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SPECIAL FEATURE
DEVELOPMENTS IN ASSET FORFEITURE LAW

Does Apprendi v. New Jersey Change the Standard of Proof in Criminal Forfeiture Cases?

BY STEFAN D. CASSELLA

INTRODUCTION

In Apprendi v. New Jersey, the Supreme Court invalidated a New Jersey “hate crimes” statute on the ground that the statute permitted the trial court to increase the level of punishment beyond the statutory maximum based on a determination made under the “preponderance of the evidence” standard, that certain factors were present. “Other than the fact of a prior conviction,” the Court held, “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.”

The question now being raised in forfeiture cases is whether Apprendi requires that issues regarding the amount of property subject to forfeiture in a criminal case be submitted to a jury and proved beyond a reasonable doubt. The author thinks that it does not.

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2 Id. at 2362-63.
I. PRE-APPRENDI LAW

Before Apprendi was decided, the appellate courts were virtually unanimous in holding that the standard of proof in a criminal forfeiture case was "preponderance of the evidence." Those courts repeatedly

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3 See United States v. Bellomo, 176 F.3d 580, 595 (2d Cir. 1999) (finding that, because forfeiture is part of sentencing, and fact-finding at sentencing is established by a preponderance of the evidence, the preponderance standard applies to criminal forfeiture); United States v. Dieter, 198 F.3d 1284, 1289 (11th Cir. 1999) (holding that because forfeiture is part of sentencing, the preponderance standard applies to all § 853(a) forfeitures); United States v. Layne, 192 F.3d 556, 575 (6th Cir. 1999); United States v. Garcia-Guzar, 160 F.3d 511, 518 (9th Cir. 1998) (maintaining that the preponderance standard is constitutional because criminal forfeiture is not a separate offense but only an additional penalty for an offense that was established beyond a reasonable doubt); United States v. DeFries, 129 F.3d 1293, 1312 (D.C. Cir. 1997) (holding that in light of Libretti v. United States, 516 U.S. 29 (1995), the burden of proof in a RICO case is preponderance of the evidence); United States v. Rutgard, 108 F.3d 1041, 1063 (9th Cir. 1997) (holding that the appropriate standard is preponderance of the evidence); United States v. Patel, 131 F.3d 1195, 1200 (7th Cir. 1997) (reiterating that the burden of proof in § 853 cases is preponderance of the evidence because under Libretti criminal forfeiture is part of the sentence, not an element of the underlying crime); United States v. Rogers, 102 F.3d 641, 648 (1st Cir. 1996) (holding that criminal forfeiture, as a sentencing issue, is governed by the preponderance standard); United States v. Voigt, 89 F.3d 1050, 1083 (3d Cir. 1996) (following Myers and upholding a preponderance standard); United States v. Ben-Hur, 20 F.3d 313, 317 (7th Cir. 1994) (maintaining that the government must establish, by a preponderance of the evidence, that the defendant, as a matter of state law, held an ownership interest in the property at the time the offense was committed); United States v. Bieri, 21 F.3d 819, 822 (8th Cir. 1994) (noting that "Congress has clearly designated criminal forfeiture as part of the sentencing or punishment phase of a criminal proceeding and has given no indication that a higher standard of proof applies than normally applies at sentencing"); United States v. Myers, 21 F.3d 826, 829 (8th Cir. 1994) (holding that criminal forfeiture is part of the sentence, not an offense or element of the offense); United States v. Elgersma, 971 F.2d 690, 697 (11th Cir. 1992) (holding that the preponderance standard applies to § 853(a)(1) forfeitures and that due process does not bar Congress from permitting sentencing issues to be resolved by the preponderance standard and that because forfeiture is part of sentencing, a preponderance standard is unobjectionable if that is what Congress intended); United States v. Smith, 966 F.2d 1045, 1050-53 (6th Cir. 1992) (maintaining that forfeiture is part of sentencing which is governed by the preponderance standard,
emphasized that forfeiture is an aspect of sentencing in a criminal case, not an element of the offense that must be submitted to the jury and proven beyond a reasonable doubt.

Some courts focused on the language of the forfeiture statute itself. For example, in United States v. Hernandez-Escarsega, the Ninth Circuit observed that 21 U.S.C. § 853(a) directs a court “imposing sentence” on a person convicted of a drug offense to enter an order of forfeiture “in addition to any other sentence imposed.” This language, the court held, makes it clear “that the forfeiture is additional punishment for the crime, not an element of the crime.”

The Third, Eighth, and Eleventh Circuits drew the same conclusion from the same statutory provision and the parallel provision in 18 U.S.C. § 982(a), the forfeiture provision for money laundering offenses. The Fourth Circuit took the statutory analysis a step further. In United States v. Tanner, the court held that the direction in § 853(a) to enter a forfeiture judgment against any person convicted of a violation of the drug laws “presupposes that the defendant has already been tried and convicted of the substantive offense.” This language in Tanner makes it clear that the

and thus the same standard applies to forfeiture of proceeds and facilitating property; see also United States v. Tanner, 61 F.3d 231, 234-35 (4th Cir. 1995); United States v. Herrero, 893 F.2d 1512, 1541-42 (7th Cir. 1990); United States v. Hernandez-Escarsega, 886 F.2d 1560, 1576-77 (9th Cir. 1989); United States v. Sandini, 816 F.2d 869, 875-76 (3d Cir. 1987). But see Voigt, 89 F.3d at 1083 (holding that the reasonable doubt standard applies to RICO, but not in the money laundering context); United States v. Pelullo, 14 F.3d 881, 902-04 (3d Cir. 1994) (“Obviously any violation of § 1962 [RICO] must be proved beyond a reasonable doubt.”).

