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Criminal asset Forfeiture and the Sixth Amendment After "Southern Union" and "Alleyne:" State-Level Ramifications

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NOTES

Criminal Asset Forfeiture and the Sixth Amendment After *Southern Union* and *Alleyne*: State-Level Ramifications

I. INTRODUCTION

The Founding Fathers thought the jury-trial right was so fundamental to our system of justice that they included it in the Sixth Amendment of the United States Constitution. The right to trial by jury serves to protect criminal defendants against government overreaching by ensuring that they will be judged by their fellow citizens.[1] And as a whole, our system of justice and our citizenry have remained committed to the jury trial. But since the Founding, the Supreme Court has narrowed the application of the Sixth Amendment's guaranty.

Two decades ago, the Supreme Court decided in *Libretti v. United States* that there is no constitutional right to a "jury verdict on forfeitability" in a criminal proceeding.[2] Rather, the Court held that the right to a jury trial in forfeiture proceedings was purely statutory and thus entirely up to the legislature to grant or deny.[3] Because it considered criminal forfeiture to be part of the sentence imposed on a person found guilty of a crime, the Court reasoned that the facts that link an asset to a crime and make it subject to seizure, like other sentencing factors, need not be proven to a jury beyond a reasonable doubt.[4] Relying on subsequent cases, scholars have cast *Libretti*'s

1. U.S. CONST. amend VI.
2. 516 U.S. 29, 49 (1995).
3. *Id.*
4. *See* STEFAN D. CASSELLA, ASSET FORFEITURE LAW IN THE UNITED STATES § 15-2, at 562 (2d ed. 2013).

holding into doubt, believing the Court's reasoning in that case "rests on principles that are no longer sound."[5]

Since *Libretti*, the Court has expanded Sixth Amendment protection to require jury fact-finding in a greater range of procedures, specifically identifying factors that a jury, rather than a judge, must decide for sentencing.[6] In *Apprendi v. New Jersey*, the Court held that a jury, not a judge, must determine any fact that increases a defendant's maximum sentence.[7] A jury must find that the government has proven those facts beyond a reasonable doubt.[8] The Supreme Court then extended its *Apprendi* rationale to encompass criminal fines as well as terms of imprisonment in *Southern Union Co. v. United States*.[9] Since the amount of the defendant's fine depended on the number of days the defendant was in violation of the law, the relevant number of days was a fact that a jury must have determined beyond a reasonable doubt.[10] Most recently, in *Alleyne v. United States,* the Court held that any fact that increases a defendant's mandatory *minimum* sentence is an "element" of the crime that must be submitted to the jury.[11] In light of this progression of the so-called *Apprendi* rule, both defendants and commentators have vigorously argued that *Libretti* should be abrogated.[12] However, despite the Court's expansion of the *Apprendi* rule, lower courts have consistently held that a trial court's fact-finding during the forfeiture proceedings

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5. Matthew R. Ford, Comment, *Criminal Forfeiture and the Sixth Amendment's Right to a Jury Trial Post-*Booker, 101 NW. U. L. REV. 1371, 1378 (2007).

6. *See, e.g.*, United States v. Booker, 543 U.S. 220, 232–33 (2005) (holding that federal sentencing guidelines are subject to the jury trial requirements of the Sixth Amendment); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("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."). *But see* Almendarez-Torres v. United States, 523 U.S. 224, 226–27 (1998) (holding a prior conviction constitutes a sentencing factor, rather than an element of the offense requiring a jury's determination).

7. 530 U.S. at 476.

8. *See id.*

9. 132 S. Ct. 2344, 2348–49 (2012).

10. *See id.*; Stefan D. Cassella, *Criminal Forfeiture Procedure in 2013: An Annual Survey of Developments in the Case Law*, 49 CRIM. L. BULL., at 27–29 (2013), *available at* http://works.bepress.com/stefan_cassella/32, *archived at* http://perma.cc/PUK3-EC6V.

11. 133 S. Ct. 2151, 2155 (2013).

12. United States v. Kluding, No. CR–14–123–C, 2014 WL 5306777, at *2 (W.D. Okla. Oct. 15, 2014); Reply Brief of Defendant-Appellant at 16–20, United States v. Sigillito, 759 F.3d 913 (8th Cir. 2014) (No. 13-1027), 2013 WL 5324215; Allan Ellis et al., *Apprehending and Appreciating* Apprendi, 15 CRIM. JUST. 16, 22 (Winter 2001); Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1481 n.51 (2001); B. Patrick Costello, Jr., Comment, Apprendi v. New Jersey*: "Who Decides What Constitutes a Crime?" An Analysis of Whether a Legislature Is Constitutionally Free to "Allocate" an Element of an Offense to an Affirmative Defense or a Sentencing Factor Without Judicial Review*, 77 NOTRE DAME L. REV. 1205, 1258 n.377 (2002); Ford, *supra* note 5, at 1378–79, 1413–16.

did not violate the defendant's Sixth Amendment rights because the right to have a jury determine forfeitability remains statutory in nature.[13]

This Note agrees that the Court should, and eventually will, overrule *Libretti*: the same constitutional standard that applies to *Apprendi* facts should apply to the facts necessary to authorize and determine the amount of forfeiture.[14] Unlike the scholars and judicial opinions that have addressed this issue, this Note contributes an argument based on historical practice at the time the Sixth Amendment was adopted and focuses on forfeiture proceedings in state, rather than federal, courts.[15] This Note argues that the right to have a jury determine forfeiture is constitutionally guaranteed and that, in anticipation of a Supreme Court pronouncement to that effect, states should adopt a statutory scheme sufficiently robust to protect that right.

Part II discusses the contours of criminal asset forfeiture, including the types, theories, and makeup of the modern statutes. This Part also explains the Sixth Amendment procedural safeguards (or lack thereof) within these criminal forfeiture provisions. Part III analyzes the impact of the *Apprendi* rule on criminal forfeiture, how *Libretti*'s foundation has begun to crumble, and why determinations regarding forfeitability deserve Sixth Amendment protection. Part IV summarizes how the Supreme Court relies on common law and history when determining the scope of the Sixth Amendment and explains how the history of criminal forfeiture procedures (at both the state and federal levels) suggests that a jury—not a judge—must determine forfeitability under modern forfeiture statutes.[16] Part V provides guidelines for statutory amendments for those states that wish to anticipate a Supreme Court decision overruling *Libretti* and holding

13. *E.g.*, United States v. Fruchter, 411 F.3d 377, 382–83 (2d Cir. 2005).

14. Several appellate courts take the opposite view that *Southern Union* does not apply to forfeiture for the same reasons that the *Apprendi* rationale does not apply to forfeiture. *See, e.g.*, United States v. Phillips, 704 F.3d 754, 770 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2796 (2013); United States v. Day, 700 F.3d 713, 732–33 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 2038 (2013).

15. The Sixth Amendment right to a jury trial in criminal cases applies to the states by virtue of the Fourteenth Amendment. A state criminal defendant has a Fourteenth Amendment right to a jury trial in all cases that, if federal, would fall within protections of the Sixth Amendment. *See, e.g.*, Ballew v. Georgia, 435 U.S. 223, 229 (1978); Mills v. Collins, 924 F.2d 89, 91 (5th Cir. 1991).

16. As this Note explains, the procedure and underlying crimes leading to criminal forfeitability vary drastically among states that authorize the government to seek criminal asset forfeiture. Thus, this Note provides a thorough, yet generalized, overview of the various state provisions.

that the Sixth Amendment's right to a trial by jury applies to criminal forfeitures.

II. CONTOURS OF CRIMINAL ASSET FORFEITURE

The procedural safeguards of modern criminal forfeiture provisions demonstrate that legislatures are concerned about preventing prosecutorial overreaching and ensuring robust protection of defendants' constitutional rights. To understand the appropriate scope of the jury's determination of forfeiture and the relevant burden of proof, legislatures should consider the theories underlying criminal asset forfeiture and how these theories should animate the statutory framework.

