No. 05-312

In the Supreme Court of the United States

DAVID HAMPTON TEDDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the order of criminal forfeiture in this case violated petitioner's Sixth Amendment right to a jury trial.

2. Whether the court of appeals correctly rejected petitioner's contention that the amount he was required to forfeit should be reduced by the amount that petitioner's co-conspirators were required to forfeit as a result of a judicial order entered in another case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 403 F.3d 836. The opinion of the district court denying petitioner's motion for judgment of acquittal on the forfeiture count (Pet. App. B1-B14) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2005. On June 24, 2005, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including September 3, 2005, and the petition was filed on September 6, 2005 (the Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted of conspiring to violate the wire wagering act, 18 U.S.C. 1084, in violation of 18 U.S.C. 371; conspiring to launder money, in violation of 18 U.S.C. 1956(h); and two counts of money laundering, in violation of 18 U.S.C. 1957. The jury also rendered a criminal forfeiture verdict under 18 U.S.C. 982 (2000 & Supp. II 2002). Petitioner was sentenced to concurrent terms of 60 months of imprisonment on each count, was subjected to fines totaling more than $1.06 million, and was ordered to forfeit $2.77 million in proceeds from his illegal money-laundering activities. The court of appeals affirmed petitioner's convictions and the order of forfeiture, but the court vacated petitioner's sentence and remanded for resentencing. Pet. App. A1-A17; Pet. 7.

1. Petitioner is a former attorney who described himself as an expert in asset protection and estate planning. In March 1997, petitioner entered into a conspiracy with his clients Duane Pede and Jeffrey D'Ambrosia. Pede and D'Ambrosia were the co-founders and operators of Gold Medal Sports (GMS), an illegal offshore sports-bookmaking operation incorporated in the island of Curacao, Netherlands Antilles. Petitioner assisted Pede and D'Ambrosia by advising and recommending deferred-compensation packages, directing the formation of shell corporations, establishing accounts used in laundering profits from the sports-book operation to pay vendors and bettors, and sheltering GMS money in offshore banks in the Bahamas. Each time money was moved from GMS to a subsidiary entity or a new bank, an act of money laundering occurred. Petitioner recommended business changes to encourage

what would appear to be greater "arms-length" transactions in an effort to insulate Pede and D'Ambrosia from liability, and to make the money flowing in and out of GMS seem more legitimate. Presentence Investigation Report (PSR) paras. 15, 20, 21, 22; Pet. App. A3.

During its three-and-a-half years of operation, GMS collected approximately $402.7 million in wagers. A significant portion of the net profits was placed into deferred compensation programs established by petitioner. From August 1996 through April 2002, petitioner personally assisted in opening accounts for GMS and brokering a $2.4 million transfer of GMS profits from Orco Bank to an account at Surety Bank & Trust in the Bahamas. Pede and D'Ambrosia funneled a total of more than $4 million of GMS profits to petitioner. PSR paras. 19, 39, 42.

2. Following a seven-day trial, a jury found petitioner guilty of two conspiracy counts, including one count of conspiracy to commit money laundering, and two substantive money-laundering counts. Gov't C.A. Br. 4. The jury also returned a special verdict of forfeiture, finding that funds in the amount of $7,288,090.49 were "involved in and [were] traceable to property that was involved in the money laundering conspiracy." C.A. App. 118. Before sentencing, the district court concluded that the jury verdict had overstated the amount subject to forfeiture by double-counting certain funds, and the court reduced the forfeiture to approximately $2.77 million. Pet. 7; Pet. App. A8. Approximately $1.7 million was ordered forfeited from Challenge Realty, one of the entities petitioner had created to hold the venture's profits, and the rest stood "as a personal money judgment against [petitioner] to be satisfied out of as-

sets that he had purchased with the tainted proceeds." *Ibid.*

3. Petitioner appealed, arguing, *inter alia*, that the district court's forfeiture order was invalid. The court of appeals affirmed petitioner's convictions and the forfeiture ordered by the district court, while remanding for redetermination of petitioner's prison sentence in light of *United States* v. *Booker*, 125 S. Ct. 738 (2005). Pet. App. A1-A17.

