libretti – the issue of jury trial – is not an issue here. Moreover, despite the jurisprudential considerations of Libretti, the Second Circuit in Fruchter decided, nonetheless, that it could, and did, reach the substantive issue of Booker's

application. In any event, for all the reasons stated herein, the forfeiture order in this case was invalid.

II. *Booker* Applies To Orders Of Restitution Under the Victim And Witness Protection Act ("VWPA")

A. Restitution Orders Under VWPA Are Criminal in Nature

The Supreme Court and this Court have ruled that restitution is a criminal penalty and is part of the criminal sentence as decreed by Congress in 18 U.S.C. § 3556, which provides that "the court, in imposing a sentence on a defendant who has been found guilty of an offense . . . may order restitution in accordance with section 3663." This Court held in United States v. Syme, 276 F.3d 131, 159 (3d Cir. 2002), that "restitution orders made pursuant to criminal convictions [are] criminal penalties . . . . We therefore hold that restitution ordered under 18 U.S.C. § 3663 [VWPA] constitutes 'the penalty for a crime' within the meaning of Apprendi." Id.

Thus, restitution is penal in nature and the government has essentially conceded the point. Last term, the Supreme Court decided Pasquantino v. United States, __ U.S. __ 125 S.Ct. 1766 (2005), in which it held that prosecution under the wire fraud statute was not barred by the common law revenue rule. There, petitioners contended that recovery of taxes was the object of the government's prosecution "because restitution of the lost tax revenue to Canada is required under the [MRVA]." Id. at 1777. The government submitted that it had an independent

interest in prosecuting violations of the wire fraud statute and obtaining restitution. It argued that restitution under the MRVA was "penal" and was a "punishment" that "fulfills the domestic criminal law's aims":

> While victims have certain limited rights in the restitution process, restitution remains a criminal punishment that is imposed as part of the sentence for an offense. As this Court has explained, restitution imposed as part of a criminal sentence is a "penal" sanction despite its additional function to reimburse a victim for loss. Kelly v. Robinson, 479 U.S. 36, 52 (1986). Seen in that light, restitution is a punishment that fulfills the domestic criminal law's aims, once the United States, as sovereign, has made an independent decision to prosecute.

Brief of the United States, Pasquantino v. United States, No. 03-725 (S.Ct. 2004), available at 2004 WL 1743939, at *20-*21 (emphasis supplied). The Supreme Court adopted this position in its ruling in Pasquantino: "The purpose of awarding restitution in this action is not to collect a foreign tax, but to mete out appropriate criminal punishment for the conduct." Id. at 1777 (emphasis supplied).

Even before Pasquantino, in Kelly v. Robinson, 479 U.S. 36 (1986), the Supreme Court had reviewed a Connecticut restitution statute that, just like the VWPA, provided for a "flexible remedy tailored to the defendant's situation" to determine whether a restitution judgment was dischargeable in bankruptcy. Id. at 54. The Court determined the Connecticut statute to be primarily in the nature of criminal punishment:

> The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole. Thus, it is concerned not only with punishing the offender, but also with rehabilitating him. Although restitution does resemble a judgment "for the benefit of" the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant.

Id. at 52 (emphasis added); see also Brian Kleinhaus, "Serving Two Masters," 73 Fordham L. Rev. 2711, 2717-18 (May 2005).

The VWPA, under which appellants were sentenced, is penal in nature. Several circuit courts have stated, however, that the nature of restitution (at least under the Mandatory Victim Restitution Act ("MVRA")) is not a criminal penalty, and disagreement about restitution's fundamental nature has propelled these circuits to conclude that restitution orders fall outside the ambit of Apprendi, and hence Booker/Blakely. See, e.g., United States v. Rand, 403 F.3d 489, 495 n.3 (7th Cir. 2005). "[T]he MVRA makes restitution mandatory for victims in certain offenses." United States v. Perry, 360 F.3d 519, 530 (6th Cir. 2004) (citing 18 U.S.C. § 3663A(a)(1)). "[U]nlike the VWPA, district courts may no longer consider a defendant's financial circumstances when determining the amount of restitution to be paid." Id. (citing 18 U.S.C. § 3664(f)(1)(A)). The victim now has

a right to restitution. Id.; see also 18 U.S.C. § 3771(Crime Victims Rights Act of 2004 which provides additional rights to crime victims).

