

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

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In Apprendi v. New Jersey, (1) 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." (2)

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. I think that it does not.

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." (3) Those courts repeatedly 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*, (4) 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." (5)

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. (6) The Fourth Circuit took the statutory analysis a step further. In *United States v. Tanner*, (7) the court held that the direction in Section 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," (8) thus making it clear that the forfeiture is not a separate offense, but a part of the punishment imposed on a person who has already been convicted.

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 *United States v. Rogers*, (9) forfeiture bears the same relationship to the crime as does a jail sentence or a fine. (10) It is a consequence of the 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." (11)

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 *United States v. Smith*: (12)

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. (13)

"Because 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. (14)

The Fifth Circuit extended this rule to another context. In *United States v. Cantu*, (15) the court bifurcated the trial between the guilt phase and the forfeiture phase. When a juror was unable to continue with the jury deliberations during the guilt phase, the defendant agreed to proceed with an eleven-member jury pursuant to Rule 23, Federal Rules of Criminal Procedure. He did not agree, however, to have an 11-member jury determine the forfeiture. 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 ground to complain about the forfeiture verdict returned by the 11-member jury. (16)

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

The Constitutional Rule in *Apprendi*

In *Apprendi*, a defendant was convicted under a New Jersey statute that normally carried a penalty range of 5 to 10 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 20 years, and sentenced the defendant to 12 years' imprisonment. The sentence was upheld by the New Jersey Supreme Court, but the Supreme Court of the United States reversed, holding that the sentencing procedure violated the defendant's rights under the Due Process Clause of the Fourteenth Amendment.

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 were not among the elements of the underlying crime, creates a separate offense with elements that are never presented to a jury. This violates the defendant's Sixth Amendment right to have all elements of the offense presented to a jury and proved beyond a reasonable doubt. Second, the New Jersey statute exposed the 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 to the loss of his liberty than were authorized for the offense on which he was tried and convicted.

1. 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, (17) but judges generally may not impose a sentence that exceeds the statutory maximum. (18) 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 said the following:

The 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. (19)

The New Jersey statute, the Court said, created a second 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.' " (20)

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 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. (21)

Allowing the 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." (22) 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 "redefining the elements that constitute different crimes [as] factors that bear solely on the extent of punishment." (23) Accordingly, the Court held that, "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." (24)

2. 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 "core 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 verdict alone." (25)

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; . . . (26)

In other words, the 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 the limits fixed by law," (27) and "the range of sentencing options proscribed by the legislature." (28) 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" (29) violates his right to due process.

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?" (30)

Application of Apprendi to criminal forfeiture

The twin themes of the Apprendi analysis suggest that the Court's holding applies to any case 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; or 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, *Apprendi* involved a finding that the defendant was culpable for two separate acts: unlawful possession of a weapon, and selecting his victims with a purpose to intimidate them on account of their race. (31) 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 two acts that New Jersey has singled out for punishment." (32)

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, "The argument that forfeiture is an element which must be proved beyond a reasonable doubt confuses culpability with consequences." (33)

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 he 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.

1. 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*, (34) 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 Section~853(a). At

the plea hearing, the district judge determined that the defendant's plea was voluntary, but 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. (35)

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. (36) 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. (37)

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." (38) In support, he pointed, among other things, to language in the Supreme Court's own opinion in *Caplin & Drysdale, Chartered v. United States*, (39) suggesting that "forfeiture is a substantive charge in the indictment." (40) 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." (41)

At bottom, 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 requirements of Rule 11(f) did not apply. (42) 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." (43)

Libretti also challenged the criminal forfeiture on the very ground that was central to the Court's later 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." (44) Anticipating what it would later emphasize in Apprendi, the Court acknowledged that "The 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." (45) But there is no Sixth Amendment right to have the jury determine the 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. (46)

It was this conclusion, of course, that led to the Fifth Circuit's recent holding that a defendant has no constitutional right to have a forfeiture determined by a 12-member jury, (47) 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 held that 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 to *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 in recent Supreme Court jurisprudence. In *Austin v. United States*, (48) 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. (49) The appellate courts recognized that the Supreme Court had never held civil forfeiture to implicate double jeopardy in the past, but they held 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." (50)

Chief Justice Rehnquist, writing for the Court in the decision reversing the Sixth and Ninth Circuits, 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 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." (51)

To apply *Apprendi* to criminal forfeiture law would be to repeat the same error that the lower courts committed in the double jeopardy cases. 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 the jury determine the forfeiture. Nothing in *Apprendi* suggests that the Supreme Court had "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.