a. Petitioner contended that the district court had violated his Sixth Amendment right to jury trial when the court determined the amount subject to forfeiture rather than convening a new jury to make that finding. Pet. App. A8; Pet. C.A. Br. 46, 50-52. The court of appeals rejected that argument. Pet. App. A8-A9. The court explained that, under *Libretti* v. *United States*, 516 U.S. 29, 49 (1995), the constitutional right to a jury trial "does not apply to forfeitures." Pet. App. A8. The court of appeals further observed that, because "[t]here is no statutory maximum forfeiture," this Court's subsequent decisions in *Booker* and in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), do not supersede *Libretti*'s holding. Pet. App. A8. The court also held that the jury-trial right conferred by Federal Rule of Criminal Procedure 32.2 "is limited to the nexus between the funds and the crime," and that "Rule 32.2 does not entitle the accused to a jury's decision on the amount of forfeiture." *Id.* at A8-A9.

b. Petitioner further contended that his monetary obligation under the forfeiture order should be reduced by the amount (approximately $3.25 million) that had already been forfeited by Pede and D'Ambrosia after the sale of GMS. See Pet. App. A9; Pet. C.A. Br. 53. The court of appeals rejected that claim. Pet. App. A9-

A10. The court acknowledged that, "if Pede and D'Ambrosia already ha[d] coughed up the full profits of the venture," then petitioner's own funds could not properly be regarded as traceable proceeds of the unlawful conduct and therefore would not be subject to forfeiture. *Id.* at A9. The court of appeals concluded, however, that the forfeiture order entered by the district court did not result in any double-counting of funds because "[t]he district judge's concrete findings establish that the $2.8 million forfeited in this prosecution is distinct from the assets that Pede and D'Ambrosia have surrendered." *Id.* at A10. Because the $2.8 million that petitioner was ordered to forfeit represented "only proceeds that came to rest with [petitioner] or one of the entities he controls," the court of appeals found "no reason to disturb the district court's disposition of the forfeiture question." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 11-20) that the district court violated his Sixth Amendment right to jury trial by determining the amount that petitioner was required to forfeit. Petitioner further argues (Pet. 16-17) that the court of appeals' resolution of the Sixth Amendment question conflicts with decisions of two other circuits. Those contentions lack merit and do not warrant further review.

a. Federal Rule of Criminal Procedure 32.2(b)(4) provides that, "[u]pon a party's request in a case in which a jury returns a verdict of guilty, the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant." This Court has squarely held, however, that "the right to a jury verdict on for-

feitability does not fall within the Sixth Amendment's constitutional protection." *Libretti* v. *United States*, 516 U.S. 29, 49 (1995). The Court in *Libretti* explained that a criminal forfeiture order is properly regarded as "an aspect of sentencing," and it relied on prior decisions holding that "a defendant does not enjoy a constitutional right to a jury determination as to the appropriate sentence to be imposed." *Ibid.*

In *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court held, as a matter of federal constitutional law, 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. Several courts of appeals have considered whether the rule announced in *Apprendi* and subsequently applied in *Blakely* v. *Washington*, 542 U.S. 296 (2004), and in *United States* v. *Booker*, 125 S. Ct. 738 (2005), casts doubt on the *Libretti* Court's conclusion that there is no Sixth Amendment right to trial by jury on questions of criminal forfeiture. Every court of appeals to address the question has held that *Apprendi*, *Blakely*, and *Booker* do not cast doubt on *Libretti*'s application of Sixth Amendment principles to the forfeiture context. See, *e.g.*, Pet. App. A8; *United States* v. *Hall*, 411 F.3d 651, 654-655 (6th Cir. 2005); *United States* v. *Fruchter*, 411 F.3d 377, 382-383 (2d Cir. 2005); *United States* v. *Shryock*, 342 F.3d 948, 991 (9th Cir. 2003), cert. denied, 541 U.S. 965 (2004); *United States* v. *Keene*, 341 F.3d 78, 85-86 (1st Cir. 2003); *United States* v. *Gasanova*, 332 F.3d 297, 301 (5th Cir.), cert. denied, 540 U.S. 1011 (2003); *United States* v. *Najjar*, 300 F.3d 466, 485-486 (4th Cir.), cert. denied, 537 U.S. 1094 (2002); *United States* v. *Vera*, 278 F.3d 672, 673 (7th Cir.), cert. denied,

