

Civil and Criminal Forfeiture Procedure

U.S. Department of Justice
Asset Forfeiture & Money Laundering Section
January 2004

Electronic version scanned in and annotated by Forfeiture Endangers American Rights Foundation,
corrected December 22, 2004

Part I - pages 101-154

- *United States v. One Lot of U.S. Currency Totaling \$14,665*, 33 F. Supp. 2d 47 (D. Mass. 1998) (quantity of cash, use of cash to buy airline ticket, use of rubber bands to package cash, vague but plausible explanation for source of cash and purpose of trip, and positive dog sniff all insufficient to establish probable cause where claimant had no criminal record and the Government failed to prove claimant's story false);

- *United States v. \$16,500 in U.S. Currency*, 48 F. Supp. 2d 1268 (D. Or. 1999) (evidence that airline passenger fit courier profile and had cash to which drug dog alerted concealed on his person was insufficient to establish probable cause);

- *United States v. \$15,800 in U.S. Funds*, 2003 WL 21697352 (N.D. Ill. 2003) (dog sniff alone is not enough to support summary judgment for the Government; it might be different if the Government had submitted scientific evidence explaining dog's ability to ignore background contamination);

- *Note*: The Supreme Court has applied a totality of the circumstances test to the factors supporting a *Terry* stop of an automobile; see *United States v. Arvizu*, 534 U.S. 266 (2002).

4. Dog sniffs:

- *United States v. \$141,770.00 in U.S. Currency*, 157 F.3d 600 (8th Cir. 1998) (district court properly disallowed testimony of expert witness who sought to impeach value of dog sniff with evidence that 99 percent of U.S. currency is contaminated; such testimony failed to address fact that the dog was able to distinguish between the seized currency and a control sample taken from the pockets of arresting officers);

- *United States v. \$22,474 in U.S. Currency*, 246 F.3d 1212 (9th Cir. 2001) (because a properly trained drug dog alerts to the presence of methyl benzoate, a chemical by-product that evaporates quickly when exposed to the air, and does not alert to the cocaine itself, a dog alert means that the currency has been in recent proximity to cocaine);

- *United States v. \$30,670 in U.S. Funds*, 2002 WL 1483897 (N.D. Ill. 2002) (evidence that drug dog has been reliable in the past allows court to consider positive alert in ruling on Government's motion for summary judgment);

- *Cf. United States v. \$46,000 in U.S. Currency*, 2003 WL 21659180 (E.D. Pa. 2003) (granting motion to suppress use of seized currency as evidence: dog sniff may be used to support

probable cause only if the Government introduces evidence of the dog's training and reliability);

5. Bank Accounts:

Note: The following cases were decided under the pre-CAFRA probable cause standard:

- *United States v. \$9,041,598.68*, 163 F.3d 238 (5th Cir. 1998) (evidence that \$9 million was deposited into bank account in cash 'wrapped in rubber bands by Mexican official accused of taking bribes was sufficient probable cause for forfeiture under sections 881 (a)(6) and 981(a)(I)(A));

- *United States v. Banco Cafetero Panama*, 797 F.2d 1154 (2d Cir. 1986) (to establish that tainted funds remain in a bank account, notwithstanding a fluctuating balance, the Government may use a "last out" rule);

- *United States v. One 1993 Ford Thunderbird*, 2000 WL 1154628 (N.D. in. 2000) (lack of sufficient legitimate income, claimant's role as lookout during drug deal, concealment of bank passbook in hidden compartment of vehicle used for hiding drugs, and two previous civil forfeitures involving same claimant establish probable cause for forfeiture of bank account as drug proceeds);

6. Luxury items/residences-lack of legitimate income:

• *Note:* The following cases were decided under the pre-CAFRA. probable cause standard:

- *United States v. Real Property at 40 Clark Road*, 52 F. Supp. 2d 254 (D. Mass. 1999) (the Government must show more than that drug dealer had substantial income from drug sales to establish that art and other luxury items were purchased with drug proceeds);

- *United States v. 1978 Cessna Turbo 210*, 182 F.3d 919,1999 WL 407469 (6th Cir. 1999) (unpublished) (fable) (evidence that claimant had purchased eight other aircraft for drug dealer with drug proceeds *not* sufficient to show that *this* aircraft was forfeitable under either section 881 (a)(4) or (6));

- *United States v. 1131 Aegean Drive*, 2001 WL 293114 (N.D. in. 2001) ("where a claimant's verifiable income cannot possibly account for the level of wealth displayed and where evidence of drug trafficking exists,... there is probable cause to believe that the item of wealth is either a direct product of the illicit activity [or is traceable thereto]);

- *United States v. 3714 Cancun Loop*, 2002 WL 1035457 (M.D.N.C. 2002) (under the "net worth" theory, court may presume that drug dealer's expenditures on his residence in excess of his legitimate income were derived from drug proceeds);

- *Weng v. United States*, No. 95 CV 219 (RJD) (E.D.N.Y. Mar. 20, 2001) (unexplained wealth in the hands of a person engaged in drug activities constitutes probable cause for the forfeiture of the money);

7. Property intended to be used to buy drugs:

- *United States v. U.S. Currency in the Amount of \$40,000*, 1999 WL 1011938 (E.D.N.Y. 1999) (under section 881(a)(6), whether claimant actually derived cash from gambling winnings is irrelevant; if he intended to exchange it for a controlled substance, legitimate source doesn't matter);

C. Negating a "legitimate source" defense:

1. If a third party acquires an interest in the property after it becomes subject to forfeiture, the fact that the third party used clean money to acquire his or her interest does not affect the forfeitability of the property; that goes to the innocent owner defense:

- *United States v. \$4,255,000*, 762 F.2d 895, 905 (11th Cir 1985) (it does not matter that third party used clean money to acquire the drug dollars that represent the defendant *res*; if it did, there would be no need for an innocent owner defense);

- *But see United States v. Premises Known as 7725 Unity Avenue*, 294 F.3d 954 (8th Cir. 2002) (in civil action against real property, court upholds lienholder's claim on the ground that lienholder used clean money to acquire its interest even though the property was already subject to forfeiture at that time);

2. Under pre-CAFRA law, evidence of possible legitimate sources of income was insufficient to establish legitimate source defense without records:

- *United States v. \$149,442.43 in U.S. Currency*, 965 F.2d 868 (10th Cir. 1992);

- *United States v. \$87,118.00 in U.S. Currency*, 95 F.3d 511 (7th Cir. 1996) (claimant's explanation that he kept a large number of small bills to facilitate car sales or to realize better exchange rate in Nigeria insufficient to establish legitimate source);

- *United States v. \$9,380 in U.S. Currency*, 2000 WL 686040 (S.D.N.Y. 2000) (pay stubs dated years before criminal activity insufficient to overcome evidence that defendant kept drug proceeds in his house);

- *United States v. One 1995 Chevrolet Impala SS*, 2001 WL 1631438 (D. Minn. 2001) (claimants' assertion that they had \$60,000 in legitimate income over 10 years is insufficient explanation for their ability to purchase \$3,500 automobile and pay mortgage with cash during period when husband was selling drugs);

3. Same is true under the post-CAFRA. preponderance of the evidence standard:

- *United States v. \$30,670 in U.S. Funds*, 2002 WL 1483897 (N.D. m. 2002) (claimant's tax returns and bankruptcy filing indicated insufficient income to explain possession of \$30,670 in cash that he claimed was from savings);

4. Cross-examination:

- *United States v. \$141,710.00 in U.S. Currency*, 157 F.3d 600 (8th Cir. 1998)(AUSA properly impeached claimant's assertion that money came from a legitimate source by asking if claimant had paid any federal income taxes of alleged legitimate business income, even though question prompted claimant to invoke his Fifth Amendment rights);

I. Facilitating property-the substantial connection test:

- Under CAFRA, if the Government's theory of forfeiture is that the property was used to commit or facilitate the offense, or was involved in the commission of an offense, the Government must prove by a preponderance of the evidence that there was a "substantial connection" between the property and the offense, *see* section 983(c)(3).

1. The substantial connection test was the rule in most circuits before CAFRA:

- *United States v. One 1986 Ford Pickup*, 56F.3d 1181 (9th Cir. 1995); *United States v. 1966 Beechcraft Aircraft*, 777 F.2d 947, 953 (4th Cir. 1985); *United States v. One '1976 Ford F-150 Pick-Up*, 769 F.2d 525,527 (8th Cir. 1985); *United States v. 1972 Chevrolet Corvette*, 625 F.2d 1026, 1029 (1st Cir. 1980); *United States v. 100 Chadwick Drive*, 913 F. Supp. 430 (W.D.N.C. 1995); *United States v. Real Property...9917 Amazona Drive*, 1999 WL 1940056 (W.D.N.C. 1999);

- *United States v. Carrell*, 252 F.3d 1193, 1201 n.7 (11th Cir. 2001) (the substantial connection requirement comes from the 1978 legislative history of 21 U.S. C. § 881);

- *United States v. Cleckler*, 270 F.3d 1331 (11th Cir. 2001) (substantial connection test applied to forfeitures of facilitating property in the Eleventh Circuit before CAFRA);

- *United States v. 152 Char-Nor Manor Blvd.*; 922 F. Supp. 1064 (D. Md. 1996) ("extensive and specially adapted use of the property demonstrates a substantial connection");

- *United States v. One 1998 Tractor*; 288 F. Supp. 2d 710 (W.D. Va. 2003) (the substantial connection test is the same as it was pre-CAFRA; only the burden of proof has changed);

- *United States v. 5 S 351 Tuthill Road*, 233 F.3d 1017 (7th Cir. 2000) (the Seventh Circuit's "nexus" test was "only semantically distinguishable from the 'substantial connection' test used in other circuits");

- *But see United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993) (the Government must demonstrate only a nexus, not a substantial connection); *United States v. 1990 Toyota 4Runner*, 9 F.3d 651, 653-54 (7th Cir. 1993); *United States v. 1964 Beechcraft Baron Aircraft*, 691 F.2d 725, 727 (5th Cir. 1982);

- *United States v. One Parcel...916 Douglas Ave.*, 903 F.2d 490, 494 (7th Cir. 1990) (substantial connection not required; it is necessary only to show that the connection was more than

incidental or fortuitous; the difference may be "semantic rather than practical.");

- *United States v. R.D. 1. Box 1. Thompsontown*, 952 F.2d 53, 57 n.5 (3d Cir. 1991) (finding it unnecessary to choose between substantial connection and other formulations; "the distinctions made and their applications often appear to be semantical.);

- *United States v. \$10,700.00 in U.S. Currency*, 258 F.3d 215 (3d Cir. 2001) (finding it unnecessary to determine whether the substantial connection test applies to the seizure of "drug money," but expressing doubt that the concept has meaning in that context);

- *Note:* The legislative history of the substantial connection requirement in section 983(c)(3) demonstrates that it was intended only as a codification of the majority rule, and not as major change in the quality of the nexus between the property and the offense, see "The Civil Asset Forfeiture Reform Act of 2000," 21 *Journal of Legislation* 97, 109, Notre Dame Law School (2001), available on AFML Online.

- *United States v. \$22,991.00, More or Less, in U.S. Currency*, 227 F. Supp. 2d 1220 (S.A., Ala. 2002) (the substantial connection test under CAFRA is the same as it was before, only the Government must prove its case by preponderance of the evidence without hearsay);

2. The substantial connection requirement does not apply in proceeds cases:

- *United States v. \$118,170.00 in U.S. Currency*, 69 Fed. Appx. 714, 2003 WL 21659445 (6th Cir. 2003) (substantial connection requirement in section 983(c)(3) applies only to facilitating property; Government need not show a substantial connection between seized currency and a drug offense when it bases the forfeiture on a proceeds theory);

3. Substantial connection between property and drug trafficking:

- Post-CAFRA:

- *United States v. One Parcel,.. 2526 Faxon Ave.*, 145 F. Supp. 2d 942,946 (W.D. Tenn. 2001) (residence used as stash house for drug money is substantially connected to the drug offense even under CAFRA's higher standard of proof; following *Schifferli*; connection need not be integral, essential, or indispensable, but must have been more than incidental or fortuitous);

- *United States v. One 1998 Tractor*, 288 F. Supp. 2d 710 (W.D. Va. 2003) ("it is well settled that the use of property as a situs for conducting illegal activities establishes a substantial connection between the property and the underlying criminal activity"; but the trailer being pulled by a truck is not substantially connected if the contraband was in the cab of the truck and not the trailer);

- Pre-CAFRA:

- *United States v. Premises Known as 3639-2nd St.*, 869 F.2d 1093, 1096 (8th Cir. 1989) (section 881(a)(7) requires something more than an "incidental or fortuitous" connection, but house

where drug deal took place and where drugs and gun were stored satisfied the test; there is no requirement of an ongoing operation);

- *United States v. One Parcel... 7715 Betsy Bruce Lane*, 906 F.2d 110, 113 (4th Cir. 1990) (circumstantial evidence that house was used to possess cocaine with intent to distribute is sufficient, even if only trace amounts are found);

- *United States v. Schifferli*, 895 F.2d 987, 990-91 (4th Cir. 1990) (use of dentist office on multiple occasions to write illegal prescriptions showed connection was more than incidental or fortuitous);

- *United States v. Real Property... 3097 S. W. 111th Ave.*, 921 F.2d 1551, 1556 (11th Cir. 1991) (single drug deal on driveway sufficient to establish substantial connection where defendant arranged the location so that deal would "take place on familiar territory");

- *United States v. One Parcel... 7079 Chilton County Road*, 123 F. Supp. 2d 602 (M.D. Ala. 2000) (use of property to negotiate two drug deals, and consummate one of them, satisfies substantial connection test; "there is no requirement.. of a continuing drug business or ongoing operation in order to show a substantial connection"), *aff'd on this point, rev'd on other grounds*, 270 F.2d 1331 (11th Cir. 2001);

- *United States v. All Right, Title and Interest... 785 St. Nicholas Ave.*, 983 F.2d 396, 403 (2d Cir. 1993) (extraordinary number of drug transactions occurring on or near property establishes that property was used to facilitate);

- *United States v. Real Property Described in Deeds*, 962 F. Supp. 734 (W.D.N.C. 1997) (real property has substantial connection to drug offense if, by virtue of its location, it serves to conceal the criminal acts);

- *United States v. Real Property at 40 Clark Road*, 52 F. Supp. 2d 254 (D. Mass. 1999) (truck used to transport fuel oil for marijuana grow equipment and tractor used to bury plant waste forfeitable as facilitating property under section 881(a)(4));

- *United States v. Two Parcels of real Property...101 North Liberty Street*) 80 F. Supp. 2d 1298 (M.D. Ala. 2000) ("a substantial connection is sufficiently established when the Government shows that illegal drug transactions occurred on real property");

- *United States v. 2304 E. Highland Drive, Tucson, Arizona*) No. 98-CV -444-TUC-ACM (D. Ariz. Nov. 16, 2000) (use of phone to arrange drug deals on repeated occasions and storage of drugs, cash, and gun on premises sufficient to establish probable cause for forfeiture as facilitating property);

4. In real property cases, forfeiture applies to the entire tract:

- *United States v. Real Property Described in Deeds*, 962 F. Supp. 734 (W.D.N.C. 1997) (entire tract is forfeitable, despite conveyance in separate deeds, if farm was always operated as one

tract);

- *United States v. Real Property...9917 Amazona Drive*, 1999 WL 1940056 (W.D.N.C. 1999) (if house built with drug proceeds straddles two parcels, court will treat both parcels as one for purposes of forfeiture);

- See "entire parcel" cases in Criminal Forfeiture Case Outline.