2. 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 that are authorized by the jury's guilty verdict. 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 Supreme Court clearly stated its concern: the defendant may not be exposed "to a greater punishment than that authorized by the jury's guilty verdict." (52) 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*, (53) 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*, (54) 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 from his crimes, (55) and other courts have held that criminal forfeiture is mandatory consequence of the defendant's conviction for drug trafficking, money laundering and other offenses. (56) Most important, the recently-enacted general criminal forfeiture provision, which authorizes the 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 (21 U.S.C. 853)." (57)

Because criminal forfeiture is automatically mandated as part of the sentence for a criminal offense, based solely on the jury's verdict of guilty on 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, a number of appellate courts adopted this rationale in holding - before Apprendi was decided - that the preponderance standard applies to criminal forfeitures. (58)

This interpretation of Apprendi is also consistent with the post-Apprendi rulings of the Courts of Appeals. For example, in *United States v. Aguayo-Delgado*, (59) the Eighth Circuit had to determine whether Apprendi invalidated a sentence imposed under the Federal Sentencing Guidelines based on the court's determination, by a preponderance of the evidence, that certain sentencing factors were present. In its analysis of the Supreme Court decision, the panel noted that Apprendi required judges to operate "within the limits of the legal penalties provided" by the statute. (60) Only if the "defendant faces punishment beyond that provided by the statute" is there a violation of the defendant's due process rights. (61) The court continued as follows:

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. (62)

The key point, the panel concluded, was that "The 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." (63) 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 simply did not apply. (64)

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 "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 with 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. (65) 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 said, it may be left to the judge to decide whether to impose the maximum sentence or a lesser one. Because the jury's verdict alone in the capital case exposed the defendant to the maximum punishment, the judge's action does not transform the nature of the crime into a greater offense. (66) 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." (67) Once the jury determines those facts, the defendant faces whatever consequences the legislature has, by statute, provided for that offense, "but 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." (68)

Similarly, the Seventh Circuit recently held that a defendant in a "drug kingpin" case, (69) for which the prescribed sentencing range is 30 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 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. (70)

So it is in criminal forfeiture cases. The defendant knows at the outset of the trial that criminal forfeiture is part of the sentence that may be imposed upon conviction for the offense presented to the jury. When he 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; but the forfeiture will in all cases fall within the strictures of the statute authorizing forfeiture for the offense. Thus, the defendant "will never get more punishment than he bargained for," and his guilt of the crime giving rise to the forfeiture will have been determined beyond a reasonable doubt by the jury.

Sixth Circuit's Ruling in United States v. Corrado

One appellate court has already held that Apprendi does not apply to criminal forfeiture. In *United States v. Corrado*, (71) 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 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.

Defendants waived their right to have the forfeiture determined by the jury, leaving it to the court to determine, by a preponderance of the evidence, what property each of the defendants was required to forfeit. 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. The court also held that each defendant was liable only for the amount of money distributed to him. 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 a judgment forfeiting zero dollars. The Government appealed.

Defendants moved to dismiss the appeal on two grounds: First, 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," if 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 Section 3742(b). (72)

In support of their double jeopardy argument, 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 an acquittal that barred an appeal on double jeopardy grounds. But the Sixth Circuit held that *Apprendi* does not apply to criminal forfeiture.

Following *Libretti*, the 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. All the Constitution requires is 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. (73)

"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 . . ." (74) 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." (75) 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 failure to enter an order of forfeiture.

Affect 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 that the Supreme Court approved only weeks before the decision in Apprendi was announced.

Rule 32.2, Federal Rules of Criminal Procedure, (76) provides that the court may issue an order of forfeiture in a criminal case forfeiting property in generic terms. For example, the court may order the defendant to forfeit all proceeds of the drug trafficking offense for which he was convicted, up to a certain amount that the court (or a jury) has determined by a preponderance of the evidence, (77) 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. (78)

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 that order was entered." The Government, of course, must establish that the newly-identified property is subject to forfeiture. Rule 32.2(e)(2). But it is the court alone, not the jury, that makes that determination. Rule 32.2(e)(3) ("There is no right to a trial by jury under Rule 32.2(e).").

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 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 the 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 a 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) permitting the Government to allege the 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 each of the items subject to forfeiture in the indictment, nor to specify what theory of forfeiture pertains to each item. (79) In other words, under 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* only addressed 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*, (80) "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." (81) 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 of knowing in advance what property the defendant may have derived from, or used to commit, the offense, such a rule would render criminal forfeiture impractical in many cases.

Conclusion

Nothing in the 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 a preponderance of the evidence. 1.