536 U.S. 911 (2002); *United States* v. *Cabeza*, 258 F.3d 1256, 1257 (11th Cir. 2001) (per curiam); *United States* v. *Corrado*, 227 F.3d 543, 550 (6th Cir. 2000).[1] In *Booker*, moreover, this Court identified 18 U.S.C. 3554, which authorizes the sentencing court in specified categories of prosecutions to impose an order of criminal forfeiture, as one of the Sentencing Reform Act of 1984 provisions that remain "perfectly valid." 125 S. Ct. at 764.

As the Second Circuit has explained, "*Blakely* and *Booker* address determinate sentencing regimes." *Fruchter*, 411 F.3d at 383 (citing *Blakely*, 542 U.S. at 308; *Booker*, 125 S. Ct. at 749-750). By its terms, the rule announced in *Apprendi* applies only to a factual determination that "increases the penalty for a crime beyond the prescribed statutory maximum." 530 U.S. at 490. The amount of money or other property that a federal criminal defendant may be required to forfeit, however, is not subject to any statutory maximum. The holdings of *Apprendi*, *Blakely*, and *Booker* are inapplicable here because "[a] judge cannot exceed his constitutional authority by imposing a punishment beyond the statutory maximum if there is no statutory maximum. Criminal forfeiture is, simply put, a different animal from determinate sentencing." *Fruchter*, 411 F.3d at 383.[2]

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[1] The Third Circuit sua sponte recently granted rehearing en banc to consider, *inter alia*, the question "[w]hether the decision of the Supreme Court of the United States in *United States v. Booker*, 125 S. Ct. 738 (2005) applies to forfeiture." Order of Sept. 19, 2005, *United States* v. *Leahy*, Nos. 03-4490, et al. Reargument before the en banc court was held on November 1, 2005.

[2] Petitioner also seeks to rely separately on the Due Process Clause to argue that, even if no jury-trial right applies to criminal-forfeiture

b. Contrary to petitioner's contention (Pet. 16-17), the court of appeals' resolution of the question presented here does not conflict with either *United States* v. *Bornfield*, 145 F.3d 1123 (10th Cir. 1998), cert. denied, 528 U.S. 1139 (2000), or *United States* v. *Gilbert*, 244 F.3d 888 (11th Cir. 2001). In *Bornfield*, the jury rendered a special verdict of forfeiture with respect to the funds contained in the defendant's business account, even though the money-laundering offense for which the defendant was convicted involved only his personal account. See 145 F.3d at 1137-1138. The court of appeals held that the jury's special verdict, which apparently resulted from confusion between the account numbers of the business and personal accounts, "is clear error because the jury could not legally order the forfeiture of funds contained in Bornfield's business account." *Id.* at

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determinations under the Sixth Amendment, the government must prove forfeitability beyond a reasonable doubt. Pet. 15-16, 19-20. Petitioner's briefs in the court of appeals did not raise that claim, see Pet. C.A. Br. 45-55 (discussion of forfeiture issue); Pet. C.A. Reply Br. 18-21 (same), and the question therefore is not properly presented here. In any event, petitioner cites no decision of this Court that has required proof beyond a reasonable doubt in a criminal case with respect to a finding as to which no jury trial is required by the Sixth Amendment. To the contrary, this Court has treated the two requirements as interlinked. See, *e.g.*, *United States* v. *Gaudin*, 515 U.S. 506, 510, 522-523 (1995). The cases cited by petitioner (Pet. 19-20) all predated this Court's decision in *Libretti*. In most of those cases, moreover, the applicability of a reasonable-doubt standard was either assumed or conceded. The only one of those cases in which the point was actively contested was *United States* v. *Pelullo*, 14 F.3d 881 (3rd Cir. 1994), and the court in that case specifically limited its holding to criminal forfeitures under RICO. See *id.* at 903 (acknowledging but distinguishing Third Circuit's prior holding that preponderance standard applies to determinations of forfeitability under the Continuing Criminal Enterprise Act).