4 United States v. Hernandez-Escarsega, 886 F.2d 1560 (9th Cir. 1989).
5 Id. at 1577 (emphasis added).
6 Id.
7 See Dicter, 198 F.3d at 1289 (“The language of section 853(a) itself makes clear that its forfeiture provisions are elements of sentencing.”); Voigt, 89 F.3d at 1083 (“[T]he plain language of the statute reveals that forfeiture is a form of sentence enhancement that follows a previous finding of personal guilt.” (quoting Myers, 21 F.3d at 826, 829)); Myers, 21 F.3d at 829 (“By stating that ‘[t]he court, in imposing sentence on a person convicted’ of a money laundering offense, shall forfeit property involved in the offense, Congress indicates that forfeiture under the money laundering provision is also a sentencing sanction, not an offense or element of an offense.”).
8 United States v. Tanner, 61 F.3d 231 (4th Cir. 1995).
9 Id. at 234 (citation omitted).
forfeiture is not a separate offense, but a part of the punishment imposed on a person who has already been convicted.\textsuperscript{10}

Other courts based their analyses more generally on the relationship between the forfeiture judgment and the underlying criminal conviction. As the First Circuit held in \textit{United States v. Rogers},\textsuperscript{11} forfeiture bears the same relationship to the crime as does a jail sentence or a fine.\textsuperscript{12} It is a consequence of finding that the defendant is culpable for having committed the offense, not a finding of culpability itself. Thus, as the Third Circuit observed: "The argument that forfeiture is an element which must be proved beyond a reasonable doubt confuses culpability with consequences."\textsuperscript{13}

The point is that forfeiture only comes into play once a jury has found, beyond a reasonable doubt, that the defendant is guilty of the underlying offense. No additional factor is necessary to trigger the forfeiture. It flows automatically from the conviction. The Sixth Circuit made that point in \textit{United States v. Smith}:\textsuperscript{14} "Although a criminal forfeiture proceeding bears some characteristics of a criminal matter, its purpose is to determine the proper punishment for the charged offense once the defendant’s guilt on that charge has been proved beyond a reasonable doubt."\textsuperscript{15}

"[B]ecause the criminal forfeiture provision does not itself describe a separate offense," the Ninth Circuit concluded, "but is merely an ‘additional penalty’ for an offense that must be proved beyond a reasonable doubt," allowing the government to prove that the property was subject to forfeiture by a preponderance of the evidence does not violate any of the criminal defendant’s rights under the Fifth and Sixth Amendments.\textsuperscript{16}

The Fifth Circuit extended this rule to another context. In \textit{United States v. Cantu},\textsuperscript{17} the court bifurcated the trial between the guilt phase and the forfeiture phase. When a juror was unable to continue with the jury

\textsuperscript{10} \textit{Id.}

\textsuperscript{11} \textit{United States v. Rogers, 102 F.3d 641 (1st Cir. 1996).}

\textsuperscript{12} \textit{Id. at 648 ("[T]he criminal forfeiture is akin to a jail sentence or a fine and lacks the historical and moral roots that have led to a higher proof requirement for a finding of criminal guilt.")}.\textsuperscript{13}

\textsuperscript{13} \textit{United States v. Sandini, 816 F.2d 869, 875 (3d Cir. 1987).}

\textsuperscript{14} \textit{United States v. Smith, 966 F.2d 1045 (6th Cir. 1992).}

\textsuperscript{15} \textit{Id. at 1052. \textit{See also} United States v. Ben Hur, 20 F.3d 313, 317 (7th Cir. 1994) ("Procedurally, a forfeiture authorized by section 853 operates as a sanction against the defendant based upon his conviction.") (citation omitted).}

\textsuperscript{16} \textit{United States v. Garcia-Guzar, 160 F.3d 511, 518 (9th Cir. 1998).}

\textsuperscript{17} \textit{United States v. Cantu, 167 F.3d 198 (5th Cir. 1999).}
deliberations during the guilt phase, the defendant agreed to proceed with an eleven-member jury pursuant to Rule 23 of the Federal Rules of Criminal Procedure.\textsuperscript{18} The defendant did not agree, however, to have an eleven-member jury determine the forfeiture issue. On appeal, the Fifth Circuit held that because the forfeiture did not constitute a separate offense, and because the defendant therefore had no constitutional right to a jury trial on the forfeiture issue in the first place, he had no grounds upon which to complain about the forfeiture verdict returned by the eleven-member jury.\textsuperscript{19}

Thus, before \textit{Apprendi} was decided, it was well-established that criminal forfeiture was not a separate offense with elements that must be presented to a jury and proved beyond a reasonable doubt.

\section*{II. The Constitutional Rule in \textit{Apprendi}}

In \textit{Apprendi}, a defendant was convicted under a New Jersey statute that normally carried a penalty of five to ten years imprisonment. After a contested evidentiary hearing, however, the sentencing judge found by a preponderance of the evidence that the crime was motivated by racial bias. Based on this finding, the judge applied a separate statute that increased the maximum sentence for racially-motivated crimes to twenty years, and sentenced the defendant to twelve years imprisonment. The sentence was upheld by the New Jersey Supreme Court, but the U.S. Supreme Court reversed, holding that the sentencing procedure violated the defendant’s rights under the Due Process Clause of the Fourteenth Amendment.\textsuperscript{20}

In his opinion for the Court, Justice Stevens emphasized two related objections to the New Jersey statute. First, a statute that allows a trial judge to impose a sentence outside of the statutory maximum, based on facts that are not among the elements of the underlying crime, creates a separate offense with elements that are never presented to a jury. This violates a defendant’s Sixth Amendment right to have all elements of the offense presented to a jury and proved beyond a reasonable doubt.\textsuperscript{21} Second, such a statute exposes a defendant to a level of punishment beyond what could be imposed for the offense on which the jury returned a verdict, thus exposing the defendant to a greater stigma and risk than authorized for the offense on which he was tried and convicted.\textsuperscript{22}

\begin{itemize}
\item \textsuperscript{18} \textsc{Fed. R. Crim. P.} 23.
\item \textsuperscript{19} \textit{Cantu}, 167 F.3d at 206-07.
\item \textsuperscript{20} \textit{Apprendi v. New Jersey}, 120 S. Ct. 2348, 2349-50 (2000).
\item \textsuperscript{21} \textit{Id.} at 2354-66.
\item \textsuperscript{22} \textit{Id.}
\end{itemize}
A. The Elements of a Separate Offense

The Court recognized that judges have broad discretion to impose a sentence within the statutory range for a given crime, but judges generally may not impose a sentence that exceeds the statutory maximum.\textsuperscript{23} The New Jersey statute, however, permitted the trial judge to sentence the defendant outside of the statutory maximum based on facts that were never presented to the jury. In so doing, the New Jersey statute in effect created a separate legal offense.