5. Probable cause for seizure of facilitating property:

- *Seaborn v. Thompson*, 2002 WL 737654 (M.D.N.C. 2002) (throwing drugs out window while being pursued for traffic violation provides probable cause for seizure of car);

- Money laundering cases:

1. What constitutes property "involved in" the money laundering offense:

- The evidence needed to establish that property was "involved in" a money laundering offense and is therefore subject to forfeiture under section 981 (a)(I)(A) is covered in detail in *Federal Money Laundering Cases, Part II (2004)* (publication of the Department of Justice), available on AFML Online.

2. *Mens rea* for money laundering:

- *United States v. Dollar Bank Money Market Account*, 980 F.2d 233 (3d Cir. 1992) (trial ordered on issue of whether perpetrator had requisite mental state to satisfy *mens rea* element of structuring offense - i.e., whether he knew that bank was required by law to file CTRs);

- *United States v. \$200,000*, 805 F. Supp. 585, 589 (N.D. in. 1992) (same) (the Government's showing of probable cause with respect to mental state does not mean claimant may not be able to establish absence of mental state by preponderance of evidence at trial);

3. Black market dollars derived from illegal activity are subject to forfeiture even if the claimant acquired them in exchange for clean money:

- *United States v. \$4,255,000*, 762 F.2d 895, 905 (11th Cir. 1985) (noting that if the claimant could argue that the taint on the seized property had been removed through his supposedly legitimate purchase, there would be no need for the innocent owner defense);

- *United States v. Cuartres*, 155 F. Supp. 2d 1338 (S.D. Fla. 2001) (drug dollars purchased on the black market are subject to forfeiture unless the claimant is a bona fide purchaser);

- Elements of the offense:

- *United States v. Leak*, 123 F.3d 787 (4th Cir. 1997) (to establish forfeitability, the Government must show that the elements of the underlying offense are satisfied);

- Summary judgment on the forfeitability issue:

1. At the summary judgment stage, forfeitability is determined on the basis of all of the facts, not on what the Government knew at the time of the seizure, 18 U.S. C. § 983(c)(2):

- *United States v. \$30,670 in U.S. Funds*, 2002 WL 1483897 (N.D. in. 2002) (summary judgment under preponderance of the evidence standard granted against money seized from courier; court considers evidence discovered after the filing of the forfeiture complaint);

- *See United States v. 47 West 644 Route 38*, 962 F. Supp. 1081 (N.D. m. 1997);

2. Pre-CAFRA, the Government was entitled to summary judgment on the forfeitability issue by showing probable cause:

- *United States v. Oil Leong Chinese Merchants Ass 'n Building*, 918 F.2d 1289, 1292 (7th Cir. 1990) (gambling case); *United States v. Property at 4492 Livonia Rd.*, 889 F.2d 1258, 1269 (2d Cir. 1989) (drug case); *United States v. All Monies*, 754 F. Supp. 1467, 1476 (D. Haw. 1991); *United States v. Real Property in Mecklenburg County*, 814 F. Supp. 468, 477 (W.D.N.C. 1993);

- *Un fled States v. Wagoner County Real Estate*, 278 F.3d 1091 (10th Cir. 2002) (noting that district court entered summary judgment on forfeitability issue before jury trial on the affirmative defenses);

- *United States v. Property Identified as 1813 15th Street, N. W.*, 956 F. Supp 1029, 1033-34 (D.D.C. 1997) (the Government is entitled to summary judgment on probable cause issue notwithstanding the claimant's denials if its evidence meets the usual probable cause standard and no reasonable jury could find otherwise; sworn affidavits denying the property was used to facilitate drug trafficking insufficient to create a material issue);

- *United States v. 5506,641 in U.S. Currency*, 1996 WL 396082 (N.D. 111. 1996) (summary judgment for the Government on probable cause appropriate where undisputed facts would support probable cause even if claimant's challenge to other facts had merit);

- *United States v. \$206,323.56 in U.S. Currency*, 998 F. Supp. 693 (S.D. W. Va. 1998) (circumstantial evidence was sufficient to establish probable cause that cash seized during traffic stop was drug proceeds; despite claimant's suggestion money had legitimate source, there was no material issue of fact because claimant offered no documentation to support his claim);

- *But see U7lited States v. \$57,443.00 in U.S. Currency*, 42 F. Supp. 2d 1293 (S.D. Fla. 1999) (court cannot grant summary judgment on probable cause issue alone, but it may make finding under Rule 56(d) that the Government has established probable cause);

- Structuring offenses:

- *United States v. 1988 Oldsmobile Cutlass Supreme*, 983 F.2d 670 (5th Cir. 1993) (pattern of structured transactions sufficient to show probable cause in section 981 case); *United States v.*

\$200,000,805 F. Supp. 585, 589 (N.D. in. 1992) (same); *United States v. A Certain Parcel of Land*, 781 F. Supp. 830) 833 (D.N.H. 1992); *United States v. Funds Seized From Account Number 20548408 at Baybank, N.A.*, 1995 WL 381659 (D. Mass. 1995) (unpublished) (\$100,000 in structured money orders); see *United States v. \$81,990.47*, *supra*.

- But see *United States v. All Funds all Deposit in Any Account*, 767 F. Supp. 36, 40 (E.D.N.Y. 1991) (motion for summary judgment on probable cause issue denied where there was a question of fact as to whether the subject property "represented the fruits of the illegal [structuring] activity"); *United States v. All Funds Presently 071 Deposit (American Express Bank)*, No. CV92-5310 (E.D.N.Y. Oct. 28, 1994) (deposit of numerous structured money orders only created triable issue of fact);

- CMIR offense:

- *United States v. \$292,888.04 in U.S. Currency*, 54 F.3d 564 (9th Cir. 1995) (Summary judgment for the Government appropriate where bearer instruments in excess of \$10,000 were deposited in bank account and no CMIR was filed);

3. Post.CAFRA, Government entitled to summary judgment If there is no genuine issue of fact regarding the forfeitability of the property:

- *United States v. \$17,206.00 in U.S., Currency*, 320 F.3d 658 (6th Cir, 2003) (affirming summary judgment for the Government based on claimants' lack of legitimate income and absence of any rebuttal showing a legitimate source);

- *United States v. \$21,510 in U.S. Currency*, - F. Supp. 2d-, 2003 WL 22753434 (D.P.R. Nov. 13, 2003) (quantity of currency, proximity of money to drugs, defendant's guilty plea to drug offense, and his failure to substantiate claim that money came from a cash-only business were sufficient to support summary judgment for the Government on the forfeitability issue under CAFRA);

- *United States v. \$181,087.14 in U.S. Currency*, 2002 WL 31951270 (S.D. Ohio 2002) (claimants' failure to offer sufficient evidence of a legitimate source for money to create material issue of fact means that court may enter *summary* judgment for the Government under the preponderance standard);

- *United States v. One Parcel... 2526 Faxon Avenue*, 145 F. Supp. 2d 942 (W.D. Tenn. 2001) (entering summary judgment for the Government under the preponderance standard where claimant's defense was that he was an innocent owner, not that the property was not used for drug trafficking);

- But see *United States v. \$15,800 in U.S. Funds*, 2003 WL 21697352 (N.D. In. 2003) (denying summary judgment for the Government in section 881(a)(6) case where the only evidence of a drug nexus was a dog sniff);

4. Implausible explanation is not sufficient to defeat summary judgment:

- *United States v. Two Parcels in Russell County*, 92 F.3d 1123 (11 th Cir. 1996) (the mere allegation of a highly unlikely legitimate source of income without some support to give the allegation credibility cannot constitute an issue of material fact defeating summary judgment);
- *United States v. \$86,020.00 in U.S. Currency*, 1 F. Supp. 2d 1034, 1040-41 (D. Ariz. 1997) (court may enter summary judgment for the Government even if the claimant offers evidence of a legitimate source for seized currency if the explanation is so implausible that no reasonable jury could find for the claimant);
- *United States v. Real Property at 40 Clark Road*, 52 F. Supp. 2d 254 (D. Mass. 1999) (same) (claimant must offer something more than evidence of some legitimate income to create material issue of fact);
- *United States v. Eleven Vehicles*, 836 F. Supp. 1147 (E.D. Pa. 1993) (assertion that some of the property had a legitimate source raises material issue of fact and is insufficient to justify summary judgment for claimant);
- *United States v. Four Contiguous Parcels*, 191 F.3d 461, 1999 WL 701914 (6th Cir. 1999) (unpublished) (Table) (affirming summary judgment where the Government had probable cause to believe money was gambling proceeds and claimant's only rebuttal evidence was that he was wealthy before he engaged in illegal activity);
- *United States v. Contents of Account Numbers 208-06070* 847 F. Supp. 329 (S.D.N.Y. 1994) (where entire contents of account are forfeitable under facilitation theory) evidence that some property had legitimate source will not defeat summary judgment);
- *United States v. \$200,226.00 in United States Currency*, 57 F.3d 1061, 1995 WL 357904 (1st Cir. 1995) (unpublished) (Table) (summary judgment not appropriate even though claimant offered incredible statement regarding source of funds);
- *But see United States v. Premises Known as RR #1*, 14 F.3d 864 (3d Cir. 1994) (assertion that property was not used to facilitate drug offense raises triable issue of fact; summary judgment for the Government is denied);
- *United States v. \$7,300 in U.S. Currency*, 2003 'NI. 21496858 (S.D.N.Y. 2003) (though a jury may disbelieve it, claimant's assertion that the admission she made at the time of her arrest was false, and that the money really came not from selling drugs but from selling a car, creates a material issue of fact);

5. Reliance on conviction to establish forfeitability:

- *United States v. \$25,829,681.80 in Funds*, 2002 WI. 143679 (S.D.N.Y. 2002) (to establish forfeitability of property under section 981 (a)(1)(C), Government may rely on claimant's conviction in the UK for criminal offense that if committed in the United States would have been a wire fraud violation);

- *United States v. One 1988 Checolet 410 Turbo Property Aircraft*, 282 F. Supp. 2d 1379 (S.D. Fla. 2003) (court enters partial summary judgment on the forfeitability issue based on pilot's conviction for drug trafficking involving his airplane);

6. Summary judgment where mental intent is an issue:

- *United States v. Dollar Bank Money Market Account*, 980 F.2d 233 (3d Cir. 1992) (summary judgment denied if there exists material issue as to whether claimant knew CTRs were required by law); *United States v. Leak*, 123 F.3d 787 (4th Cir. 1997) (same); *United States v. \$200,000*, 805 F. Supp. 585) 591 (N.D. in. 1992) (same);

- *United States v. Certain Funds on Deposit in Scudder Tax Free Investment Account*, 998 F.2d 129 (2d Cir. 1993) (summary judgment inappropriate where alleged SUA offense for money laundering, 18 U.S.C. § 657, is offense with specific intent element and there is material issue as to whether alleged perpetrator possessed such intent);

- See discussion at page 152 regarding difficulty in obtaining summary judgment on affirmative defenses when mental state is in issue;

7. Summary judgment where there is a parallel criminal case:

- *United States v. Contents of Account Numbers 208-06070*, &47 F. Supp. 329 (S.D.N.Y. 1994) (claimant cannot create material issue by contradicting sworn statements made in his earlier guilty plea);

- But see *United States v. One 1997 Ford Expedition*, 135 F. Supp. 2d 1142 (D.N.M. 2001) (lack of explanation by the Government for why claimants were not prosecuted criminally creates material issue of fact; motion for summary judgment denied);

8. Summary judgment where the Fifth Amendment is asserted:

- *United States v. \$61,443.04 U.S. Currency*, 818 F. Supp. 135 (E.D.N.C. 1993) (claimant who asserts Fifth Amendment rights to avoid deposition cannot submit affidavits to create material issues of fact in opposition to motion for summary judgment);

- *United States v. \$118,170.00 in U.S. Currency*, 69 Fed. Appx. 714, 2003 WL 21659445 (6th Cir. 2003) (claimant who invoked his Fifth Amendment right to remain silent at his deposition, and thus leaves the Government's evidence uncontroverted, cannot complain that the entry of summary judgment for the Government deprived him of due process)

9. Summary judgment for the *claimant*:

- *United States v. All Funds Presently 071 Deposit at American Express Bank*, 832 F. Supp. 542 (E.D.N.Y. 1993) (where forfeitability predicated on applicability of section 984-forfeiture of fungible property - and section 984 does not apply, claimant's motion of summary judgment is granted);

11. Tracing

- Forfeiture applies to funds, not to bank Accounts:

- *United States v. \$488,342.85,969 F.2d 474,476-77* (7th Cir. 1992) (bank account is a container; fact that dirty money passed through an account in the past does not entitle the Government to forfeit funds found in the account at later time); *United States v. All Funds on Deposit (Great Eastern Bank)*, 804 F. Supp. 444- 447 (E.D.N.Y. 1992); *United States v. All Funds Presently on Deposit at American Express Bank*, 832 F. Supp. 542, 562 (E.D.N.Y. 1993);

- *United States v. Barnfield*, 145 F.3d 1123 (10th Cir. 1998) (following \$488,342.85; account number is used for identification purposes and is not itself a forfeitable item);

B. Forfeiture of entire account may be based on circumstantial evidence:

- *United States v. Certain Accounts*, 795 F. Supp. 391, 397 (S.D. Fla. 1992) (deposit of numerous money orders in amounts just under \$10,000 into an account sufficient to establish probable cause for forfeiture of entire account even though balance exceeded total value of money orders);

- *United States v. U.S. Currency (\$199,710.00)*, 96 CV 2241 (ERK) (RML) (E.D.N.Y. Mar. 20. 1998) (if the Government has probable cause to believe that a bank. account is used exclusively for money laundering, it does not have to establish a separate money laundering nexus for each deposit into the account);

C. If forfeiture cannot be established by circumstantial evidence or facilitation theory, the Government must trace money to the offense giving rise to forfeiture:

- *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1158-62 (2d Cir. 1986) (drug case; the Government is entitled to use "first in, first out") or "first in, last out" analysis in tracing tainted funds through volatile bank account; but the Government is subject to the "lowest intermediate balance" rule);

- *United States v. \$488,342.85,969 F.2d 474,476-77* (7th Cir. 1992) (section 981 case discussing application of *Banco Cafetero* to money laundering; strict tracing, such as employed in the law of trusts, not required in civil forfeiture cases);

D. In civil cases, tracing the seized property to criminal activity is part of the Government's burden:

- *United States v. \$8,221,877.16 in U.S. Currency*, 330 F.3d 141 (3d Cir. 2003) (in civil forfeiture cases, the Government is required to trace the seized property directly to the offense giving rise to the forfeiture);

- *Marine Midland Bank, NA. v. United States*, 11 F.3d 1119 (2d Cir. 1993) (failure of the Government to establish probable cause to seize an entire account at time of seizure results in

return of property pretrial);

- *United States v. All Funds Presently on Deposit at American Express Bank*, 832 F. Supp. 542 (E.D.N.Y. 1993) ("probable cause to seize and forfeit an active bank account.. requires that the funds in that account be somehow 'traceable' to the alleged unlawful activity that gave rise to the forfeiture in the first place");

- *United States v. All Funds on Deposit (Great Eastern Bank)*, 804 F. Supp. 444, 446 (E.D.N.Y. 1992) (the Government must establish probable cause with respect to *all* of the seized property; where a portion of the bank account is not traceable to criminal activity and no facilitation theory applies, the Government has failed to establish probable cause with respect to portion of funds);

- *United States v. All Monies*, 754 F. Supp. 1467 (D. Haw. 1991) (the Government concedes it has burden of establishing probable cause with respect to funds not directly traceable to criminal activity; establishes probable cause to believe balance of funds were used to facilitate criminal activity); .