1138. The court further held that, absent a valid initial order of forfeiture, the district court could not order forfeiture pursuant to the substitute-assets provisions of 18 U.S.C. 982(b)(1)(A) and 21 U.S.C. 853(p). 145 F.3d at 1138-1139.

In *Gilbert*, the Eleventh Circuit concluded that the jury's forfeiture verdict was invalid because it encompassed an entire business, rather than simply the defendants' ownership interests in that business, notwithstanding uncontradicted evidence that part of the business was owned by an innocent party. 244 F.3d at 920-921. The court of appeals further held that the district court could not correct the error by entering an order of forfeiture limited to the defendants' ownership interests. *Id.* at 922. The court explained that, "[s]ince the jury's verdict reached beyond those assets that were legally forfeitable under the applicable statute, the verdict was invalid. Without a valid *verdict* of forfeiture, the district court cannot properly enter an *order* of forfeiture unless the defendant waives his right to a jury trial on that issue." *Ibid.*

Because neither *Bornfield* nor *Gilbert* was based on the Sixth Amendment, those decisions cannot reasonably be thought to conflict with the Seventh Circuit's disposition of the constitutional question in this case. And because current Federal Rule of Criminal Procedure 32.2 was not in effect at the time of the forfeitures at issue in *Bornfield* and *Gilbert*, the courts in those cases had no occasion to discuss that Rule's allocation of authority between the trial court and the jury.

In any event, the defect in the forfeiture verdict rendered by petitioner's jury is significantly different from the defects involved in *Bornfield* and *Gilbert*. In each of those cases, the jury's forfeiture verdict encompassed

discrete assets that had no legally sufficient nexus to the offenses of conviction. No such error occurred in this case; rather, the district court found that the jury had incorrectly computed the *amount* of the forfeitable funds by double-counting monies used in more than one transaction. The jury's computation of the forfeitable amount was apparently based on the premise, which the district court rejected, that the jury could "count the same money more than once if it was involved in more than one transaction." Pet. App. B7; see *id.* at B7-B10. Pursuant to Federal Rule of Criminal Procedure 32.2(b)(1), the district court conducted a hearing to "determine the amount of money that [petitioner] will be ordered to pay," at which it placed upon the government the "burden to show how much of the jury's verdict reflected money that was not double counted," Pet. App. B10. But all of the funds ultimately ordered to be forfeited had been properly found by the jury to have the requisite nexus to the offenses of conviction.

2. Petitioner contends (Pet. 21-30) that the amount he was required to forfeit should have been offset by the sum forfeited by Pede and D'Ambrosia upon the sale of GMS. Because the amount forfeited by Pede and D'Ambrosia was greater than the amount that petitioner was ordered to forfeit, the effect of such an offset would have been to eliminate petitioner's forfeiture obligation altogether. See Pet. App. A8-A9. Petitioner argues (Pet. 21) that, as a result of the lower courts' refusal to approve an offset, the government has obtained an impermissible "double recovery of the same property." Petitioner's claim lacks merit and raises no significant legal issue warranting this Court's review.

In holding that an offset was inappropriate in this case, the court of appeals accepted petitioner's basic

legal contention that the government is not entitled to forfeiture of more than the total proceeds of the various defendants' unlawful activities. The court explained that, "[i]f the United States already has all of the boodle, having collected it from Pede and D'Ambrosia, then the funds in [petitioner's] hands * * * cannot also be traceable proceeds." Pet. App. A9. The court concluded, however, that "[t]he district judge's concrete findings establish that the $2.8 million forfeited in this prosecution is distinct from the assets that Pede and D'Ambrosia have surrendered." *Id.* at A10. To the extent that petitioner challenges the court of appeals' application of the relevant legal principles to the particular record in this case, his factbound claim provides no basis for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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