The Court made this point several times in its opinion. For example, in discussing the historic role of the judiciary in sentencing, the Court noted that "[t]he judge’s role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury. Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition ‘elements’ of a separate legal offense."\textsuperscript{24}

The New Jersey statute, the Court said, created a second \textit{mens rea} element, exposing the defendant to greater punishment if he selected his victims with a purpose to intimidate them on account of their race. "The defendant’s intent in committing a crime," the Court said, "is perhaps as close as one might hope to come to a core criminal offense ‘element.’"\textsuperscript{25}

Later, the Court reiterated the point when discussing the proper use of "sentencing factors":

[W]hen the term “sentence enhancement" is used to describe an increase beyond the maximum authorized statutory sentence, it is \textit{the functional equivalent of an element of a greater offense} than the one covered by the jury’s guilty verdict. Indeed, it fits squarely within the usual definition of an “element” of the offense.\textsuperscript{26}

Allowing a judge to determine the facts that constitute a separate legal offense, and to impose a sentence accordingly, the Court said, violates the "basic principles . . . of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond a reasonable doubt."\textsuperscript{27}

\textsuperscript{23} \textit{Id.}
\textsuperscript{24} \textit{Id.} at 2359.
\textsuperscript{25} \textit{Id.} at 2364 (footnote omitted).
\textsuperscript{26} \textit{Id.} at 2365 n.19 (citation omitted) (emphasis added).
\textsuperscript{27} \textit{Id.} at 2359.
A state simply cannot deprive a defendant of his Sixth Amendment right to have the jury determine all elements of an offense beyond a reasonable doubt "by redefin[ing] the elements that constitute different crimes . . . as factors that bear solely on the extent of punishment." Accordingly, the Court held 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."

B. Increasing the Degree of Culpability

The Court was also concerned that the New Jersey statute exposed the defendant to a greater degree of punishment than was authorized for the offense on which the jury returned a verdict. The "[c]ore concerns animating the jury and burden-of-proof requirements," the Court said, are that the defendant not be exposed to "a deprivation of liberty greater than that authorized by the verdict according to the statute," nor to "a greater stigma than that accompanying the jury verdict alone." The Court further stated: "If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened . . . ."

In other words, a jury's verdict on a criminal offense establishes the outer limits on the punishment to which the defendant may be exposed. Those limits are delineated by the penalty provisions of the criminal statute itself. Factors that assist the court in determining the sentence need not be presented to a jury nor proved beyond a reasonable doubt so long as the sentence falls "within limits fixed by law" and "the range of sentencing options prescribed by the legislature." A sentence that falls within those limits violates none of the defendant's constitutional rights because he is exposed to no greater degree of criminal culpability than is legally triggered by the jury's verdict. But a statute that exposes the defendant to "a more severe sentence than the maximum authorized by the facts found by the jury" violates his right to due process.

28 Id. at 2360 (quoting Mullaney v. Wilbur, 421 U.S. 684, 698 (1975)).
29 Id. at 2362-63.
30 Id. at 2363 n.16.
31 Id. at 2359 (emphasis added).
32 Id. at 2358 (citing Williams v. New York, 337 U.S. 241 (1949)).
33 Id. (citation omitted).
34 Id. at n.9.
Thus, "the relevant inquiry," the Court held, "is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?"\(^{33}\)

III. APPLICATION OF \textit{APPRENDI} TO CRIMINAL FORFEITURE

The twin themes of the \textit{Apprendi} analysis suggest that the Court’s holding applies in either of two situations: where the legislature has, in effect, created two separate offenses, with separate elements, with the second or greater offense carrying a heavier punishment than the first; and where the statutory scheme allows a court to impose a punishment for a single offense that lies beyond "the range of sentencing options" authorized by the legislature based on the jury’s verdict alone. Neither of these concerns applies to criminal forfeiture.

As the Supreme Court itself defined the issue, \textit{Apprendi} involved a finding that the defendant was culpable for two separate acts: he "unlawfully possessed a weapon," and "selected his victims with a purpose to intimidate them because of their race."\(^{36}\) The holding in the case is based on the Court’s conclusion that the "procedural safeguards" of the Fifth and Sixth Amendments "should apply equally to the \textit{two acts} that New Jersey has singled out for punishment."\(^{37}\)

In contrast, a criminal case in which forfeiture is imposed as part of the sentence does not involve culpability for separate acts. Forfeiture is the consequence of the finding that the defendant was culpable for a single act. As the Third Circuit observed, "[t]he argument that forfeiture is an element which must be proved beyond a reasonable doubt confuses culpability with consequences."\(^{38}\)

Moreover, the entry of an order of forfeiture as part of a criminal sentence does not impose upon the defendant any greater punishment than was authorized for the single offense for which the defendant has been convicted. Forfeiture is a mandatory part of the sentence that may be imposed for any criminal offense that contains a criminal forfeiture provision. Thus, the imposition of a judgment of forfeiture falls squarely within the "range of sentencing options" to which the defendant is exposed based on the jury verdict alone.