- *United States v. \$488,342.85,969 F.2d 474, 477* (7th Cir. 1992) (the Government establishes probable cause to believe that all funds in account are forfeitable by showing that scheme is ongoing and that deposits of proceeds of scheme exceed the balance of the account at the time of seizure; burden then shifts to claimant to identify the sums not subject to forfeiture as part of affirmative defense) ;

E. Examples of property found traceable to the offense:

- *United States v. One 1997 E35 Ford Van*, 50 F. Supp. 2d 789 (N.D. m. 1999) (car and residence purchased with money sent into United States in violation of section 1956(a)(2)(A) are forfeitable as property traceable to the offense);

- *United States v. 5709 Hillingdon Road*, 919 F. Supp. 863 (W.D.N.C. 1996) (forfeiture of real property on which mortgage was retired with funds traceable to 33 structured deposits), *rev'd on other grounds. United States v. Leak*, 123 F 3d 787 (4th Cir. 1997);

- *United States v. Eleven Vehicles*, 836 F. Supp. 1147, 1155 (E.D. Pa. 1993) (where business was forfeitable as facilitating property, salaries paid by business, and property purchased with salaries, proceeds were traceable to forfeitable property and were forfeitable even though the Government did not seek forfeiture of business itself);

- *United States v. 1990 Chevrolet Silverado Pickup*, 804 F. Supp. 777 (W.D.N.C. 1992) (truck traceable to earlier truck purchased with gambling proceeds is forfeitable as property traceable to property involved in section 1956 violation);

- *United States v. 1988 Oldsmobile Cutlass Supreme*, 983 F.2d 670 (5th Cir. 1993) (cars purchased with cashier's checks acquired in structured transaction); *United States v. Rogers*, 1996 WL 252659 (N.D.N.Y. 1996) (same);

- *United States v. Contents of Account Numbers 208-06070*, 847 F. Supp. 329 (S.D.N.Y. 1994) (bank: account that contains only funds transferred from account forfeitable as facilitating property is itself forfeitable);

F. Application of tracing rules:

1. Proceeds forfeitures are limited to the portion traceable to the unlawful activity:

- *United States v. One 1980 Rolls Royce*, 905 F.2d 89, 90 (5th Cir. 1990) (claimant could avoid forfeiture to the extent that he could prove what portions of the property were purchased with legitimate funds);

- *United States v. Real Property Located at 22 Santa Barbara Drive*, 121 F.3d 719, 1997 WL 420580 (9th Cir. 1997) (unpublished) (Table) (forfeiture under section 881(a)(6) is limited to the portion of the property traceable to the offense; the Government proceeded under section 881(a)(6) when it could have based forfeiture on money laundering);

- *United States v. One Parcel Known as 352 Northup St.*, 40 F. Supp. 2d 74 (D.R.I. 1999) (in proceeds cases, forfeiture limited to portion of property purchased with drug money; portion traceable to subsequent investment of legitimate funds *not* forfeitable; property apportioned after sale);

2. Insurance proceeds:

- *United States v. Real Property Described in Deeds*, 962 F. Supp. 734 (W.D.N.C. 1997) (insurance proceeds received when forfeitable property was destroyed are forfeitable as property traceable to the offense);

3. Tracing is part of the Government's burden:

- *United States v. Gonzalez*, 240 F.3d 14 (1st Cir. 2001) (complaint and subsequent order forfeiting cash found at location A cannot be used to forfeit cash found at location B without showing that latter property was traceable to former);

4. *Voigt* and cases distinguishing *Voigt*:

- *United States v. Stewart*, 185 F.3d 112 (3d Cir. 1999) (if \$3 million in laundered funds is traced to an account and stays there, that amount is directly forfeitable even though the account contains clean funds; distinguishing *Voigt*);

- *United States v. One Parcel o/Real Property...J70 Westfield Dr.*, 34 F. Supp. 2d 107 (D.R.I. 1999) (under *Banco Cafetero*, money in a commingled account is traceable if the balance never

fell below the amount deposited ["last out" rule]; assets purchased with commingled funds are traceable up to the amount deposited ["first out" rule]; the Government may elect which rule to apply depending on the circumstances; *Voigt* makes tracing impossible and does not apply in

civil cases);

- *But see United States v. Voigt*, 89 F.3d 1050 (3d Cir. 1996) (property purchased with laundered money is forfeitable as property "traceable to," but property purchased with funds from an account into which laundered money and clean money have been commingled is not "traceable to"; this case does not address the question whether the purchase of property from an account containing commingled funds is itself a money laundering offense subjecting the purchased property to forfeiture);

- *See also United States v. Bornfield*, 145 F.3d 1123 (10th Cir. 1998) (discussing distinction between traceable property and facilitating property; the former is traceable to the offense; the latter is involved in the offense);

United States v. Loe, 49 F. Supp. 2d 514 (E.D. Tex. 1999) (if the entire contents of a bank account are used to make a purchase and there were laundered funds in the account, there is no problem tracing the purchased property to the laundered funds; *Voigt* distinguished; but if the Government relies on the traceable property theory, only the portion of the property traceable to the *SUA proceeds* are subject to forfeiture);

r. Fungible property/section 984:

1. Under 18 U.S.C. § 984, the Government need not satisfy tracing requirement in cases where a bank account is seized within 1 year of date when the offense occurred:

- *United States v. U.S. Currency Deposited in Account No. 1115000763247 For Active Trade Company*, 176 F.3d 941 (7th Cir. 1999) (once the Government has established probable cause to believe that the amount of money laundered through a bank account in the past year exceeds the balance in the account at the time of seizure, the entire balance is subject to forfeiture under section 984);

- *Marine Midland Bank, NA. v. United States*, II F.3d 1119, 1126 (2d Cir. 1993) (section 984 eliminates tracing requirement in *Banco Cafetero*);

- *United States v. \$4,007,891.28 United States Currency*. CV 98-5762-WDK (C.D. Cal.. Dec. 30, 1998) (section 984 is not a separate cause of action; the forfeiture action is brought under section 981; but if section 984 applies, the Government is relieved of the tracing requirements that would otherwise apply);

Some courts incorrectly limit section 984 to proceeds cases; it applies to property forfeitable under any theory:

- *United States v. All Funds Presently on Deposit at American Express Bank*, 832 F. Supp. 542, 559 (E.D.N.Y. 1993) (with respect to actual money laundered, section 984 overrules *Banco Cafetero*); *but see id.* at 560-61 (section 984 does not permit substitution of fungible property for property forfeitable under a facilitation theory; enactment of section 984 abrogates facilitation theory for section 981 cases);

- *United States v. Goykhman*, 1999 WL 97895 (S.D.N.Y. 1999) (following *American Express Bank*; property forfeitable under facilitation theory not forfeitable under section 984); *United States v. \$348,884.40 U.S. Currency (Seized from Accounts of BITAL)*, 76 F. Supp. 2d 1063 (C.D. Cal. 1999) (same) (*dicta*);

- See Cassella, "First Case Interpreting New Fungible Property Statute Misreads the Law," *Asset Forfeiture News* (January/February 1994): 14-17.

2. The 1-year limitations period is tolled by the filing of the complaint or the seizure of the property:

- *United States v. Funds Representing Proceeds of Drug Trafficking* (\$75,868.62), 52 F. Supp. 2d 1160, 1166 (C.D. Cal. 1999) (section 984(c) is satisfied if the complaint was filed within 1 year of the money laundering offense, even though the seizure occurred 94 days later);

- *United States v. All Funds in Home Savings of America Account Number 092-011336 in the Name of Custom Lab Supply, Inc.*, No. CV-F-OO-5277 REC (E.D. Cal. July 25, 2003) (same, following *Funds Representing Drug Trafficking*);

- See H. Rep. 102-28, 102d Congress (1991) at 47-48, 1991 WL 42201 ("property is subject to forfeiture [under section 984] if not more than one year has passed between the time the original property subject to forfeiture was so located or maintained and the time the forfeiture action was initiated by seizing the property or filing the complaint");

- But see *United States v. \$8,221,877.16 in U.S. Currency*, 330 F.3d 141 (3d Cir. 2003) (forfeiture complaint must be filed within 1 year; seizure within 1 year not sufficient; legislative history not controlling);

3. Section 984 is not a separate cause of action:

- *United States v. \$8,221,877.16 in U.S. Currency*, 330 F.3d 141 (3d Cir. 2003) (section 984 is not a separate action for forfeiture; it simply modifies the tracing requirements that would otherwise apply in a civil forfeiture action);

4. Section 984 only applies if the Government cannot trace the property directly:

- *United States v. One Parcel of real Property... 170 Westfield Dr.*, 34 F. Supp. 2d 107 (D.R.I. 1999) (no need to resort to section 984 where the Government can trace property to money laundering offense using *Banco Cafetero's* "drugs in-first out" rule; 1-year statute of limitations in section 984(c) only applies where the Government cannot trace the money and is forced to rely on section 984);

- *United States v. One 1997 Ford Van*, 50 F. Supp. 2d 789 (N.D. Ill. 1999) (because the Government alleged that the money in seized bank account was directly traceable to section 1956(a)(2)(A) offense, the 5-year statute in section 1621, not the 1-year limit in section 984(c), applied);

- *United States v. Approximately \$25,829,681.80 in Funds*, 1999 WL 1080370 (S.D.N.Y. 1999) (interbank account exception does not apply when funds are directly traceable to underlying offense; in that instance, section 984 does not apply at all);

- *But see United States v. All Funds Distributed to Weiss*, 2001 WL 1150217 (E.D.N.Y. 2001) (even though the Government was not relying on section 984, the 1-year limitation period bars the cause of action under section 981 (a)(1)(A) because the *res* is fungible property), *rev'd on other grounds*, 345 F.3d 49 (2d Cir. 2003) (even if section 984 does apply, the limitations period should have been equitably tolled);

- *Note*: CAFRA included an amendment to section 984(d) stating explicitly that nothing in section 984 could be construed to limit the ability of the Government to forfeit property under another provision of law-i.e., section 981 - if the property was traceable to the offense.

- *United States v. Contents in Account No. 059-644J90-69*, 253 F. Supp. 2d 789 (D. Vt. 2003) (section 984(d) was enacted to make clear that the 1-year limitation period in section 984(b) applies only if the Government relies on the fungible property provision in section 984(a); otherwise, if the Government is willing to trace the funds to the offense, the normal 5-year limitations period applies);

- *United States v. \$72,100 in U.S. Currency*, No. 2:03CV0140 DS (D. Utah July 3, 2003) (same, following *Contents in Account*);

5. Section 984 may be invoked even if the Government knows where the directly forfeitable property has gone:

- *United States v. All Funds on Deposit in United Bank of Switzerland (Sawan Exchange Company)*, 188 F. Supp. 2d 407 (S.D.N.Y. 2002) (because section 984(a)(1)(B) says that it is not a defense that the property has been removed, the Government can rely on section 984 even if it knows the location to which the directly forfeitable property has been moved);

- *United States v. \$814,254.76 in U.S. Currency*, No. CIV-92-659-TUC-ACM (D. Ariz. Jan. 10, 1994) (unpublished), *rev'd on other grounds*, 51 F.3d 207 (9th Cir. 1995) (amount equal to sting money that passed through bank account could be forfeited under section 984 even though Government recovered the money);

- *United States v. \$4,007,891.28 United States Currency*, No. CV-98-5762-WDK (C.D. Cal. Dec. 30, 1998) (the Government may use section 984 to forfeit an amount equal to the amount that passed through a corrupt bank's correspondent account even though the bank returned any of the laundered money to undercover agents);

- *But see United States v. \$3,148,884.40 U.S. Currency (Seized from Accounts of BITAL)*, 76 F. Supp. 2d 1063 (C.D. Cal. 1999) (it is a defense to a forfeiture based on sections 981 and 984 that the sting money was passed on to the Government and thus did not remain in the subject bank account);

6. Interbank account exception:

- Foreign bank not entitled to interbank account exception in section 984(d) if employees knew of the illegal scheme: *United States v. \$814,254.76 in U.S. Currency*, No. CIV-92-659-TUC-ACM (D. Ariz. Jan. 10, 1994) (unpublished), *rev'd on other grounds*, 51 F.3d 207 (9th Cir. 1995); *United States v. \$4,007,891.28 United States Currency*, No. CV-98-5762-WDK (CD. Cat Dec. 30, 1998) (same);
- Foreign bank not entitled to interbank account exception where the Government seeks forfeiture of property directly traceable to the offense, not fungible property: *Marine Midland Bank, NA. v. United States*, 1994 WL 381536 (S.D.N.Y. July 20, 1994), *renewed motion for return of funds denied*, Nos. 93-CIV-0307(RPP), 93-CIV-0357(RPP), 1995 WL 450483 (S.D.N.Y. 1995);
- *United States v. All Funds on Deposit...in the Name of Perusa, Inc.*, 935 F. Supp. 208 (E.D.N.Y. 1996) (money transmitter is not a financial institution for purposes of section 984(d); definition in 18 U.S.C. § 20, not 31 U.S. C. § 5312, applies);

7. Section 984 does not apply retroactively:

- *United States v. \$814,254.76 in U.S. Currency*, 51 F.3d 207 (9th Cir. 1995);
- *United States v. Contents of Account Numbers 208-06070,847* F. Supp. 329 (S.D.N.Y. 1994);

8. The Third Circuit has suggested that all money is fungible in any event:

- *United States v. Thomas*, 319 F.3d 640 (3d Cir. 2003) (stating, in the context of a discussion of *in rem* jurisdiction, that money, unlike other assets, is fungible, and that it is the value of the money, not the monetary instruments representing that value, that is subject to forfeiture);

H. Foreign deposits/correspondent Accounts:

- Section 981(k) creates special procedures regarding forfeiture actions against funds deposited in a foreign bank account - *see* Civil Forfeiture Case Outline.
- Under section 981 (k), the Government may recover funds deposited in a foreign account by filing a forfeiture action against the contents of a correspondent account held by a foreign bank.
- In such cases, it is not necessary to trace the funds to the foreign deposit, or to rely on section 984.

XIII. Standing and Ownership

The innocent owner defense and the distinction between standing and ownership are discussed at length in Cassella, "The Uniform Innocent Owner Defense to Civil Asset Forfeiture," 89 *Kentucky Law Journal* 653 (2001), available on AFML Online.