120 S. Ct. 2348 (2000). 2.

120 S. Ct. at 2362-63. 3. See *United States v. Dicter*, 198 F.3d 1284, 1289 (11th Cir. 1999) (because forfeiture is part of sentencing, preponderance standard applies to all section~853(a) forfeitures); *United States v. Garcia-Guizar*, 160 F.3d 511, 518 (9th Cir. 1998) (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) (in light of *Libretti*, burden of proof in RICO case is preponderance of the evidence); *United States v. Patel*, 131 F.3d 1195, 1200 (7th Cir. 1997) (burden of proof in section~853 cases is preponderance of the evidence because criminal forfeiture is part of the sentence

under Libretti); *United States v. Rogers*, 102 F.3d 641, 648 (1st Cir. 1996) (same); *United States v. Bellomo*, 176 F.3d 580, 595 (2d Cir. 1999) (following DeFries, Patel, and Rogers; 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. Myers*, 21 F.3d 826, 829 (8th Cir. 1994) (criminal forfeiture is part of the sentence); *United States v. Voigt*, 89 F.3d 1050, 1083 (3d Cir. 1996) (same, following Myers); *United States v. Rutgard*, 108 F.3d 1041, 1063 (9th Cir. 1997) (same); *United States v. Smith*, 966 F.2d 1045, 1050-53 (6th Cir. 1992) (forfeiture is part of sentencing which is governed by the preponderance standard; same standard applies to forfeiture of proceeds and facilitating property); *United States v. Bieri*, 21 F.3d 819 (8th Cir. 1994) (same); *United States v. Layne*, 192 F.3d 556, 575 (6th Cir. 1999) (reaffirming Smith); *United States v. Elgersma*, 971 F.2d 690, 697 (11th Cir. 1992) (preponderance standard applies to Section 853(a)(1) forfeitures; due process does not bar Congress from permitting sentencing issues to be resolved by the preponderance standard; because forfeiture is part of sentencing, a preponderance standard is unobjectionable if that is what Congress intended); *United States v. Ben-Hur*, 20 F.3d 313, 317 (7th Cir. 1994) (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); 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 *United States v. Pelullo*, 14 F.3d 881 (3d Cir. 1994); *United States v. Voigt*, supra (reasonable doubt standard applies to RICO, but not to any other criminal forfeiture).

4. 886 F.2d 1560 (9

th Cir. 1989). 5. 886 F.2d at 1577

. 6. See *United States v. Dicter*, 198 F.3d 1284, 1289 (11th Cir. 1999) ("The language of section 853(a) itself makes clear that its forfeiture provisions are elements of sentencing. See 21 U.S.C. § 853(a) (providing that court shall order forfeiture "in addition to any other sentence imposed").); *United States v. Voigt*, 89 F.3d 1050, 1083 (3rd Cir. 1996) ("the plain language of the statute reveals that forfeiture is a form of sentence enhancement that follows a previous finding of personal guilt"); *United States v. Myers*, 21 F.3d 826, 829 (8

th Cir. 1994) ("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."). 7. 61 F.3d 231 (4

th Cir. 1995). 8.

61 F.3d at 234. 9. 102 F.3d 641 (1

st Cir. 1996). 10. 102 F.3d at 648 ("the 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").

11. United States v. Sandini, 816 F.2d 869, 877 (3rd Cir. 1987).

12. 966 F.2d 1045 (6

th Cir. 1992). 13. 966 F.2d at 1052. See also United States v. Ben Hur, 20 F.3d 313, 317 (7

th Cir. 1994) ("Procedurally, a forfeiture authorized by section 853 operates as a sanction against the defendant based upon his conviction."). 14. United States v. Garcia-Guizar, 160 F.3d 511, 518 (9

th Cir. 1998). 15. 167 F.3d 198 (5th Cir. 1999)

. 16.

167 F.3d at 206-07. 17. 120 S. Ct. at 2358

. 18.

Id. 19.

120 S. Ct. at 2359 n.10. 20.

120 S. Ct. at 2364. 21.

120 S. Ct. at 2365 n.19 (emphasis supplied). 22.

120 S. Ct. at 2359. 23.

120 S. Ct. at 2360. 24.

120 S. Ct. at 2362-63. 25.

120 S. Ct. at 2363 n.16. 26.

120 S. Ct. at 2359 (emphasis added). 27.

120 S. Ct. at 2358 (emphasis removed). 28.

Id. 29.

120 S. Ct. at 2358 n.9. 30.

120 S. Ct. at 2365. 31.

120 S. Ct. at 2355. 32.

Id. (emphasis added). 33. *United States v. Sandini*, 816 F.2d at 877.

34.