A. Types and Theories of Criminal Asset Forfeiture

Forfeiture occurs when "the government confiscates the property because it has been used in violation of the law and [court proceedings] require disgorgement of the fruits of the illegal conduct."[17] In other words, it rests on the concept that a criminal should not be allowed to benefit from a crime. Three basic principles define criminal asset forfeiture. First, the government's authority to seize property rests on an underlying conviction; that is, the government may not initiate a criminal forfeiture proceeding against an individual who has not been convicted of a crime.[18] Similarly, if the underlying conviction is reversed, then criminal forfeiture is prohibited, and any previous forfeiture order must be vacated.[19] Second, criminal forfeiture statutes only allow the government to seize assets that have a "prescribed relationship with the criminal activity."[20] Third, forfeiture is limited to the defendant's interest in

17. DEE. R. EDGEWORTH, ASSET FORFEITURE: PRACTICE AND PROCEDURE IN STATE AND FEDERAL COURTS 1 (3d ed. 2014) (citing United States v. Usery, 518 U.S. 267, 284 (1996)).

18. *Id.* at 199 (citing United States v. Aramony, 88 F.3d 1369, 1387 n.11 (4th Cir. 1996)); Stefan D. Cassella, *Criminal Forfeiture Procedure: An Analysis of Developments in the Law Regarding the Inclusion of a Forfeiture Judgment in the Sentence Imposed in a Criminal Case*, 32 AM. J. CRIM. L. 55, 57 & nn.5–7 (2004); *cf.* Cisco v. State, 680 S.E.2d 831, 833–34 (Ga. 2009) (holding Georgia's former criminal forfeiture statutory scheme unconstitutional because it did not contain any procedural safeguards for defendants and it allowed the government to seize assets of an unindicted individual).

19. *See, e.g.*, United States v. Warshak, 631 F.3d 266, 333 (6th Cir. 2010); Cassella, *supra* note 10, at 3.

20. WAYNE LAFAVE ET AL., 6 CRIM. PROC. § 26.6(d) (3d ed. 2014), *available at* WestLaw CRIMPROC; *see* FED. R. CRIM. P. 32.2(b)(1); CASSELLA, *supra* note 4, § 15-2, at 563.

the property.[21] In many instances, ancillary proceedings decide questions of ownership because property belonging to a third party may not be forfeited.[22] The prosecutor should bear the full burden of proving the scope of the defendant's interest in the property, and the defendant should not have to rebut any presumptions regarding his or her interest.[23]

Four theories provide for criminal forfeiture: contraband, proceeds, facilitation, and enterprise forfeiture.[24] Property that is per se illegal to possess is considered "contraband" and is always subject to forfeiture.[25] "Proceeds" describes property that is traceable to the criminal activity.[26] For example, a money judgment against the defendant authorizes the seizure of any income or property that the defendant gained as a result of an illegal transaction.[27] This judgment may be either directly or indirectly against the defendant for specific assets that were gained in the crime or for substitute assets that the defendant owns.[28] If specific assets cannot be located or are beyond the court's jurisdiction, "other property owned by the defendant of equal value to the forfeitable property can be ordered forfeited."[29] "Facilitation" forfeitures apply to property "that makes it easier to conduct the illegal activity"[30] or "contributes directly and materially to the commission of the crime."[31] Finally, under the "enterprise" theory, a defendant must forfeit the interest or control of any enterprise with a purpose to "reach the assets of corrupt organizations beyond those actually tainted by the illegal racketeering activity."[32] Statutes that provide for forfeiture under any of these four theories should protect defendants with procedural safeguards regardless of whether *Libretti* is overruled.

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21. For more information regarding the law and procedural mechanisms to determine a defendant's interest in the property, see EDGEWORTH, *supra* note 17, at 199–201.

22. *See* Cassella, *supra* note 10, at 25.

23. *See infra* Part V.

24. EDGEWORTH, *supra* note 17, at 11.

25. *Id.* at 11–12.

26. *Id.* at 12.

27. *Id.* at 6.

28. *Id.*

29. *Id.* (citing 18 U.S.C. § 1963(m)).

30. *Id.* at 14–15. An example would be a car used for transportation to and from a crime scene. *Id.*

31. N.Y. C.P.L.R. § 1310(4) (McKinney 2014) (defining "instrumentality of a crime"). Examples include actual funds laundered in a money laundering offense, or child pornography. *See* EDGEWORTH, *supra* note 17, at 14–15.

32. EDGEWORTH, *supra* note 17, at 16.

B. Modern Criminal Asset Forfeiture Statutes

The forms of forfeiture recognized in modern statutes stem from two historical concepts: in rem and in personam forfeiture.[33] In rem forfeiture, or "[t]he sacrifice of property—whether it be the ox that gored a neighbor, or the cart from which your friend fell—rested on the fiction that the thing, or *res*, was itself responsible for the harm."[34] On the other hand, in personam forfeiture represented a form of punishment directed at the person committing the crime, rather than at the property involved in the crime. Thus, in personam forfeiture historically applied only to treason and felonies.[35] Today's criminal asset forfeiture is in personam; instead of a separate action against the property, or *res*, forfeiture is a part of the sentence imposed when a person is convicted of a criminal offense for which forfeiture is an authorized form of punishment.[36] The criminal nature of in personam forfeiture, in many ways, raises the bar with respect to constitutional protection available to a defendant.

Criminal forfeiture has five main purposes: (1) enforcing the law; (2) deterring crime; (3) reducing economic incentives to commit crimes; (4) extending the pecuniary consequences of criminal activity; and (5) forfeiting property illegally used or acquired and diverting the property to assist in law enforcement.[37] Notably, statutes do not mention revenue production as a purpose; this omission serves as a deterrent to government overreaching.[38] Similarly, the Sixth Amendment shields defendants from oppressive legislatures and overzealous prosecutors by guaranteeing a jury trial in specific criminal procedure scenarios. Although these same concerns underlie criminal asset forfeiture, *Libretti* denies defendants the same Sixth Amendment protections in the forfeiture context.[39]

State legislatures enacted most modern state criminal forfeiture statutes following the passage of federal forfeiture provisions in the 1970s. These provisions, specifically the Racketeer Influenced and Corrupt Organizations Act ("RICO")[40] and the

33. Ford, *supra* note 5, at 1400–07.

34. *Id.* at 1400.

35. *Id.* at 1401.

36. *See* CASSELLA, *supra* note 4, § 15-2, at 563; *see also* Arthur W. Leach & John G. Malcolm, *Criminal Forfeiture: An Appropriate Solution to the Civil Forfeiture Debate*, 10 GA. ST. U. L. REV. 241, 247–48 n.25 (1994).

37. MINN. STAT. ANN. § 609.531(1)(a) (West 2014).

38. *See* EDGEWORTH, *supra* note 17, at 305–06.

39. *See* Brief for the Petitioner at 44–45, Libretti v. United States, 516 U.S. 29 (1995) (No. 94-7427), 1995 WL 408706.

40. 18 U.S.C. §§ 1961–68 (2012).

Comprehensive Drug Abuse Prevention and Control Act,[41] both conditioned forfeitability of an asset on its relationship to the offense. Each provided a statutory right to have that relationship found by the jury.[42] Later, Congress enacted § 16 of the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"),[43] which authorizes criminal forfeiture for any property subject to civil forfeiture.[44]

Over twenty states enacted criminal forfeiture provisions for a variety of underlying offenses,[45] and over fifteen state legislatures adopted criminal RICO forfeiture statutes.[46] Most of these statutes attach criminal forfeiture to certain crimes, including narcotics and

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41. Comprehensive Drug Abuse and Prevention Act of 1970, Pub. L. 91–513, 84 Stat. 1236 (codified at scattered sections of 21 U.S.C. and at 42 U.S.C. § 257a).

42. *See* Richard E. Finneran & Steven K. Luther, *Criminal Forfeiture and the Sixth Amendment: The Role of the Jury at Common Law*, 35 CARDOZO L. REV. 1, 43–44 (2013). The jury trial right was originally codified in former FED. R. CRIM. P. 31(e). *See* FED. R. CRIM. P. 32.2 advisory committee's note.

43. 106 Pub. L. 185, 114 Stat. 202, 221 (amending 28 U.S.C. § 2461).

44. *See* EDGEWORTH, *supra* note 17, at 33; Stefan D. Cassella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties*, 27 J. LEGIS. 97, 99 (2001). Similar to criminal forfeiture, civil forfeiture is a process "designed to confiscate property used in violation of the law." 36 AM. JUR. 2D, *Forfeitures and Penalties* § 1 (2015). In contrast, however, civil asset forfeiture proceeds as an action against the property itself, instead of against the criminal defendant. *See id.* For further distinction between civil and criminal forfeiture, see *infra* Part II.B.