\(^{33}\) \textit{Id.} at 2365 (footnote omitted).
\(^{36}\) \textit{Id.} at 2355.
\(^{37}\) \textit{Id.} (emphasis added).
\(^{38}\) United States v. Sandini, 816 F.2d 869, 875 (3d Cir. 1987).
A. Criminal Forfeiture is not a Separate Offense

The Supreme Court has already determined that criminal forfeiture is not a separate offense with separate elements. In Libretti v. United States, the defendant pled guilty to running a continuing criminal enterprise in violation of 21 U.S.C. § 848, and agreed to the forfeiture of his assets under § 853(a). At the plea hearing, the district judge determined that the defendant’s plea was voluntary. However, on appeal, the defendant insisted that the forfeiture nevertheless should be set aside because the court neglected to establish a “factual basis” for the forfeiture as required by Rule 11(f) of the Federal Rules of Criminal Procedure.

In rejecting this argument, the Supreme Court held that Rule 11(f) requires a factual inquiry only with respect to the defendant’s admission of guilt to a substantive offense. Forfeiture, the Court said, is not a substantive offense, but is only part of the sentence imposed for the offense to which the defendant pled guilty. The Court’s ruling was quite clear: “Congress plainly intended forfeiture of assets to operate as punishment for criminal conduct in violation of the federal drug and racketeering laws, not as a separate substantive offense.”

Libretti insisted that criminal forfeiture was “not ‘simply’ an aspect of sentencing, but is, in essence, a hybrid that shares elements of both a substantive charge and a punishment imposed for criminal activity. In support, he pointed, among other things, to language in the Supreme Court’s own opinion in Caplin & Drysdale, Chartered v. United States, suggesting that “forfeiture is a substantive charge in the indictment.” But the Court expressly disavowed the language in Caplin & Drysdale, noting that elsewhere in the same opinion, the Court “recognized that forfeiture is a ‘criminal sanction,’ and is imposed as a sentence under § 853.”

In sum, the Court held that because “criminal forfeiture is an element of the sentence imposed for a violation of certain drug and racketeering laws,” and is not “an element of the offense to be alleged and proved,” the

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40 Id. at 37-38.
41 Id. at 38-39.
42 Id. at 39 (emphasis added).
43 Id. at 40.
45 Id. at 628 n.5.
46 Libretti, 516 U.S. at 40 (citations omitted).
requirements of Rule 11(f) did not apply. Accordingly, the Court found that when a defendant pleads guilty to a substantive offense, the trial court’s determination that there is a factual basis for the plea is essential but, because forfeiture is part of the sentence and not an offense, the only inquiry with respect to the forfeiture is whether the defendant’s plea is knowing and voluntary, “not whether it is factually sound.”

Libretti also challenged the criminal forfeiture on the very ground that was central to the Court’s holding in Apprendi: he argued that his agreement to the criminal forfeiture was invalid because the trial judge failed to advise him that he was waiving a “constitutional right” to have the forfeiture determined by a jury. The Supreme Court disagreed. Libretti’s argument, the Court said, was that the Court should equate his right to have a jury determine the forfeitability of his property “with the familiar Sixth Amendment right to a jury determination of guilt or innocence.” Anticipating what it would later emphasize in Apprendi, the Court acknowledged that “[t]he Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged.” But there is, however, no Sixth Amendment right to have the jury determine the issue of criminal forfeiture. Again, the Court was exceedingly clear: “[O]ur analysis of the nature of criminal forfeiture as an aspect of sentencing compels the conclusion that the right to a jury verdict on forfeitability does not fall within the Sixth Amendment’s constitutional protection.”

It was this conclusion that led to the Fifth Circuit’s recent holding that a defendant has no constitutional right to have a forfeiture determined by a twelve-member jury, and to the consensus among the appellate courts that forfeiture need not be proved beyond a reasonable doubt.

To the extent that the Supreme Court’s holding in Apprendi was based on the notion that the New Jersey statute created a separate offense, with separate elements that had to be presented to a jury and proved beyond a reasonable doubt, Libretti forecloses the application of that decision to criminal forfeiture. Libretti clearly holds that criminal forfeiture is not an element of the offense that must be alleged and proved, and it holds that

47 Id. at 41.
48 Id. at 42.
49 Id. at 48.
50 Id. at 49 (citation omitted).
51 Id. (quoting United States v. Gaudin, 515 U.S. 506, 511 (1995)).
52 Id.
53 See supra note 19 and accompanying text.
there is no Sixth Amendment right to have the forfeiture presented to a jury. Accordingly, a court cannot apply Apprendi's "separate offense" rationale to a criminal forfeiture case without concluding that Libretti has been overruled.

Nothing in the Supreme Court's decision in Apprendi, however, so much as mentions criminal forfeiture; nor does the court have any occasion to cite Libretti. Thus, it would be extraordinary to conclude that the Supreme Court intended to overrule its recent precedent in that case.

There is an analogy that supports the above conclusion in recent Supreme Court jurisprudence. In Austin v. United States,54 the Supreme Court held, for the first time, that civil forfeitures constitute punishment for purposes of the Excessive Fines Clause of the Eighth Amendment. Shortly after that holding was announced, the Courts of Appeals for the Sixth and Ninth Circuits held that Austin required them to find, notwithstanding a long line of Supreme Court precedents to the contrary, that civil forfeiture constitutes punishment for purposes of the Double Jeopardy Clause of the Fifth Amendment.55 The appellate courts recognized that the Supreme Court had never before considered civil forfeiture to implicate double jeopardy, but they concluded that the decision in Austin must have meant that the Court had "changed its collective mind," and "adopted a new test for determining whether a nominally civil sanction constitutes 'punishment' for double jeopardy purposes."