516 U.S. 29, 116 S. Ct. 356 (1995). 35.

516 U.S. at 37-38. 36.

516 U.S. at 38-39. 37.

516 U.S. at 39 (emphasis added). 38.

516 U.S. at 40. 39.

491 U.S. 67, 109 S. Ct. 2646 (1989). 40.

491 U.S. at 628 n.5. 41. 516 U.S. at 40 (citations omitted).

42.

516 U.S. at 41. 43.

516 U.S. at 42. 44.

516 U.S. at 48-49. 45. 516 U.S. at 49, quoting *United States v. Gaudin*, 515 U.S. 506, 511, 115 S. Ct. 2310, 2314, 132 L. Ed.2d 444 (1995)

. 46.

Id. (emphasis supplied). 47. See note 15,

supra, and accompanying text. 48. 509 U.S. 602 (1993)

. 49. See *United States v. \$405,089.23 in U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994); *United States v. Ursery*, 59 F.3d 568 (6

th Cir. 1995). 50.

\$405,089.32, 33 F.3d, at 1218-19. 51.

United States v. Ursery, 518 U.S. 267, 288, 116 S. Ct. 2135, 2147 (1996). 52.

120 S. Ct. at 2365. 53. 509 U.S. 544, 562(1993)

. 54. 491 U.S. 600, 606 (1989).

55. See *United States v. Johnston*, 199 F.3d 1015, 1022 (9th Cir. 1999)

. 56. See *United States v. Tencer*, 107 F.3d 1120, 1134 (5th Cir. 1997) (criminal forfeiture for money laundering under §~982(a)(1) is mandatory); *United States v. Hendrickson*, 22 F.3d 170, 175 (7th Cir. 1994) (same); *United States v. Bieri*, 68 F.3d 232, 235 (8th Cir. 1995) (under §~853(a)(2), criminal forfeiture of property used to facilitate a drug trafficking offense "is mandatory, not discretionary"); *United States v. Hill*, 167 F.3d 1055 (6th Cir. 1999) (court may not ignore mandatory language of forfeiture statute and give defendant option of substituting cash for forfeited items, unless section~853(p) applies).

57.

28 U.S.C. §~2461(c) (emphasis supplied). 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. 58. See notes 9 through 14,

supra. 59. 220 F.3d 926 (8

th Cir. 2000). 60.

220 F.3d at 932. 61.

Id. 62.

220 F.3d at 933 (emphasis supplied). 63.

Id. 64. 220 F.3d at 934. See *United States v. Corrado*, ___ F.3d ___, 2000 WL 1199096 *13 (6th Cir. Aug. 24, 2000) (sentence that falls within the 20 year maximum penalty for RICO may be determined by the court by a preponderance of the evidence without implicating *Apprendi*); *United States v. Hernandez-Guardado*, ___ F.3d ___, 2000 WL 1264596 *9 (9th Cir. Sept. 7, 2000) (same for sentence that fell within 10-year sentence for alien smuggling); *Hernandez v. United States*, ___ F.3d ___, 2000 WL 1253528 *2 (7th Cir. Sept. 1, 2000) (because statutory maximum for kidnaping 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) (determination of the drug quantity, by a preponderance of the evidence, did not violate *Apprendi* where the sentence was within the statutory maximum);

Doe v. United States, 112 F. Supp. 2d 398, 403 (D.N.J. 2000) (same). 65.

Apprendi, 120 S. Ct. at 2366. 66.

Id. 67.

120 S. Ct. at 2467 (Scalia, J., concurring). 68.

Id. 69.

21 U.S.C. §~848. 70. See *United States v. Smith*, 223 F.3d 554 (7

th Cir. 2000). 71. ___ F.3d ___, 2000 WL 1396742 (6

th Cir. Sept. 27, 2000). 72.

Id. at ___. 73.

Id. at ___. 74.

Id. at ___. 75.

Id. 76. See *Supreme Court Actions*, 68 USLW 2637 (April 17, 2000).

77. See *Advisory Committee Notes on Rule 32.2, subdivision (e)* ("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) (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)." 78.

See Rule 32.2(b)(3); 21 U.S.C. §~853(m). 79. See United States v. Diaz, 190 F.3d 1247 (11th Cir. 1999) (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 asset after the guilty verdict and before the forfeiture phase of the trial begins); United States v. DeFries, 129 F.3d 1293 (D.C. Cir. 1997) (not necessary to specify in either the indictment or a bill of particulars that the Government sought forfeiture of defendant's salary; 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); Committee Advisory Notes, Rule 32.2, Federal Rules of Criminal Procedure (December 1, 2000) ("[S]ubdivision (a) is 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.").

80.

526 U.S. 227 (1999). 81. United States v. Meshack, 225 F.3d 556, 575 n.15 (5th Cir. 2000).