45. *See, e.g.*, ALASKA STAT. § 17.30.112 (2014); ARIZ. REV. STAT. ANN. § 13-4312 (2014); CAL. PENAL CODE §§ 186.2–.8 (West 2014); COLO REV. STAT. §§ 18-17-102 to 18-17-109 (2014); FLA. STAT. ANN. § 895.05 (West 2014); GA. CODE ANN. § 16-13-49(j) (2014); HAW. REV. STAT. ANN. § 712A-13 (LexisNexis 2014); IDAHO CODE ANN. §§ 37-2801 to 37-2815 (2014); KY. REV. STAT. ANN. § 500.090 (West 2014); ME. REV. STAT. ANN. tit. 15, § 5826 (2013); MD. CODE ANN., CRIM. PROC. §§ 13-101 to 13-408 (LexisNexis 2014); MINN. STAT. ANN. §§ 609.905–.908 (West 2014); MONT. CODE ANN. § 45-9-206 (West 2014); NEB. REV. STAT. ANN. § 28-431 (LexisNexis 2014); NEV. REV. STAT. ANN. §§ 207.420–.450, .490 (LexisNexis 2013); N.Y. PENAL LAW §§ 480.00–.35 (McKinney 2014); N.C. GEN. STAT. §§ 90-112 to 90-113.2 (2014); OHIO REV. CODE ANN. § 2941.1417 (LexisNexis 2014); OR. REV. STAT. ANN. §§ 131.550–.602 (West 2014); R.I. GEN. LAWS § 21-28-5.04.1 (2014); TENN. CODE ANN. § 39-11-708(d) (2014); TEX. CODE CRIM. PROC. ANN. art. 18.18 (West 2013); UTAH CODE ANN. § 24-4-105 (LexisNexis 2014); VA. CODE ANN. §§ 19.2-368.19 to 19.2-368.22 (2014); WIS. STAT. ANN. § 973.075 (West 2013).

46. *See, e.g.*, CAL. PENAL CODE § 186.2–.8; COLO. REV. STAT. §§ 18-17-102 to 109 (both civil and criminal RICO); CONN. GEN. STAT. ANN. § 3-397(b)(1) (West 2014); FLA. STAT. ANN. §§ 895.05(2), (10) (both civil and criminal RICO); GA. CODE ANN. § 16-14-7(m); HAW. REV. STAT. § 842-3; IDAHO CODE ANN. § 18-7804(i); 725 ILL. COMP. STAT. ANN. 175/6(d) (West 2014); MICH. COMP. LAWS ANN. §§ 750.159j(4), 750.159n(1) (West 2014) (both civil and criminal RICO); MINN. STAT. ANN. § 609.905(1); NEV. REV. STAT. ANN. §§ 207.420(1), 207.460 (both civil and criminal RICO); N.J. REV. STAT. §§ 2C:41-3(b), 4(a)(9) (West 2014) (both civil and criminal RICO); N.Y. PENAL LAW § 460.30; N.Y. C.P.L.R. 1353–55 (McKinney 2014); OHIO REV. CODE ANN. § 2923.32(B)(3); OKLA. STAT. tit. 22 § 1405(A) (2014); R.I. GEN. LAWS ANN. §§ 7-15-3.1, 4(e) (both civil and criminal RICO); UTAH CODE ANN. § 76-10-1603.5(1); WIS. STAT. ANN. §§ 946.86, 946.87; *see also* LAFAVE ET AL., *supra* note 20, § 26.6(d) n.46 (citing several law review articles that collect state criminal forfeiture provisions); RICO STATE BY STATE: A GUIDE TO LITIGATION UNDER THE STATE RACKETEERING STATUTES 9 (John E. Floyd et al. eds., 2d ed. 2011).

money laundering;[47] white-collar crimes such as securities fraud;[48] and sexual offenses like child pornography.[49] In one state,[50] criminal forfeiture is authorized for any "criminal activity."[51] Like their federal counterparts, state statutes have limited the assets subject to forfeiture to the "proceeds" of the underlying criminal activity and property used to "facilitate" that activity.[52]

C. Sixth Amendment Procedural Safeguards (or Lack Thereof) in Modern Criminal Asset Forfeiture Statutes

The Court's decision in *Libretti* leaves important procedural safeguards—specifically the right to confrontation, the right to a jury determination, and the burden of proof—as protections that Congress and the state legislatures have the discretion to implement or ignore. An analysis of the procedural mechanisms currently contained in forfeiture statutes reveals that this discretion has resulted in disparate protections varying by jurisdiction. Inconsistency across state lines stems directly from *Libretti*'s holding that criminal asset forfeiture falls outside the scope of Sixth Amendment protection. Thus, *Libretti*'s demise would have substantial ramifications; a constitutional right to a Sixth Amendment jury trial for criminal asset forfeiture would invalidate a number of the current standards described in the following Sections.

1. Confrontation: Notice in the Charging Instrument

While the Supreme Court has intimated that a defendant is constitutionally entitled to have notice of *Apprendi* factors in the charging instrument,[53] the Court has never directly addressed the question. State statutes are hardly uniform on the subject, but several

47. *See* KAN. STAT. ANN. § 60-4104 (West 2014); MICH. COMP. LAWS ANN. § 600.4701; MO. ANN. STAT. § 513.605 (West 2014).

48. *See* MICH. COMP. LAWS ANN. § 600.4701.

49. *See* MO. ANN. STAT. § 513.605; EDGEWORTH, *supra* note 17, at 39.

50. EDGEWORTH, *supra* note 17, at 39 (citing 2013 Utah Laws Ch. 394 (H.B. 384)).

51. *Id.* (citing UTAH CODE ANN. § 24-4-102).

52. *See, e.g.*, 18 U.S.C. § 1963 (2012) (property derived from racketeering offenses); § 853 (property involved in the continuing criminal enterprise); § 982 (property "involved" in the offense); United States v. White, 116 F.3d 948, 951 (1st Cir. 1997) (defendants are jointly and severally liable during forfeiture proceedings).

53. *See infra* note 117 and accompanying text; *see also* King & Klein, *supra* note 12, at 1503.

state courts have held that the defendant possesses such a right to confrontation in the forfeiture context.[54]

2. Right to a Jury Trial

Whether a criminal defendant has a right to a jury trial regarding asset forfeiture and, if so, the scope of that right, varies depending on the jurisdiction where the criminal trial takes place. In the federal system and in certain states, both the prosecution and the defense have a statutory right to a jury trial that may be waived if not asserted in a timely manner.[55] If either party requests a jury trial as to forfeiture, the jury's special verdict only answers whether there is a nexus between the property and the offense of conviction.[56] Consequently, the jury's role in these jurisdictions is limited to determining only whether the property bears the necessary connection to the offense by a preponderance of the evidence.[57] New York, in contrast, authorizes a jury to decide the factual predicates to criminal forfeiture and relies on a beyond-a-reasonable-doubt standard of proof.[58]

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54. *See, e.g.*, Cisco v. State, 680 S.E.2d 831, 833–34 (Ga. 2009) (holding that the in personam RICO statutory scheme was unconstitutional because it lacked "all of the constitutional safeguards due [to] a criminal defendant"); *infra* note 118 and accompanying text; *cf.* Pimper v. State *ex rel.* Simpson, 555 S.E.2d 459, 462–66 (Ga. 2001) (Hunstein, J., dissenting) (explaining that the former criminal forfeiture provision violated the defendant's right to confrontation and that the prosecutor decided "to bring an in personam criminal forfeiture proceeding against unindicted, preconviction individuals pursuant to a statute which contain[ed] absolutely no procedural safeguards to protect the constitutional rights of the defendants").

55. *See* FED. R. CRIM. P. 32.2(b)(4), (5); TENN. CODE ANN. § 39-11-708(d) (2014) ("Upon the request by the state or the defendant in a case in which a jury returns a verdict of guilty, the jury shall determine in a bifurcated hearing whether the state has established that the property is subject to forfeiture."). However, in Ohio, only the defendant has a right to a jury trial. OHIO REV. CODE ANN. § 2981.08 (LexisNexis 2014) ("Parties to a forfeiture action under this chapter have a right to a jury trial as follows: (A) In a criminal forfeiture action, the *defendant* has the right to trial by jury." (emphasis added)).