Chief Justice Rehnquist, writing for the Court in United States v. Ursery,57 a decision that reversed the Sixth and Ninth Circuits on this issue, noted that nothing in Austin nor in any of the other recent Supreme Court cases on which the lower courts had relied related in any way to the application of double jeopardy law to civil forfeiture, and the Chief Justice chastised the lower courts for assuming that the Supreme Court would reverse its precedents without saying so in cases that had nothing to do with the issue at hand. "It would have been quite remarkable," the Chief Justice wrote, "for this Court both to have held unconstitutional a well-established practice, and to have overruled a long line of precedent, without having even suggested that it was doing so."

To apply Apprendi to criminal forfeiture law would be to repeat the same error that the lower courts committed in the double jeopardy cases.

55 See United States v. Ursery, 59 F.3d 568 (6th Cir. 1995); United States v. $405,089.23 U.S. Currency, 33 F.3d 1210 (9th Cir. 1994).
56 $405,089.32 U.S. Currency, 33 F.3d at 1218-19.
58 Id. at 288.
The Supreme Court clearly held in *Libretti* that criminal forfeiture is not a separate offense and that a defendant has no Sixth Amendment right to have a jury determine the forfeiture. Nothing in *Apprendi* suggests that the Supreme Court has "changed its collective mind" and intended to overrule *Libretti* without giving the least suggestion that it was doing so. Again, *Apprendi* neither mentions criminal forfeiture nor cites *Libretti*. Hence, it would be extraordinary for a lower court to determine that, notwithstanding *Libretti*, criminal forfeitures must now be submitted to a jury in all instances and proved beyond a reasonable doubt.

**B. Criminal Forfeiture Does not Lie Outside the Statutory Maximum**

The second basis for the holding in *Apprendi* was that a defendant may not be subjected to greater punishment for the commission of a criminal offense than is authorized for that offense alone. The punishment, in other words, must fall within the range of sentencing options for that offense. Criminal forfeiture, however, does not expose the defendant to any punishment outside the scope of the sanctions that may be imposed for the offense presented to the jury. Because forfeiture is a mandatory part of the sentence for any offense for which it is authorized, it is part of the maximum penalty to which the defendant is exposed based solely on the jury's determination that the elements of the underlying offense have been established beyond a reasonable doubt.

In *Apprendi*, the Court clearly stated its concern: the defendant may not be exposed "to a greater punishment than that authorized by the jury's guilty verdict." But in every case in which the criminal forfeiture statutes apply, the forfeiture "is authorized by the jury's verdict."

In *Alexander v. United States*, the Supreme Court observed that "a RICO conviction subjects the violator not only to traditional, though stringent, criminal fines and prison terms, but also mandatory forfeiture under § 1963." And in *United States v. Monsanto*, the Court said, "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied . . . ." The Ninth Circuit recently held that criminal forfeiture is mandatory upon conviction because it is designed to ensure that a defendant does not profit

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61. *Id.* at 562.
63. *Id.* at 606.
from his crimes, and other courts have held that criminal forfeiture is a mandatory consequence of the defendant's conviction for drug trafficking, money laundering, and other offenses. Most important, the recently-enacted general criminal forfeiture provision, which authorizes forfeiture of the proceeds of hundreds of crimes in the federal criminal code, provides that "upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act."

Because criminal forfeiture is automatically mandated as part of the sentence for a criminal offense, based solely on the jury's guilty verdict with respect to the underlying crime, the imposition of the forfeiture does not lie outside the scope of the sentence that may be imposed based on the jury's verdict alone. As mentioned above, a number of appellate courts adopted this rationale in holding—before Apprendi was decided—that the preponderance standard applies to criminal forfeitures.

This interpretation of Apprendi is also consistent with post-Apprendi rulings of the Courts of Appeals. For example, in United States v. Aguayo-Delgado, the Eighth Circuit was presented with the question whether Apprendi invalidated a sentence imposed under the Federal Sentencing Guidelines based on the court's determination, made by a preponderance

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64 See United States v. Johnston, 199 F.3d 1015, 1022 (9th Cir. 1999).
65 See United States v. Corrado, 227 F.3d 543 (6th Cir. 2000) (holding that because criminal forfeiture is mandatory, the court's failure to impose forfeiture is appealable as an unlawful sentence under 18 U.S.C. § 3742(b)); United States v. Hill, 167 F.3d 1055, 1075 (6th Cir. 1999) (holding that courts may not ignore mandatory language of forfeiture statute and give defendant option of substituting cash for forfeited items, unless 21 U.S.C. § 853(p) applies); United States v. Tencer, 107 F.3d 1120, 1134 (5th Cir. 1997) (holding that criminal forfeiture for money laundering under § 982(a)(1) is mandatory); United States v. Bieri, 68 F.3d 232, 235 (8th Cir. 1995) (holding that under § 853(a)(2), criminal forfeiture of property used to facilitate a drug trafficking offense "is mandatory, not discretionary"); United States v. Hendrickson, 22 F.3d 170, 175 (7th Cir. 1994) (providing for mandatory forfeiture of property in cases involving a conviction for money laundering).
66 28 U.S.C. § 2461(c) (emphasis added). This statute, taken together with 18 U.S.C. § 981(a)(1)(C), which provides for the civil forfeiture of the proceeds of any crime listed within the definition of "specified unlawful activity" in the money laundering statute, 18 U.S.C. § 1956(c)(7), may be used to include a criminal forfeiture allegation in any criminal indictment that charges any of the most commonly prosecuted federal crimes.
67 See supra notes 12-17 and accompanying text.
68 United States v. Aguayo-Delgado, 220 F.3d 926 (8th Cir. 2000).
of the evidence, that certain sentencing factors were present. In its analysis of *Apprendi*, the panel noted that the decision required judges to operate "within the limits of the legal penalties provided" by the statute. Only if the "defendant faces punishment beyond that provided by the statute." is there a violation of the defendant's due process rights. The court continued:

