

Supreme Court Holds That the Government Must Prove to a Jury Beyond a Reasonable Doubt Any Fact That Increases the Maximum Available Criminal Fine

The Supreme Court held yesterday in *Southern Union Company v. United States* that the Sixth Amendment requires the government to prove to a jury beyond a reasonable doubt any fact that increases the maximum available criminal fine that may be imposed on a defendant, resolving a circuit split between the First, Second, and Seventh Circuits. The *Southern Union* decision will have a particularly significant impact on corporate prosecutions that could include substantial fines, such as prosecutions for violations of federal health care laws, securities laws, and the Foreign Corrupt Practices Act. (A full copy of the opinion can be found [here](#).)

Twelve years ago, in *Apprendi v. New Jersey*, the Supreme Court held that the “Sixth Amendment reserves to juries the determination of any fact, other than the fact of a prior conviction, that increases a criminal defendant’s maximum potential sentence.” Over the next six years, the Supreme Court applied the so-called “*Apprendi* rule” to invalidate death sentences imposed on the basis of a judge’s finding of “aggravating factors” (*Ring v. Arizona*), prison sentences enhanced on the basis of a judge’s finding of “substantial and compelling” circumstances (*Blakely v. Washington*), and prison sentences imposed under the mandatory Federal Sentencing Guidelines (*United States v. Booker*). One question left unresolved, however, was whether the *Apprendi* rule “applies to sentences of criminal fines.” The Supreme Court’s decision in *Southern Union* resolves that question: “it does.”

The facts in *Southern Union* are quite simple. In 2007, Southern Union was indicted for storing liquid mercury without a permit at a facility in Rhode Island, in violation of the Resource Conservation and Recovery Act (“RCRA”). Under the RCRA, Southern Union was subject to a penalty of up to \$50,000 “for each day of violation.” At trial, the government argued that Southern Union had illegally stored the mercury for 762 days. Neither the verdict form nor the trial court’s instructions, however, “asked [the jury] to determine the precise duration of the violation.” Instead, they “permitted conviction if the jury found even a 1-day violation.”

The jury convicted Southern Union. At sentencing, the government asserted that the maximum available fine was “\$38.1 million dollars, on the basis that Southern Union violated the RCRA for each of the 762 days from September 19, 2002, through October 19, 2004.” Southern Union objected to the government’s calculation on Sixth Amendment grounds. The company argued that “the only violation the jury necessarily found was for one day, and imposing any fine greater than the single-day penalty of \$50,000 would require factfinding by the court, in contravention of *Apprendi*.” The trial court agreed with the company that criminal fines are subject to the *Apprendi* rule but “concluded from the ‘content and context of the verdict all together’ that the jury found a 762-day violation.” The trial court “therefore set a maximum potential fine of \$38.1 million, from which it imposed a fine of \$6 million and a ‘community service obligation’ of \$12 million.” The First Circuit affirmed the trial court’s sentence, though on the inverse rationale: the First Circuit rejected the trial court’s “conclusion that the jury necessarily found a violation of 762 days” but held that “*Apprendi* does not apply to criminal fines.”

The Supreme Court reversed the First Circuit’s decision by a vote of 6-to-3. Writing for the majority, Justice Sotomayor held that there is “no principled basis” to apply *Apprendi* to prison and death sentences, but not to criminal fines. Justice Sotomayor rejected the government’s argument that, because fines are “less onerous

than incarceration and the death sentence,” they “categorically ‘do not implicate’ the ‘primary concerns motivating *Apprendi*.” Justice Sotomayor explained that, “[w]here a fine is so insubstantial that the underlying offense is considered ‘petty,’ the Sixth Amendment right of jury trial is not triggered, and no *Apprendi* issue arises.” But “[w]here a fine is substantial enough to trigger [the jury trial] right”—such as the RCRA’s fine of up to \$50,000 for each day of violation—“*Apprendi* applies in full.” Justice Sotomayor singled out the “federal twice-the-gain-or-loss statute,” 18 U.S.C. § 3571(d), as one that “has been used to obtain substantial judgments against organizational defendants.” Justice Sotomayor likewise rejected the argument advanced by the government, as well as by Justice Breyer in his dissenting opinion, that the Sixth Amendment permits judges to engage in factfinding that “‘involve[s] 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)?”

The *Southern Union* decision has important consequences for criminal defendants facing large potential fines. In such cases, *Southern Union* requires the government to prove to a jury beyond a reasonable doubt—rather than to a judge by a preponderance of the evidence—any fact (other than the fact of a prior conviction) that enhances the maximum available fine. Perhaps most critically, where the government seeks a fine under 18 U.S.C. § 3571(d), which provides that a “defendant may be fined . . . the greater of twice the gross gain or twice the gross loss” resulting “from the offense,” the maximum fine will be limited to twice the amount of gain or loss that the government is able to prove to the jury beyond a reasonable doubt.

Although, in reality, a relatively small number of criminal cases go to trial, the benefits of *Southern Union* will redound to all targets of criminal investigations, not merely defendants that go to trial. In particular, because it increases the government’s litigation risk at trial with respect to the fine amount, *Southern Union* gives targets of criminal investigations an additional argument for why a lesser fine would be appropriate as part of a negotiated resolution.

If you would like further information, please contact the Ropes & Gray attorney who usually advises you.