56. *See* FED. R. CRIM. P. 32.2(b)(4).

57. *See id.* advisory committee's note:

> Even before *Libretti*, lower courts had determined that criminal forfeiture is a sentencing matter and concluded that criminal trials therefore should be bifurcated so that the jury first returns a verdict on guilt or innocence and then returns to hear evidence regarding the forfeiture. In the second part of the bifurcated proceeding, the jury is instructed that the government must establish the forfeitability of the property by a preponderance of the evidence.

However, certain federal statutes require facts underlying criminal forfeiture to be established beyond a reasonable doubt. *See, e.g.*, 18 U.S.C. § 1467(e)(1) (obscenity); 18 U.S.C. § 2253(e) (child exploitation).

58. *See* LAFAVE ET AL., *supra* note 20, § 26.6(d) n.56 (citing N.Y. PENAL LAW § 460.30).

In some states, juries have no role whatsoever in forfeiture determinations.[59] For example, in Idaho, the statutory scheme for forfeiture mandates that the trial shall occur before the court without any option for a jury determination.[60] These state statutes will certainly be invalidated if the Court expands the *Apprendi* rule to encompass criminal asset forfeiture.

Although many states have delegated forfeiture determinations to judges at sentencing, others have followed Congress in providing that a defendant is entitled to a bifurcated trial to first determine guilt and then which, if any, of the defendant's assets are subject to forfeiture.[61] The jury determines whether the government established the requisite nexus between the property and the offense.[62] In these jurisdictions, the forfeiture action is usually heard before the same jury that heard the criminal case.[63]

3. Burdens of Proof and Rebuttable Presumptions

Under *Libretti*, the burden of proof for criminal forfeiture also varies among states, giving defendants in some states greater

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59. *See, e.g.*, GA. CODE. ANN. § 16-13-49 (2014); MICH. COMP. LAWS ANN. 750.159j(7) (West 2014) (stating that a judge determines the extent of property subject to forfeiture); *see also* People v. Martin, 721 N.W.2d 815, 846 (Mich. Ct. App. 2006) (holding that there are no Sixth Amendment rights when determining forfeiture).

60. *See* IDAHO CODE ANN. § 37-2801(2) (2014); *see also* State v. Key, 239 P.3d 796, 806 (Idaho Ct. App. 2010) (Idaho criminal forfeiture statute did not violate right of defendant to a jury trial under the Idaho Constitution).

61. *See, e.g.*, OHIO REV. CODE ANN. § 2925.42(B)(4) (LexisNexis 2014); TENN. CODE ANN. § 39-11-708(d) (2014) ("Upon the request by the state or the defendant in a case in which a jury returns a verdict of guilty, the jury shall determine in a bifurcated hearing whether the state has established that the property is subject to forfeiture."); *see also* FED. R. CRIM. P. 32.2(b)(1). In Maine, however, the court will only bifurcate guilt and forfeiture proceedings if requested by either party:

> At trial by jury, the court, upon motion of a defendant or the State, shall separate the trial of the matter against the defendant from the trial of the matter against the property subject to criminal forfeiture. If the court bifurcates the jury trial, the court shall first instruct and submit to the jury the issue of the guilt or innocence of defendants to be determined by proof beyond a reasonable doubt and shall restrict argument of counsel to those issues. If the jury finds a defendant guilty of the related criminal offense, the court shall instruct and submit to the jury the issue of the forfeiture of the property.

ME. REV. STAT. ANN. tit. 15 § 5826 (2013).

62. *See* State v. Taylor, 974 N.E.2d 175, 184 (Ohio Ct. App. 2012); FED. R. CRIM. P. 32.2(b)(4).

63. *See* CAL. PENAL CODE § 186.5(d) (West 2014) (stating that the judge may decide whether to empanel a new jury to determine forfeiture or simply bifurcate the proceedings and rely on the same jury that adjudicated guilt); TENN. CODE ANN. § 39-11-708(d). Practically, this means the same jury members who convicted the defendant of the underlying offense then determine if (and what) the defendant must forfeit.

protections than defendants in others. Some jurisdictions require the criminal forfeiture action be proven beyond a reasonable doubt,[64] which most robustly protects a defendant's property rights. Other states follow the current federal constitutional standard[65] and permit forfeiture by a preponderance of evidence.[66] Other states implement burden-shifting rules that give defendants greater protections than the federal standard. In these jurisdictions, the prosecutor must prove by a preponderance of the evidence that the assets sought to be forfeited are traceable to the crime, such as drug trafficking; the burden then shifts to the defendant to show the assets in question are not "tainted, and thus, not subject to forfeiture."[67] In other states, the prosecutor's initial burden is even lower: if there is probable cause to believe the asset sought is traceable to the trafficking, then the burden shifts to the defendant to show the asset is not traceable to drug trafficking.[68] In all burden-shifting jurisdictions, once a prosecutor proves a nexus to the underlying offense—by presenting evidence, for example, that money was found in close proximity to controlled substances[69] or that property was acquired while trafficking activity was ongoing[70]—the defendant must rebut the presumption in order to avoid asset seizure.

This Note posits that criminal forfeiture statutes should afford defendants the constitutional protections embodied in the Sixth Amendment. In particular, lack of notice in the charging instrument, the lack of an absolute right to a jury trial to determine forfeitability, a burden of proof less stringent than beyond a reasonable doubt (preponderance or otherwise), and any burden-shifting mechanisms all fall short and will be invalid once *Libretti* is no longer the law.

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64. *See* CAL. PENAL CODE § 186.5(d); NEB. REV. STAT. ANN. § 28-431(4) (LexisNexis 2014); N.Y. PENAL LAW § 460.30 (McKinney 2014); UTAH CODE ANN. § 24-1-8(4)(b) (LexisNexis 2014); *see also* 25 AM. JUR. 2d, *Drugs and Controlled Substances* § 240 (stating that Montana, Nebraska, and North Carolina employ a beyond-a-reasonable-doubt standard).

65. *See* Libretti v. United States, 516 U.S. 29, 36 (1995). *But see, e.g.*, 18 U.S.C. § 1467(e)(1) (2012) (forfeiture provision for underlying obscenity offense where burden of proof is beyond a reasonable doubt); § 2253(e) (same beyond-a-reasonable-doubt burden of proof for criminal forfeiture provision, but underlying offense is child exploitation).

66. *See* ME. REV. STAT. ANN. tit. 15 § 5826.A; OHIO REV. CODE ANN. § 2925.42(B)(1)(a)(3)(a); R.I. GEN. LAWS ANN. §§ 21-28-5.94.1(f)(6); TENN. CODE ANN. § 39-11-708(d); People v. Arman, 576 N.E.2d 11, 15 (Ill. App. Ct. 1991).

67. *See* 25 AM. JUR. 2D, *Drugs and Controlled Substances* § 240. States that employ this type of burden-shifting include Kansas, North Dakota, and Pennsylvania. *Id.*

68. *See id.* States that employ this technique are modeled after the federal drug forfeiture statute and include Delaware, Florida, Massachusetts, and Washington. *Id.*

69. N.Y. PENAL LAW § 480.35.

70. TENN. CODE ANN. § 39-11-708(e).

III. IMPACT OF THE *APPRENDI* RULE: *LIBRETTI*'S REJECTION OF SIXTH AMENDMENT PROTECTIONS IS NO LONGER VIABLE

Recent Sixth Amendment jurisprudence calls into doubt the Court's official position that any right to have a jury determine either the defendant's interest in property or the factual nexus between that property and the defendant's crime is merely statutory in nature. Since the *Libretti* decision, the Supreme Court has progressively chipped away at the notion that criminal forfeiture is a factor for sentencing, moving towards the idea that it is an element of the underlying crime protected by various constitutional guaranties.[71] Two themes consistently underlie the Court's expansion of the jury's role as an increasingly robust constitutional protection for defendants. The first is whether the right to have a jury decide a particular fact or procedure existed at common law. The second is whether the fact or procedure at issue affects the statutory maximum (or, after *Alleyne*, statutory minimum) of the defendant's sentence and thus must be determined by a jury beyond a reasonable doubt.