Thus, if the government wishes to seek penalties in excess of those applicable by virtue of the elements of the offense alone, then the government must charge the facts giving rise to the increased sentence in the indictment, and must prove those facts to the jury beyond a reasonable doubt.71

The key point, the panel concluded, was that "[t]he rule of *Apprendi* only applies where the non-jury factual determination increases the maximum sentence beyond the statutory range authorized by the jury's verdict." Because the factual determination in *Aguayo-Delgado* resulted in a sentence that fell within the range of sentences that could have been imposed based on the jury verdict alone, *Apprendi* did not apply.73

Again, criminal forfeiture is a penalty applicable in criminal cases "by virtue of the elements of the offense alone;" the imposition of the forfeiture does not increase the "degree of culpability," or heighten the

69 Id. at 932 (citing United States v. Apprendi, 120 S. Ct. 2348 (2000)).
70 Id. (emphasis added).
71 Id. at 933 (emphasis added).
72 Id.
73 See id. at 934. See also United States v. Hernandez-Guardado, 228 F.3d 1017, 1026 (9th Cir. 2000) (holding "that a sentence that fell within ten-year sentence for alien smuggling may be determined by the Court by a preponderance of the evidence without implicating *Apprendi*"); Hernandez v. United States, 226 F.3d 839, 841 (7th Cir. 2000) (stating that because the statutory maximum for kidnapping is life in prison, any sentence could be imposed by the court alone, based on factors determined by a preponderance of the evidence, without violating the rule in *Apprendi*); United States v. Meshack, 225 F.3d 556, 575-77 (5th Cir. 2000) (concluding that the determination of the drug quantity, by a preponderance of the evidence, did not violate *Apprendi* where the sentence was within the statutory maximum); United States v. Corrado, 227 F.3d 528, 542 (6th Cir. 2000) (holding that a sentence that falls within the twenty-year maximum penalty for RICO may be determined by the court by a preponderance of the evidence without implicating *Apprendi*); Doe v. United States, 112 F. Supp. 2d 398, 403 (D.N.J. 2000) (holding that the determination of the drug quantity by a preponderance of the evidence did not violate *Apprendi*).
74 See supra note 71 and accompanying text.
“stigma” attached to the conviction, beyond what is “authorized by the jury’s verdict.”  Once the defendant is convicted, the forfeiture of the proceeds of the offense, or the property involved in or used to commit the offense, inevitably follows. All that is required of the finder of fact in a criminal case is to determine precisely what property may be forfeited in accordance with the terms of the forfeiture statute—a determination entirely analogous to the court’s determination, pursuant to the sentencing guidelines, of where to set the sentencing level within the maximum range authorized by statute.

Indeed, the Supreme Court itself viewed its ruling in Apprendi in similar terms. The dissenting Justices in Apprendi argued that the constitutional rule announced by the Court would render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a death sentence. The majority, however, explained that that was not so. Once a jury has found the defendant guilty of a crime that carries the maximum sentence of death, the Court noted, it may be left to the judge to decide whether to impose the maximum sentence or a lesser one. Because a jury verdict alone in a capital case exposes a defendant to the maximum punishment, a judge’s action does not transform the nature of the crime into a greater offense. As Justice Scalia said in his concurring opinion, the defendant’s right is “to have a jury determine those facts that determine the maximum sentence the law allows.”

Once the jury determines those facts, the defendant faces whatever consequences the legislature has provided for that offense, “[b]ut the criminal will never get more punishment than he bargained for when he did the crime, and his guilt of the crime . . . will be determined beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens.”

Similarly, the Seventh Circuit recently held that a defendant in a so-called “drug kingpin” case, for which the prescribed sentencing range is thirty years to life, has no right, under Apprendi, to have the jury determine factors that make the life sentence mandatory. Because a life sentence falls within the range of consequences prescribed for the underlying offenses, the court held that the defendant was entitled to have the jury determine those facts that made the life sentence mandatory.

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75 See supra note 64 and accompanying text.
77 See id.
78 Id. at 2467 (Scalia, J., concurring).
79 Id.
81 See United States v. Smith, 223 F.3d 554 (7th Cir. 2000).
offense, the imposition of the life sentence does not expose the defendant to punishment any greater than he could have received based on the factors presented to the jury and proved beyond a reasonable doubt.\textsuperscript{82}

The above is also true in criminal forfeiture cases. The defendant knows at the outset of trial that criminal forfeiture is part of the sentence that may be imposed upon conviction of the offense presented to the jury. If the defendant is convicted, the amount of the forfeiture is determined by a preponderance of the evidence, and may in some circumstances be determined by the court, not the jury; in all cases, however, the forfeiture will fall within the strictures of the statute authorizing forfeiture for the offense. Thus, the defendant "will never get more punishment than he bargained for,"\textsuperscript{83} and his guilt of the crime giving rise to the forfeiture will have been determined beyond a reasonable doubt by the jury.

IV. THE SIXTH CIRCUIT'S RULING IN \textit{UNITED STATES V. CORRADO}

Two appellate courts have already held that \textit{Apprendi} does not apply to criminal forfeiture. In \textit{United States v. Corrado},\textsuperscript{84} defendants, all members of the Detroit Cosa Nostra, were convicted of RICO offenses involving extortion and other crimes. On the basis of those convictions, the government alleged that the defendants were jointly and severally liable for the forfeiture of more than $5.4 million derived from a number of different schemes through which one or another of the defendants had conducted the RICO enterprise.\textsuperscript{85}

Defendants waived their right to have the forfeiture determined by the jury, leaving it to the United States District Court for the Eastern District of Michigan to determine, by a preponderance of the evidence, what property each of the defendants was required to forfeit.\textsuperscript{86} Although the court found that the racketeering scheme involved the extortion of funds from numerous victims over a period of time, the court held that it was impossible—based on the evidence presented at trial—to quantify the amount of money actually obtained.\textsuperscript{87} Because it found that the total amount of proceeds was unquantifiable, and that there was no evidence of how much each defendant had realized from the scheme, the court entered

\textsuperscript{82} Id.
\textsuperscript{83} \textit{Apprendi}, 120 S. Ct. at 2467 (Scalia, J., concurring).
\textsuperscript{84} \textit{United States v. Corrado}, 227 F.3d 543 (6th Cir. 2000).
\textsuperscript{85} Id. at 547.
\textsuperscript{86} Id.
\textsuperscript{87} Id. at 547-48.
a judgment forfeiting zero dollars. The government appealed this determination.