A. Standing and ownership are different concepts:

1. Standing is a threshold question in every civil forfeiture case:

- *United States v. 1998 BMW HI" Convertible*, 235 F.3d 397,399 (8th Cir. 2000) ("at the outset a claimant must be able to show a facially colorable interest in the proceedings sufficient to satisfy Article III standing");

- *United States v. One Lincoln Navigator*, 328 F.3d 1011, 1013 (8th Cir. 2003) ("Article III standing is a threshold question in every federal court case");

2. Standing requires only a "colorable interest" in the property:

- *United States v. One-Sixth Share*, 326 F.3d 36 (1st Cir. 2003) ("at the initial stage of intervention, the requirements for a claimant to demonstrate constitutional standing are very forgiving. In general, a colorable claim on the defendant property suffices.");

- *United States v. \$557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66 (2d Cir. 2002) ("the only question that the courts need assess regarding a claimant's standing is whether he or she has shown the required 'facially colorable interest,' not whether he ultimately proves the existence of that interest");

- *United States v. Premises Known as 7725 Unity Avenue*, 294 F.3d 954 (8th Cir. 2002) ("claimant need only show a colorable interest in the property, redressable, at least in part, by the return of the property"); *United States v. One Lincoln Navigator* 1998, 328 F.3d 1011 (8th Cir. 2003) (same);

- *United States v. \$9,041,598.68*, 163 F.3d 238 (5th Cir. 1998) (claimant has burden of establishing standing; he must have a "facially colorable interest in the proceedings sufficient to satisfy the case-or-controversy requirement");

- *United States v. U.S. Currency, \$81,000.00*, 189 F.3d 28,35 (1st Cir. 1999) ("courts generally do not deny standing to a claimant who is either the colorable owner of the *res* or who has any colorable possessory interest in it"); *United States v. Contents of Accounts (Friko Corporation)*, 971 F.2d 974,985 (3d Cir. 1992) (same) (collecting cases);

- *But see United States v. \$138,381 in U.S. Currency*, 240 F. Supp. 2d 220 (E.D.N.Y. 2003) (where non-possessory claimant's only basis for standing is her allegation that she is an owner, proof of ownership is required to establish standing);

3. Ownership is an element of the claimant's affirmative defense:

- *United States v. \$557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66 (2d Cir. 2002) (claimant who asserts an innocent owner defense must establish ownership);

- *United States v. One Lincoln Navigator* 1998,328 F.3d 1011 (8th Cir. 2003) (district court erred

in confusing standing, which is a threshold question, and ownership, which is an element of the innocent owner defense);

- *United States v. \$100,348 U.S. Currency*, 157 F. Supp. 2d 1110 (C.D. Cal. 2001) (the first element of any innocent owner defense is proof of ownership);

- *United States v. 2001 Honda Accord EX*, 245 F. Supp. 2d 602,607 n.4 (M.D. Pa. 2003) (standing and ownership are different concepts; once claimant establishes she has a right to contest the forfeiture, she must prove ownership);

- *In re Seizure of \$82,000 More or Less*, 2000 WL 1707495 (W.D. Mo. 2000) (Government concedes claimants are innocent, but they still must prove they are owners under state law);

- *United States v. One Parcel of Property Located at 1512 Lark Drive*, 978 F. Supp. 935, 940 (D.S.D. 1997) (if as a matter of state law the wife is not an owner or a lienholder of the property, her lack of knowledge of the illegal activity is irrelevant);

- *United States v. All Funds in "The Anaya Trust" Account*, 1997 WL 578662 (N.D. Cal. 1997) (innocent owner defense has two elements: claimant must be an owner, and must be innocent-as defined by statute);

4. A person may have standing yet fail to satisfy the ownership element of his or her defense:

- *United States v. One Lincoln Navigator* 1998, 328 F.3d 1011 (8th Cir. 2003) (even though they have established standing, claimants may fail to establish that they were owners under section 983(d)(6) because nominees who do not exercise dominion and control are not owners under that statute);

- *United States v. One-Sixth Share*, 326 F.3d 36 (1st Cir. 2003) (the standards for establishing constitutional standing are "very forgiving"; "courts should not, however, conflate the constitutional standing inquiry with the merits determination that comes later");

- *United States v. \$9,041,598.68*, 163 F.3d 238, 245 (5th Cir. 1998) (claimant had standing to contest the forfeiture, but ultimately jury determined on the merits that claimant was not an owner of the property);

- *United States v. 5 S 351 Tuthill Road*, 233 F.3d 1017 (7th Cir. 2000), *as amended Mar. 21, 2001* (fact that beneficiary of a land trust, who would be injured if the property were forfeited) has standing even though he failed to exercise dominion or control does not resolve the issue of innocent ownership);

- *United States v. Premises Known as 7725 Unity Avenue*, 294 F.3d 954 (8th Cir. 2002) (lienholder has standing even if he acquired his lien after the property became subject to forfeiture, and he may not be able to prevail on the merits);

- *United States v. \$100,348 U.S. Currency*, 157 F. Supp. 2d 1110 (C.D. Cal. 2001) (even though

the person from whom currency is seized has standing to contest its forfeiture, if he is not the owner of the property, his innocent owner defense must fail);

- *In re Seizure of \$82,000 More or Less*, 2000 WL 1707495 (W.D. Mo. 2000) (titled owner and purchaser of vehicle both have colorable interest sufficient for standing, but must prove ownership as part of innocent owner defense on the merits);

- *Kadonsky v. United States*, 246 F.3d 681, 2001 WL 113825 (10th Cir. 2001) (Table) (for standing, claimant need not prove merits of underlying claim; allegation of ownership and some supporting evidence, such as possession, is sufficient; but claimant may yet fail to establish ownership on the merits);

- *United States v. \$347,542.00 in U.S. Currency*, 2001 WL 335828 (S.D. Fla. 2001) (standing is a threshold issue; claimant still must establish ownership on the merits; Government's motion to dismiss denied where claimant has standing and his claim of ownership cannot be negated on the pleadings);

- The same rule applies in the ancillary proceeding in criminal forfeiture cases:

- *United States v. Hooper*, 229 F.3d 818, 820 n.4 (9th Cir. 2000) (a spouse in a community property state has a colorable interest in the defendant's property sufficient to establish Article III standing, but the spouse did not have the legal interest necessary to prevail on the merits);

- *United States v. Alcaraz-Garcia*, 79 F.3d 769, 774 n.10 (9th Cir. 1996) (allegation of ownership is sufficient to establish standing under section 853(n)(2), but may not satisfy "superior interest" requirements of section 853(n)(6)(A));

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of American Express Bank II)*, 961 F. Supp. 287 (D.D.C. 1997) (granting motion for summary judgment for failure to establish ownership interest under section 1963(l)(6)(A) or (B) even though claimant had standing);

- *United States v. Ida*, 14 F. Supp. 2d 454 (S.D.N.Y. 1998) (titled owner of real property who used his own money to purchase the property has standing to file a claim even if he is a mere straw whether he will prevail on the merits is another matter);

5. Standing is sufficient to challenge forfeitability; ownership is needed to establish an innocent owner defense:

- *United States v. \$557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66 (2d Cir. 2002) (claimant who has standing may prevail if the Government fails to establish forfeitability even if the claimant is not the owner; ownership only comes into play if the Government establishes forfeitability and the court reaches the innocent owner defense);

- Simple possession, claim of ownership, or potential injury are sufficient for standing:

1. Simple claim of ownership is sufficient for standing:

- *United States v. \$39,400 in U.S. Currency*, No. 01cv16255-IEG(LSP) (S.D. Cal. Aug. 12, 2002) (claimant who denied ownership at time currency was seized but later filed claim asserting ownership has standing);

- *But see Kadonsky v. United States*, 216 F.3d 499 (5th Cir. 2000) (unsupported assertion of ownership is insufficient to establish standing to contest forfeiture of drug proceeds seized from a storage locker);

- *United States v. \$138,381 in U.S. Currency*, 240 F. Supp. 2d 220 (E.D.N.Y. 2003) (claim of ownership not sufficient where, based on the undisputed evidence, no reasonable jury could find that claimant had an ownership interest in the property);

- *United States v. \$61,483.00 in U.S. Currency*, 2003 WL 1566553 (W.O. Tex. 2003) (bald assertion of ownership is not sufficient to establish standing if the facts reveal that claimant is merely an unsecured creditor);

2. Simple possession is sufficient, if accompanied by an explanation:

- *United States v. \$511,060.42 in U.S. Currency*, 152 F.3d 491, 498 (6th Cir. 1998) (naked possession of seized property is not sufficient to establish standing, but the Government's own pleadings may provide a sufficient explanation of the claimant's relationship to the property by describing the claimant's role in the scheme; simple possession is sufficient if it is "accompanied by factual allegations regarding how the claimant came to possess the property, the nature of the claimant's relationship to the property, and/or the story behind the claimant's control of the property");

- *Mantilla v. United States*, 302 F.3d 182 (3d Cir. 2002) (claimant's temporary possession of the seized currency, however fleeting—he held the keys to the vehicle for a moment before passing them on—sufficient for court to "assume" claimant had a possessory interest);

- *United States v. \$/00,348 U.S. Currency*, 157 F. Supp. 2d 1110 (C.D. Cal. 2001) (person from whom money is seized has standing to contest its forfeiture even if he is acting as a courier for someone else);

- *United States v. \$1,646,000 in Cashiers Checks and Currency*, 118 F. Supp. 2d 977 (N.D. Cal. 2000), *opinion withdrawn*, 123 F. Supp. 2d 1186 (N.D. Cal. 2000) (possession plus assertion, of ownership is sufficient to establish standing to contest forfeiture of cashier's checks and cash);

- *United States v. \$271,070.00 in U.S. Currency*, 1997 WL 94722 (N.D. in. 1997) (claimant need not assert an ownership interest; possessory interest is sufficient for standing; but bald assertions of possessory or ownership interest without evidentiary support will not be sufficient);

- *United States v. 47 West 644 Route 38*, 962 F. Supp. 1081, 1085 (N.D. m. 1997) (simple possession is enough to establish standing, but claimant must be more than an "unknowing custodian") ;

- *Olivo v. United States*, 1997 WL 23181 (S.D.N.Y. 1997) (person's conscious possession of the property seized was sufficient for standing to contest its forfeiture, despite his lack of ownership);

- *United States v. \$347,542.00 in U.S. Currency*, 2001 WL 335828 (S.D. Fla. 2001) (finder of lost currency has "facially coorabie interest" sufficient for Article III standing);

3. Naked possession by unknowing custodian is *not* sufficient for standing:

- *United States v. \$557,933.89, More or Less. in U.S. Funds*, 287 F.3d 66,71 n.1 (2d Cir. 2002) (reaffirming that naked possession alone is insufficient for standing, but if courier files a verified claim asserting ownership, he has standing);

- *United States v. Currency U.S. \$42,500*, 283 F.3d 977, 984 n.. (9th Cir. 2002) (*dicta*) (if Government had moved to dismiss for lack of standing, motion could have been granted because currency courier refused to identify the true owner of the currency that she was carrying);

- *United States v. \$244,320.00 in U.S. Currency*, - F. Supp. 2d __,2003 WL 22945740 (S.D. Iowa Dec. 5, 2003) (ownership of the vehicle from which currency is seized is not sufficient, by itself, to contest the forfeiture of the currency; person in. actual or constructive possession of seized currency must offer an explanation for his possession and satisfy the court that he exercised dominion and control over the property and was not simply an unknowing custodian);

- *United States v. \$182.980 in U.S. Currency*, 1998 WL 307059 (S.D.N.Y. 1998) (naked possession by drug courier-an unknowing custodian-is insufficient);

- *United States v. \$141,480.00 in U.S. Currency*, No. 00-1738-CIV-GOLD/SIMONTON (S.D. Fla. Jan. 9, 2001) (assertion of standing based on ownership negated by claimant's denial of ownership at the time of seizure; assertion based on possession fails because claimant was a courier who had no knowledge of contents of packages he was carrying; possession confers standing only if it is knowing and substantiated by dominion and control);

- *United States v. \$180,770.00 in U.S. Currency*, No. CIV 98-1103 MVIRLP (D.N.M. May 17, 2000) (unpublished) (simple possession is not sufficient to establish standing; claimant must offer some minimal explanation of his relationship to the property; claimant who invokes Fifth Amendment as to all questions at his deposition lacks standing);

4. Person whose name is on the title has standing:

- *United States v. 1998 BMW "I" Convertible*, 235 F.3d 397 (8th Cir. 2000) (person must have an ownership interest to establish standing to contest forfeiture of vehicle, but ownership includes actual possession, control, title. or a financial stake);

- *United States v. One Lincoln Navigator 1998*, 328 F.3d 1011 (8th Cir. 2003) (person whose name was put on the vehicle's title by the purchaser has standing);

- *In re Seizure of \$82,000 More or Less*, 2000 WL 1707495 (W.O. Mo. 2000) (titled owner and purchaser of vehicle both have colorable interest sufficient to contest forfeiture of cash found in vehicle's gas tank);

- *United States v. Ida*, 14 F. Supp. 2d 454 (S.D.N.Y. 1998) (titled Owner of real property who used his own money to purchase the property has standing to file a claim even if he is a mere straw);

5. Standing of lienholder:

- *United Shares v. Premises Known as 7725 Unity Avenue*, 294 F.3d 954 (8th Cir. 2002) (lienholder with a recorded interest has sufficient colorable interest to contest the forfeiture regardless of when he acquired the lien);

- *United States v. One-Sixth Share*, 326 F.3d 36 (1 st Cir. 2003) (normally person holding a lien on the defendant property would have standing, but a lien entered after the property is forfeited to the United States has no effect because the defendant no longer had an interest in the property at that time);

6. Standing to contest forfeiture of bank Accounts/money given to money remitter:

- *United States v. U.S. Currency, \$81,000.00*, 189 F.3d 28 (1 st Cir. 1999) Joint account holder had standing to contest forfeiture of fugitive brother's bank account);

- *United States v. \$79,000 in Account Number 2168050/6749900*, 1996 WL 648934 (S.D.N.Y. 1996) (depositor has standing to contest forfeiture of his bank account only because he retains control over the account, not because he retains title to the deposited funds; third party who placed funds in the account with instruction to transfer them to relatives in Pakistan lacks standing to contest forfeiture of the account because he exercised no control);

- *United States v. All Fund.'S on Deposit in the Name of Kahn*, 955 F. Supp. 23 (E.D.N.Y. 1997) (customers who gave a money transmitter money to transfer to relatives in Pakistan lacked standing to contest forfeiture of transmitter's bank Accounts because they had transferred title to the money to the money transmitter in much the same way as a depositor transfers title to his money to his bank when he makes a deposit);

- *United States v. Cambio Exact, S.A.*, 166 F.3d 522 (2d Cir. 1999) (money transmitter has standing to contest forfeiture of funds in account in his own name; because he is obligated to pay his customers, money transmitter suffers injury if the money is forfeited, so he has standing whether he is an "owner" of the funds or not);

- *United States v. Contents of Account Numbers 208-06070*, 847 F. Supp. 329 (S.D.N.Y. 1994) (claimant has standing to contest forfeiture of wife's bank account where claimant had access to the account);

- *United States v. Funds in the Name or For the Benefit of Wetterer*, 210 F.3d 96 (2d Cir. 2000)

(beneficial owner of bank deposit has standing to challenge forfeiture);

- *Kado1JSky v. United States*, 3 Fed. Appx. 898, 2001 WL 113825 (10th Cir. 2001) (Table) (payee on check has standing to contest forfeiture of check);

- *United States v. One 1993 Ford Thunderbird*, 2000 WL 1154628 (N.D. m. 2000) (account holder lacks standing to contest the forfeiture of the portion of bank account traceable to deposit made by third party which claimant admits did not involve her own funds);

- See special rule for correspondent bank Accounts at page 138.