A. The Apprendi *Rule and Its Progeny*

In 2000, the Supreme Court decided the seminal case *Apprendi v. New Jersey*,[72] holding that any fact other than a prior conviction that "authorizes the imposition of a penalty that is more severe than the penalty authorized by law for the offense of conviction alone" must be proven beyond a reasonable doubt.[73] The Court found that these facts are not sentencing issues that a judge may adjudicate; rather, these facts must be presented to a jury.[74] Justice Stevens emphasized

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71. *See* Petition for Writ of Certiorari at 25, Hagan v. United States, 534 U.S. 1022 (2001) (No. 01-579), 2001 WL 34115954:

> Because fines, restitution, and forfeitures are among the 'penalt[ies]' imposed in criminal cases, 'any fact' that increases those penalties must be charged in the indictment, submitted to the jury, and proved beyond a reasonable doubt, as well. Indeed, many of the nineteenth century cases from which the constitutional holding of *Apprendi* is derived, themselves only involved differences in fines and other financial penalties, according to Justice Thomas's extensive review in his concurring opinion [in *Apprendi*].

(internal quotations and citations omitted); LAFAVE ET AL., *supra* note 20, § 26.4(i); Ellis et al., *supra* note 12, at 22; King & Klein, *supra* note 12, at 1496.

72. 530 U.S. 466, 490 (2000).

73. *Id.* ("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."). Justice Stevens articulated that precedent and the historical practice of American and English courts justified this new rule. *Id.*; *see also* LAFAVE ET AL., *supra* note 20, § 26.4(i).

74. *See Apprendi*, 530 U.S. at 490.

that the decision reflected core values and traditions of the judicial system, stating, "[T]he historical foundation for our recognition of these principles extends down centuries into the common law."[75] The decision prompted legislatures nationwide to amend criminal codes and treat facts that were formerly sentencing factors—such as racial animus, serious bodily injury, the use of a firearm, proximity to a school, etc.— as elements of the underlying offense instead.[76]

In its 2004 *Booker* decision, the Court further refined the *Apprendi* rule when it invalidated sections of the Federal Sentencing Guidelines and pointed to the Sixth Amendment as a limitation upon a defendant's available sentencing range.[77] The part of the opinion written by Justice Stevens held that the " 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."[78] Thus, any fact that increases a defendant's punishment beyond the statutory maximum must either be admitted by the defendant or found by a jury beyond a reasonable doubt. To remedy the constitutional violation resulting from the mandatory nature of the Federal Sentencing Guidelines in the case, Justice Breyer's part of the opinion declared the Guidelines "effectively advisory."[79]

After *Booker*, many defendants challenged forfeiture penalties imposed in absence of a jury finding as violations of their Sixth Amendment rights.[80] Since only statutes, not the Federal Sentencing Guidelines, govern the imposition of criminal forfeiture, these defendants argued that only the remainder of the *Booker* opinion governs when applied in the forfeiture context: Justice Stevens's broad constitutional holding. According to these defendants, *Booker* established that determining forfeiture without proving the underlying facts beyond a reasonable doubt violated the Sixth Amendment.[81] But relying on *Libretti*, the lower courts rejected this argument.[82]

In one subsequent case, *Oregon v. Ice*, the *Apprendi* dissenters prevailed in allowing judges, rather than juries, to find facts necessary for imposition of consecutive, rather than concurrent, sentences for

75. *Id.* at 477.
76. *See* LAFAVE ET AL., *supra* note 20, § 26.4(i).
77. United States v. Booker, 543 U.S. 220, 232 (2005) (Stevens, J.).
78. *Id.*
79. *Id.* at 245 (Breyer, J.).
80. *See, e.g.*, State v. Key, 239 P.3d 796, 799–800 (Idaho Ct. App. 2010).
81. Ford, *supra* note 5, at 1373.
82. *Id.*

multiple offenses.[83] Justice Ginsburg wrote for the majority and supported the holding with a slippery slope argument: if *Apprendi* were to apply to consecutive sentences, it would also have to apply to fines, restitution, and the like.[84] In subsequent decisions, however, the Court expanded *Apprendi*'s reach to facts underlying the same types of elements Justice Ginsburg enumerated.

First, in 2012, the Supreme Court surprised many when it dismissed Justice Ginsburg's dicta in *Ice*[85] and expanded *Apprendi* from a rule about incarceration to one encompassing fines. In *Southern Union Co. v. United States*, the Court held that the imposition of criminal fines implicates the Sixth Amendment right to a jury trial.[86] In doing so, the Court emphasized the importance of examining the historical jury role at common law when determining the scope of the constitutional jury right.[87] The majority concluded that the predominant common-law practice was to allege facts in the indictment that determined the amount of a fine, such as the value of damaged or stolen property, and to prove them to the jury.[88] Colonial courts required a jury to determine the value because "the extent of the punishment . . . depend[s] upon the value of the property consumed or injured."[89]

Most recently, the *Alleyne* Court broadened the scope of the *Apprendi* rule from one about statutory maximums to include statutory minimums.[90] As a result, while the *Apprendi* rule initially only covered facts that increased the ceiling of a defendant's sentence, the rule now covers any fact that increases *either* the ceiling *or the floor* of a defendant's sentence.[91] According to the Court, the relationship between the crime and the punishment was clear at

83. *See* Oregon v. Ice, 555 U.S. 160, 161–63 (2009).

84. *See id.* at 162 (stating that reading the *Apprendi* rule to encompass consecutive sentences would "cut the rule loose from its moorings"); *see also* Douglas A. Berman, *Doesn't* Southern Union *Suggest Sixth Amendment Limits Judicial Factfinding for Restitution Punishments?*, SENT'G L. & POL'Y (June 21, 2012, 1:34 P.M.), http://sentencing.typepad.com/sentencing_law_and_policy/2012/06/doesnt-southern-union-suggest-sixth-amendment-limits-judicial-factfinding-for-restitution-punishment.html, *archived at* http://perma.cc/WS2C-3HMN.

85. *See* LAFAVE ET AL., *supra* note 20, § 26.4(i), n.200.2 & 200.3.

86. 132 S. Ct. 2344, 2348 (2012).

87. *Id.* at 2353 (quoting *Ice*, 555 U.S. at 170); *see also, e.g.*, Blakely v. Washington, 542 U.S. 296, 301–02 (2004); Apprendi v. New Jersey, 530 U.S. 466, 477–84 (2000).

88. *Southern Union*, 132 S. Ct. at 2353.

89. *Id.* at 2354 n.6 (citing Ritchey v. State, 7 Blackf. 168, 169 (Ind. 1844) (internal quotation marks omitted)). Justice Sotomayor supported this proposition by explaining that this requirement stems from "longstanding common-law principles." *Id.* (citing 1 J. BISHOP, CRIMINAL PROCEDURE §§ 81, 540 (2d ed. 1872)).

90. *See* Alleyne v. United States, 133 S. Ct. 2151, 2155 (2013).

91. *Id.* at 2159.

common law; there was "a well-established practice of including in the indictment, and submitting to the jury, every fact that was a basis for imposing or increasing punishment."[92] This common-law rule, partially implemented in *Alleyne*, protects a defendant's right to notice and confrontation: by examining the indictment, the defendant may predict the judgment he or she faces if convicted.[93]

B. Impact of the Apprendi *Rule on Criminal Asset Forfeiture*

1. The Basis for *Libretti* Has Been Undermined

Even after *Southern Union* and *Alleyne*, lower courts continue to follow *Libretti*, noting that they are bound to do so until the Supreme Court explicitly overrules the precedent.[94] Nonetheless, the foundational jurisprudence supporting the denial of Sixth Amendment guaranties for facts underlying criminal forfeiture has deteriorated. Additionally, the *Apprendi* rule's expansion to encompass other elements such as fines indicates that it should not be incompatible with asset forfeiture.

2. Lack of Statutory Maximum Is No Longer Relevant

Courts and commentators defending *Libretti* have argued the *Apprendi* rule only applies to facts that increase statutory maximums; because there is no maximum for forfeiture, *Apprendi* does not apply.[95] This argument fails to address the Court's most recent pronouncements. *Southern Union* dealt with the Alternative Fines Act,[96] for which there is no statutory maximum. Rather, the fine is

92. *Id.* (collecting examples).