In any event, restitution under the VWPA is even more clearly penal than under the MVRA based on the decision of the Supreme Court in Kelly and thus this Court was correct in its holding in Syme, 276 F.3d at 159. See also Perry, 360 F.3d at 530 (pre-Pasquantino) (distinguishing VWPA and finding the "new restitution scheme is not merely a means of punishment and rehabilitation, but an 'attempt to provide those who suffer the consequences of crime with some means of recouping the personal and financial losses'") (quotation omitted); United States v. Visinaiz, 344 F.Supp.2d 1310, 1322 (D.Utah 2004) (Cassell, J.) (pre-Pasquantino) (distinguishing the Connecticut statute at issue in Kelly from MVRA and holding restitution under MVRA outside the ambit of Blakely).

B. *Booker* Applies to Orders of Restitution Under the VWPA

Once it is determined that restitution is penal in nature, there is no basis for removing VWPA restitution orders from the ambit of Booker/Blakely. The amount of the loss which formed the basis for the VWPA restitution order was not an element of the of bank fraud offenses charged. Thus, restitution under VWPA is a "'penalty for a crime' within the meaning of Apprendi." Syme, 276 F.3d at 159. But Syme nonetheless determined that Apprendi was not violated by judge-made restitution orders because before Booker and Blakely, this Court (like other

courts of appeals) understandably believed that Apprendi's notion of "statutory maximum" applied only to criminal penalties that increase a defendant's sentence beyond that supplied "in the restitution statute itself." Syme, 276 F.3d at 159. Post-Blakely and Booker, however, the landscape is different: we know that Ring's teaching compels the conclusion that Apprendi's "statutory maximum" refers to the "maximum sentence a judge may impose without any additional findings." Blakely, 124 S.Ct. at 2537 (emphasis omitted).

As demonstrated above in the discussion of forfeiture, it is a distinction without a difference to say that the restitution statute contains no defined "maximum" limit. The alternative fine provision contains no limit and is indistinguishable from an order of restitution. The "statutory maximum" for restitution that is permitted based on the jury's beyond-a-reasonable-doubt findings in this case was zero. By exceeding that amount and imposing restitution jointly and severally on the defendants in the amount of $408,970 based on preponderance-of-the-evidence findings of "loss," the district court exceeded its constitutional authority. Under Booker/Blakely, for restitution to be imposed, the government must establish that the victims incurred a loss and quantify that loss. Since the amount of the loss was not an element of the bank fraud offense charged, the imposition of restitution based on preponderance-of-the-evidence findings was in error.

Although thus far the circuits have not recognized the square applicability of Booker/Blakely to restitution relying on a variety of theories,[6] Judge Bye, dissenting from the Eighth Circuit's contrary determination in United States v. Carruth, 418 F.3d 900 (8th Cir. 2005), appreciated that once one acknowledges that restitution is a "criminal penalty," the "proverbial Apprendi dominoes begin to fall":

> Once we recognize restitution as being a 'criminal penalty' the proverbial Apprendi dominoes begin to fall. While many in the pre-Blakely world understandably subscribed to the notion Apprendi does not apply to restitution because restitution statues 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.

Carruth, 418 F.3d at 906 (footnote and citations omitted).

This conclusion, appellants respectfully submit, is inescapable. There is no basis for excluding orders of restitution under VWPA from the reach of

[6] See, e.g., United States v. Sosebee, 419 F.3d 451, 461-62 (6th Cir. 2005); United States v. George, 403 F.3d 470, 473 (7th Cir. 2005); United States v. Rattler, 139 Fed.Appx. 534, 536 (4th Cir. 2005); United States v. May, 413 F.3d 841, 849 (8th Cir. 2005); United States v. DeGeorge, 380 F.3d 1203, 1221 (9th Cir. 2004); United States v. Garcia-Castillo, 127 Fed.Appx. 385, 390-92 (10th Cir. 2005).

Blakely/Booker. In this case involving heavily disputed issues of fact that generated the court's restitution order,[7] constitutional error was committed.

[7] United States v. Trala, 386 F.3d 536 (3d Cir. 2004), is thus not controlling. In that case, "the amount of restitution was not a disputed issue of fact under Blakely." Id. at 547 n.15 (emphasis original).

Respectfully submitted,

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October 5, 2005

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,987 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF COMPLIANCE WITH LAR 31.1(c)

I hereby certify that the text of the electronic brief is identical to the text in the paper copies and that the file was through Norton AntiVirus (version 9.0) and contains no electronic viruses.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of October, 2005, I caused two true and correct copies of the foregoing "Supplemental Brief of Appellants Regarding Forfeiture and Restitution" to be served upon the following by hand delivery:

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