7. Standing of bailee:

- *United States v. Portrait of Wally*, 2002 WL 553532 (S.D.N.Y. 2002) (*Wally in*) (bailee has standing if he names the bailor; it is not necessary to state separately that he is authorized to make the claim on behalf of the bailor; bailor and bailee may both file claims);

- *United States v. U.S. Currency (\$97,253.00)*, 1999 WL 458155 (E.D.N.Y. 1999) (nothing in Second Circuit's opinion in *Cambio Exacto* changes longstanding rule that bailees have Article in. standing to contest forfeiture);

- *United States v. \$57,790 in U.S. Currency*, No. 01CV0414 R (JAR) (S.D. Cal. Nov. 13, 2003) (unexplained possession is insufficient to establish standing to contest the forfeiture of seized currency; if the possessor's only explanation is that he was acting as a bailee, but the bailor herself does not have standing, then the possessor does not have standing either);

8. Standing of bailor:

- *United States v. \$61,483.00 in US- Currency*, 2003 WL 1566553 (W.D. Tex. 2003) (a bailor has standing to contest a forfeiture of the bailed funds, but he must establish that the elements of bailment under state law have been satisfied);

- *United States v. \$79,000 in Account Number 2168050/6749900*, 1996 WL 648934 (S.D.N.Y. 1996) (bailor has standing to contest forfeiture of funds from bailee only if valid bailment was created under state law);

9. Standing of decedent's estate:

- *United States v. Real Property... 221 Dana Ave.*, 81 F. Supp. 2d 182 (D. Mass. 2000) (executrix of estate of deceased drug dealer has standing to contest forfeiture of his property, but because executrix stands in decedent's shoes, she cannot be an innocent owner), *rev'd on other grounds*, 261 F.3d 65 (1st Cir. 2001);

10. Potential injuries may be sufficient for standing:

- *United States v. One Lincoln Navigator* 1998, 328 F.3d 1011 (8th Cir. 2003) (grandmother who

paid for drug dealer's car has financial interest in the outcome of the forfeiture, and therefore has standing to contest it);

- *United States v. Cambio Exact, S.A.*, 166 F.3d 522 (2d Cir. 1999) (straw owners lack standing because they suffer no injury despite having title; persons with naked possession lack standing because they suffer no injury from loss of property they did not know they had; but a person who is *not* an owner may have standing if he suffers a direct injury);

- *United States v. 8402 W. 132nd Street*, 2000 WL 294094 (N.D. in. 2000) (non-owner resident who would be left homeless if property were forfeited has standing to contest forfeiture of father's real property);

- *United States v. 5 S 351 Tuthill Road*, 233 F.3d 1017 (7th Cir. 2000) (failure to exercise dominion and control does not negate standing if claimant is a beneficiary of a land trust who would be injured if the property were forfeited);

- *United States v. One Parcel of real Property at Route 2*, 46 F. Supp. 2d 572 (S.D. Miss. 1998) (drug dealer who invested in real property held in third party's name has standing to contest forfeiture);

- *United States v. One 1990 Lincoln Town Car*, 817 F. Supp. 1575 (N.D. Ga. 1993) (party recording judgment lien against property has standing to oppose forfeiture of property as innocent owner);

- *But see United States v. Antonelli*, 1998 WL 775055 (N.D.N.Y. 1998) (defendant's minor children have no legal interest in real property held exclusively in the defendant's name and therefore have no basis for challenging a criminal forfeiture order even though the property is their residence);

II. Standing to challenge forfeiture of corporate assets:

- *United States v. The New Silver Palace Restaurant*, 810 F. Supp. 440 (E.D.N.Y. 1992) (corporate shareholders lack standing to challenge forfeiture of corporate assets);

- *United States v. All Funds in Home Savings of America Account Number 092-011336 in the Name of Custom Lab Supply, Inc.*, No. CV-F-00-5277 REC (E.D. Cal. July 25, 2003) (same. following *New Silver Palace*);

- *In the Matter of the Seizure of the Contents of Community Trust Bank Account 4000393242*, No. 01-205D (S.D. Ohio Nov. 5, 2001) (shareholder lacks standing to contest seizure of funds from corporate bank. account);

12. *Alter ego* corporation and "sham" trust lack standing:

- *United States v. Contents of Accounts (Friko Corporation)*, 971 F.2d 974, 986 (3d Cir. 1992) (corporation that lacks separate existence *vis a vis* its individual owner lacks standing to contest

forfeiture even though assets are held in corporate name);

- *United States v. Approximately \$417,148.06*, Civ. No. S-99-2456 MLS DAD (E.D. Cal. Apr. 4, 2002) (two trusts that trustee used to commit tax evasion lacked standing to contest forfeiture of bank account held in trusts' names because a trust used to commit a criminal act is a sham and thus cannot have an ownership interest);

13. Standing of trust beneficiaries:

- *United States v. \$61,483.00 in U.S. Currency*, 2003 WL 1566553 (W.D. Tex. 2003) (claim of interest based on constructive trust failed because claimant could not satisfy all of the elements of constructive trust under state law; in particular, claimant could not show defendant obtained money from him by fraud);

- *United States v. \$3,000 in Cash*, 906 F. Supp. 1061 (E.D. Va. 1995) (beneficiary of constructive trust may have a legal interest, but must have clean hands to ask court to do equity);

- *United States v. \$79,000 in Account Number 2168050/6749900*, 1996 WL 648934 (S.D.N.Y. 1996) (beneficiary of a constructive trust would have standing under Second Circuit law, but no constructive trust created where claimant has adequate remedy at law-i.e., ability to file remission petition);

- *United States v. 5 S 351 Tuthill Road*, 233 F.3d 1017 (7th Cir. 2000) (beneficiary of land trust who has an interest in the proceeds of the sale of the land faces an immediate threat of injury,

and so has Article III standing to contest the forfeiture even if he exercised no dominion or control);

- *United States v. 8402 W. 132nd Street*, 2000 WL 294094 (N.D. Minn. 2000) (beneficiaries of irrevocable trust, asset of which is drug dealer's real property, lack standing because forfeiture of property they never considered their own will not cause any real injury);

14. Unsecured creditors lack standing:

- See page 136, *infra*.

15. Enforcement of the standing requirements may preclude victims from contesting forfeiture of the defendant's property:

- *United States v. One-sixth Share*, 326 F.3d 36 (1st Cir. 2003) (family of murder victim has no standing to contest forfeiture of defendant's property; "Congress has provided for justice a different way: it has provided that the Government, which stands for all the citizens, may take the criminal's property by forfeiture, and it has limited those who may assert competing claims"; but victims can petition the Attorney General for remission);

16. Criminal defendant may be barred from contesting related civil forfeiture:

- *United States v. \$14,344.50 in U.S. Currency*, 49 Fed. Appx. 207, 2002 WL 31243861 (10th Cir. 2002) (defendant who agrees to the forfeiture of his interest in a guilty plea lacks standing to contest the civil forfeiture of the property);

- *United States v. Real Property Described in Deeds*, 962 F. Supp. 734 (W.D.N.C. 1997) (defendant who agrees to forfeiture of property in plea agreement lacks standing to contest civil forfeiture);

C. Procedure for determining standing:

1. Standing is a threshold question for the court:

- *United States v. One Lincoln Navigator 1998*, 328 F.3d 1011 (8th Cir. 2003) (the court may resolve disputed issues regarding standing on its own; the Rule 56 standards do not apply to standing as they do to the merits of the case);

- *United States v. \$557,933.89, More or Less. in U.S. Funds*, 287 F.3d 66 (2d Cir. 2002) (standing is a threshold question for the court; once the court determines that a claimant has standing, it should not chase its tail by revisiting the issue once all of the evidence is admitted at trial; following *\$9,041,598.68*);

- *United States v. \$9,041,598.68*, 163 F.3d 238 (5th Cir. 1998) (district court first held defendant had standing, then reversed itself when trial evidence showed defendant was not an owner; court should not have revisited standing issue, but was correct to deny claim on the merits for failure to establish the ownership element of the innocent owner defense);

- *United States v. Hooper*, 229 F.3d 818, 820 n. 4 (9th Cir. 2000) (when the district court held that claimant lacked standing in the ancillary proceeding, it meant that claimant, who had standing, had failed to establish a legal interest that existed at the time of the offense, as required by section 853(n)(6)(a);

- *United States v. 1998 BMW "I" Convertible*, 235 F.3d 397 (8th Cir. 2000) (standing is a threshold issue that should be determined at the outset of the proceedings and not deferred until trial; where the parties submit contradictory evidence on the standing issue the court cannot rely on the paper record alone, but must conduct an evidentiary hearing);

- *United States v. \$244,320.00 in U.S. Currency*, - F. Supp. 2d --, 2003 WL 22945740 (S.D. Iowa Dec. 5, 2003) (standing is a threshold question for the court in every case; it should be decided at the commencement of litigation and not deferred until trial);

2. Failure to establish standing may result in summary judgment for the Government or dismissal of the claim:

- *United States v. \$57,790.00 in U.S. Currency*, 263 F. Supp. 2d 1239 (S.D. Cal. 2003) (while a mere assertion of a co-ownership interest may be sufficient to survive a motion to dismiss on the pleadings, at trial the claimant must establish standing by a preponderance of the evidence);

hence the Government may move for summary judgment based on claimant's inability to meet that burden); *United States v. \$57,790 in U.S. Currency*, No. 01CV0414 R (JAR) (S.D. Cal. Nov. 13, 2003) (claimants who did not appear for their depositions and did not appear to testify at trial could not rely on the self-serving claims of ownership of the seized currency set forth in their claims; such assertions are "classic hearsay");

- *United States v. \$244,320.00 in U.S. Currency*, - F. Supp. 2d -,2003 WL 22945740 (S.D. Iowa Dec. 5, 2003) (court grants Government's Rule 12(c) motion for judgment on the pleadings in which claimant fails to offer explanation for his constructive possession of seized currency);

- *United States v. \$138,381 in U.S. Currency*, 240 F. Supp. 2d 220 (E.D.N.Y. 2003) Government is entitled to summary judgment based on lack of standing when no reasonable jury could find, based on the undisputed facts, that the claimant had sufficient income to have an ownership interest in \$138,381 in seized currency);

- *United States v. 1990 Chevrolet Silverado Pickup*. 804 F. Supp. 777 (W.D.N.C. 1992) (proof of ownership required to establish standing; failure to establish standing results in summary judgment for the Government);

- *United States v. \$271,070.00 in U.S. Currency*, 1997 WL 94722 (N.D. Ill. 1997) (claimant's motion for summary judgment denied where the Government establishes material issues as to claimant's standing);

- *United States v. \$3,000 in Cash*, 906 F. Supp. 1061 (E.D. Va. 1995) (claimant must establish Article III standing before asserting an innocent owner defense);

3. Claimant's prior statements denying ownership may be used to rebut standing:

- *United States v. Derenak*, 27 F. Supp. 2d 1300 (MD. Fla. 1998) (defendant's prior statement that seized cash belonged to codefendant-sufficient to negate standing to contest forfeiture);

4. Claimant must have standing as to each asset:

- *Mantilla v. United States*, 302 F.3d 182 (3d Cir. 2002) (where money was seized from each of two vehicles, claimant had to show he had standing as to each sum of money, respectively; standing established as to one sum, but not as to the other);

D. An owner must have a legal interest in the property:

1. The nature of the claimant's interest is determined by state law:

- *United States v. U.S. Currency, \$81,000.00*, 189 F.3d 28,33 (1st Cir. 1999) (state law determines person's ownership interest in a joint bank account);

- *United States v. 1989 Lear Jet*, 25 F.3d 793, 797 (9th Cir. 1994) (state law determines existence and extent of lienholder's interest);

- *United States v. Premises Known as 7725 Unity Avenue*, 294 F.3d 954 (8th Cir. 2002) (whether lienholder acquired valid lien is question of state law);
- *United States v. \$61,483.00 in U.S. Currency*, 2003 WL 1566553 (W.D. Tex. 2003) (court applies state law to determine that claimant was a general creditor, was not entitled to imposition of a constructive trust, and was not a bailor);
- *United States v. 2001 Honda Accord EX*, 245 F. Supp. 2d 602 (M.D. Pa. 2003) (whether claimant has the requisite Ownership interest under section 983(d) is determined by reference to state law; although the drug offense in which the vehicle was involved occurred in Pennsylvania, court looks to the law of the state where the vehicle was registered);
- *United States v. Real Property Located at 5208 Los Franciscos Way*, 252 F. Supp. 2d 1060 (E.D. Cal. 2003) (state law determines ownership of property for purposes of the innocent owner defense; because a transfer that violates the Uniform Fraudulent Transfer Act does not convey ownership under state law, the transferee cannot satisfy the ownership element in section 983(d));
- *United States v. One Parcel of Property Located at 1512 Lark Drive*, 978 F. Supp. 935, 940 (D.S.D. 1997) (state law determines whether wife has an interest in property held in husband's name);
- *United States v. \$9,041.598.68*, 976 F. Supp. 633 (S.D. Tex. 1997) (whether claimant was owner of property received as gift from family members depends on the definition of gift under state law; no "gift" where donor intended to retain access to the property if he needed it), *aff'd*, 163 F.3d 238 (5th Cir. 1998);
- *In re seizure of \$82,000 More or Less*, 2000 WL 1707495 (W.O. Mo. 2000) (state law used to determine if finder of abandoned property is an owner);
- *United States v. 47 West 644 Route 38*, 962 F. Supp. 1081 (N.D. in. 1997) (spouse who has no ownership interest in other spouse's property under state law has no standing);
- *United States v. 2930 Greenleaf St.*) 920 F. Supp. 639 (E.D. Pa. 1996) (claimant who failed to record interest in the property before the Government filed */is pendens* providing claimant with constructive; notice of the forfeiture was not an owner under state law);
- *United States v. Antonelli*, 1998 WL 775055 (N.D.N.Y. 1998) (using state law to determine if defendant's minor children had a legal interest in real property held exclusively in defendant's name);
- *United States v. \$79,000 in Account Number 2168050/6749900*, 1996 WL 648934 (S.D.N.Y. 1996) (bailor has standing to contest forfeiture of funds from bailee only if valid bailment was created under state law);
- *United States v. All Funds on Deposit in Any Accounts*, 801 F. Supp. 984 (E.D.N.Y. 1992)

("owner" is a person with a recognizable legal or equitable interest in the property seized);

- *United States v. Eleven Vehicles*, 836 F. Supp. 1147, 1160 (B.D. Pa. 1993) (state law controls question whether claimant is an owner or not);

- *United States v. One 1995 Chevrolet Impala SS*, 2001 WL 1631438 (D. Minn.2001) (mortgagee who failed to record mortgage before Government commenced civil forfeiture action lacked legal interest in the property as a matter of state law);

2. Federal law determines whether claimant's interest is sufficient to allow the claimant to prevail in the federal forfeiture proceeding:

- *United States v. U.S. Currency, \$81,000.00*, 189 F.3d 28, 33 (1st Cir. 1999) ("state law determines [the claimant's] ownership interest in the joint account, but then federal law determines the effect of his ownership interest on his right to bring a claim");

- *United States v. 5 S 351 Tuthill Road*, 233 F.3d 1017 (7th Cir. 2000) (state law defines and classifies property interests for purposes of the forfeiture statutes, while federal law determines the effect of the property interest on the claimant's standing);

- *Note:* The same rule applies in the ancillary proceeding in criminal forfeiture cases:

- *United States v. Lester*, 85 F.3d 1409 (9th Cir. 1996) (when claim is filed in the ancillary proceeding, court looks to state law to see what interest the claimant has in the property and looks to the federal statute to see if that interest is subject to forfeiture); *United States v. Kennedy*, 201 F.3d 1324 (11 th Cir. 2000) (same);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of American Express Bank II)*, 961 F. Supp. 287 (D.D.C. 1997) (what interest claimant has in the property is a matter of state law; consequences of that interest-i.e., whether that interest results in judgment in favor of claimant in the ancillary proceeding-is question of federal law);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36,57 (D.D.C. 1999) ("the nature of the claimant's interest is determined by reference to applicable state property law, but the determination of whether such an interest defeats the United States' claim to the property...is a matter of federal law");

3. The claimant must exercise dominion and control over the property:

- The definition of "owner" in section 983(d)(6)(B)(iii) explicitly excludes "a nominee who exercises no dominion or control over the property":

- *United States v. One Lincoln Navigator* 1998,328 F.3d 1011 (8th Cir. 2003) (state law used to determine if claimants are owners, but state law is overridden by section 983(d)(6) if the owner is a nominee who exercises no dominion and control over the property);