93. *See* LAFAVE ET AL., *supra* note 20, § 26.4(i) (discussing the distinction between sentencing facts and elements).

94. *See, e.g.*, United States v. Sigillito, 759 F.3d 913, 935 (8th Cir. 2014); United States v. Phillips, 704 F.3d 754, 769 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2796 (2013); United States v. Day, 700 F.3d 713, 732–33 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 2038 (2013); EDGEWORTH, *supra* note 17, at 193 ("*Booker* itself suggests that a district court determination [of criminal forfeiture] does not offend the Sixth Amendment" (quoting United States v. Fruchter, 411 F.3d 377, 382 (2d Cir. 2005))); EDGEWORTH, *supra* note 17, at 193 ("Of particular note in the section of the opinion discussing the portions of the sentencing statute that the [C]ourt found 'perfectly valid' is the fact that the [C]ourt cites 18 U.S.C. § 3554 (forfeiture)." (quoting *Fruchter*, 411 F.3d at 382)); *see also* Cassella, *supra* note 10, at 28–29 (explaining that unlike the lower courts, the Supreme Court is not "constrained" by *Libretti* and it "may well render a decision that profoundly changes the way criminal forfeitures are imposed").

95. *See, e.g.*, *Sigillito*, 759 F.3d at 936 (collecting cases); Stefan D. Cassella, *Does* Apprendi v. New Jersey *Change the Standard of Proof in Criminal Forfeiture Cases?*, 89 KY. L.J. 631, 631 (2001).

96. 18 U.S.C. § 3571 (2012).

determined by factual findings—just as with forfeiture. A jury must find these facts beyond a reasonable doubt:

> Sometimes, as here, the fact is the duration of a statutory violation; under other statutes it is the amount of the defendant's gain or the victim's loss, or some other factor. In all such cases, requiring juries to find beyond a reasonable doubt facts that determine the fine's maximum amount is necessary to implement *Apprendi*'s 'animating principle': the 'preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense.'[97]

Thus, *Southern Union* invalidated the argument that there is no statutory maximum in forfeiture determinations and that *Apprendi* therefore does not apply.[98]

After *Alleyne*, the Sixth Amendment jury-trial right now extends not only to fact-finding that increases the statutory sentencing ceiling but also to fact-finding that increases the statutory sentencing floor. This casts further doubt upon the "no-statutory-maximum" argument because *Alleyne* creates uncertainties regarding how courts should analyze criminal asset forfeiture in the context of mandatory minimums. As a district court recently lamented, once the prosecution has met its burden to establish criminal forfeiture, the court has no discretion to reduce or eliminate forfeiture.[99] Thus, the court is beholden to the statute and must order forfeiture for no less than the proven property and amount. This requirement is the substantial equivalent of a mandatory minimum punishment—governed by *Alleyne*.[100]

IV. JURY RIGHT TO FORFEITURE DETERMINATIONS IS CONSISTENT WITH A HISTORICAL UNDERSTANDING OF THE SIXTH AMENDMENT

Not only is *Libretti*'s rejection of a constitutional right to a jury trial inconsistent with the Court's reasoning in the *Apprendi* line of cases, it is also inconsistent with historical practice influencing the

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97. S. Union Co. v. United States, 132 S. Ct. 2344, 2350–51 (2012) (quoting Oregon v. Ice, 555 U.S. 160, 168 (2009), *quoted in* Reply Brief of Defendant, *supra* note 12, at 19–20).

98. For an expansion of this argument, see Reply Brief of Defendant, *supra* note 12, at 19–20. In addition to criminal fines now falling under the *Apprendi* rule, the Court recently suggested that criminal restitution may also be subject to the rule and thus require a jury determination. *See* Paroline v. United States, 134 S. Ct. 1710 (2014). The *Paroline* Court held that since criminal restitution "also serves punitive purposes" when imposed at sentencing, it may fall "within the purview of the Excessive Fines Clause," *id.* at 1726 (internal quotation marks omitted), a conclusion that "supports the application of *Apprendi* to restitution orders imposed as part of a sentence." LAFAVE ET AL., *supra* note 20, §26.4(i) n.200.3.

99. United States v. Carpenter, No. 04-10029-GAO, 2014 WL 2178020, at *3 (D. Mass. May 23, 2014), *cert. denied*, 134 S. Ct. 901 (2014) (citing United States v. Phillips, 704 F.3d 754, 769 (9th Cir. 2012)).

100. *Carpenter*, 2014 WL 2178020, at *3.

passage of the Sixth Amendment. A defendant subject to criminal asset forfeiture under common law had the right to a jury determination of the relationship between the assets and the offense.[101] To the extent the Sixth Amendment jury right reflects its common-law origins, *Libretti* was wrong to conclude that the Sixth Amendment does not require a jury determination of these issues.

The Court's *Apprendi* line of cases has repeatedly referenced the common law when determining the scope of the Sixth Amendment's Jury Clause.[102] An examination of both federal and state common law supports the right to jury trial for fact-findings necessary to criminal forfeiture. Common-law authority for criminal asset forfeiture predated the U.S. Constitution and included jury determinations.[103] For example, seventeenth- and eighteenth-century English courts relied on reference books that outlined the standard jury instructions on the issue of forfeiture.[104] Evidence shows criminal forfeiture was very unpopular among juries, and juries commonly tried to nullify the state's forfeiture attempts by finding the defendant did not own property.[105]

At the Bill of Rights' adoption in the late eighteenth century, criminal forfeiture required a jury to determine which assets of a convicted defendant could be forfeited as part of the penalty for conviction. In the colonies, juries abhorred criminal forfeiture as much as their English counterparts, viewed it as too harsh a punishment, and often sought to prevent it through nullification.[106] In New York, for example, colonial juries adjudicated cases arising out of Leisler's

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101. *See, e.g.*, Brief for the Petitioner, *supra* note 39, at 43–44 (citing Greene v. Briggs, 10 F. Cas 1135, 1142 (C.C.D. R.I. 1852); JULIUS GOEBEL & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 713 (1944)).

102. *See, e.g.*, *Ice*, 555 U.S. at 167–73; Apprendi v. New Jersey, 530 U.S. 466, 466 (2000) (noting the common-law foundation for a criminal defendant's right to a jury determination for each element of the crime).

103. *See, e.g.*, Hutson v. Woodbridge Prot. Dist., 16 P. 549, 551 (Cal. 1888):

> In a proceeding at common law, a citizen of the United States cannot be divested of his property except by verdict of a jury, under due process of law, in a proceeding in which he is in some manner a party, having opportunity to be heard, and having a day in court.;

The J.W. French, 13 F. 916, 921 (E.D. Va. 1882) (finding that a law providing for forfeiture by a proceeding at common law of a boat used to illegally catch fish was unconstitutional because it divested the defendant of property without the verdict of the jury); *Greene*, 10 F. Cas at 1142 (holding the accused had a right to a jury determination).

104. Brief for the Petitioner, *supra* note 39, at 42 (citing THOMAS DOGHERTY, THE CROWN CIRCUIT COMPANION 21–22 (7th ed. 1799)).

105. *See id.* at 43 (citing DOGHERTY, *supra* note 104, at 22; 4 WILLIAM BLACKSTONE, COMMENTARIES *387).

106. *Id.* (citing GOEBEL & NAUGHTON, *supra* note 101, at 713).

Rebellion[107] and returned verdicts in which forfeiture was notably absent, despite the fact that a later writ of enquiry identified forfeitable properties.[108] These juries "almost invariably reported no forfeitable lands, tenements, or chattels upon conviction."[109] Jury verdicts finding no property functioned as a check on government overreaching and overzealous prosecutions—a check that the Framers intended to embody within the Sixth Amendment's Jury Clause.[110]

After ratification of the Constitution, the First Congress banned the use of in personam forfeiture for federal crimes, and several states quickly followed suit.[111] Not all states followed the federal lead in outlawing criminal forfeiture, however. In Rhode Island, for example, a judge applied the state's constitution and held that in a criminal forfeiture prosecution, "the owner would be entitled to a trial by jury, and to have the accusation, relied upon to work the forfeiture, set forth substantially, in accordance with the rule of the common law, so that he could discern its nature and cause."[112] Although criminal forfeitures were rare within the first two hundred years after the Constitution's adoption, "there is evidence that the common law practice of trying criminal forfeiture to the jury carried forward into state law."[113]

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107. Simon Middleton, *Legal Change, Economic Culture, and Imperial Authority in New Amsterdam and Early New York City*, 53 AM. J. LEGAL HIST. 89, 89 (2013) (describing Leisler's Rebellion, in which a German-American militia captain in colonial New York seized control of part of the colony, resulting in the prosecution and execution of many involved).