Defendants moved to dismiss the appeal on two grounds. First, the defendants argued that no statute authorized a government appeal from a criminal forfeiture order. Second, they argued that even if there were statutory authority for such an appeal, the entry of a judgment of "zero forfeiture" was the functional equivalent of an "acquittal," and appeals from acquittals in criminal cases are barred by the Double Jeopardy Clause of the Fifth Amendment. The Sixth Circuit rejected both arguments.

On the first point, the panel acknowledged that the government has no right of appeal in a criminal case unless a statute expressly grants such a right. It noted, however, that 18 U.S.C. § 3742(b) authorizes government appeals from any sentence in a criminal case that is "imposed in violation of law." Because forfeiture is a mandatory part of the sentence in any criminal case for which forfeiture is authorized, the failure of a trial court to enter a judgment of forfeiture would constitute a sentence "imposed in violation of law," assuming that the forfeiture is supported by the facts. Therefore, government appeals from the refusal of a court to enter a judgment of forfeiture in a criminal case are authorized by § 3742(b).

In support of their double jeopardy argument, the defendants relied on the Supreme Court's decision in Apprendi. They argued that if a factor that increases the defendant's sentence beyond the statutory maximum is an element of a separate offense, as Apprendi holds, then a determination adverse to the government on that point—i.e., a finding that the factor has not been established—is the functional equivalent of an acquittal, and consequently, an appeal from the adverse ruling is barred.

Defendants' argument hinged, of course, on the notion that Apprendi applies to criminal forfeiture, and that criminal forfeiture issues therefore must be submitted to a jury and proved beyond a reasonable doubt. Only if that were so would the failure to establish the forfeiture at trial constitute

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88 Id.
89 Id.
90 Id. at 548.
91 Id.
92 Id. at 558.
93 Id. at 549.
94 Id.
95 Id.
96 Id. at 550.
97 Id.
an acquittal that barred an appeal on double jeopardy grounds. The Sixth Circuit, however, held that Apprendi does not apply to criminal forfeiture.98

Consistent with Libretti, the Sixth Circuit panel held that criminal forfeiture is not a separate offense with elements that must be submitted to a jury. To the contrary, criminal forfeiture is an aspect of the punishment that is imposed following the conviction on a substantive criminal offense. The Sixth Circuit found that the Constitution requires only that the jury determine, beyond a reasonable doubt, that the defendant committed the offense giving rise to the forfeiture. Once that determination is made, the forfeiture automatically follows, just like any other aspect of the punishment prescribed by the statute setting forth the punishment for that offense.99

"There is no requirement under Apprendi, or in any other precedent cited by the defendants," the court said, "that the jury pass upon the extent of a forfeiture. . . ."100 "Accordingly," the court concluded, "we reject the defendants' argument that the jury must decide the extent of forfeiture or that the district court, as the agreed trier of fact, must make fact determinations based on the 'beyond a reasonable doubt' standard."101 The Sixth Circuit concluded that, because Apprendi did not apply, and the forfeiture was therefore only an aspect of the sentence, there was no double jeopardy bar to the government’s appeal from the trial court’s order refusing to enter an order of forfeiture.

Similarly, in United States v. Powell,102 the defendants were convicted of drug offenses and ordered to forfeit real property that was traceable to drug proceeds. On appeal, they sought to overturn the forfeiture, inter alia, on the ground that the trial court had instructed the jury to determine the forfeitability of the property under the preponderance of the evidence standard. In an unpublished per curiam opinion, the Fourth Circuit rejected that contention.

"The Supreme Court has held that forfeiture is not an independent offense, but is only part of the sentence imposed for the underlying drug offense," the panel said, citing Libretti. Thus, as almost all courts have previously held, "the burden of proof on a forfeiture count is preponderance of the evidence."103 Nothing in Apprendi changes this, the panel concluded, because as part of the sentence for the underlying offense, the forfeiture

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98 Id. at 550-51.
99 Id. at 551.
100 Id. at 550.
101 Id. at 551 (citation omitted).
103 Id. (citing United States v. Tanner, 61 F.3d 231 (4th Cir. 1995)).
does not increase the sentence beyond the statutory maximum. Thus, 

*Apprendi* does not require the trier of fact to make *factual determinations relating to the forfeiture beyond a reasonable doubt.*  

V. *APPRENDI’S EFFECT ON RULE 32.2*

Finally, applying *Apprendi* to criminal forfeiture would do more than change the standard of proof from “preponderance of the evidence” to “beyond a reasonable doubt” and require that all forfeiture matters be presented to a jury. Beyond that, it is at least arguable that *Apprendi* would invalidate two key provisions of the new Rule of Federal Criminal Procedure governing criminal forfeitures, a rule that the Supreme Court approved only weeks before the decision in *Apprendi* was announced.

Rule 32.2 of the Federal Rules of Criminal Procedure  

provides that a court may issue an order of forfeiture in a criminal case in generic terms—i.e., without listing specific assets. For example, a court may order a defendant to forfeit all proceeds of the drug trafficking offense for which he or she was convicted, up to a certain amount that the court (or a jury) has determined by a preponderance of the evidence, even though the government has not yet located the money itself. The Rule goes on to provide that once the order of forfeiture is entered, the government may conduct post-conviction discovery, in accordance with the applicable forfeiture statute, to locate the property subject to forfeiture.