- *United States v. U.S. Currency, \$81,000.00*, 189 F.3d 28, 3S (1st Cir. 1999) (claimant with legal title to joint bank account still must show he was not a "nominal or straw owner");
- *United States v. One Sixth Share*, 326 F.3d 36 (1st Cir. 2003) (joint account holder may have standing to contest forfeiture of *contents* of bank account, but has no standing to contest forfeiture of funds that were seized before they were deposited into the account);
- *United States v. Carrell*, 252 F.3d 1193 (11th Cir. 2001) (innocent owner claim fails if claimant cannot prove that he and his mother, whose names were on title to property purchased by drug dealer father, were other than straw owners);
- *United States v. Premises and Real Property... 100 Delaware Street*, 113 F.3d 310 (2d Cir. 1997) (father who acquired real property from his son for \$1 in admitted attempt to avoid forfeiture was mere straw who exercised no dominion or control over the property);
- *United States v. One 1990 Chevrolet Corvette*, 37 F.3d 421 (8th Cir. 1994) (titled owner lacks standing to contest forfeiture of property over which she exercised no dominion or control);
United States v. The Premises and Real Property... 191 Whitney Place, 2000 WL 1335748 (W.D.N.Y. 2000) (same, motion for summary judgment granted);
- *United States v. One 1998 Mercury Sable*, EP-02-CA-056-DB (W.D. Tex. Sept. 2, 2003) (where Government offers evidence that claimant is a mere nominee, claimant cannot rely solely on fact that his name is on the title; claim dismissed for failure to establish evidence of actual control);
- *United States v. 2001 Honda Accord EX*, 245 F. Supp. 2d 602 (M.D. Pa. 2003) (even though state law creates a rebuttable presumption that the person in whose name the vehicle is titled is the owner, the claimant must show that she was not a nominee under section 983(d)(6); claimant satisfied that burden);
- *United States v. 2930 Greenleaf St.*, 920 F. Supp. 639 (E.D. Pa. 1996) (claimant cannot rely on oral conveyance of the property if she did not have possession of the property or exercise dominion or control over it at any time);
- *United States v. Funds in the Amount of \$228,390*, 1996 WL 284943 (N.D. in. 1996) (if property was held exclusively and personally by corporate officer, corporation was straw owner);
- *United States v. One 1988 Prevost Liberty Motor Home*, 952 F. Supp. 1180 (S.D. Tex. 1996) (corporation that was titled owner of motor home was not owner if defendant exercised exclusive dominion and control over the vehicle);
- Note: The same rule applies in the ancillary proceeding in criminal forfeiture cases:
- *United States v. Morgan*, 224 F.3d 339 (4th Cir. 2000) (if third party claimant in a criminal forfeiture case exercises no dominion or control over a joint bank account, court may ignore the

claimant's state law interest in the property and deny his claim for failure to establish legal right, title, or interest under federal law);

4. Sham transaction does not convey ownership:

- *United States v. Vacant Land Located at 10th St. and Challenger Way*, 15 F.3d 128 (9th Cir. 1993) (transfer of land used to facilitate a marijuana grow operation to drug dealer's father-in-law for no consideration was sham transaction);

- *United States v. Certain Real Property Located at River Road*, 839 F. Supp. 1, 2-3 (D. Me. 1993) (drug dealer's attempt to quitclaim land to his son to evade forfeiture conveyed only "nominal, voidable title");

- *United States v. Johnston*, 13 F. Supp. 2d 1316, 1317 (M.D. Fla. 1998) (transfer of property to corporation in which defendant had no interest, but which his wife controlled, "was a complete and utter sham, designed to defeat the interest of the United States in the forfeited property");

- *But see United States v. Real Property Described in Deeds*, 962 F. Supp. 734 (W.D.N.C. 1997) (claimant who accepts transfer of real property has ownership interest even though the Government had filed *lis pendens*);

5. Unsecured creditors are not owners, and lack a sufficient interest even to have standing:

- Section 983(d)(6)(B)(I) codifies the pre-CAFRA law holding that the term "owner" does not include a person with only a general unsecured interest in, or claim against, the property or estate of another:

- *United States v. One-Sixth Share*, 326 F.3d 36 (1st Cir. 2003) (person with an *in personam* judgment against the property owner has no secured interest in any particular asset, and therefore lacks standing to contest the forfeiture of specific property);

- *United States v. Cambio Exact, S.A.*, 166 F.3d 522 (2d Cir. 1999) (person to whom a money transmitter owes money lacks standing as a general creditor to contest forfeiture of money transmitter's account);

- *United States v. Carrell*, 252 F.3d 1193, 1207 n.2 (11th Cir. 2001) (woman contesting forfeiture on the ground that the property owner owes her child support payments lacks standing because she is not an owner);

- *United States v. \$20,193.39 U.S. Currency*, 16 F.3d 344 (9th Cir. 1994) (general unsecured creditors lack standing under section 981);

- *United States v. 561,483.00 in U.S. Currency*, 2003 WL 1566553 (W.D. Tex. 2003) (notwithstanding his claim of ownership, claimant lacked standing because he was an unsecured creditor);

- *United States v. \$124,906 in U.S. Currency*, 2000 WL 360086 (D. Or. 2000) ("unsecured creditors do not have: standing to challenge the civil forfeiture of their debtor's property");

- *United States v. \$15,060 in U.S. Currency*, 1999 WL 166847 (D. Or. 1999) (claimant who allegedly loaned money to defendant not knowing defendant intended to use it to facilitate drug trafficking was an unsecured creditor with no legal standing to contest the forfeiture of the seized funds);

- Former owner or victim's ability to trace former property to the *res* being forfeited does not change the claimant's status from that of an unsecured creditor:

- *United States v. \$61,483.00 in U.S. Currency*, 2003 WL 1566553 (W.D. Tex. 2003) (under state law, a lender retains no legal interest in the funds that he loans to a borrower; thus the lender's ability to trace his money into the *res* subject to forfeiture from the borrower doesn't change lender's status as general creditor or give lender standing to contest the forfeiture);

- *United States v. \$3,000 in Cash*, 906 F. Supp. 1061 (E.D. Va. 1995) (even though claimant/victim could trace his money to seized bank account, title was passed to perpetrator, making claimant an unsecured creditor without standing);

- Note: The same rule applies in the ancillary proceeding in criminal forfeiture cases:

- *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (a person who voluntarily transfers his property to the defendant is no longer the owner of that property; his ability to trace his property to defendant's assets is irrelevant; therefore, victims who transferred their property to the defendant are merely unsecured creditors, not owners of the forfeited property);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Chawla)*, 46 F.3d 1185 (D.C. Cir. 1995) (unsecured creditors are not owners); *United States v. Schwimmer*, 968 F.2d 1570, 1581 (2d Cir. 1992) (same); *United States v. Campos*, 859 F.2d 1233 (6th Cir. 1988) (same);

- *United States v. Ribadeneira*, 105 F.3d 833 (2d Cir. 1997) (person holding check drawn on defendant's forfeited bank account is a general unsecured creditor with no interest in specific funds);

- *United States v. Strobe*, 58 F. Supp. 2d 576 (M.D. Pa. 1999) (family members who obtained a judgment lien against defendant personally were general creditors and not owners of any interest in a specific parcel of property);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of OAS)*, 73 F.3d 403 (D.C. Cir. 1996) (bank depositor was only a general creditor of the defendant bank; therefore it was the defendant's property, not the claimant's, that was forfeited);

6. Special rule for correspondent bank accounts:

- In general, a customer has no ownership interest in the bank's funds, including funds deposited by the bank into its correspondent account at another bank.

- See *BCCI Holdings, supra*.

- But under 18 U.S. C. § 981(k), if funds subject to forfeiture under section 981(a) or section 881 are deposited into a foreign bank, the Government may bring a forfeiture action against the foreign bank's correspondent account in the United States, and only the depositor will have an ownership interest in those funds for purposes of filing a claim.

E. Temporal requirement/relation back doctrine:

- The ownership interest must exist at the time the act giving rise to the forfeiture took place, *see* section 983(d)(2), or else the claimant must be a bona fide purchaser, *see* section 983(d)(3).

1. Pre-CAFRA, Government could not use relation back doctrine to defeat claim of owner who acquired interest before judgment of forfeiture was entered by a court:

- *United States v. A Parcel of Land (92 Buena Vista)*, 507 U.S. 111 (1993) (person who acquires interest after the offense giving rise to the forfeiture has standing to contest the forfeiture, notwithstanding the relation back doctrine);

- *United States v. Real Property... 221 Dana Ave.*, 81 F. Supp. 2d 182 (D. Mass. 2000) (heir who acquires interest upon death of drug dealer has standing under *92 Buena Vista*; *pre-Buena Vista* cases to the contrary, like *United States v. One 1985 Nissan 300zx*, 889 F.2d 1317 (4th Cir. 1989), probably no longer good law), *reversed on other grounds*, 261 F.3d 65 (1st Cir. 2001);

- *In re Seizure of \$82, 000 More or Less*, 2000 WL 1707495 (W.O. Mo. 2000) (claimant who acquired interest in abandoned property by operation of law became owner before Government's interest vested under relation back doctrine);

2. Post-CAFRA, sections 983(d)(2) and (3) divide claimants into two categories; only bona fide purchasers can defeat Government's interest if they acquired the property after the crime occurred:

- *United States v. Hooper*, 229 F.3d 818 (9th Cir. 2000) (section 983(d) divides claimants into the same two categories as does the criminal forfeiture statute, section 853(n)(6); thus, under section 983(d), claimant who did not have an interest in the property at the time of the offense must be a bona fide purchaser);

- See Cassella, "The Uniform Innocent Owner Defense to Civil Asset Forfeiture," *Kentucky Law Journal* 89:3 (Spring 2001) at 653, available on AFML Online.

- See Criminal Forfeiture Case Outline, containing cases where third party claim in the ancillary proceeding was dismissed because claimant's interest did not exist at the time of the offense.

XIV. The Innocent Owner Defense

- The uniform innocent owner defense, codified at 18 U.S. C. § 983(d), is discussed in detail in Cassella, "The Uniform Innocent Owner Defense to Civil Asset Forfeiture," *Kentucky Law Journal* 89:3 (Spring 2001).

A. Innocent owner defense is not constitutionally required:

1. Pre-CAFRA cases:

- *Bennis v. Michigan*, 516 U.S. 442 (1996);

- *United States v. \$734,578.82 in U.S. Currency*, 298 F.3d 641 (3d Cir. 2002) (pre-CAFRA, there was no innocent Owner defense for forfeitures under section 1955(d);

- *United States v. An Antique Platter of Gold*, 184 F.3d 131 (2d Cir. 1999) (there is no innocent owner defense for violations of section 545; applying *Bennis*);

- *United States v. Various Ukranian Artifacts*, 1997 WL 793093 (E.D.N.Y. 1997) (there is no innocent owner defense under 19 U.S. C. § 1497);

- *United States v. \$83,132.00 in United States Currency*, 1996 WL 599725 (E.D.N.Y. 1996) (under *Bennis*, there is no innocent owner defense in CMIR cases);

- *United States v. One 1997 Ford Expedition*, 135 F. Supp. 2d 1142 (D.N.M. 2001) (for pre-CAFRA cases, there is no innocent owner defense in cases brought under 49 U.S. C. § 80303 using vehicle to transport contraband);

2. CAFRA carve-out:

- *United States v. One Lucite Ball*, 252 F. Supp. 2d 1367 (S.D. Fla. 2003) (innocent owner defense in section 983(d) does not apply to forfeiture under 19 U.S.C. § 1595a);

3. Innocent owner defense does not apply to contraband:

- *United States v. \$557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66, 77 n.6 (2d Cir. 2002) (innocent owner defense does not apply to seized drugs);

- *United States v. 144,774 Pounds of Blue King Crab*, No. C02-2167C (W.D. Wash. July 10, 2003) (the innocent owner defense does not apply to the forfeiture of illegally imported goods under the Lacey Act because such goods are contraband 'within the meaning of section 983(d)(4);

- See 18 U.S. C. § 983(d)(4) (exempting contraband or other property illegal to possess from the innocent owner defense);

B. Burden of proof on innocent owner defense:

1. Once the Government establishes forfeitability, burden shifts to claimant to establish innocent owner defense by preponderance of the evidence:

- *United States v. 15 Bosworth Street*, 236 F.3d 50 (1st Cir. 2001) (Government has no burden of negating claimant's innocent owner defense in its case-in-chief; when claimant rests without presenting any evidence, because Government offered no evidence of claimant's knowledge or consent, there is nothing in the record supporting judgment for claimant, so such judgment must be reversed);

- *United States v. Land, Property Recorded in Name of Neff*, 960 F.2d 561 (5th Cir. 1992) (rule applies to *all* affirmative defenses, not just owner defense); *United States v. \$200,000*, 805 F. Supp. 585 (N.D. m. 1992) (rule applies to "no criminal violation" defense);

- *United States v. One parcel, 2526 Faxon Avenue*, 145 F. Supp. 2d 942 (W.D. Term. 2001) (under CAFRA., claimant still has the burden of proving the affirmative innocent Owner defense by a preponderance of the evidence);

- *United States v. 2001 Honda Accord EX*, 245 F. Supp. 2d 602 (M.D. Pa. 2003) (CAFRA preserved the rule that the burden of proof shifts to the claimant to establish the innocent owner defense) ;

2. Burden shifting is not unconstitutional:

- *United States v. One Parcel... 194 Quaker Farms Road*, 85 F.3d 985 (2d Cir. 1996) (burden shifting where one party has superior access to evidence is not unconstitutional);

- *United States v. All Funds on Deposit in Any Accounts*, 801 F. Supp. 984 (E.D.N.Y. 1992) (citing cases), *aff'd sub nom.*, *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993);

C. Innocent owner defense has two elements:

- Claimant must prove that he or she is an owner of the property, and that he or she is innocent, *see* page 121, *supra*.

D. Ownership:

- Ownership is determined in accordance with state law and the definition of "owner" in section 983(d)(6), *see* page 132, *supra*.

E. Innocence-interests in existence when the crime occurred:

- A person claiming an interest that existed at the time the offense giving rise to the forfeiture occurred, *see* temporal requirement at page 138, *supra*, must either not know that the property was used to commit the offense, or must have taken all reasonable steps

to stop it, *see* section 983(d)(2).

1. The test is disjunctive--claimant can show lack of knowledge *or* that he or she took all reasonable steps:

- Pre-CAFRA law:

- *United States v. 141st Street Corp.*, 911 F.2d 870, 877-78 (2d Cir. 1990) (landlord who knew building was being used for drug trafficking had opportunity to show he did not consent to such use);

- *United States v. Parcel of real Property Known as 6/09 Grubb Road*, 886 F.2d 618, 626 (3d Cir. 1989) (wife who knew of husband's use of residence for drug trafficking had opportunity to show she did not consent to such use);

- *United States v. One 1973 Rolls Royce*, 43 F.3d 794, 816-17 (3d Cir. 1994) (following *Grubb Road*; collecting cases);

- *United States v. Cleckler*, 270 F.3d 1331 (11th Cir. 2001) (disjunctive test applied in the Eleventh Circuit in pre-CAFRA cases);

- *See United States v. 16328 South 43rd E. Ave.*, 275 F.3d 1281 (10th Cir. 2002) (finding it unnecessary to resolve the "disjunctive/conjunctive debate" because claimant could satisfy neither prong of the pre-CAFRA defense);

- *But see United States v. One Parcel of Land Known as Lot 11 I-B*, 902 F.2d 1443, 1445 (9th Cir. 1990) ("knowledge" and "consent" are conjunctive terms, and claimant must prove lack of both);

2. Knowledge:

The knowledge prong of section 983(d)(2)(A)(i) is the same as it was under the old innocent owner defenses - thus it is likely that the pre-CAFRA case law defining "knowledge" will apply to the new statute.

