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Apprendi Applies to White-Collar Defendants Too

by David Debold

Fifteen years after the U.S. Supreme Court's landmark decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), new opportunities still arise for criminal defendants to take advantage of that case's key Sixth Amendment holding: "Other 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 476. The recent decision in *United States v. DeCoster*, __ F.3d __ (8th Cir. July 6, 2016),* serves as a useful reminder that this critical right is not just for persons prosecuted for drug trafficking, violent crimes, or firearms violations. Lawyers for white-collar defendants would also do well to keep *Apprendi* and the Sixth Amendment jury-trial right in mind when the government seeks to impose unduly harsh penalties.

In *DeCoster*, the government charged an Iowa company (Quality Egg) and two senior officers with various offenses following a 2010 salmonella outbreak that was traced back to Quality Egg's facilities. All three defendants pleaded guilty. The two individuals were convicted of misdemeanor violations of 21 U.S.C. § 331(a), which prohibits the introduction into interstate commerce of adulterated food.

A key issue at sentencing was the state of mind of the two individual defendants. The government did not allege that either of them *intentionally* sold contaminated eggs. In fact, the government stipulated that neither individual even *knew* the eggs contained salmonella. The defendants were instead convicted under the "responsible corporate officer" doctrine, which required the government to prove they possessed sufficient authority to detect, prevent, and correct violations that came to their attention. The defendants argued that under the Fifth and Eighth Amendments they could not be sent to prison for what is a strict-liability offense. The district court disagreed, sentencing each to three months in prison.

The Eighth Circuit affirmed 2-1. Judge Gruender, who concurred in the judgment, wrote separately to emphasize the district judge's finding that the defendants had been "negligent." According to Judge Gruender, that finding avoided the serious due-process concerns that would stem from imprisoning someone based solely on vicarious liability. Judge Murphy's majority opinion agreed that the record supported such a finding, but she did not think it was necessary to prove even a merely negligent state of mind. In her view, "elimination of a mens rea requirement" does not violate due process for public welfare offenses where the penalty is "relatively small;" the conviction does not "gravely damage" the defendant's reputation; and congressional intent supports imposing the penalty.

Judge Beam dissented. He concluded it was "unfair," based on the record developed in the district court, to "contend that the DeCosters negligently failed to prevent a salmonella outbreak within the broad reach of their corporate operations." In his view, no precedent supported imprisonment "without establishing some measure of a guilty mind"—a showing he believed the government failed to make.

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* [Ed. Note: WLF filed an *amicus* brief in support of the DeCosters in the Eighth Circuit, *available at* http://www.wlf.org/litigating/case_detail.asp?id=824.]

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With intent being so critical to the lawfulness of a prison sentence for public welfare offenses, and given the sharp disagreement among the three appellate judges on the level of intent that the record established, it is useful to remember that *Apprendi* and later cases give defendants the right to a jury finding for every fact needed to authorize a particular sentence. Two of the judges in *DeCoster* were unwilling to say that, absent a finding of *at least* negligence, any prison sentence was lawful. In that event, *Apprendi* required a jury to find beyond a reasonable doubt that these defendants acted with a guilty mind. And where, as here, a defendant pleads guilty, the requisite level of intent must be admitted by the defendant; it cannot be found by a judge at sentencing by a preponderance of the evidence.

Presumably case-specific circumstances prompted the defendants in *DeCoster* to refrain from pressing this Sixth Amendment argument. (Judge Gruender's concurrence pointed out that the issue had been waived.) The point here is not to second-guess that decision. Rather, *DeCoster* serves as a helpful reminder that defense counsel in white-collar cases should consider whether *Apprendi* requires jury findings before the court imposes a given sentence. As *DeCoster* illustrates, it is far from settled whether one can be sentenced to prison based solely on vicarious liability.

Not only was the panel divided on the "responsible corporate officer" question, the two judges who thought more was required had trouble agreeing on precisely how much—be it simple negligence, gross negligence, recklessness, or something more culpable. Wherever that line ends up being drawn—and especially while the law on this point is unsettled—defense counsel in such cases should take great care to assess whether it is better for the client to contest the intent element. Even if going to trial is not in the client's best interests, counsel should consider whether to refrain from having the client admit to more than the bare minimum level of intent needed to convict for the charged offense.

For those who represent white-collar defendants, it is all too easy to think of the *Apprendi* rule as a turn-of-the-century relic. To be sure, that ruling continues to deliver benefits indirectly in most federal sentencings, because the remedy for the *Apprendi* violation in *United States v. Booker*, 543 U.S. 220 (2005), was to declare the federal sentencing guidelines merely advisory. But as for a direct impact, most of the appellate action since *Booker* has played out in death-penalty cases, drug prosecutions where the maximum penalty is based on drug quantity, firearms enhancements, and mandatory minimums. *DeCoster* helps remind defense attorneys that the jury-trial right can directly affect the sentencing of white-collar clients too.

That direct effect also comes into play for penalties other than imprisonment. Four years ago, the Supreme Court held in *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012), that *Apprendi* requires jurors to find facts needed to increase the possible fine. Thus, if the statute keys the maximum fine amount to loss, gain, or number of days of violation, the jury must find the amount of loss, amount of gain, or how long the violation lasted. The other shoe—*Apprendi*'s application to restitution—has yet to drop. It is disconcerting that no circuit has extended *Southern Union*'s reasoning to restitution despite the striking similarities to how fines are imposed. *See* Judge William M. Acker, Jr., *The Mandatory Victims Restitution Act Is Unconstitutional. Will the Courts Say So After* Southern Union v. United States*?* 64 Alabama L. Rev. 804 (2013). Defense counsel should routinely raise and preserve that objection in the event the Supreme Court ultimately takes up the question whether *Apprendi* applies to restitution.

Whether the government is seeking a disproportionate prison sentence or an onerous financial penalty, white-collar defense counsel should keep in mind the role that the Sixth Amendment jury-trial right can still play in achieving a fair and just sentencing outcome in individual cases.

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