108. *See* Brief for the Petitioner, *supra* note 39, at 43 (citing GOEBEL & NAUGHTON, *supra* note 101, at 713).

109. *Id.* at 43 (citing GOEBEL & NAUGHTON, *supra* note 101, at 715) (internal quotation marks omitted)).

110. *See id.* at 44–45; *see also* Charles Reich, *The New Property*, 73 YALE L.J. 733, 771 (1964) (arguing that civil liberties depend on the existence of private property).

111. *See* Ford, *supra* note 5, at 1402–04; *see also* United States v. Bajakajian, 524 U.S. 321, 332 n.7 (1998) ("The First Congress explicitly rejected *in personam* forfeitures as punishments for federal crimes . . . and Congress reenacted this ban several times over the course of two centuries." (citations omitted)); State v. Key, 239 P.3d 796, 805 (Idaho Ct. App. 2010):

> While rooted in English law and adopted briefly by the American colonies prior to formation of the United States, following the ratification of the United States Constitution the use of criminal forfeiture 'quickly went out of style' and in short order the First Congress, as well as several states, banned the use of *in personam* forfeiture and other predicates of the modern criminal forfeiture.

(citations omitted). *But see* LAFAVE ET AL., *supra* note 20, §26.6(d) ("The Framers prohibited the English practice of 'forfeiture of estate,' a criminal penalty that deprived a convicted felon of the ability to transfer any of his property at death." (citing U.S. CONST. art. III, § 3; Act of April 30, 1790, ch. 9, § 24, 1 Stat. 112, 117 (prohibiting forfeiture of estate as criminal punishment))).

112. Greene v. Briggs, 10 F. Cas. 1135, 1142 (C.C.D. R.I. 1852), *quoted in* Brief for the Petitioner, *supra* note 39, at 44; *cf.* State v. Gurney, 37 Me. 156, 160 (Me. 1853).

113. Brief for the Petitioner, *supra* note 39, at 44. Mention of a jury right in criminal forfeiture proceedings at common law also appears in the Advisory Committee Note accompanying the 1972 amendment to the federal rule governing criminal forfeiture. The

The findings required by today's forfeiture laws resemble those made by juries in forfeiture proceedings more than two centuries ago. Criminal asset forfeiture today should thus be viewed as a version of the historical practice that existed at the time the Sixth Amendment was adopted,[114] in which juries determined the requisite relationship between assets and the crime before forfeiture could be imposed as a consequence of conviction. Were the Court to consider the question today, this history would support an interpretation of the Jury Clause that extends the jury right to findings required for criminal forfeiture, just as the right applies to findings required for imposing fines or mandatory minimum sentences.

V. SOLUTION: *APPRENDI*-COMPLIANT STATE FORFEITURE PROCEEDINGS

The Supreme Court may soon revisit whether the Sixth Amendment guarantees a jury trial when adjudicating criminal asset forfeiture. This Note argues that facts underlying criminal forfeiture are not sentencing factors for a judge to adjudicate but rather function as elements—which are subject to a jury's determination beyond a reasonable doubt. Should the Court extend *Apprendi* to criminal forfeiture, states would no longer be able to: prove an asset's eligibility for forfeiture to a judge; prove such eligibility to a jury by a preponderance of the evidence rather than beyond a reasonable doubt; or place the burden of disproving the requisite relationship on the defendant. States should adopt changes now to prepare for the Supreme Court overruling *Libretti* and holding that juries must decide the facts upon which the statute conditions forfeiture.

In the event *Libretti* is overruled, states that provide defendants with a right for a jury to hear criminal forfeiture proceedings will avoid litigation and potential resentencing or retrial for defendants whose assets were forfeited in proceedings that did not comply with the Sixth Amendment. Furthermore, *Apprendi*-compliant state forfeiture proceedings embrace core constitutional values. This Part proposes guidelines for state legislatures crafting procedures that would comply with the Sixth Amendment. Under *Apprendi, Southern Union,* and finally *Alleyne,* a state should provide a right to a jury determination, by proof beyond a reasonable doubt, of any factual finding necessary for forfeiture to be imposed after conviction.

Committee stated, "*Under the common law,* in a criminal forfeiture proceeding, the defendant was apparently entitled to notice, trial, and a special jury finding on the factual issues surrounding the declaration of forfeiture which followed his criminal conviction." *Key*, 239 P.3d at 806 (emphasis added) (internal quotation marks omitted).

114. *See* Finneran & Luther, *supra* note 42, at 43–44.

A. Criminal Asset Forfeiture Statutes Should Provide Pretrial Notice to the Defendant

Although the Supreme Court has never specifically addressed whether the charging instrument must include an *Apprendi* fact in order to provide the defendant with notice[115] and some state statutory schemes lack any such requirement,[116] the Court's dicta suggests notice is important.[117] Certain jurisdictions require the prosecutor to charge statutory aggravating factors in the indictment,[118] whereas in other states, notice of these aggravators must be given before trial.[119] In the context of criminal asset forfeiture, notice requirements protect a defendant against coercion and self-incrimination[120] because "there are serious constitutional ramifications when in personam proceedings

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115. Apprendi v. New Jersey, 530 U.S. 466, 477 n.3 (2000) ("Apprendi has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment . . . . We thus do not address the indictment question separately today.").

116. *See* LAFAVE ET AL., *supra* note 20, § 26.4(i) n.200.9 (citing McKaney v. Foreman, 100 P.3d 18, 23 (Ariz. 2004)) (aggravating factors need not be in indictment or supported by evidence of probable cause to grand jury); State v. Sawatzky, 125 P.3d 722, 727 (Or. 2005) (enhancement factors need not be set out in indictment)); *see also* LAFAVE ET AL., *supra* note 20 § 19.2(e) nn. 69 & 70.

117. *See, e.g.*, Alleyne v. United States, 133 S. Ct. 2151, 2161 (2013) (Thomas, J.) (stating that it was vital for the defendant to be able to "predict the legally applicable penalty from the face of the indictment"); *Apprendi*, 530 U.S. at 478–79 (same); United States v. Promise, 255 F.3d 150, 157 n.6 (4th Cir. 2001) ("[T]he constitutional rule at issue concerns 'the required procedures for finding the facts that determine the maximum permissible punishment[, including] the safeguards going to the formality of notice.' " (quoting Jones v. United States, 526 U.S. 227, 243 n.6 (1999))).

118. *See* LAFAVE ET AL., *supra* note 20, § 26.4(i) n.200.9 (citing United States v. Fell, 531 F.3d 197, 237–38 (2d Cir. 2008); State v. Jess, 184 P.3d 133, 150 (Haw. 2008)).

119. *See id.* § 26.4(i) n.200.11 (citing 725 ILL. COMP. STAT. ANN. 5/111-3(c-5)) ("[T]he alleged fact must be included in the charging instrument or otherwise provided to the defendant through a written notification before trial, submitted to a trier of fact as an aggravating factor, and proved beyond a reasonable doubt."); N.C. GEN. STAT. ANN. § 15A-1340.16(a6):

> The State must provide a defendant with written notice of its intent to prove the existence of one or more aggravating factors . . . at least 30 days before trial or the entry of a guilty or no contest plea. A defendant may waive the right to receive such notice. The notice shall list all the aggravating factors the State seeks to establish.;

State v. Nichols, 33 P.3d 1172, 1175 (Ariz. Ct. App. 2001) (enhancement factor need not be included in the indictment, but prosecution must file notice of intent to prove enhancement factor at least twenty days before trial); State v. Kendell, 723 N.W.2d 597, 612 (Minn. 2006) (state's notice of intent to seek upward departure from presumptive sentence range before trial is adequate, unnecessary in indictment); State v. Chauvin, 723 N.W.2d 20, 30 (Minn. 2006) (notice several weeks before trial is adequate).