- *United States v. One 1988 Checolet 410 Turbo Property Aircraft*, 282 F. Supp. 2d 1379 (S.D. Fla. 2003) (when it enacted the uniform innocent owner defense, Congress intended to carry forward the pre-CAFRA case law equating knowledge with willful blindness);

- *United States v. 2001 Honda Accord EX*, 245 F. Supp. 2d 602 (M.D. Pa. 2003) (assuming that pre-CAFRA law applies to CAFRA cases, court holds claimant must show lack of actual knowledge and that she was not willfully blind);

- *United States v. One 1988 Beechcraft Power Boat*, No. 01-10054-CN-MOORE (S.D. Fla. Nov. 21, 2002) (knowledge prong of the innocent owner defense under section 983(d)(2), including the concept of willful blindness, is the same as it was pre-CAFRA);

- Willful blindness of parent/landlord:

- *United States v. Collado*, 348 F.3d 323 (2d Cir. 2003) (property owner who is willfully blind to the distribution of illegal drugs on her property by her son does not qualify as innocent owner);

- Pre-CAFRA cases:

- *United States v. One Parcel Known as 352 Northup St.*, 40 F. Supp. 2d 74 (D.R.I. 1999) (father who laundered son's drug money on many occasions and claimed he never asked where money came from failed to show he did not know money he used to purchase land was drug proceeds);

- *United States v. Property Identified as 1813 15th Street. N. W.*, 956 F. Supp. 1029 (D.D.C. 1997) (circuits are split on whether "actual" or "constructive" knowledge test applies, but even under more lenient standard, claimant "faced with overwhelming evidence to the contrary... cannot rely upon mere denials to prove an absence of actual knowledge, but rather must come forward with something more substantial");

- *United States v. Eleven Vehicles*, 836 F. Supp. 1147, 1160-61 (E.D. Pa. 1993) (claimant must prove that she was unaware of the illegal transactions that gave rise to the forfeitable property);

- *United States v. 152 Char-Nor Manor Blvd.*, 922 F. Supp. 1064 (D. Md. 1996) (claimant who admits knowing that her boyfriend used land to grow marijuana had knowledge even if she believed the marijuana was for personal use);

- *United States v. Carrell*, 252 F.3d 1193 (11th Cir. 2001) (pre-CAFRA, the Eleventh Circuit held that the innocent owner defense was based on "actual knowledge, not constructive knowledge"; person who acquires property from his father, knowing his father had no legitimate income and had been imprisoned for drug dealing, has actual knowledge that the property was purchased with drug proceeds); *United States v. One 1990 Lincoln Town Car*, 817 F. Supp. 1575 (N.D. Ga. 1993) (claimant need only prove lack of actual knowledge);

- The person who committed the underlying offense cannot be an innocent owner:

- *United States v. Six Negotiable Checks*, 207 F. Supp. 2d 677 (E.D. Mich. 2002) (person who failed to file the CMIR form when leaving or entering the United States cannot be an innocent owner);

3. Employee's knowledge may be imputed to the corporation:

- *United States v. 141st Street Corp.*, 911 F.2d 870 (2d Cir. 1990) (corporate officer's knowledge of drug trafficking at corporation's building could be imputed to the corporation to defeat innocent owner defense);

- *United States v. One Parcel Known as 352 Northup St.*, 40 F. Supp. 2d 74 (D.R.I. 1999) (corporation's interest forfeited because principal shareholder who controlled 60 percent of shares knew property was purchased with drug money);

- *United States v. Nissan Van*, 45 F.3d 438, 1994 WL 71 1941 (9th Cir. 1994) (unpublished) (Table) (corporate employee's knowledge imputed to corporation to defeat innocent owner claim);

- *But see United States v. Route 2, Box 472*, 60 F.3d 1523 (11th Cir. 1995) (guilty knowledge of corporate officer not imputed to corporation asserting innocent owner defense because individual was not acting within the scope of his employment and with intent to benefit the corporation); *United States v. One Parcel of Land... 7326 Highway 45. North*, 965 F.2d 311 (7th Cir. 1992) (same); *United States v. One Parcel of real Estate*, 852 F. Supp. 1013 (S.D. Fla. 1994) (same); *United States v. One Parcel...4,657 Acres*, 730 F. Supp. 423 (S.D. Fla. 1989);

4. Knowledge equates with willful blindness:

- *United States v. 16328 South 43rd E. Ave.*, 275 F.3d 1281 (10th Cir. 2002) (woman who was told her son was growing marijuana on her land, found at least one plant and seeds, but failed to investigate was at least willfully blind and therefore had knowledge of the illegal use of her property) ;

- *United States v. Real Property 874 Gartel Drive*, 79 F.3d 918 (9th Cir. 1996) (claimant must prove lack of knowledge of the illegal transactions; not sufficient to show he did not know conduct-structuring-was illegal; willful blindness equates with knowledge);

- *One Parcel of Property, Located at 755 Forest Road*, 985 F.2d 70, 72 (2d Cir. 1993) ("where an owner has engaged in willful blindness as to activities occurring on her property) her ignorance will not entitle her to avoid forfeiture");

- *United States v. 3814 Thurman Street*, 164 F.3d 1191 (9th Cir. 1999) (following *Gartel Drive*: owner who is willfully blind to false statements made on loan application is not an innocent owner under sections 981(a)(1)(C) and (a)(2));

- *United States v. One 1992 Lexus SC400*, 167 F. Supp. 2d 977 (N.D. 2001) (failure to inquire into boyfriend's source of income when although incarcerated he continued to lavish claimant with gifts, shows claimant was willfully blind and therefore had knowledge that gifts were drug proceeds); .

- *United States v. \$1,646,000 in Cashiers Checks and Currency*, 118 F. Supp. 2d 977 (N.D. Cal. 2000), *opinion withdrawn*, 123 F. Supp. 2d 1186 (N.D. Cal. 2000) (following *Gartel Drive*; willful blindness equates with knowledge);

- *United States v. One Parcel of real Estate Located at 1948 Martin Luther King Drive*, 91 F. Supp. 2d 1228 (C.D. in. 2000) (family members who are willfully blind to drug dealer's source of income cannot be innocent owners of property he titles in their names), *aff'd*, 270 F.3d 1102 (7th Cir. 2001);

- *United States v. 1977 Porsche Carrera* 911, 748 F. Supp. 1180, 1185 (W.D. Tex. 1990) (even if claimant lacked actual knowledge, he was not an innocent owner if he was willfully blind);

- *United States v. \$705,270.00 in U.S. Currency*, 820 F. Supp. 1398 (S.D. Fla. 1993) (deliberate ignorance is equated with knowledge of the illegal activity);

- *United States v. One 1992 Isuzu Trooper*, Civ. No. 97-C-1403-N (M.D. Ala. Mar. 9, 1999) (claimant who knew boyfriend sold drugs was willfully blind to his use of her car for such purpose because she failed to take all reasonable steps to prevent it);

- *United States v. One 1995 Chevrolet Impala SS*, 2001 WL 1631438 (D. Minn. 2001) (wife who knew husband had drug convictions and little legitimate income, and who participated in spending \$160,000, knew or was at least willfully blind to the fact that marital property was acquired with drug proceeds);

5. Definition of "willful blindness":

- *United States v. One 1973 Rolls Royce*, 43 F.3d 794, 808 (3d Cir. 1994) (willful blindness involves a state of mind of much greater culpability than simple negligence and more akin to knowledge); *United States v. 2001 Honda Accord EX*, 245 F. Supp. 2d 602,611 n. 8 (M.D. Pa. 2003) (applying *Rolls Royce's* discussion of willful blindness to post-CAFRA case);

- *United States v. 1989 Jeep Wagoneer*, 976 F.3d 1172 (8th Cir. 1992) ("Willful blindness involves an owner who deliberately closes his eyes to what otherwise would have been obvious and whose acts of omissions show a conscious purpose to avoid knowing the truth. This standard is a way of inferring knowledge, whereas the *Calero Toledo* standard is more nearly a negligence standard.") ;

- *United States v. \$1,646,000 in Cashiers Checks and Currency*, 118 F. Supp. 2d 977 (N.D. Cal. 2000), *opinion withdrawn*, 123 F. Supp. 2d 1186 (N.D. Cal. 2000) (following *Rolls Royce*; "willful blindness results when one is aware of a high probability of a fact and consciously avoids seeking truth because he desires to remain ignorant"; it is more than mere negligence);

- *United States v. All Monies (\$477,048.62)*, 754 F. Supp. 1467, 1477 (D. Haw. 1991) (claimant who "sticks his head in the sand" is willfully blind);

- *United States v. 1977 Porsche Carrera 911*, 748 F. Supp. 1180, 1186-87 (W.D. Tex. 1990) (lawyer whose fee was paid with drug proceeds was willfully blind if he failed to take the basic investigatory steps necessary to determine that his fees were not being satisfied with a major instrumentality of the crime charged against his client);

6. The "all reasonable steps" test:

- The "all reasonable steps" requirement in section 983(d)(2)(A)(ii) replaces the "consent" prong of the pre-CAFRA innocent owner defense. Pre-CAFRA cases interpreted "consent" to mean failure to take all reasonable steps.
- Pre-CAFRA law:

- *United States v. Lot Numbered One of the Lavaland Complex*, 256 F.3d 949 (10th Cir. 2001) (motel owner must take all reasonable steps to prevent illegal use of property, but is entitled to advance notice of what steps court or Government considers reasonable; measure of reasonableness is what would be reasonable in circumstances faced by claimant);

- *United States v. 16328 South 43rd E. Ave.*, 275 F.3d 1281 (10th Cir. 2002) (applying all reasonable steps test as articulated in *Lavaland*, court holds that woman who failed to call the police, evict her son who was growing marijuana from her property, or otherwise more thoroughly investigate his activities could not establish lack of consent);

- *United States v. All Right, Title and Interest... 143-147 East 23rd Street (Kenmore Hotel)*, 77 F.3d 648, 657 (2d Cir. 1996) ("unless an owner with knowledge can prove every action, reasonable under the circumstances, was taken to curtail the drug-related activity, consent is inferred and the property is subject to forfeiture"), quoting *United States v. Certain Real Property...418 57th Street*, 922 F.2d 129, 132 (2d Cir.1990);

- *United States v. One Parcel of Real Estate (1012 Germantown Road)*, 963 F.2d 1496,1504 (11th Cir. 1992) (proof of lack of consent requires claimant to show that he "took all reasonable steps to prevent illegal use of his property");

- *United States v. Two Parcels (19 and 25 Castle Street)*, 31 F.3d 35, 40 (2d Cir. 1994) (parent of adult child consented to illegal use of his property when he did not take every reasonable step to prevent such use);

- *United States v. All Right, Title and Interest ...785 St. Nicholas Ave.*, 983 F.2d 396, 404 (2d Cir. 1993) (even though neighborhood may be drug infested, owners of rental property must take reasonable steps *under the circumstances* to prevent property from facilitating drug trafficking);

- *Yskamp v. DEA*, 163 F.3d 767 (3d Cir. 1998) (charter aircraft operator and its insurance company were not innocent owners where neither took reasonable steps to ensure that the aircraft was not used for an unlawful purpose);

- *United States v. 141st Street Corporation*, 911 F.2d 870) 879 (2d Cir. 1990) (landlord must show he did all that reasonably could be expected to prevent the illegal activity once he learned of it; collecting cases);

- *United States v. One Parcel... 7079 Chilton County Road*, 123 F. Supp. 2d 602 (M.D. Ala. 2000) (whether claimant has done "everything that he could reasonably be expected to do" must be viewed in light of claimant's circumstances; taking all reasonable steps includes cooperating with law enforcement after police apprise claimant of the illegal activity), *rev'd on other grounds*, 270 F.3d.1331 (11th Cir. 2001);

- *United States v. Property Identified as 1813 15th Street, N.W.*, 956 F. Supp. 1029 (D.D.C. 1997) (taking some steps to bar drug dealers from property not sufficient; landlady must take *all* reasonable steps, such as evicting tenants convicted of drug offenses);

- *United States v. 5.382 Acres*, 871 F. Supp. 880 (W.D. Va. 1994) ("Property owners are required to meet a significant burden in proving lack of consent for they must remain accountable for the use of their property. Unless an owner with knowledge can prove every action, reasonable under the circumstances, was taken to curtail drug-related activity, consent is inferred and the property is subject to forfeiture."); *United States v. One Parcel Property at Lot 22*, 1996 WL 695404 (D. Kan. 1996) (same);

- *United States v. One Parcel of Property (755 Forest Road)*, 985 F.2d 70 (2d Cir. 1993) (wife's willful blindness to husband's use of residence for drug activity inconsistent with taking an reasonable steps); *United States v. The Premises and Real Property...191 Whitney Place*, 2000 WL 1335748 (W.D.N.Y. 2000) (same; father's willingness "to stick his head in the proverbial sand" and ignore his son's activities, criminal or not, is willful blindness and therefore does not meet all reasonable steps standard);

- *United States v. 3 Parcels in La Plata County*, 919 F. Supp. 1449 (D. Nev. 1995) (willful blindness is not an element of the innocent owner defense under section 881(a)(6), but failure to exercise duty to inquire when reasonable suspicions are aroused is incompatible with innocent ownership);

- *United States v. 152 Char-Nor Manor Blvd.*, 922 F. Supp. 1064 (D. Md. 1996) (claimant who fails to take "affirmative steps to prevent the property' 5 illegal use" cannot show lack of consent; where property was used for marijuana grow, claimant could have cut down the crop, forbidden boyfriend from using the property, or changed the locks on her house);

- *But see United States v. One Parcel...2526 Faxon Avenue* 145 F. Supp. 2d 942 (W.D. Tenn. 2001) (pre-CAFRA, the Sixth Circuit did not equate consent with failure to take all reasonable steps; CAFRA changes that, but even under pre-CAFRA law, agreement to store money claimant suspected was drug proceeds constitutes consent);

- *United States v. One 1992 Lexus SC400*, 167 F. Supp. 2d 977 (N.D. m. 2001) (to show lack of consent, post-illegal act transferee must show she took affirmative steps to demonstrate her lack of consent to receiving gifts derived from drug proceeds);

- *United States v. One Parcel... 2526 Faxon Avenue*, 145 F. Supp. 2d 942 (W.D. Term. 2001) (CAFRA overrules Sixth Circuit cases holding that claimant *did not* have to prove he took all reasonable steps to show lack of consent);

F. After-acquired interests:

1. Under pre-CAFRA law, there was no distinction between preexisting and after-acquired interests. Hence) donees, heirs) spouses, lienholders, and persons who acquired their interest by operation of law after it became subject to forfeiture could assert an innocent owner defense:

- *United States v. Real Property at 221 Dana Ave.*, 261 F.3d 65 (1st Cir. 2001) (noting that Congress did not address post-illegal act transferees in the pre-CAFRA statute, and the resulting split in the case law);

- See temporal requirement/relation back doctrine at page 138, *supra*.