Once that property is located, the government may move, pursuant to Rule 32.2(e)(1)(A), to amend the order “to include property that is subject to forfeiture under an existing order . . . but was located and identified after

\[104\] *See also* United States v. Messino, 2001 WL 123799 (N.D. Ill. Jan. 31, 2001) (following *Corrado* and holding that a preponderance standard still applies in the Seventh Circuit).

\[105\] *See* Supreme Court Actions, 68 U.S.L.W. 2637 (Apr. 17, 2000).

\[106\] *See* FED. R. CRIM. P. 32.2(e) advisory committee’s note.

As a practical matter, courts have also determined that they, not the jury, must determine the forfeitability of assets discovered after the trial is over and the jury has been dismissed. *See* United States v. Saccoccia, 898 F. Supp. 53 (D.R.I. 1995) (holding that the government may conduct post-trial discovery to determine location and identity of forfeitable assets; post-trial discovery resulted in discovery of gold bars buried in defendant’s mother’s backyard several years after the entry of an order directing the defendant to forfeit all property, up to $137 million, involved in his money laundering offense).

\[Id.\]

\[107\] *See* FED. R. CRIM. P. 32.2(b)(3); 21 U.S.C. § 853(m) (2000).
that order was entered.

The government, of course, must establish that the newly-identified property is subject to forfeiture. But it is the court alone, not the jury, that makes that determination.

If *Apprendi* applies to criminal forfeiture cases, the determination that property is subject to forfeiture will have to be made by a jury. But what about property that has not yet been located at the time of the trial? If the government does not locate the forfeitable property until months or years after the trial is over, is it sufficient to know that a jury determined, at the time of trial, that all proceeds, or other property involved in the offense, were subject to forfeiture up to a maximum amount? If that is the case, then Rule 32.2(e)(3) is constitutional, and the subsequent identification of specific property as falling within the scope of the jury's finding may be left to the court. But it is at least arguable that every time the government seeks to amend an order of forfeiture to include newly-identified property the court must empanel a new jury, and prove beyond a reasonable doubt, that the newly-identified property is, in fact, the property that the trial jury said the government was entitled to forfeit. Such an interpretation of the rule would make criminal forfeiture impractical in many cases.

Moreover, the application of *Apprendi* to criminal forfeiture calls into question the provision in Rule 32.2(a) that permits the government to allege forfeiture in generic terms in the indictment. Recent case law and the Advisory Notes to Rule 32.2 make clear that the government is required only to put the defendant on notice that it will be seeking the forfeiture of his property in the event of a conviction. While as a practical matter it is often done, it is not necessary for the government to list in the indictment each of the items subject to forfeiture, nor must the government specify what theory of forfeiture pertains to each item. In other words, under

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109 *Id.* at 32.2(e)(2).

110 *Id.* at 32.2(e)(3) ("There is no right to a trial by jury under Rule 32.2(e)").

111 See *Fed. R. Crim. P.* 32.2 advisory committee's notes.

112 See *United States v. Diaz*, 190 F.3d 1247, 1257 (11th Cir. 1999) (stating that the government complies with Rule 7(c)(2) and due process if the indictment tracks language of the forfeiture statute, and the government informs defendant of its intent to forfeit specific assets after the guilty verdict and before the forfeiture phase of the trial begins); *United States v. DeFries*, 129 F.3d 1293, 1315 n.17 (D.C. Cir. 1997) (holding that it is not necessary to specify in either the indictment or a bill of particulars that the government sought forfeiture of defendant's salary, and that, to comply with Rule 7(c), the government need only put defendant on notice that it would seek to forfeit everything subject to forfeiture under the applicable statute, such as all property "acquired or maintained" as a result of a RICO violation); *Fed. R. Crim. P.* 32.2 advisory committee's note ("[S]ubdivision (a) is
Rule 32.2(a), it is sufficient for the indictment to include an allegation that
the government, in the event of a conviction, will seek the forfeiture of all
proceeds of the defendant’s drug trafficking offense, and all property used
to facilitate that offense.

As the Fifth Circuit recently observed, *Apprendi* addressed only
whether certain facts must be proved and found by a jury. It did not address
whether these facts must also be alleged in the indictment. But the opinion
of the Court, read in conjunction with the Court’s earlier opinion in *Jones
v. United States*,113 “clearly indicates that a fact which must be proved to
the jury is an element of the offense that must also be alleged in the
indictment.”114 If that is so, then it may be necessary—notwithstanding the
clear intent of Rule 32.2(a)—for the government to allege in the indictment
each asset that is subject to forfeiture and its relationship to the underlying
criminal offense. Again, because of the difficulty in ascertaining what
property a defendant may have used to commit an offense or was derived
from an offense, such a rule would render criminal forfeiture impractical
in many cases.

CONCLUSION

Nothing in the U.S. Supreme Court’s decision in *Apprendi v. New
Jersey* compels the conclusion that a criminal forfeiture must be presented
to a jury and proved beyond a reasonable doubt. *Apprendi* does not
overturn the well-established rule of *Libretti v. United States* that criminal
forfeiture is not a separate offense with elements that must be alleged and
proved. Nor is *Apprendi* inconsistent with the view that criminal forfeiture
falls within the range of sentencing options that are prescribed by Congress
as a consequence of the defendant’s conviction for a criminal offense.
Accordingly, *Apprendi* does not disturb the prevailing view that the factors
supporting a criminal forfeiture judgment may be established by the court
under a preponderance of the evidence standard.

not intended to require that an itemized list of the property to be forfeited appear
in the indictment or information itself. . . . It does not require a substantive
allegation in which the property subject to forfeiture, or the defendant’s interest in
the property, must be described in detail.”) (citation omitted).
114 *United States v. Meshack*, 225 F.3d 556, 575 n.15 (5th Cir. 2000) (citations
omitted).