120. *See* Michael P. Kenny & H. Suzanne Smith, *A Comprehensive Analysis of Georgia RICO*, 9 GA. ST. U. L. REV. 537, 583 (1993).

are initiated against individuals who have not been . . . convicted of any criminal activity."[121]

Thus, a criminal asset forfeiture statute should provide the defendant with adequate notice by requiring the prosecutor to include any forfeiture counts or provisions in the indictment or charging document. For example, the Tennessee criminal asset forfeiture provision requires the indictment or information to contain a separate count notifying the defendant that the state will pursue forfeiture and describing all allegedly forfeitable property.[122] Notice should meet the standard of "reasonable particularity" to serve the purposes of law enforcement while still protecting a defendant's constitutional rights.[123] That is, a defendant should be able to discern from a charging document what the government seeks to seize and what the defendant will be expected to disgorge—whether that is proceeds, instrumentalities, or both.

B. The Defendant Should Have a Constitutional Right to Trial by Jury

Through *Apprendi* and its progeny, it is now undisputed that

> regardless of how a fact is designated by a legislature, that fact must be proven beyond a reasonable doubt to a jury, if it is a fact other than prior conviction, and it authorizes the imposition of a penalty that is more severe than the penalty authorized by law for the offense of conviction alone.[124]

The Court has emphasized the importance of historical context in determining whether the jury should control a fact. As discussed in Part III, evidence suggests that colonial juries determined whether a convicted defendant was subject to criminal forfeiture and what was to be forfeited.[125] Since these questions regarding criminal asset forfeiture were historically for the jury to answer, contemporary Supreme Court jurisprudence indicates that these questions are for today's modern juries as well. Despite *Libretti*, legislatures should treat criminal forfeiture not merely as a sentencing factor but instead as an element of the offense, triggering constitutional protections under the Sixth Amendment.

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121. Pimper v. State *ex rel.* Simpson, 555 S.E.2d 459, 463 (Ga. 2001) (Hunstein, J., dissenting).

122. TENN. CODE ANN. § 39-11-708(d) (2014).

123. *See* R.I. GEN. LAWS § 21-28-5.04.1 (2014) ("Any criminal complaint, information, or indictment charging one or more covered offenses shall set forth with reasonable particularity property that the attorney general seeks to forfeit pursuant to this section.").

124. LAFAVE ET AL., *supra* note 20, § 26.4(i); *see supra* Part III.A; *see also* Apprendi v. New Jersey, 530 U.S. 466, 498 (2000) (Scalia, J., concurring) ("[A]ll the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury.").

125. *See supra* Part IV.

To support the "animating principle" of the *Apprendi* rule—to "preserv[e] the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense"[126]—the maximum sentence imposed by a judge may only reflect those underlying facts either found by a jury or admitted by the defendant. After *Southern Union*, therefore, it is no longer logical to argue that *Apprendi* does not apply to forfeiture because there is no statutory maximum.[127]

C. The Trier of Fact Should Determine When the Property Is Subject to Forfeiture

State criminal asset forfeiture provisions should include explicit language requiring a jury to determine the nexus between the property sought and the underlying offense. Some state statutes afford defendants a statutory right to a jury that may be waived—by either party or both parties, depending on the state[128]—and such provisions meet the Sixth Amendment jury trial guaranty.[129] State statutes that do not require jury determinations, however, deprive defendants of an important protection, even though *Libretti* permits this. Those states may emulate New York, which, in the context of defendants convicted of enterprise corruption, requires a jury to decide whether the defendant had "any interest in, [proceeds derived from,] security of, claim against or property or contractual right affording a source of influence over any enterprise . . . [or that the defendant] acquired or maintained in an enterprise . . . ."[130]

D. The Jury's Determination Should Be Beyond a Reasonable Doubt

Similarly, when a jury determines criminal asset forfeiture, it should do so only if there is no reasonable doubt regarding (i) the existence of a nexus between the assets sought and the underlying criminal activity and (ii) the property and amount to be forfeited. *Apprendi* articulated this standard of proof, and the Court's

126. S. Union Co. v. United States, 132 S. Ct. 2344, 2350–51 (2012) (citing Oregon v. Ice, 555 U.S. 160, 168 (2009)).

127. *See supra* Part III.B.2.

128. *See, e.g.*, CAL. PENAL CODE §§ 186.2, 186.5 (West 2014) ("If the defendant is found guilty of the underlying offense, the issue of forfeiture shall be promptly tried, either before the same jury or before a new jury in the discretion of the court, unless waived by the consent of all parties.").

129. A defendant's right to a jury trial, like other fundamental constitutional rights, may be extinguished by a knowing and intelligent waiver. *See* LAFAVE ET AL., *supra* note 20, § 26.4(i).

130. N.Y. PENAL LAW § 460.30 (McKinney 2014).

development of this sentencing rule has reinforced it.[131] Requiring any lesser burden of proof (such as preponderance of the evidence) would deny defendants due process protection and violate the Sixth Amendment.[132]

E. The Prosecutor Should Bear the Entire Burden of Proving Whether the Property Is Subject to Forfeiture

Although certain criminal forfeiture statutes employ burden-shifting or rebuttable presumptions,[133] the burden of proof should always remain with the prosecution, requiring the state to prove a nexus between the property sought and the underlying offense. Because a prosecutor is constitutionally bound to prove any substantive element of a statutorily defined offense, requiring the defendant to rebut any presumption in order to maintain his or her innocence would be inconsistent with the prosecutor's duty in a world where *Libretti* is overruled. Defendants have no obligation to rebut or otherwise disprove aggravating *Apprendi* factors such as criminal fines, and similarly defendants should not face that hurdle when a court determines grounds for criminal forfeiture. Rebuttable presumptions in this context would permit circumvention of procedural safeguards designed to protect defendants from government overreaching.[134] States should employ permissive language to afford defendants the opportunity to present contrary evidence in forfeiture proceedings, but the defendant should not be forced to do so.[135]

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131. *See, e.g.*, Alleyne v. United States, 133 S. Ct. 2151, 2158 (2013); Ring v. Arizona, 536 U.S. 584, 585–86, 603 (2002) (citing Apprendi v. New Jersey, 530 U.S. 466, 483):

> If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt. A defendant may not be "expose[d] . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.";

Apprendi, 530 U.S.at 489.

132. *Cf. supra* note 64 and accompanying text.

133. *E.g.*, N.Y. PENAL LAW § 480.35 ("The presumption established by this section *shall be rebutted* by credible and reliable evidence which tends to show that such currency or negotiable instruments payable to the bearer is not the proceeds of a felony offense." (emphasis added)).

134. *Cf.* John C. Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1335–36 (1979) ("Although some penal statutes purport to create presumptions in mandatory terms, they are generally not given compulsory effect." (citations omitted)).

135. *See, e.g.*, TENN. CODE ANN. § 39-11-708(e) (2014) ("The state and defendant *may* introduce evidence at the forfeiture hearing." (emphasis added)).

VI. CONCLUSION

In light of the Court's recent pronouncements of robust Sixth Amendment protections in criminal sentencing, the right to a jury trial in determining forfeitability should be viewed as a constitutional right. Drafters of criminal asset forfeiture statutes must aim to facilitate law enforcement and aid in effective government investigation while simultaneously protecting a defendant's due process rights and other constitutional guaranties. Although twenty years ago, the Supreme Court interpreted criminal forfeiture as a part of the defendant's sentence and thus beyond the scope of Sixth Amendment protection, it is now more apparent than ever that the foundations of that holding have crumbled. Consequently, a state that authorizes criminal forfeiture should ensure its statutes governing forfeiture proceedings comply with the Sixth Amendment; otherwise, a shift in the Court's view may force states to face a flood of litigation. By requiring a jury to decide whether the prosecutor has proven a nexus between the underlying offense and the property sought, legislatures will overcome any question of constitutionality under the Sixth Amendment. Criminal forfeiture proceedings are not simply part of sentencing, in which case the Sixth Amendment right to a jury trial would not apply. Rather, under *Apprendi* and its recent progeny *Southern Union* and *Alleyne*, facts underlying criminal asset forfeiture should be treated as having the capacity to raise the statutory minimum or maximum and thus should be determined by a jury beyond a reasonable doubt.

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