2. Some courts assessed the state of mind at the time the owner acquired the property:

- The Third Circuit, relying on the consent prong of the innocent owner defense, held that all persons with after-acquired interests were innocent owners because they could not have consented to the illegal use of the property before they owned it:

- *United States v. One 1973 Rolls Royce*, 43 F.3d 794 (3d Cir. 1994) (a person who knowingly acquires forfeitable property is considered an innocent owner because he could not have consented to the illegal use of the property before he owned it);

- Third Circuit also held that the knowledge prong is evaluated at the time of the original offense, not when the transfer to the post-illegal act transferee took place:

- *United States v. 1993 Bentley Coupe*, 986 F. Supp. 893 (D.N.J. 1997) (applying *Rolls Royce* to section 881(a)(6) and section 981 case; claimant who bought property in tax sale after being notified it was subject to pending federal forfeiture action was nevertheless an innocent owner);

- The First Circuit also evaluated the claimant's state of mind at the time the property was used to commit the offense:

- *United States v. Real Property at 221 Dana Ave.*, 261 F.3d 65 (1st Cir. 2001) (widow who did not know husband was using her home for drug dealing until shortly before he committed suicide, and who had no interest in the property until that time, was an innocent owner; innocence should be assessed not when the owner acquires the property but at the time she had an opportunity to prevent illegal use of the property);

3. Other circuits held that the state of mind was determined as of the time the claimant acquired the property, and that lack of consent was not automatic in post-illegal act transferees:

- *United States v. One Parcel of real Estate Located at 6640 SW 48th Street*, 41 F.3d 1448, 1452-53 (11th Cir. 1995) (person who acquires property knowing that it was used to commit an illegal act is not an innocent owner); *United States v. Carrell*, 252 F.3d 1193 (11th Cir. 2001) (reaffirming *SW 48th Street*; knowledge determined at the time claimant acquires ownership);

- *United States v. One 1992 Lexus SC400*, 167 F. Supp. 2d 977 (N.D. 111. 2001) (girlfriend who knew when she received gifts that boyfriend was a drug dealer was at least willfully blind to the source of the gifts and therefore had knowledge; also, person who acquires criminal proceeds without taking affirmative steps to ascertain legitimacy of source has no lack of consent defense);

- *United States v. One Parcel Known as 352 Northup St.*, 40 F. Supp. 2d 74,82 (D.R.I. 1999) (father who received money he knew to be proceeds of son's drug trafficking and used it to buy land is not innocent owner of the land);

- *United States v. 3 Parcels in La Plata County*, 919 F. Supp. 1449, 1457 (D. Nev. 1995) (claimant must show he is the holder of an ownership interest who was, at the time of acquiring the interest, ignorant of the illegal conduct giving rise to the forfeiture action);

- *United States v. Funds in the Amount of \$228,390*, 1996 WL 284943, *3 (N.D. TIL 1996) ('<if a post-illegal act transferee knows of illegal activity which would subject property to forfeiture at the time he takes his interest, he cannot assert the innocent owner defense");

- *United States v. 1977 Porsche Carrera* 911, 748 F. Supp. 1180, 1185 (W.D. Tex. 1990) (court must assess state of mind at the time claimant accepts the property);

- *United States v. 2304 E. Highland Drive, Tucson, Arizona*, No. 98-CV -444- TUC-ACM (D. Ariz. Nov. 16,2000) (same; following *6640 SW 48th Street* and noting that this rule has been codified by CAFRA at section 983(d));

- *See a/so United States v. 10936 Oak Run Circle*. 9 F.3d 74, 76 (9th Cir. 1993) (holding that the statute bars an owner with knowledge of the origin of the property in drug proceeds from asserting "the innocent owner defense;" and noting that such person has a duty to inquire at the time of the transfer);

4. CAFRA resolves both problems-only bona fide purchasers can assert after-acquired interests, and the state of mind is determined as of the time of the purchase, *see* section 983(d)(3):

- *United States v. Hooper*, 229 F.3d 818 (9th Cir. 2000) (an interest in criminal proceeds is necessarily acquired after the offense; hence, under CAFRA, only bona fide purchasers can assert an interest in such property; 92 *Buena Vista* does not apply to forfeitures under CAFRA);

- *United States v. One Single Family Residence at 2200 SW 28th Ave.*, 204 F. Supp. 2d 1361 (S.D. Fla. 2002) (innocent heirs could not contest forfeiture of real property under section 983(d)(3) because they were not bona fide purchasers and the "primary residence" exception did not apply);

- *United States v. Real Property at 221 Dana Ave.*, 261 F.3d 65 (1st Cir. 2001) (acknowledging that assessing state of mind at the time of the illegal use of the property would not apply in post-CAFRA cases);

5. A person who buys real property on which a *lis pendens* has been filed is not a bona fide purchaser:

- *United States v. One Residential Property... 8110 Mojave Road*, 229 F. Supp. 2d 1046 (S.D. Cal. 2002) (under CAFRA, section 983(d)(3), person who buys property at a foreclosure sale knowing it is subject to forfeiture is not a bona fide purchaser; CAFRA. supersedes *Roundhill Drive*);

- *But see United States v. Real Property at 2659 Drive (Roundhill Dr. I)*, 194 F.3d 1020 (9th Cir. 1999) (purchaser who takes property knowing it is subject to *lis pendens* may still qualify as

innocent owner; *lis pendens* only puts purchaser on notice of pending lawsuit; it does not put purchaser on notice that property was used to commit a crime); *United States v. Real Property at 2659 Roundhill Drive (Roundhill Dr. II)*, 283 F.3d 1146 (9th Cir. 2002) (Kozinski J., dissenting) (criticizing holding in *Roundhill Dr. I*; where *lis pendens* makes it obvious that the Government accuses the property owner of buying the property with drug money, a person who buys the property with notice of the *lis pendens* is not an innocent owner);

- *United States v. Premises Known as 7725 Unity Avenue*, 294 F.3d 954 (8th Cir. 2002) (party acquiring mortgage lien after *lis pendens* filed was innocent owner; distinguishable on ground that court treated the loan proceeds, not the interest in the land, as the *res* subject to forfeiture);

6. Because the bona fide purchaser requirement is virtually identical to the requirement in the criminal statute, section 853(n)(6)(B), the case law interpreting the bona fide purchaser requirement in criminal forfeiture cases will be applicable to the new statute:

- See Criminal Forfeiture Case Outline, containing cases interpreting the bona fide purchaser provision in the criminal forfeiture statute;

- See Cassella, 'The Uniform Innocent Owner Defense to Civil Asset Forfeiture,' *Kentucky Law Journal* 89:3 (Spring 2001), at 653, available on AFML Online.

7. Bona fide purchaser requirement in black market cases:

- *United States v. Cuartres*, 155 F. Supp. 2d 1338 (S.D. Fla. 2001) (a bona fide purchaser must be reasonably without cause to believe that the property was subject to forfeiture; if the circumstances are suspicious, the claimant has a duty to inquire into the source of the funds; Colombian businessman who bought dollars from a broker without concern for the source of the money, under circumstances that would have alerted him to serious questions about the legitimacy of the transaction, was not a bona fide purchaser; "blind reliance on the broker is not objectively reasonable);

J. Summary judgment on the innocent owner defense:

1. Where claimant offers no evidence to support any of his or her affirmative defenses, summary judgment may be granted on the Government's showing of forfeitability alone:

- *United States v. 1988 Oldsmobile Cutlass Supreme*, 983 F.2d 670 (5th Cir. 1993) (structuring case); *United States v. Property at 4492 Livonia Rd.*, 889 F.2d 1258, 1269 (2d Cir. 1989) (drug case);

- *United States v. 15 Bosworth Street*, 236 F.3d 50 (1st Cir. 2001) (Government has no burden of negating claimant's innocent owner defense in its case-in-chief; when claimant rests without presenting any evidence, because Government offered no evidence of claimant's knowledge or consent, there is nothing in the record supporting judgment for claimant, so such judgment must be reversed);

2. Government entitled to summary judgment if claimant is not an owner:

- *Kadonsky v. United States*, 246 F.3d 681, 2001 WL 113825 (10th Cir. 2001) (Table) (Government entitled to summary judgment if claimant is estopped from asserting ownership; but summary judgment not appropriate where material facts are in dispute; remanding case to district court for factual findings);

- *But see United States v. One Lincoln Navigator* 1998,328 F.3d 1011 (8th Cir. 2003) (when ownership is a disputed issue, it is erroneous for the court to resolve the dispute rather than having a jury decide unless the requirements of Rule 56 are satisfied; the court's power to resolve standing issues on its own is different);

3. To avoid summary judgment, claimant must do more than make general denials:

- *United States v. Parcel of Land (18 Oakwood Street)*, 958 F.2d 1 (1st Cir. 1992) (to sustain burden of showing existence of material issue of fact on innocent owner defense, claimant must offer evidence admissible at trial as to his lack of knowledge and consent);

- *United States v. Dollar Bank Money Market Account*, 980 F.2d 233 (3d Cir. 1992) (claimant cannot avoid summary judgment "merely by offering any unlikely but legitimate excuse");

- *United States v. Certain Real Property... 24121 Church Road*, 1995 WL 871219 (B.D. Mich. 1995) (general denial insufficient to overcome motion summary judgment based on evidence of willful blindness);

- *United States v. Real Property in Mecklenburg County*, 814 F. Supp. 468,481 (W.D.N.C. 1993) (to avoid summary judgment, claimant must do more than make conclusory denial that funds involved in financial transaction were drug proceeds); *United States v. \$506.641 in U.S. Currency*, 1996 WL 396082 (N.D. m. 1996) (same);

- *United States v. Oyekoya*, 2001 WL 435619 (S.D.N.Y. 2001) (person asserting innocent owner defense to forfeiture of money traceable to fraud committed by third party cannot rely on conclusory claim of innocence, but must offer evidence showing he had reason to believe the funds came from a legitimate source; claimant's lack of involvement in the underlying fraud is irrelevant);

- *United States v. \$25,829,681.80 in the Court Registry Investment System*, 2002 WL 31159116 (S.D.N.Y. 2002) (unsupported claim that claimant thought she was receiving payment on a debt, not fraud proceeds, insufficient to defeat summary judgment on innocent owner issue);

4. When mental state of claimant is at issue, resolution of claim by summary judgment is often inappropriate because party's mental state is question of fact which turns on credibility:

- *United States v. Real Property 874 Gartel Drive*, 79 F.3d 918 (9th Cir. 1996) (where wife disclaims knowledge of the illegal transactions-structuring-there is material issue of fact);

- *United States v. Dollar Bank Money Market Account*, 980 F.2d 233 (3d Cir. 1992) (no summary judgment where affirmative defense is that underlying crime did not occur because of absence of requisite *mens rea* element. and claimant offers "reasonable and legitimate" explanation for events that would permit jury to find that perpetrator lacked requisite intent); *United States v. Leak*, 123 F.3d 787 (4th Cir. 1997) (same); *United States v. 5200,000*, 805 F. Supp. 585 (N.D. in. 1992) (same);

- *United States v. All Monies*, 754 F. Supp. 1467 (D. Haw. 1991) (no summary judgment on innocent owner defense where reasonableness of owner's action in purchasing drug money on black market was a question for the jury);

- *United States v. Eleven Vehicles*, 836 F. Supp. 1147, 1161 (E.D. Pa. 1993) (no summary judgment for claimant on innocent Owner defense where assertions merely raise material issues of fact regarding claimant's knowledge);

- *United States v. \$1,646,000 in Cashiers Checks and Currency*, 118 F. Supp. 2d 977 (N.D. Cal.. 2000), *opinion withdrawn*, 123 F. Supp. 2d 1186 (N.D. Cal. 2000) (where Government claims claimant was willfully blind, court cannot grant summary judgment for the Government as long as a reasonable jury could find that claimant's actions and statements were consistent with innocent conduct);

- *United States v. One Parcel... 2526 Faxon Avenue*, 145 F. Supp. 2d 942 (W.D. Tenn. 2001) (although admitting that he "suspected" his property was being used for drug trafficking, claimant's denial of knowledge, though suspect, is enough to create genuine issue of fact as to the innocent owner defense);

5. Even where mental state is at issue, the Government is entitled to summary judgment where denial of knowledge is totally inconsistent 'with uncontested facts:

- *United States v. 16328 South 43rd E. Ave.*, 275 F.3d 1281 (10th Cir. 2002) (to avoid summary judgment on the knowledge prong of the innocent owner defense, claimant must offer more than bare denials that amount to willful blindness or are inconsistent with the uncontested facts);

- *United States v. One Parcel of Property (755 Forest Road)*, 985 F.2d 70, 72 (2d Cir. 1993) (claimant's denial of drug use in the home inconsistent with presence of drug paraphernalia throughout the bedroom);

- *United States v. Premises Known as 717 South Woodward Street*, 2 F.3d 529, 532-34 (3d Cir. 1993) (general denial of knowledge by claimant is sufficient to create material issue for trial unless there is evidence rendering the denial incredible);

- *United States v. One 1992 Lexus SC400*, 167 F. Supp. 2d 977 (N.D. in. 2001) (Government entitled to summary judgment on claimant-girlfriend's innocent owner defense where no reasonable jury could believe she did not know boyfriend was a drug dealer and that expensive gifts were proceeds of drug trafficking);

- *United States v. Property Identified as 1813 15th Street, N.W.*, 956 F. Supp. 1029, 1033 (D.D.C. 1997) (given overwhelming evidence that residence was used for drug trafficking, plus warnings from the police, there was no material issue regarding landlady's actual knowledge);

- *United States v. \$705,270.00 in U.S. Currency*, 820 F. Supp. 1398, 1400 (S.D. Fla. 1993) (summary judgment for the Government On innocent owner defense where claimant offered only general denials and did not offer evidence to show that he was unaware of CTR requirements);

6. Summary judgment on the failure to take all reasonable steps:

- *United States v. 16328 South 43rd E. Ave.*, 275 F.3d 1281 (10th Cir. 2002) (woman who failed to Cal..l police, evict her son, or more thoroughly investigate his marijuana grow operation could not possibly show by a preponderance of the evidence that she had taken all reasonable steps; bond between mother and son is not enough to create triable issue for a jury on the reasonableness of her inaction);

- *United States v. Collado*, 348 F.3d 323 (2d Cir. 2003) (summary judgment is appropriate where property owner is wilfully blind to son's illegal conduct and does not take reasonable steps to stop it);

7. Court does not reach innocent owner issue on motion for summary judgment until Government has established the forfeitability of the property:

- *United States v. \$21,510 in U.S. Currency*, __F. Supp. 2d __,2003 WL 22753434 (D.P.R. Nov. 13,2003) (no summary judgment for Government on innocent owner issue until it shows that property was drug proceeds);

8. Summary judgment for the claimant:

- *United States v. One 1988 Checolet 410 Turbo Prop Aircraft*, 282 F. Supp. 2d 1379 (S.D. Fla. 2003) (to be entitled to summary judgment on the innocent owner defense, claimant must prove the absence of any disputed issues of fact bearing on its lack of knowledge; company president's affidavit disclaiming knowledge of the illegal use of its property insufficient to prove the company was not wilfully blind);

H. Retroactive application of section 983(d) to pre-CAFRA cases:

- *United States v. All Funds on Deposit at Dime Savings Bank*, 255 F. Supp. 2d 56 (E.D.N.Y. 2003) (section 983(d)(6) applies to any case commenced after August 23,2000, regardless of when the underlying facts occurred);

XV. Trial Procedure

A. Jury trial:

- *United States v. One Lincoln Navigator* 1998, 328 F.3d 1011, 1014 n.2 (8th Cir. 2003) (claimant has a Seventh Amendment right to a jury trial on her innocent owner defense);

- *United States v. U.S. Currency in the Sum of \$97,253*, 1999 WL 84122 (E.D.N.Y. 1999) (right to jury trial waived if demand not timely made under Rule 38(b));

B. Burden of proof: