

Civil and Criminal Forfeiture Procedure

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Case Outline

Part II - Criminal Forfeiture

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I. Scope and Purpose of Criminal Forfeiture

A. Criminal forfeiture requires a conviction on a criminal count:

- *United States v. Aramony*, 88 F.3d 1369 (4th Cir. 1996) (because section 1957 conviction was reversed on appeal, section 982 forfeiture order had to be vacated); *United States v. Tencer*, 107 F.3d 1120 (5th Cir. 1997) (same for section 1956); *United States v. Ahmad*, 213 F.3d 805 (4th Cir. 2000) (same for structuring offense); *United States v. Hanafy*, 124 F. Supp. 2d 1016 (N.D. Tex. 2000) (sections 1956 and 1957);

- *United States v. Goodson*, 2001 WL 135726 (E.D. La. 2001) (reversal of mail fraud conviction meant that money laundering conviction predicated on the mail fraud had to be vacated, and that the money laundering forfeiture had to be vacated as well; but RICO conviction and forfeiture not disturbed);

- *United States v. Duhon-Otero*, 76 F. Supp. 2d 161 (D.P.R. 1999) (dismissing forfeiture allegation as to codefendants not named in any substantive count on which forfeiture could be based);

- *United States v. Hasson*, 333 F.3d 1264, 1279 n.19 (11th Cir. 2003) (the court in a money laundering case may not impose a forfeiture order based on a money laundering offense with which defendant was not charged or for which he was acquitted, but once the conviction is obtained, the forfeiture may be based on amounts defendant conspired to launder, including amounts derived from uncharged substantive conduct, or substantive counts for which he was been acquitted);

- *United States v. Cherry*, 330 F.3d 658 (4th Cir. 2003) (criminal forfeiture constitutes part of the sentence and is used to enhance the punishment of a defendant who has already been convicted of a particular offense; if the underlying conviction is vacated, the forfeiture based on that conviction must be vacated as well);

- *But see United States v. Rosario*, 111 F.3d 293 (2d Cir. 1997) (section 853 forfeiture need not be vacated when section 846 conviction reversed on appeal because surviving section 848 conviction supports the forfeiture);

B. Only property involved in the offense of conviction may be forfeited:

- *United States v. Garcia-Guizar*, 160 F.3d 511 (9th Cir. 1998) (where defendant is charged with selling \$5,000 worth of drugs but \$43,000 is seized from his locker, only the amount traceable to the offenses for which defendant is convicted can be forfeited in the criminal case; same for conspiracy count if it is limited to commission of the substantive offense);

- *United States v. Barnfield*, 145 F.3d 1123 (10th Cir. 1998) (because defendant was convicted of using account A to commit money laundering offense, it was an error for jury to return a special verdict forfeiting property in account B);

- *But see United States v. Genova*, 333 F.3d 750 (7th Cir. 2003) (because criminal forfeiture is part of sentencing, the forfeiture is not limited to the property involved in the offenses for which the defendant was convicted; to the contrary, property involved in conduct for which the defendant has been acquitted may be forfeited if the judge finds that it is forfeitable by a preponderance of the evidence);

C. Only the defendant's property can be forfeited:

- *United States v. Totaro*, 345 F.3d 989 (8th Cir. 2003) (criminal forfeiture is *in personam*; if a third party's interest could be forfeited, the forfeiture would become an *in rem* action in which the third party would have the right to contest the forfeiture on more than ownership grounds);

- *United States v. O'Dell*, 247 F.3d 655 (6th Cir. 2001) (criminal forfeiture "entitles the Government to forfeiture of a convicted defendant's interests and nothing more"; defendant's only interest was right to become owner in the future if he maintained loan payments);

- *United States v. Lester*, 85 F.3d 1409 (9th Cir. 1996) (noting, *in dicta*, that defendant could have challenged forfeiture on the grounds that property was held by a corporation, not by the defendant, and that unless corporate form could be ignored, defendant's only forfeitable interest was his stock in the corporation);

- *United States v. Gilbert*, 244 F.3d 888, 919 (11th Cir. 2001) ("because it seeks to penalize the defendant for his illegal activities, *in personam* forfeiture reaches only that property, or portion thereof, owned by the defendant"); *id.* at 920 (what distinguishes criminal forfeiture from civil forfeiture is that "the property itself is not forfeited; rather, the defendant's *interest* in the property is forfeited") (emphasis in original);

- *United States v. Riley*, 78 F.3d 367 (8th Cir. 1996) (if corporation used by defendant to commit offense is not a defendant, only defendant's interest in the corporation may be forfeited, not the corporation itself or its assets);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Chawla)* , 46 F.3d 1185, 1190 (D.C. Cir. 1995) ("only the property of the defendant-including property held by a third party pursuant to a voidable transaction-can be confiscated in a RICO proceeding");
- *United States v. Jimerson*, 5 F.3d 1453 (11th Cir. 1993) (the Government may not use the ancillary proceeding to forfeit the interests of third parties);
- *United States v. Douglas*, 55 F.3d 584 (11th Cir. 1995) (if the Government forfeits third party's property in criminal case without conducting factual inquiry into ownership of the property, and court orders forfeiture of property without ascertaining factual basis for defendant's guilty plea, the Government may be liable to third party for EAJA fees in the ancillary proceeding);
- *United States v. Kennedy*, 201 F.3d 1324 (11th Cir. 2000) (where husband and wife are tenants by the entirety, only husband's interest is forfeitable in a criminal case);
- *United States v. Ida*, 14 F. Supp. 2d 454 (S.D.N.Y. 1998) (the effect of a verdict of forfeiture is to put the Government in the shoes of the defendant; it succeeds to whatever interest, if any, the defendant had in the property; because third parties are not parties to the criminal case, they cannot be bound by the verdict of forfeiture);
- *United States v. Harris*, 246 F.3d 566,575 (6th Cir. 2001) (criminal forfeiture puts the Government in the shoes of the defendant, "acquiring only the rights of the defendant at the time of the criminal acts, and nothing more");
- *United States v. Nonnan*, 1999 WL 959254 (E.D. La. 1999) (criminal forfeiture is *in personam* action that is part of defendant's sentence, so only defendant's property can be forfeited);
- *Cf United States v. Mulligan*, 178 F.R.D. 164 (E.D. Mich. 1998) (fugitive's wife cannot agree in consent judgment to criminal forfeiture of fugitive's interest in property);

D. But property held by third party nominees may be forfeited:

- *United States v. Houlihan*, 92 F.3d 1271 (1st Cir. 1996) (house forfeited from defendant based on evidence establishing that defendant's uncle, whose name appeared on the deed, was a mere straw);
- *United States v. Totaro*, 345 F.3d 989 (8th Cir. 2003) (if claimant were a mere straw, she could not contest the forfeiture notwithstanding her bare legal title; but wife who lived on the property and raised her family there was not a mere straw);
- *United States v. Padilla-Galarza*, - F.3d _2003 WL 22927862 (1st Cir. Dec. 12,2003) (affirming acceptance of defendant's guilty plea even though he attempted to withdraw it on the ground that the property did not belong to him; whether property belongs to third party is sorted out in the ancillary proceeding);

- *United States v. Cuartef*, 155 F. Supp. 2d 1338 (S.D. Fla. 2001) (upon conviction of money launderer under section 1956(h)) Government may seek criminal forfeiture of money defendant has sold) through the black market, to a third party; third party' must assert bona fide purchaser defense in the ancillary proceeding);

- *United States v. Ida*, 14 F. Supp. 2d 454 (S.D.N.Y. 1998) (criminal forfeiture of real property held in third party's name was proper where third party was a straw);

- *United States v. Messina*, 917 F. Supp. 1303 (N.D. Ill. 1996), *appeal dismissed*, 122 F.3d 427 (7th Cir. 1997) (real property in father's name; real property in girlfriend's name; vehicles in son's name);

- *United States v. Cleveland*, 1998 WL 175900 (E.D. La. 1998) (court enters preliminary order forfeiting defendants' interests in gambling business based on finding that defendants were *defacto* owners; defendants' children failed to establish they were true owners, not nominees, in the ancillary proceeding), *aff'd*, *United States v. Bankston*, 182 F.3d 296 (5th Cir. 1999);

- *United States v. Infelise*, 938 F. Supp. 1352 (N.D. Ill. 1996) (property forfeited as substitute assets even though title held by third party nominee);

- *United States v. Nonnan*, 1999 WL 959254 (E.D. La. 1999) (car nominally titled in the name of the defendant's father may be forfeited if defendant was true owner);

- *Cf United States v. Kirschenbaum* 156 F.3d 784 (7th Cir. 1998) (the Government seeks criminal forfeiture of laundered fraud proceeds held in wife's name; pretrial restraining order uphold);

- See cases on forfeiting substitute assets held in name of third party at page 57.

- Criminal forfeiture has an *in rem* component; as long as the nexus to the offense is established, the property may be forfeited, subject to the limitation that a nondefendant's interest may not be forfeited:

- *United States v. White*, 116 F.3d 948 (1st Cir. 1997) (once nexus between farm and marijuana operation was established, farm was subject to forfeiture; convicted defendant could not argue that forfeiture was limited to the property he personally used to commit the offense; convicted defendants are liable to forfeit their property based on each other's acts);

E. Court may disregard corporate form to forfeit property of the defendant:

- *United States v. Simmons*, 154 F.3d 765 (8th Cir. 1998) (distinguishing *Riley*; corporate form may be ignored where defendants received bribe money through nondefendant corporation);

- *United States v. BCCI Holdings (Luxembourg) S.A. (petition of ICIC Investments)*; 795 F. Supp. 477, 479 (D.D.C. 1992) (assets of corporation that was alter ego of defendant are subject to forfeiture);

- *United States v. BCCI Holdings (Luxembourg) S.A. (petition of Banco Central Del Uruguay)*, 977 F. Supp. 27 (D.D.C. 1997) (court may disregard corporate form and order the forfeiture of *alter ego's* assets as part of preliminary order of forfeiture based solely on information in the Government's affidavit; but *alter ego* may challenge the forfeiture in the ancillary proceeding);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (procedure for forfeiting assets held by *alter ego* is to have the Government establish that the entity is the defendant's *alter ego* by a preponderance of the evidence and then to allow the *alter ego* to file a claim in the ancillary proceeding);

- *United States v. Taylor*, 2000 WL 715916 (D. Or. 2000) (individual defendant who is corporate president can agree to criminal forfeiture of property nominally held by the corporation, and such property can be forfeited in the criminal case even though the corporation is not a defendant);

- See cases on standing of *alter ego* corporation at page 78,

F. Defendant may forfeit his or her interest in property held by tenants in common or partnership:

- *United States v. Dethlefs*, 934 F. Supp. 475 (D. Me. 1996) (if any part of the property is used to commit an offense, defendant's undivided one-quarter interest as tenant in common is implicated and may be forfeited if defendant is convicted), *aff'd sub nom, United States v. White*, 116 F.3d 948 (1st Cir. 1997);

- *United States v. Johnston*, 13 F. Supp. 2d 1316 (M.D. Fla. 1998) (forfeiture of defendant's 25 percent interest in general partnership results in the Government's obtaining 25 percent interest in partnership assets);

- But see *United States v. Christulas*, 61 F. Supp. 2d 642 (E.D. Mich. 1999) (no part of property held as tenancy by the entireties can be forfeited in a criminal case unless both husband and wife are convicted or consent to the forfeiture);

G. Property transferred after-the-fact to non-bona fide purchasers can be forfeited:

- *United States v. Totaro*, 345 F.3d 989 (8th Cir. 2003) (wife's ability to recover in the ancillary proceeding is limited to the portion of the property she owned before defendant began investing criminal proceeds; nothing the wife acquired as a consequence of defendant's using proceeds to pay off the mortgage or make improvements on the property is exempt from forfeiture);

- *United States v. McCorkle*, 321 F.3d 1292 (11th Cir. 2003) (describing the procedure for obtaining a special verdict under section 853(c) against forfeitable property in the hands of a third party, and allowing the third party to contest the forfeiture in the ancillary proceeding);

- *United States v. Moffitt, Zwerling & Kemler*, 83 F.3d 660 (4th Cir. 1996) (property transferred

to lawyer as attorney's fee);

- *United States v. Saccoccia*, 165 F. Supp. 2d 103 (D.R.I. 2001) (explaining how the relation back doctrine works), *rev'd on other grounds*, 344 F.3d 31 (1st Cir. 2003);

- *See* cases on transfers to third parties at page 55.

- *See* cases on the scope of RICO forfeiture at page 115.

II. Criminal Forfeiture Procedure

A. In general:

- *United States v. Pelullo*, 178 F.3d 196 (3d Cir. 1999) (criminal forfeiture occurs in two steps: (1) the jury determines the:: forfeitability of the property and the district court enters an order of forfeiture; and (2) third parties assert their interests in an ancillary proceeding);

- *United States v. Kirschenbaum*, 156 F.3d 784 (7th Cir. 1998) (incorporation of procedures from section 853 is a shorthand way to avoid having to reiterate procedures in subsequently enacted statutes; the procedures apply as they would in a drug case, but no drug nexus is required; the notion that Congress meant the procedures to apply only in section 982 cases involving drug trafficking is rejected);

B. Forfeiture is part of sentencing:

- *United States v. Descent*, 292 F.3d 703 (11 th Cir. 2002) (because forfeiture is part of sentencing, modifications to amount Government is seeking as money judgment do not constitute constructive amendments to the indictment);

- *United State£ v. Hill*, 177 F.3d 1251 (11 th Cir. 1999) (motion for a new trial must be made within 7 days of guilty verdict; motion made 7 days after special verdict on criminal forfeiture but 8 days after guilty verdict was not timely because forfeiture is part of sentencing and sentencing matters do not affect the 7-day time period under Rule 33)I

- *United States v. Apampa*, 179 F.3d 555 (7th Cir. 1999) (because criminal forfeiture is part of sentencing, the appellate rules governing criminal appeals-not those governing civil appeals-apply to appeals from the forfeiture judgment);

C. Application of Federal Rules of Criminal Procedure:

- *United States v. Posey*, 217 F.3d 282 (5th Cir. 2000) (Government cannot seek forfeiture of firearm under section 3665 without following procedures in Federal Rules of Criminal Procedure);

III. Seizure Warrants-21 U.S..C. § 853(f)

A. Probable cause standard:

- *United States v. Walker*, 943 F. Supp. 1326 (D. Colo. 1996) (facts supporting probable cause must be set forth in the application for the warrant; it is not sufficient to rely on the inclusion of the property in the forfeiture count of an indictment returned by a grand jury);
- *But cf In Re Billman*, 915 F.2d 916, 919 (4th Cir. 1994) (the probable cause found by the grand jury satisfies the Government's probable cause burden for obtaining a restraining order); *accord United States v. Bollin*, 264 F.3d 391, 421 (4th Cir. 2001);
- See probable cause cases in Civil Forfeiture Case Outline.

B. Inadequacy of restraining order:

- *United States v. Walker*, 943 F. Supp. 1326, 1331 (D. Colo. 1996) (granting motion for return of property seized pursuant to section 853(f) on the ground that restraining order under section 853(e) is adequate to preserve six bank accounts and three automobiles for trial);
- *In Re: 2000 White Mercedes ML320*, 220 F. Supp. 2d 13232 (M.D. Fla. 2001) (if property is already in Government custody, order issued under section 853(e) would be adequate to preserve it; application for section 853(f) seizure warrant denied);

C. Seizure warrants used to seize substitute assets:

- *United States v. Schmitz*, 153 F.R.D. 136 (E.D. Wis. 1994) (the Government can seize the same property under section 853(f) that it can restrain under section 853(e); since substitute assets can be restrained, they can be seized);
- *But see United States v. Floyd*, 992 F.2d 498 (5th Cir. 1993) (*dicta*) (because substitute assets are not subject to pretrial restraint, neither are they subject to seizure); *United States v. Miller*, 26 F. Supp. 2d 415 (N.D.N.Y. 1998) (same);

D. How long can the Government hold property seized with section 853(1) warrant?

- *United States v. Numisgroup Intl. Corp.*, 128 F. Supp. 2d 136 (E.D.N.Y. 2000) (property seized with Rule 41 warrant that has no evidentiary value must be returned to defendant unless Government includes property in criminal forfeiture allegation within a reasonable time);

E. Application of 21 U.S.C. § 888(c) to criminal forfeiture:

- *United States v. Schmitz*, 153 F.R.D. 136 (E.D. Wis. 1994) (section 888(c) does not apply to criminal forfeiture);
- *United States v. Patel*, 1996 WL 166949 (N.D. Ill. 1996) (unpublished) (section 888(c) does not apply to criminal forfeiture, and even if it did, the Government could seize vehicle again upon return of the indictment);

F. Effect of illegal seizure:

- *United States v. Rogers*, 102 F.3d 641 (1st Cir. 1996) (illegal seizure does not preclude forfeiture of property based on independent evidence);

G. Seizure of bail money:

- *United States v. Ramos*, 2002 WL 31031639 (D. Mass. 2002) (if Government has probable cause to believe cash offered as bail money is drug proceeds, it may seize it either for forfeiture or as evidence in a criminal case; but better practice would be to request *Nebbia* hearing);

H. Application of *James Daniel Good*:

There is little or no case law on whether the Supreme Court's decision in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) (real property may not be seized without prior notice and hearing) applies to a seizure for criminal forfeiture:

- *But see United States v. 1461 w: 4211d Street*, 251 F.3d 1329 (11th Cir. 2001) (rejecting Government's argument that *Good* does not apply to criminal forfeiture, where the same property was subject to a contemporaneous civil forfeiture action);

1. *Lis pendens*:

- *United States v. Borne*, 2003 WL 22836059 (E.D. La, 2003) (the filing of a *lis pendens* is not a prejudgment seizure);

IV. Pretrial Restraint of Assets

A. Preindictment restraining orders:

- *United States v. Kirschenbaum*, 156 F.3d 784 (7th Cir. 1998) (the Government gets preindictment order *ex parte*; defendant gets hearing on the Government's motion to continue the order for 90 days);

- *In Re: Certain Assets of Allen Petty, Jr.*, 2002 WL 1377707 (E.D. Tex, 2002) (court enters *ex parte* temporary restraining order under section 853(e)(2) and converts it to preliminary injunction under section 853(e)(1)(B) following hearing where Government was required to prove likelihood of success on the merits, etc.);

B. Duration of post-indictment restraining orders:

- *United States v. Kirschenbaum*, 156 F.3d 784 (7th Cir. 1998) (*ex parte* order remains in effect through trial unless the court grants defendant a hearing and agrees to modify the order); *United States v. Jamieson*, 189 F. Supp. 2d 754 (N.D. Ohio 2002) (same);

- *United States v. Gelb*, 826 F.2d 1175, 1176 (2d Cir. 1987) (preindictment restraining order is

akin to a preliminary injunction in that it remains in effect through the duration of the criminal trial);

C. No prerestraint hearing required for post-indictment order:

- *United States v. Monsanto*, 924 F.2d 1186, 1192 (2d Cir. 1991); *United States v. Bissell*, 866 F.2d 1343, 1352 (11th Cir. 1989);

- *United States v. Acord*, 47 F. Supp. 2d 1339 (M.D. Ala. 1999) (post-indictment restraining order may be issued *ex parte* to preserve the Government's interest in movable property, such as an automobile);

- *But see United States v. Kirschenbaum*, 156 F.3d 784, 792 (7th Cir. 1998) (whether prerestraint hearing is required is an open question);

D. Post-restraint hearings: the *Jones-Farmer* rule:

I. The emerging rule is that a post-restraint, pretrial hearing required only if the Sixth Amendment is implicated, and only if the defendant makes a *prima facie* showing that there is no probable cause for the forfeiture of the restrained property:

- *United States v. Jones*, 160 F.3d 641 (10th Cir. 1998) (defendant has initial burden of showing that he has no funds other than the restrained assets to hire private counsel or to pay for living

expenses, and that there is bona fide reason to believe the restraining order should not have been entered);

- *United States v. Jamieson*, 189 F. Supp. 2d 754, 757 (N.D. Ohio 2002) (same, following *Jones*; to satisfy Sixth Amendment requirement, defendant must show he has no access to funds from friends or family; Government has right to rebut showing of lack of funds if hearing is granted);

- *United States v. St. George*, 241 F. Supp. 2d 875 (E.D. Tenn. 2003) (following *Jones* defendant must make threshold showing that she lacks alternative source of funds to retain counsel *and* that there is reason to believe there is no probable cause for the forfeiture of the restrained property; denying hearing to defendant who failed to make second showing);

- *United States v. Ziadeh*, 230 F. Supp. 2d 702 (E.D. Va. 2002) (following *Farmer, infra*; no hearing if defendant has other assets available to pay counsel; that the restrained property was substitute assets makes no difference in the Fourth Circuit);

2. Same rule applies if the property was seized or restrained in a parallel civil forfeiture case:

- *United States v. Michelle's Lounge (Michelle's Lounge I)*, 39 F.3d 684, 693 (7th Cir. 1994) (due process requires a hearing on probable cause in a civil forfeiture case if the Government has seized all of defendant's assets needed to obtain counsel in a parallel criminal prosecution); *United States v. Michelle's Lounge (Michelle's Lounge II)*, 126 F.3d 1006 (7th Cir. 1997) (due

process requires a hearing on the payment of attorney's fees incurred in the civil forfeiture case in pursuit of the release of funds for the criminal case, but not for use in the civil forfeiture case itself) ;

- *United States v. Farmer*, 274 F.3d 800, 804-05 (4th Cir. 2001) (defendant entitled to pretrial hearing if property is seized for civil forfeiture if he demonstrates that he has no other assets available; following *Jones*);

3. Some courts are not clear with respect to whether the Sixth Amendment issue is the *only* basis on which the defendant can demand a hearing:

- *United States v. Kirschenbaum*, 156 F.3d 784, 793 (7th Cir. 1998) (hearing is required when defendant raises Sixth Amendment issue and demonstrates lack of alternative source of funds to hire counsel. but whether post-restraint hearing is required by Fifth Amendment due process when there is no Sixth Amendment issue is an open question in the Seventh Circuit);

- *United States v. Unimex, Inc.*, 991 F.2d 546, 551 (9th Cir. 1993) (post-restraint hearing required "if defendant's motion presents a "substantial claim" that defendant lacks funds with which to hire counsel);

- *United States v. Monsanto*, 924 F.2d 1186, 1195-97 (2d Cir. 1991) (post-restraint hearing required if defendant needs restrained property to hire counsel in the criminal case); *United States v. Maya-Gomez*, 860 F.2d 706, 729 (7th Cir. 1988) (same); *United States v. Thier*, 801 F.2d 1463, 1469 (5th Cir. 1986); *United States v. Crozier*, 777 F.2d 1376, 1383-84 (9th Cir. 1985); *United States v. Harvey*, 814 F.2d 905 (4th Cir. 1987);

4. The Eleventh Circuit does not allow a post-restraint hearing in any event:

- *United States v. Bissell*, 866 F.2d 1343, 1354 (11th Cir. 1989) (no post-restraint hearing required, even if the Sixth Amendment is implicated); *United States v. St. Pierre*, 950 F. Supp. 334 (M.D. Fla. 1996) (following *Bissell*; defendant has ample opportunity to challenge forfeiture at trial); *In Re Protective Order*, 790 F. Supp. 1140 (S.D. Fla. 1992); *but see United States v. Register*, 182 F.3d 820 (11th Cir. 1999) (*dicta*) (noting that the Eleventh Circuit is the only court to hold that no post-restraint hearing is required even if the Sixth Amendment rights are implicated, and suggesting *Bissell* may need to be revisited);

- *Note*: A defendant has no right to use criminal proceeds to post bail.

- 18 U.S.C. § 3142(g)(4) bars the use of criminal proceeds to make bail.

E. *Lis pendens*:

- *Aronson v. City of Akron*, 116 F.3d 804 (6th Cir. 1997) (because *lis pendens* is not a taking, filing */is pendens* without prior notice did not violate defendant's due process rights); *United States v. Sr. Pierre*, 950 F. Supp. 334 (M.D. Fla. 1996) (same);

- *United States v. Register*, 182 F.3d 820 (11 th Cir. 1999) (because filing *lis pendens* does not implicate due process rights, no post-filing hearing required to determine if *lis pendens* should be removed); *United States v. Borne*, 2003 Wi 22836059 (E.D. La. 2003) (same);

- *United States v. Miller*, 26 F. Supp. 2d 415 (N.D.N.Y. 1998) (*lis pendens* is not a restraint; therefore, the Government may file *lis pendens* on substitute assets);

- *United States v. Hyde*, 287 F. Supp. 2d 1095 (N.D. Cal. 2003) (assuming without deciding that a *lis pendens* can be filed on a substitute asset), citing *United States v. Field*, 867 F. Supp. 869,873 (O. Minn. 1994);

F. Restraint of foreign assets:

1. Restraining order may include order to repatriate property:

- 21 U.S.C. § 853(e)(4) specifically authorizes the court to include a repatriation order in a pretrial restraining order:

- *United States v. Poyiadjis*, 2002 WL 1941481 (S.D.N.Y. 2002) (noting that pretrial order contains repatriation provision);

- *United States v. Sellers*, 848 F. Supp. 73, 77 (E.D. La. 1994) (no Fifth Amendment violation if the Government does not use evidence of the repatriation in its case in chief);

2. Challenges to restraint in foreign court:

- *United States v. Poyiadjis*, 2002 WL 1941481 (S.D.N.Y. 2002) (noting that defendants were seeking release of restrained funds for attorney's fees in both foreign court and in the United States, and withholding ruling until foreign court rules first);

- *Cf.* 21 U.S.C. § 2467(d)(3) bars third party from contesting restraining order issued by U.S. court on behalf of foreign Government on the merits; such challenges must be brought where the underlying forfeiture action is pending.

G. Posting bond in lieu of restrained property:

- *United States v. Lugo*, 63 F. Supp. 2d 896, 897 n.2 (N.D. m. 1999) (if a restraining order is entered, the Government may accept a cash bond in lieu of the restrained property and agree to release the restrained property to the defendant pending trial);

H. Federal court may restrain or remove state court proceeding:

1. Mortgage foreclosure:

- *Bank One NA. v. Everly*, 2002 WL 31056716 (N.D. Ill. 2002) (instead of enjoining state mortgage foreclosure, Government removes state action to federal court, and moves to dismiss it

as barred by section 853(k));

- *United States v. Schoenauer*, 237 F. Supp. 2d 1094 (S.D. Iowa 2002) (mortgage foreclosure removed to federal court, but court refuses to enjoin it, or to order lender to foreclose on other properties first, because tender' 5 lien predated event giving rise to the forfeiture and so is not forfeitable to the United States; section 853(n)(6)(A);

2. Other civil actions:

- *United States v. Paccione*, 992 F. Supp. 335 (S.D.N.Y. 1998) (court enjoins defendant from pursuing state civil action designed to obtain legal interest in property derived from company subject to federal forfeiture order; state case removed to federal court under the An Writs Act);

I. Probable cause for restraint:

- *United States v. Sellers*~ 848 F. Supp. 73 (B.D. La. 1994) (*Banco Cafetero* applies to section 982 forfeiture; the Government may rely on "first in, last out" rule to establish that laundered proceeds are within subject bank account);

J. Issuance of restraining order is appealable under 28 U.S.C. § 1292:

- *United States v. Floyd*, 992 F.2d 498 (5th Cir. 1993); *In Re Assets of Martin*, 1 F.3d 1351 (3d Cir. 1993); *United States v. Kirschenbaum*, 156 F.3d 784 (7th Cir. 1998) (collecting cases);

K. Restraining assets of third parties:

The prevailing view is that property held by third parties may be restrained to preserve the Government's interest:

- *United States v. Real Property in Waterboro*, 64 F.3d 752 (1 st Cir. 1995) (court restrains real property held in name of defendant's brother-in-law who the Government alleges is a straw owner);

- *United States v. Kirschenbaum*, 156 F.3d 784 (7th Cir. 1998) (court restrains property held in name of defendant's wife after finding defendant was the true owner);

- *United States v. Jenkins*, 974 F.2d 32 (5th Cir. 1992); *In Re Billman*~ 915 F.2d 916 (4th Cir. 1990); *United States v. Regan*, 858 F.2d 115 (2d Cir. 1988);

- *In Re: Certain Assets of Allen Petty, Jr.*, 2002 WL 1377707 (E.D. Tex. 2002) (property held by corporation subject to preindictment restraint);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Application of Clifford and Altman)*, 980 F. Supp. 496 (D.D.C. 1997) (pursuant to section I 963(e), court may appoint trustee to liquidate assets of corporation where such liquidation is necessary for the Government to realize defendant's 61 percent interest); *United States v. BCCI Holdings (Luxembourg) S.A. (Final*

Order of Forfeiture and Disbursement), 69 F. Supp. 2d 36 (D.D.C. 1999) (same);

- *Id.* (court may order non-forfeitable portion of restrained property held in escrow to preserve status quo until competing third-party claims are resolved in a separate case);

- *United States V. Brandino*, No. 95-626-CR-RYSK.AMP (S.D. Fla. June 27, 1997) (unpublished) (court may authorize the Government to take control of non defendant corporation and manage its business, or permit third parties to run the business under the supervision of a court-appointed conservator; proceeds of restrained business remain in escrow pending the ancillary proceeding);

I But some courts decline to restrain property held by third parties or to make restraining orders apply to third parties:

- *United States v. Kirschenbaum*, 156 F.3d 784 (7th Cir. 1998) (restraining orders are directed at people, not property; defendant may be enjoined from taking action with respect to property subject to forfeiture, but such order applies only to defendant and his agents; order seeking to enjoin defendant's wife is void, but person who knowingly aids defendant in violating restraining order may be held in contempt);

- *United States V. Lugo*. 63 F. Supp. 2d 896, 897 n.2 (N.D. m. 1999) (*following Kirschenbaum*; court can restrain defendant, his agents and employees, and others acting in concert, but cannot restrain family members or other third parties);

- *United States v. Riley*, 78 F.3d 367 (8th Cir. 1996) (court may *not* appoint receiver to operate corporation where only the defendant's interest in the corporation, not corporation itself, is subject to forfeiture);

- *See* cases on post-conviction appointment of trustee to preserve corporate assets of third party corporation at page 106.

- If court declines to restrain property of third party corporation, Government may supersede the indictment to name the corporation as a defendant:

- *United States v. Najjar*, 300 F.3d 466 (4th Cir. 2002) (rejecting claim of prosecutorial vindictiveness when Government superseded indictment to name corporation as defendant after corporation objected to the pretrial restraint of its assets);

L. Third party entitled to hearing on restraint of property:

- *Roberts v'. United States*, 141 F.3d 1468 (11 th Cir. 1998)(if third party's property is restrained pretrial. and defendant is a fugitive, third party's remedy is to ask the court that issued the order to amend it and file an interlocutory appeal if unsuccessful);

- *United States V. Real Property in Waterboro*, 64 F.3d 752, 756 (1st Cir. 1995) (third party may participate in the restraining order proceeding);

- *United States v. Paris-Lopez*, 111 F. Supp. 2d 100 (D.P.R. 2000) (third party with a facially valid claim should not have to wait until the ancillary proceeding to assert his claim if the funds are restrained pretrial and it appears unlikely the Government will be able to bring the defendant to justice in a reasonable time; restrained property released pending ancillary hearing);

- *United States v. Wu*, 814 F. Supp. 491, 495 (E.D. Va. 1993) (discussing legislative history and fairness of allowing third party to contest restraining order);

- *United States v. Scardino*, 956 F. Supp. 774 (N.D. m. 1997) (third party entitled to challenge filing of pretrial *lis pendens* on property held in her name);

- *United States v. Siegal*, 974 F. Supp. 55 (D. Mass. 1997) (defendant's family members entitled to timely hearing on restraining order where criminal trial would not commence for another 6 months);

- *But see United States v. O'Brien*, 836 F. Supp. 438 (S.D. Ohio 1993) (third parties barred from opposing pretrial restraint by 21 U.S.C. § 853(k));

- *United States v. Farley*, 919 F. Supp. 276 (S.D. Ohio 1996) (third party who claims in the ancillary proceeding that the Government did not comply with the procedural requirements of sections 853(e) and (t) pretrial is not entitled to any relief; those statutes do not create substantive rights in favor of third parties such that the Government's omission requires it to give property to third parties);

- *Aronson v. City of Akron*, 116 F.3d 804 (6th Cir. 1997) (third party has no reason to object to *lis pendens* because it applies only to the defendant's interest in the property);

M. Filing *lis pendens* on property in which third party has an interest:

- *Aronson v. City of Akron*, 116 F.3d 804 (6th Cir. 1997) (because criminal forfeiture is *in personam*, a *lis pendens* implicates only the defendant's interest in the real property subject to forfeiture);

- *United States v. Hyde*, 287 F. Supp. 2d 1095 (N.D. Cal. 2003) (third parties asserting interest in property named as substitute asset pretrial do not object to *lis pendens*, but are granted permission to have the Government shift the *lis pendens* to a different asset of greater or equal value);

N. Espousal privilege:

- *United States v. Sririam*, 2001 WL 59055 (N.D. Ill. 2001) (the Espousal privilege is unavailable in ordinary civil actions but is available when the Government uses a section 1345 injunction to restrain property subject to forfeiture in a parallel criminal case);

O. Pretrial restraint of substitute assets:

- Cases holding restraint permitted:

- *In Re Billman*, 915 F.2d 916 (4th Cir. 1990); *United States v. Bollin*, 264 F.3d 391, 421 (4th Cir. 2001); *United States v. Ziadeh*, 230 F. Supp. 2d 702 (E.D. Va. 2002); *United States v. Swank Corp.*, 797 F. Supp. 497 (E.D. Va. 1992); *United States v. Helms*, 2001 WL 1057751 (W.D. Va. 2001); *but see United States v. Najjar*, 57 F. Supp. 2d 205 (O. Md. 1999) (*Billman* makes pretrial restraint of substitute; assets permissive, not mandatory; court should not restrain untainted assets where there is no evidence defendant is trying to evade forfeiture and defendant needs the money for attorney's fees);

- *United States v. Scardino*, 956 F. Supp. 774 (N.D. Ill. 1997) (holding that reference to "subsection (a)" property in section 853(c) applies to substitute assets, and stating, in *dicta*, that the same would apply to pretrial restraint under section 853(e));

- *United States v. O'Brien*, 836 F. Supp. 438 (S.D. Ohio 1993) (Government entitled to pretrial order restraining substitute assets);

- *United States v. Infelise*, 938 F. Supp. 1352 (N.D. Ill. 1996) (whether pretrial restraint of substitute assets was proper is moot once defendant is convicted; improper restraint would not be grounds for relief in ancillary proceeding);

- Cases holding restraint *not* permitted:

- *United States v. Gotti*, 155 F.3d 144 (2d Cir. 1998); *United States v. Floyd*, 992 F.2d 498 (5th Cir. 1993); *In Re Assets of Martin*, 1 F.3d 1351 (3d Cir. 1993); *United States v. Ripinsky*, 20 F.3d 359 (9th Cir. 1994); *United States v. Field*, 62 F.3d 246 (8th Cir. 1995);

- *United States v. Ford*, 64 Fed. Appx. 976, 2003 WL 21212547 (6th Cir. 2003) (following *Field*, *Floyd*, and *Ripinsky*; even though Government had probable cause to believe money was proceeds of criminal offense, jury's subsequent finding that the property was not traceable meant that it could only be forfeited as a substitute asset, and that the pretrial seizure was therefore unlawful);

- *In Re: Account Nos... Located at Bank One*, 9 F. Supp. 2d 1015 (E.D. Wis. 1998) (pre indictment restraint of substitute assets not permitted);

- If property is directly forfeitable, there is no need to apply the rule against pretrial restraint of substitute assets :

- *United States v. Stewart*, 185 F.3d 112 (3d Cir. 1999) (no need to reach defendant's argument that pretrial restraint deprived him of his right to counsel because the restrained money was directly forfeitable as laundered fi-aud proceeds);

- *United States v. Sellers*, 848 F. Supp. 73 (E.D. La. 1994) (restraint of facilitating property in money laundering case is permitted; facilitating property distinguished from substitute assets);

- Government and defendant can always agree that substitute assets may be restrained:

- *United States v. Pantelidis*, 335 F.3d 226 (3d Cir. 2003) (defendant can agree to pretrial restraint of his substitute assets as consideration for Government's promise not to include money laundering charges in the indictment);

P. Procedure at hearing on restraining order:

1. Courts differ regarding the application of Rule 65:

- Most courts hold that the probable cause standard governs the hearing:

- *United States v. Monsanto*, 491 U.S. 600, 615-16 (1989) (standard for issuance of restraining order is probable cause);

- *United States v. Farmer*, 274 F.3d 800 (4th Cir. 2001) (the only issues in the pretrial hearing are whether defendant lacks any other assets to hire counsel, and if so, whether there is probable cause to believe the restrained assets are subject to forfeiture);

- *United States v. Jones*, 160 F.3d 641, 647 (10th Cir. 1998) (once the defendant has made a *prima facie* showing of a bona fide reason to believe the restraining order should not have been entered, the Government must establish probable cause to believe that the restrained assets are subject to forfeiture);

- *United States v. Jamieson*, 189 F. Supp. 2d 754, 756 (N.D. Ohio 2002) (Rule 65 does not apply to post-indictment restraining orders);

- Before the Supreme Court decided *Monsanto*, some courts applied Rule 65, Fed. R. Civ. P., standards:

- *United States v. Crozier*, 777 F.2d 1376, 1384 (9th Cir. 1985) (Rule 65 governs hearing on pretrial restraining orders); *United States v. Thier*, 801 F.2d 1463, 1468 (5th Cir. 1986) (same);

- *But see United States v. Unimex, Inc.*, 991 F.2d 546, 551 (9th Cir. 1993) (implicitly overruling *Crozier*; hearing required only if defendant presents substantial claim);

Q. Burden of proof:

- Most courts put the burden on the Government to establish probable cause:

- *United States v. Jones*, 160 F.3d 641, 647 (10th Cir. 1998) (the Government has ultimate burden of establishing probable cause on forfeitability issue in pretrial hearing, but only after defendant makes *prima facie* showing that he has bona fide reason to believe the property is *not* traceable to the offense);

- *United States v. Bollin*, 264 F.3d 391, 421 (4th Cir. 2001) (to sustain a pretrial restraining order, the Government's burden is to establish probable cause to believe that the property is subject to forfeiture);

- *But see United States v. Farmer*, 274 F.3d 800 (4th Cir. 2001) (defendant who challenges pretrial restraint of forfeitable property has burden of establishing first that he has no other assets available to hire counsel, and second that the Government lacks probable cause for restraint of the property);

1. Reliance on grand jury's finding of probable cause:

Legislative history:

"For the purposes of issuing a restraining order, the probable cause established in the indictment or information is to be determinative of any issue regarding the merits of the [G]overnment's case on which the forfeiture is to be based." S. Rep. No. 225, 98th Cong., 2d Sess. 203 (1984), *reprinted in* 1984 U.S.. Code Congo & Admin. News 3182, 3386.

- The Fourth Circuit permits reliance on the grand jury's probable cause finding with respect to all aspects of the indictment:

- *United States v. Bollin*, 264 F.3d 391,421 (4th Cir. 2001) (the grand jury's finding of probable cause is sufficient to satisfy the Government's burden); *In Re Billman.*, 915 F.2d 916,919 (4th Cir. 1990) (same);

- Other courts permit reliance on the grand jury's finding only as to probable cause for the underlying criminal offense:

- *United States v. Jones*, 160 F.3d 641 (10th Cir. 1998) (defendant may challenge grand jury's finding of probable cause to believe the restrained property is traceable to the offense, but he may not challenge the grand jury's finding of probable cause regarding the underlying crime); *United States v. Jamieson*, 189 F. Supp. 2d 754 (N.D. Ohio 2002) (same);

- *United States v. Riley*, 78 F.3d 367 (8th Cir. 1996) (restraining order vacated where forfeitability of property not demonstrated);

- *United States V. Moya-Gomez*, 860 F.2d 706, 729 (7th Cir, 1988) (court limits inquiry to forfeiture issues; court does not look behind grand jury's finding with respect to the underlying crime);

- *United States v. Sf, Pierre*, 950 F. Supp. 334 (M.D. Fla. 1996) (defendant is not permitted to challenge grand jury's finding of probable cause as to the underlying crime; declining to follow Second Circuit's decision in *Monsanto*);

- *United States v. Lugo*, 63 F. Supp. 2d 896, 897 n.2 (N.D. Ill. 1999) (in facilitating property case, defendant can challenge restraining order on the ground that the Government restrained the

wrong vehicles, but cannot argue that the underlying crime did not occur or that no vehicles were involved in that crime);

- The Second Circuit allows the defendant to challenge the probable cause on all grounds:

- *United States v. Monsanto*, 924 F.2d 1186, 1195-97 (2d Cir. 1991) (court required to review probable cause to believe defendant had committed the underlying crime);

2 . Evidence:

- *United States v. Jamieson*, 189 F. Supp. 2d 754 (N.D. Ohio 2002) (Federal Rules of Evidence do not apply at hearing challenging restraining order);

R. Scope of third party challenges to restraining orders:

- *Roberts v. United State.*, 141 F.3d 1468 (11th Cir. 1998) (third party seeking relief from restraining order may not ask the court to entertain challenges to the underlying indictment);

- *United States v. Real Property in Waterboro*, 64 F.3d 752, 756 (1st Cir. 1995) (third party may not challenge the validity of the indictment or raise ownership issues; superior ownership claims must await the ancillary proceeding, but claimant may raise "prudential arguments concerning the burdens of restraint" pretrial);

- *United States v. Kirschenbaum*, 156 F.3d 784 (7th Cir. 1998) (whether third party has due process right to challenge pretrial restraining order on grounds of ownership is an open question);

- *United States v. Siegal*, 974 F. Supp. 55 (D. Mass. 1997) (third parties can assert superior ownership and lack of nexus between property and the offense, but they cannot challenge the validity of the indictment; no requirement that third party alleges immediate and irreparable injury from restraining order; where property was commingled with defendant's property and nexus and ownership issues are unclear, third party has to wait for ancillary proceeding);

S. Violation of restraining order:

- *United States v. Saccoccia*, 165 F. Supp. 2d 103 (D.R.I. 2001) (persons who violate pretrial restraining order may be punished for contempt. but violation does not bar third party transferee & on: asserting bona fide purchaser defense), *rev'd on other grounds*, 344 F.3d 31 (1st Cir. 2003);

T. Interlocutory sale::

- *United States v. Hyde*, 287 F. Supp. 2d 1095 (N.D. Cal. 2003) (court permits interlocutory sale of asset named as substitute asset in indictment with proviso that proceeds of the sale would be invested in a new asset of greater or equal value that would remain subject to forfeiture as a substitute asset);

v. Retention of Property Seized With Civil Process

- 18 U.S.C. § 983(a)(3)(B) provides that if the Government elects to pursue criminal forfeiture and not civil forfeiture after seizing property with civil process, it must "take the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute."
- *In Re: 2000 White Mercedes ML320*, 220 F. Supp. 2d 1322, 1326 n. 5 (M.D. Fla. 2001) (if property is already in Government custody, no section 853(t) seizure warrant can be issued, as an order under section 853(e) would be sufficient to preserve the property; a section 853(e) order need not be an injunction or restraining order, but can be any order that will "assure the availability of the property"), *aff'g* 174 F. Supp. 2d 1268 (M.D. Fla. 2001);
- *But see United States v. Schmitz*, 153 F.R.D. 136 (E.D. Wis. 1994) (pre-CAFRA case; once the Government filed criminal forfeiture action, it no longer had authority to retain property seized under section 881 unless it obtained a restraining order under section 853(e) or a seizure warrant under section 853(f); property ordered returned);

VI. Indictment

A. Rule 32.2(a) is a notice provision; the property subject to forfeiture need not be itemized:

1. Cases decided after Rule 32.2 took effect on December 1, 2000:

- *United States v. Iacaboni*, 22] F. Supp. 2d 104 (D. Mass. 2002) (Rule 32.2(a) makes clear that itemized list of property need not appear in the indictment; tracking language of section 982(a)(1) was sufficient);
- *United States v. Lino*, 2001 WL 8356 (S.D.N.Y. 2001) (under Rule 32.2(a), Government need not detail property subject to forfeiture in the indictment; to the extent that a bill of particulars is required, Government's agreement to provide particulars 60 days before trial is sufficient);
- *United State£ v. Davis*, 177 F. Supp. 2d 470 (E.D. Va. 2001) (approving Government's naming automobile as subject to forfeiture in a bill of particulars where indictment used general language tracking the forfeiture statute);

2. Cases decided under old Rule 7(c)(2):

- *United States v. Diaz*, 190 F.3d 1247 (11th Cir. 1999) (the Government complies with Rule 7(c)(2) and due process if the indictment tracks language of the forfeiture statute and the Government informs defendant of its intent to forfeit specific asset after the guilty verdict and before the forfeiture phase of the trial begins);
- *United States v. DeFries*, 129 F.3d 1293 (D.C. Cir. 1997) (not necessary to specify in either the indictment or a bill of particulars that the Government sought forfeiture of defendant's salary; to comply with Rule 7(c), the Government need only put defendant on notice that it would seek to

forfeit everything subject to forfeiture under the applicable statute, such as all property "acquire or maintained" as a result of a RICO violation);

- *United States v. Amend*, 791 F.2d 1120, 1125 (4th Cir. 1986) ("the essential purpose of [Rule 7(c)(2)] is to provide persons with adequate notice of the extent to which forfeiture is sought");

- *United States v. Grammatikos*, 633 F.2d 1013, 1024 (2d Cir. 1980) ("The plain language of Rule 7(c)(2) requires only that the extent of the interest or property subject to forfeiture be alleged...its principle objective is to provide persons facing such charges with notice that forfeiture will be sought.")

- *United States v. Moffitt, Zwerling & Kemler*, 83 F.3d 660 (4th Cir. 1996), *aff'g* 846 F. Supp. 46~ (E.D. Va. 1994) (*Moffitt I*) (indictment need not list each asset subject to forfeiture; under Rule 7(c), this can be done with bill of particulars);

- *United States v. Vasquez-Ruiz*, 136 F. Supp. 2d 941 (N.D. Ill. 2001) (Rule 7(c)(2) does not require list of specific items subject to forfeiture in the indictment, but Government must provide bill of particulars listing all property, including substitute assets, subject to forfeiture 30 days before trial);

- *United States v. Benjamin*, 72 F. Supp. 2d 161 (W.D.N.Y. 1999) (forfeiture allegation that trade section 853(a)(1) is sufficient);

- *United States v. Decay*, 2002 WL 1767423 (E.D. La, 2002) (forfeiture allegation that tracks section 853(a), combined v.l.th bill of particulars naming vehicle and specific amount of cash, gave defendant adequate notice of the forfeiture);

- *United States v. Cleveland*, 1997 WL 537707 (E.D. La. 1997) (property that the Government intends to forfeit as proceeds need not be explicitly listed in the indictment);

- *But see United States v. Gilbert*, 244 F.3d 888,923 n.76 (11th Cir. 2001) (court could not order forfeiture of defendant's interest in partnership that owned particular asset because only the asset itself, and not the partnership, was listed in the indictment pursuant to Rule 7(c)(2);

B. Specifying amount of money judgment:

- *United States v. Descent*, 292 F.3d 703 (11th Cir. 2002) (because forfeiture is part of sentencing, modification of amount Government is seeking as money judgment is not an improper amendment to the indictment);

- *United States v. Navarro-Ordas*, 770 F.2d 959,969 n.19 (11th Cir. 1985) (Rule 7(c)(2) does not require notice to defendant that he will be subject to a money judgment);

C. Extent of defendant's interest need not be specified:

- *United States v. Loe*. 248 F.3d 449 (5th Cir. 2001) (indictment that named the real property that

was subject to forfeiture was sufficient; not necessary for Government to allege that defendant held only 52,6 percent interest in the property, as was later established at trial);

- *United States v. Frye*, 202 F.2d 270, 2000 WL 32029 (6th Cir. 2000) (Table) (requirement that indictment allege extent of defendant's interest is satisfied if indictment says that the Government will forfeit an of his interest);

- *United States v. Bainbridge Management, Inc.*, 2002 WL 538777 (N.D. Ill. 2002) (Government was not required to present grand jury with evidence of defendant's ownership of the property; indictment only gives defendant notice that whatever interest he may have will be forfeited);

- *United States v. Fisk*, 255 F. Supp. 2d 694 (E.D. Mich. 2003) (indictment need not allege that defendant has an interest in the property to be forfeited);

D. Substitute assets need not be listed in the indictment:

- *United States v. Hatcher*, 323 F.3d 666 (8th Cir. 2003) (generally, a defendant must have notice of what property the Government seeks to forfeit so that he can challenge the existence of any nexus between the property and the offense; but as there is no such defense to the forfeiture of substitute assets, there is no need for prior notice of what assets will be forfeited as substitute property);

- *United States v. Bollin*, 264 F.3d 391, 422 n.21 (4th Cir. 2001) (substitute assets need not be listed in the indictment);

- *United States v. Infelise*, 938 F. Supp. 1352 (N.D. Ill. 1996) (Rule 7(c)(2) does not require listing of property to be forfeited as substitute assets; sufficient for the Government to allege it sought to forfeit \$3.7 million in proceeds);

- *United States v. Bellomo*, 954 F. Supp. 630 (S.D.N.Y. 1997) (substitute assets allegation in the indictment, plus bill of particulars, give defendant adequate notice);

E, Motion to dismiss:

- *United States v. Hilliard*, 818 F. Supp. 309, 315 (D. Colo. 1993) (forfeiture count not subject to dismissal on ground that subject property is jointly owned by innocent spouse);

- *United States v. Rupley*, 706 F. Supp. 751, 754 (D. Nev. 1989) (indictment that makes defendant aware that all property arising from drug trafficking is subject to forfeiture is sufficient to allow defendant to formulate his defense); *United States v. Best*, 657 F. Supp. 1179 (N.D. m. 1987) (same regarding mail fraud and racketeering);

- *United States v. Randell*, 1985 Wi 481 at *6 (S.D.N.Y. 1985) (indictment that seeks all money involved in the offense "plainly satisfies Rule 7(c)(2)");

- *United States v. Di Gilio*, 667 F. Supp. 191, 198 (D.N.J. 1987) (the Government must establish its forfeiture allegations at trial; indictment that alleges that defendants received financial benefits from a RICO enterprise, and that those benefits are subject to forfeiture, is sufficient to withstand a motion to dismiss);

- *United States v. Dote*, 150 F. Supp. 2d 935 (N.D. Ill. 2001) (the amount of money subject to forfeiture is a matter for the Government to prove and the jury to determine at trial-not an issue the court can resolve on a motion to dismiss the forfeiture allegation in the indictment);

- *United States v. Sudeen*, 2002 WL 1897095 (E.D. La. 2002) (motion to dismiss forfeiture allegation on *ex post facto* grounds is premature; court "Ill. consider objection only after there is a conviction");

- *But see United States v. Grass*, 2003 WL 21715878 (M.D. Pa. 2003) (criminal forfeiture allegation that fails to allege grounds on which forfeiture can be ordered, even if the defendant is convicted, is subject to a pretrial motion to dismiss; forfeiture count dismissed because Government did not allege financial institution was affected, as required by section 982(a)(2)(A));

F. Vindictiveness:

- *United States v. Arlt*, 15 Fed. Appx. 431, 2001 WL 727315 (9th Cir. 2001) (adding criminal forfeiture allegation to superseding indictment after parallel civil forfeiture judgment vacated on procedural grounds not a "vindictive prosecution");

- *United States v. Najjar*, 300 F.3d 466 (4th Cir. 2002) (rejecting claim of prosecutorial vindictiveness when Government superseded indictment to name corporation as defendant after corporation objected to the pretrial restraint of its assets);

- *United States v. King*, 1996 WL 254647 (D. Kan. 1996) (adding money laundering and criminal forfeiture to a superseding indictment to avoid double jeopardy after plea negotiations fail is reasonable, not vindictive);

- *United States v. Patel*, 1996 WL 166949 (N.D. Ill. 1996) (unpublished) (there is no presumption of vindictiveness when the Government supersedes indictment to include criminal forfeiture once plea negotiations fail);

G. Joinder and severance:

- *United States v. Lynch*, 198 F. Supp. 2d 827 (N.D. Tex. 2001) (denying Rule 14 motion to sever forfeiture "counts" from underlying substantive counts);

VII. Bifurcated Proceeding

A. Under Rule 32.2(b), the criminal trial must be bifurcated into guilt and forfeiture phases:

- See Rule 32.2(b)(1) (forfeiture proceeding takes place "as soon as practicable" after court enters guilty verdict);

- . Because a criminal forfeiture allegation is not a substantive offense, *Libretti v. United States*, *infra*, it is not subject to a Rule 29 motion for judgment of acquittal at the close of the evidence.

- *But see United States v. Barajas*, 200 F. Supp. 2d 575 (E.D.N.C. 2002) (court grants Rule 29 motion on the forfeiture "count" at close of the evidence; no discussion of Rule 32.2);

B. Before Rule 32.2 took effect, courts were divided as to whether bifurcation was required:

- *United States v. Garcia-Guizar*, 160 F.3d 511 (9th Cir. 1998) (if the court's instructions to the jury on the different standards of proof are adequate to ensure that the jury does not mistakenly apply the lower standard when determining defendant's guilt, a bifurcated trial is not necessary);

- *But see United States v. Cantu*, 167 F.3d 198 (5th Cir. 1999) (noting that the proceeding must be bifurcated in the Fifth Circuit);

- *United States v. Hill*, 167 F.3d 1055 (6th Cir. 1999) (noting that the trial was bifurcated);
United States v. Walters, 89 F. Supp. 2d 1206 (D. Kan. 2000) (same);

- Bifurcation protects defendant's Fifth Amendment rights:

- *United States v. Ruedlinger*, 1997 WL 161960 (D. Kan. 1997) (if defendant wants to testify on forfeiture issues but take the Fifth Amendment regarding his guilt or innocence, and makes timely motion to bifurcate, the motion should be granted);

- If the trial is not bifurcated, care must be given to avoid having the forfeiture allegation prejudice the Jury:

- *United States v. Ramos-Torres*, 187 F.3d 909 (8th Cir. 1999) (court committed reversible error when it inadvertently gave the jury a written jury instruction that began, "Members of the jury, you have reached a verdict that [defendant] is guilty of the distribution of cocaine as charged in the superseding indictment "because it created the impression that the judge thought defendant's guilt was a foregone conclusion);

VIII. Burden of Proof / Jury Instructions

- Criminal forfeiture is part of the sentence; it is not a substantive element of the offense:

- *Libretti v. United States*, 516 U.S. 29 (1995);

A. *Post-Libretti* cases:

- *United States v. Dieter*, 198 F.3d 1284, 1289 (11th Cir. 1999) (because forfeiture is part of

sentencing, preponderance standard applies to all section 853(a) forfeitures);

- *United States v. Garcia-Guizar*, 160 F.3d 511,518 (9th Cir. 1998) (preponderance standard is constitutional because criminal forfeiture is not a separate offense, but only an additional penalty for an offense that was established beyond a reasonable doubt);

- *United States v. DeFries*, 129 F.3d 1293, 1312 (D.C. Cir. 1997) (in light of *Libretti*, burden of proof in RICO case is preponderance of the evidence);

- *United States v. Patel*, 131 F.3d 1195, 1200 (7th Cir. 1997) (burden of proof in section 853 cases is preponderance of the evidence because criminal forfeiture is part of the sentence under *Libretti*; *United States v. Rogers*, 101 F.3d 641,648 (1st Cir. 1996) (same);

- *United States v. Bellomo*, 176 F.3d 580, 595 (2d Cir. 1999) (following *DeFries*, *Patel*, and *Rogers*; because forfeiture is part of sentencing, and fact-finding at sentencing is established by a preponderance of the evidence, the preponderance standard applies to criminal forfeiture); *United States v. Gaskin*, 2002 WL 459005 (W.D.N.Y. 2002) (following *Bellomo*);

- *United States v. Erhart*, 2002 WL 398835 (D. Minn. 2002) (applying preponderance standard in finding requisite nexus under 18 U.S.C. § 982(a)(7));

- *United States v. Cianci*, 218 F. Supp. 2d 232 (D.R.I. 2002) (whether defendant committed a RICO offense must be determined by a jury using the reasonable doubt standard; determining what property is forfeitable because of that offense is for the court to decide by preponderance of the evidence);

- *United States v. Coleman Commercial Carrier, Inc.*, 232 F. Supp. 2d 1201 (S.D.N.Y. 2002) (court determines the amount of the money judgment by preponderance of the evidence);

- *But see United States v. Voigt*, 89 F.3d 1050, 1083 (3d Cir. 1996) (*post-Libretti* case not citing *Libretti* and reaffirming reasonable doubt standard for RICO forfeiture because scope of forfeiture is greater under RICO than under section 982);

3. *Pre-Libretti* cases discussing standard of proof:

1. Section 982 forfeitures:

- *United States v. Hasson*, 333 F.3d 1264 (11th Cir. 2003) (preponderance standard applies to criminal forfeiture for money laundering; extending *Elgersma* and *Dicter* to forfeiture under section 982(a)(1) »;

- *United States v. Myers*, 21 F.3d 826, 829 (8th Cir. 1994) (criminal forfeiture is part of the sentence);

- *United States v. Voigt*, 89 F.3d 1050, 1083 (3d Cir. 1996) (following *Myers*; *post-Libretti*, but *Libretti* not cited); *United States v. Rutgard*, 108 F.3d 1041, 1063 (9th Cir. 1997) (same);

- *United States v. Cherry*, 330 F.3d 658 (4th Cir. 2003) (following *Myers* and *Voigt*; preponderance standard applies to all section 982 forfeitures);

- *See United States v. Saccoccia*, 823 F. Supp. 994 (D.R.I. 1993) (the Government concedes reasonable doubt standard applies, but court collects cases and notes that the law is ambiguous with respect to the burden of proof for both RICO and section 982 forfeitures), *aff'd*, 58 F.3d 754 (1st Cir. 1995)~

2. Section 853 forfeitures:

- *United States v. Smith*, 966 F.2d 1045, 1050-53 (6th Cir. 1992) (forfeiture is part of sentencing, which is governed by the preponderance standard; same standard applies to forfeiture of proceeds and facilitating property); *United States v. Bieri*, 21 F.3d 819 (8th Cir. 1994) (same); *United States v. Layne*, 192 F.3d 556, 575 (6th Cir. 1999) (reaffirming *Smith*);

- *United States v. Elgersma*, 971 F.2d 690, 697 (11th Cir. 1992) (*en banc*) (due process does not bar Congress from permitting sentencing issues to be resolved by the preponderance standard; because forfeiture is part of sentencing, a preponderance standard is unobjectionable if that is what Congress intended; Congress intended to apply the preponderance standard to the forfeiture of *proceeds* under section 853(a)(1), but judgment reserved as to whether the same rule would apply to other forfeitures under other statutes); *United States v. Dicter*, 198 F.3d 1284, 1289 (11th Cir. 1999) (preponderance standard applies to section 853(a)(2) and (3) forfeitures);

- *United States v. Ben-Hurl* 20 F.3d 313,317 (7th Cir. 1994) (the Government must establish by a preponderance of the evidence that the defendant, as a matter of state law, held an ownership interest in the property at the time the offense was committed);

- *See also United States v. Tanner*, 61 F.3d 231, 234-35 (4th Cir. 1995); *United States v. Herrero*, 893 F.2d 1512, 1541-42 (7th Cir. 1990); *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1576-77 (9th Cir. 1989); *United States v. Sandini*, 816 F.2d 869, 875-76 (3d Cir. 1987);

3. RICO forfeitures:

- *United States v. DeFries*, 129 F.3d 1293 (D.C. Cir. 1997) (preponderance standard applies in RICO cases);

- *But see United States v. Pelullo*, 14 F.3d 881 (3d Cir. 1994), reaffirmed by *United States v. Voigt, supra* (reasonable doubt standard applies to RICO, but not to any other criminal forfeiture);

- *United States v. Saccoccia*, 165 F. Supp. 2d 103 (D.R.I. 2001) (noting split in the circuits on burden of proof in RICO cases, and declining to decide issue), *rev'd on other grounds*, 344 F.3d 31 (1st Cir. 2003);

C. Application of *Apprendi v. New Jersey*, 530 U.S. 466 (2000):

- *United States v. Keene*, 341 F.3d 78 (1st Cir. 2003) ("forfeiture is not viewed as a separate charge, but as an aspect of punishment imposed following conviction of a substantive offense"; therefore, notwithstanding *Apprendi*, the preponderance standard applies);
- *United States v. Vera*, 278 F.3d 672 (7th Cir. 2002) (like restitution, forfeiture has no statutory maximum; it is open-ended; thus a forfeiture of property described by a criminal forfeiture statute can never exceed the statutory maximum in a way that makes *Apprendi* applicable; the preponderance of the evidence standard still applies);
- *United States v. Corrado*, 227 F.3d 543 (6th Cir. 2000) (*Corrado I*) (*Apprendi* does not apply to criminal forfeiture; under *Libretti*, forfeiture is an aspect of the sentence, not a separate offense; therefore, forfeiture need not be submitted to a jury or proved beyond a reasonable doubt); *United States v. Corrado*, 286 F.3d 934 (6th Cir. 2002) (*Corrado II*) (petition for rehearing denied);
- *United States v. Najjar*, 300 F.3d 466 (4th Cir. 2002) (because forfeiture is part of the punishment, standard of proof for RICO forfeiture remains preponderance of the evidence, notwithstanding *Apprendi*; *United States v. Powell*, 2001 WL 51010 (4th Cir. 2001) (Table) (same);
- *United States v. Cabeza*, 258 F.3d 1256 (11th Cir. 2001) (same, following *Corrado* and *Powell*);
- *United States v. Gasanova*, 332 F.3d 297 (5th Cir. 2003) (because forfeiture is part of the statutory punishment for the criminal offense, forfeiture does not exceed the statutory maximum; hence the preponderance standard applies);
- *United States v. Shryock*, 342 F.3d 948 (9th Cir. 2003) (following *Najjar*, *Gasanova*, *Corrado*, *Vera*, and *Cabeza* without discussion);
- *Ida v. United States*, 2002 WL 1203855 (S.D.N.Y. 2002) (*Libretti* rejected the notion that forfeiture has "elements" that must be submitted to a jury; as *Apprendi* does not even mention forfeiture, it did not overrule *Libretti*; thus the preponderance standard still applies in the Second Circuit);
- *United States v. Davis*, 177 F. Supp. 2d 470 (E.D. Va. 2001) (following *Corrado* and *Cabeza*; preponderance standard still applies in the Fourth Circuit);
- *United States v. Stewart*, 151 F. Supp. 2d 572 (E.D. Pa. 2001) (*Apprendi* does not apply retroactively to closed criminal cases);
- *United States v. Cianci*, 218 F. Supp. 2d 232 (D.R.I. 2002) (because forfeiture is part of sentencing, preponderance of the evidence applies to RICO forfeitures; *Apprendi* does not apply because there is no statutorily prescribed maximum forfeiture);
- *Cf. United States v. Ross*, 279 F.3d 600 (8th Cir. 2002) (because the full amount that may be

ordered as restitution will vary, there is no prescribed maximum restitution for *Apprendi* purposes) (collecting cases);

D. The Government may not shift burden to defendant:

- *United States v. Rutgard*, 108 F.3d 1041 (9th Cir. 1997) (the Government's argument that money was forfeitable under section 982 as property involved in money laundering because there was no evidence of a legitimate source improperly shifted burden of proof to the defendant);

- *United States v. Genova*, 333 F.3d 750 (7th Cir. 2003) (once defendant contends, supported by some evidence, that the property was derived, at least in part, from an untainted source, the Government must demonstrate how much is forfeitable; but as the wrongdoer, the defendant "bears the risk of uncertainty" in this calculation);

- *But see* 21 U.S.C. § 853(d) (in drug cases, there is rebuttable presumption that money earned during period of drug dealing is drug proceeds);

E, Jury instructions:

1. Money judgments:

- *United States v. Cherry*, 330 F.3d 658, 669 n.17 (4th Cir. 2003) (court properly instructed the jury that it had to find, by a preponderance of the evidence, that the sum for which the Government was seeking a money judgment fairly represented the amount derived from proceeds that the defendant obtained, directly or indirectly, from the offenses charged);

2. Property involved in money laundering:

- *United States v. Cherry*, 330 F.3d 658, 669 n.17 (4th Cir. 2003) (the court properly instructed the jury that it had to find, by a preponderance of the evidence, that the property "fairly represents the property which was involved in, or is traceable to property involved in" the money laundering counts);

IX. Guilty Pleas

A.. Rule 11(f) does not apply to forfeiture; court need not make a finding that the forfeiture is supported by the evidence:

- *Libretti v. United States*, 516 U.S. 29, 116 S. Ct. 356 (1995);

- *United States v. Boatner*, 966 F.2d 1575 (11 th Cir. 1992) (sentencing judge not required under Rule 11 to determine factual basis for defendant's concession to criminal forfeiture pursuant to plea bargain; section 853 case);

- *United States v. Ken International Co., Ltd.*, 113 F.3d 1243, 1997 WL 229114 (9th Cir. 1997) (Table) (following *Libretti*, district court under no obligation to find factual basis for defendant's agreement to criminal forfeiture);

3. Defendant can plead guilty to the offense but contest the forfeiture:

- *United States v. Cunningham*, 201 F.3d 20 (1st Cir. 2000) (because forfeiture is part of the sentence and not part of the criminal offense, a defendant may plead guilty to the offense and reserve the right to contest the forfeiture);

∴ Agreement not to contest civil forfeiture:

- *United States v. Skorniak*, 59 F.3d 750 (8th Cir. 1995) (Rule 11 does not apply when defendant, as part of his plea agreement, agrees not to contest a parallel civil forfeiture);

- *United States v. Contents of Account Number 901121707*, 36 F. Supp. 2d 6J4 (S.D.N.Y. 1999) (defendant pleads guilty to structuring offense and agrees not to contest civil forfeiture under section 981(a)(1)(A));

D. Withdrawal of guilty plea:

- *United States v. Caldwell*, 88 F.3d 522 (8th Cir. 1996) (if defendant withdraws guilty plea, his agreement to the criminal forfeiture is void; it does not wait in suspended animation for a conviction; therefore, defendant must be tried on the forfeiture count);

E. Ownership issue:

- *United States v. Padilla-Galarza*, - F.3d __, 2003 WL 22927862 (1st Cir. Dec. 12, 2003) (affirming acceptance of defendant's guilty plea even though he attempted to withdraw it on the ground that the property did not belong to him; whether property belongs to third party is sorted out in the ancillary proceeding);

x. Special Verdict / Right to Jury

A, Defendant has no constitutional right to jury determination on forfeiture issues, but Rule 32.2(b)(4) gives the defendant the right to demand a jury trial; former Rule 3 J(e) requires that a special verdict be returned when the indictment contains a forfeiture allegation:

- *Libretti v. United States*, 516 U.S. 29, 116 S. Ct 356 (1995) (because right to have jury determine forfeitability is statutory, not constitutional, defendant's waiver of jury right need not be knowing and informed);

- *United States v. Gaskin*, 2002 WL 459005 __9 n.3 (W.D.N.Y. 2002) (notwithstanding *Libretti*, which appears to make trial by jury on the forfeiture issue inappropriate, Rule 32.2(b)(4) gives the defendant the right to have the jury determine the forfeiture, if the case was tried before a jury);

1. Rule 32.2(b)(4) requires a specific request that the jury be retained:

- *United States v. Davis*, 177 F. Supp. 2d 470 (E.D. Va. 2001) (under Rule 32.2(b)(4), defendant must make a specific request to have the jury retained to determine the forfeiture; a general request for a *jury* trial at the time of arraignment is not sufficient; defendant, who stood silent while the jury was dismissed, waived his right to have the jury determine the forfeiture and could not request that a new jury be empaneled), *aff'd* 63 Fed. Appx. 76, 2003 WL 1871050 (4th Cir. 2003) (reserving "the more difficult question of what, at a minimum, would constitute a sufficient request and when, in the course of the proceedings, such a request would have to be made"):

2. Case can proceed with II-member jury:

- *United States v. Cantu*, 167 F.3d 198 (5th Cir. 1999) (if defendant agrees to proceed with II-member jurors in the guilt or innocence phase pursuant to Rule 23, the same eleven may return the special verdict of forfeiture; the forfeiture is not a separate proceeding, even though the trial is bifurcated; because defendant has no constitutional right to a jury trial on the forfeiture issue, this is a matter of statutory interpretation);

- *See United States v. Dicter*, 198 F.3d 1284 (11th Cir. 1999) (defendant waived objection to II-member jury by not raising issue in his reply brief);

- *See* cases on application of *Apprendi v. New Jersey* to criminal forfeiture at page 27.

3. Jury argument on the forfeiture issue;

- *United States v. Derman*, 211 F.3d 175 (1st Cir. 2000) (no plain error in trial court's failure to offer defense counsel opportunity to argue forfeiture issue to the jury in the bifurcated proceeding where counsel did not request such opportunity);

- *United States v. Descent*, 292 F.3d 702 (11th Cir. 2002) (judge's response to jury's question-that it could return money judgment greater than Government was seeking-violated Rule 30 because it deprived defense counsel of opportunity to respond to court's instruction);

4. Scope of the jury's responsibility:

- Rule 32.2(b)(4) limits the jury's role to one thing - determining whether the requisite nexus between the property and the offense has been established:

- *United States v. Tyson Foods, Inc.*, No. 4:01-cr-061 (E.D. Tenn. Feb, 4, 2003) (the amount of the money judgment will be for the jury to decide as part of the nexus determination pursuant to Rule 32.2(b)(1) and (4));

- *United States v. Derman*, 211 F.3d 175 (1st Cir. 2000) (whether property comprises one parcel or two and whether forfeiture would violate Eighth Amendment are issues for the court, not the jury);

- See cases on jury's role in determining ownership, *infra*.

5. Jury's exposure to publicity concerning the forfeiture:

- *United States v. Daniels*, 111 F. Supp. 2d 993 (M.D. Tenn. 2000) (exposure to newspaper stories concerning their guilty verdict in a criminal case does not render the jury unable to return a

verdict of forfeiture in a bifurcated trial if the stories do not tell the jury anything they don't already know);

6. Before Rule 32.2, the right to jury could be waived:

- *United States v. Saccoccia*, 58 F.3d 754 (1st Cir. 1995) (Rule 31(e) only applies to jury trials; no special verdict required when defendant waives jury right on the forfeiture issues);

- *United States v. McCarroll*, 1996 WL 355371 (N.D. 111. 1996) (defendant can waive jury right afforded by Rule 31(e) and submit forfeiture issue to the court), *aff'd sub nom. United States v. Jarrett*, 133 F.3d 519 (7th Cir.), *cert. denied*, 118 S. Ct. 1688 (1998);

7. There is no right to a jury if defendant pleads guilty:

- Rule 32.2(a)(4) gives defendant right to jury only in cases where the guilty verdict is returned by a jury;

8. Judicial review of the jury's finding:

- *United States v. Neal*, Cr. No. 03-35-A (E.D. Va. Sept. 29, 2003) (the court is not free to secondguess the jury's finding of forfeitability once the jury returns its special verdict; at that point, entry of a preliminary order of forfeiture is mandatory);

B. Conduct of the forfeiture phase of the trial:

1. Presence of the defendant:

- *United States v. Sherman*, 262 F.3d 784 (8th Cir. 2001) (defendant's absence from the courtroom during the forfeiture phase of the trial, in violation of Rule 43, was harmless error where all of the jury's findings with respect to codefendant would apply equally);

2. Use of hearsay:

- *United States v. Gaskin*, 2002 WL 459005 (W.D.N.Y. 2002) (in the forfeiture phase of the trial, the parties may offer evidence not already in the record; because forfeiture is part of sentencing, such evidence may include reliable hearsay);

- *United States V. Creighton*, 2002 WL 31689125 (9th Cir, 2002) (Table) (hearsay is admissible:

at sentencing and therefore may be considered in the forfeiture phase);

- *United States v. Merold*, 2002 WL 1853644 (11th Cir. 2002) (Table) (suggesting that hearsay is admissible in the forfeiture phase, but holding only that there is no error in admitting hearsay where non-hearsay evidence was sufficient to support the forfeiture);

3. Reliance on evidence from "guilt phase":

- *United States v. Merold*, 2002 WL 1853644 (11th Cir. 2002) (Table) (jury may rely on evidence admitted in the guilt phase of the trial);

C. "Ownership" vs. "nexus";

- Rule 31 (e) required a jury to return a special verdict "as to the extent of the interest or property" forfeited; it is unclear whether this means the jury must determine the extent to which the defendant is the owner of the property *vis a vis* third parties, or only that the jury must determine what portion of the property was involved in, or was traceable to, the criminal offense:

1. Rule 32.2 repeals Rule 31(e) and makes clear that determining the extent of the defendant's ownership interest *vis a vis* third parties is deferred to the ancillary proceeding:

- *United States v. Cianci*, 218 F. Supp. 2d 232 (D.R.I. 2002) (under Rule 32.2(b)(2), the determination of the nexus between the property and the offense is made without regard to any legitimate interest that a third party might have because "the Rule affords third parties the opportunity to assert such claims before a final forfeiture order is entered");

- *United States v. Weidner*, 2003 WL 22176085 (D. Kan. 2003) (defendant cannot object to the entry of a preliminary order of forfeiture on the ground that the property really belongs to a third party; determination of the extent of the defendant's interest in the property is postponed until the ancillary proceeding);

- *United States v. Gaskill*, 2002 WL 459005 "9 n.4 (W.D.N.Y. 2002) (ownership is a question for the court alone to determine in the ancillary proceeding);

- *See* Rule 32.2(b)(1) (providing that the finder of fact must determine "whether the Government has established the requisite nexus between the property and the offense"); Rule 32.2(b)(2) (providing that the determination of the extent of the defendant's interest *vis a vis* third parties is deferred to the ancillary proceeding);

- *See also* Advisory Committee Note (2000) (discussing reason for eliminating confusion over whether extent of defendant's ownership interest should be determined by the jury, and for providing that under the new rule the court simply enters an order of forfeiture "of whatever interest a defendant may have in the property without having to determine exactly what that interest is");

2. Before Rule 32.2 took effect, some courts held that jury must determine ownership:

- *United States v. Gilbert*, 244 F.3d 888 (11th Cir. 2001) (forfeiture order is fatally flawed if jury was not asked to determine how much of the property belonged to each defendant, and how much to third parties);

- *United States v. Ham*, 58 F.3d 78 (4th Cir. 1995) (district court cannot enter order of forfeiture unless jury has entered a special verdict regarding the extent of the defendant's interest in the property);

- *United States v. O'Dell*, 247 F.3d 655 (6th Cir. 2001) (if jury is waived, court must determine if defendant is owner of property before entering order of forfeiture);

3. Other courts limited jury to nexus issue:

- *United States v. Sokolow*, 91 F.3d 396 (3d Cir. 1996) (affirming, without comment, special verdict form that asked the jury to determine only if there was a nexus between property and the offense);

- *United States v. Bornfield*, 145 F.3d 1123 (10th Cir. 1998) (special verdict asked only, "Was \$13,000 involved in the money laundering offense?");

- *United States v. Frye*, 202 F.2d 270, 2000 WL 32029 (6th Cir. 2000) (Table) (as long as the Government complies with Rule 7(c)(2) and puts defendant on notice that all of his interest is subject to forfeiture, defendant cannot complain that jury did not determine extent of his interest; jury's finding on nexus issue is sufficient to support forfeiture of all of defendant's interest);

- *Cf. United States v. Mosavi*, 138 F.3d 1365 (11th Cir. 1998) (defendant must challenge order directed at codefendant on direct appeal, implying that all codefendants forfeit whatever interest they may have in the property, making ownership determination among codefendants unnecessary);

4. Some courts limited jury to nexus issue, but considered ownership an issue for the court to consider before entering an order of forfeiture:

- *United States v. Hands*, 184 F.3d 1322, 1332 n.26 (11th Cir. 1999) (noting in *dicta* that the trial judge determined that the Government failed to establish that defendant was the owner of certain parcels named in the indictment and accordingly instructed the jury not to consider the forfeitability of those parcels);

- *Cf. United States v. Messina*, 122 F.3d 427 (7th Cir. 1997) (suggesting in *dicta* that order granting motion to substitute assets was defective because, *inter alia*, court did not find that defendant was the owner of the substitute property);

5. Other cases suggested defendant could not object to forfeiture on the ground that the property belongs to a third party:

- *United States v. Saccoccia*, 62 F. Supp. 2d 539 (D.R.I. 1999) (defendant lacks standing to object to forfeiture of property as substitute assets on the ground that the property does not belong to him);

- *United States v. Miller*, 26 F. Supp. 2d 415 (N.D.N.Y. 1998) (defendant lacks standing to object to pretrial restraining order on ground that property belongs to third party);

- *Cf. United States v. Salvucci*, 448 U.S. 83, 86 (1980) (Fourth Amendment rights are personal; defendant had no standing to assert third party's rights vicariously); *Rakas v. Illinois*, 439 U.S. 128, 130-31 (1978)(same);

6. In any event, the extent requirement in Rule 31(e) *did not* permit a jury to nullify a forfeiture once it had found the requisite nexus:

- *United State. < v. Holloway*, 166 F.3d 1215, 2000 WL 1562797 (6th Cir. 2000) (Table) (reference in Rule 31 (e) to jury's determination of the extent of the defendant's interest subject to forfeiture allows the jury to determine what part of the property was derived from or used to commit the crime; it does not permit a jury to limit the forfeiture to a portion of the property or to bar forfeiture altogether if it has determined that the nexus has been established as to all of the property);

XI. Money Judgment

A. Court may order forfeiture of an amount of money:

- *United States v. Candelaria-Silva*, 166 F.3d 19 (1st Cir. 1999) (criminal forfeiture order may take several forms: money judgment, directly forfeitable property, and substitute assets); *United States v. Davis*, 177 F. Supp. 2d 470 (E.D. Va. 2001) (same, following *Candelaria-Silva*);

1. Money laundering cases:

- *United States v. Puche*, 350 F.3d 1137 (11th Cir. 2003) (affirming money judgment equal to the combined value of the commission paid to the money launderer and the untainted money used to facilitate the offense);

- *United States v. Baker*, 227 F.3d 955 (7th Cir. 2000) (a forfeiture order may include a money judgment for the amount of money involved in the money laundering offense; the money judgment acts as a lien against the defendant personally for the duration of his prison term and beyond);

- *United States v. Voigt*, 89 F.3d 1050, 1084, 1088 (3d Cir. 1996) (the Government is entitled to a personal money judgment equal to the amount of money involved in the money laundering offense, but the Government may only *seize* property directly traceable to the offense or forfeitable as substitute assets);

- *United States v. Iacaboni*, 221 F. Supp. 2d 104 (D. Mass. 2002) (court enters money judgment

equal to sum of amounts involved in all money laundering transactions making up the conspiracy to launder gambling proceeds, including salaries paid to codefendants, overhead expenses, and payouts to winning bettors);

- *United States v. Saccoccia*, 823 F. Supp. 994, 1006 (D.R.I. 1993) (money judgment for the amount laundered, \$136 million, entered against each defendant), *aff'd*, 58 F.3d 754 (1st Cir. 1995); *United States v. Saccoccia*, 898 F. Supp. 53, 56 (D.R.I. 1995) (the money judgment may be satisfied out of the laundered funds, property traceable thereto, or substitute assets);

- *United States v. Cleveland*, 1997 WL 537707 at *11 (E.D. La. 1997) (the Government is entitled to a money judgment equal to the amount of money that defendant laundered in money laundering case, adjusted to eliminate double counting);

- *United States v. Stewart*, 1998 WL 720063 (E.D. Pa. 1998) (court enters money judgment for "aggregate sum of all money laundering counts for which defendant was convicted," adjusted to eliminate double counting), *aff'd as modified*, 185 F.3d 112 (3d Cir. 1999);

- *United States v. Sokolow*, 1995 WL 113079 at *1 (E.D. Pa. 1995) (because money is fungible, the Government need not receive the identical money involved in the money laundering offense so long as the amount involved is known), *aff'd*, 81 F.3d 397 (3d Cir. 1996);

2. Fraud and other economic crimes:

- *United States v. Moyer*, 313 F.3d 1082 (8th Cir. 2002) (upholding forfeiture of amount equal to the amount defendant embezzled FROM pension plan and then used to pay personal creditors in violation of section 1957);

- *United States v. Watkins*, 320 F.3d 1279 (11th Cir. 2003) (noting that district court imposed \$100,000 money judgment and forfeited cash found in defendant's residence as substitute asset);

- *United States v. Chavez*, 323 F.3d 1216 (9th Cir. 2003) (noting without discussion that defendant was ordered to pay money judgment and that substitute assets were forfeited to satisfy it);

- *United States v. Henry*, 850 F. Supp. 681,683 (M.D. Tenn. 1994) (court enters money judgment for \$191,206, which was the amount of Medicare fraud proceeds defendant was convicted of laundering), *aff'd*, 64 F.3d 664, 1995 WL 478635 (6th Cir. 1995) (Table);

- *United States v. Bennett*, 2003 WL 22208286 (S.D.N.Y. 2003) (court enters money judgment for \$109 million in fraud proceeds that the Government could not locate);

3. Drug cases:

- *United States v. Garcia-Guizar*, 160 F.3d 511 (9th Cir. 1998) (Beezer, J., dissenting) (because cash is fungible, the Government should not be required to prove that the currency in defendant's locker was the same currency that he received for drug sales; he should be liable for the entire

amount of the sales);

4. RICO cases:

- *United States v. Corrado*, 227 F.3d 543 (6th Cir. 2000) (*Corrado I*) (remanding case to the district court to enter money judgment for the amount derived from a RICO offense);
- *United States v. Edwards*, 303 F.3d 606 (5th Cir. 2002) (court enters money judgment for amount jury found to be proceeds of racketeering activity);
- *United States v. Robilotto*, 828 F.2d 940, 949 (2d Cir. 1987) (following *Conner* and *Ginsburg*; the court may enter a money judgment for the amount of the illegal proceeds regardless of whether defendant retained the proceeds);
- *United States v. Ginsburg*, 773 F.2d 798, 801-02 (7th Cir. 1985) (*en bane*) (criminal forfeiture is a personal judgment that requires the defendant to pay the total amount derived from the criminal activity, "regardless of whether the specific dollars received from that activity are still in his possession"); *United States v. Amend*, 791 F.2d 1120, 1127 (4th Cir. 1986) (same);
- *United States v. Navarro-Ordas*, 770 F.2d 959, 969 (11 th Cir 1985) (court may enter "personal money judgment" against the defendant for the amount of the illegally obtained proceeds);
- *United States v. Conner*, 752 F.2d 566, 576 (11 th Cir. 1985) (because criminal forfeiture is *in personam*, it follows defendant; it is a money judgment against the defendant for the amount of money that came into his hands illegally; the Government is not required to trace the money to any specific asset);
- *United States v. Commercial Carrier, Inc.*, 232 F. Supp. 2d 201 (S.D.N.Y. 2002) (because criminal forfeiture is *in personam*, codefendants are jointly and severally liable for \$1 million money judgment following conviction for conspiracy to distribute marijuana; ..the crux of criminal forfeiture is punishment, not recovery of particular property");
- *United States v. Delco Wire and Cable Co. Inc.*, 772 F. Supp. 1511 (E.D. Fa. 1991) (criminal forfeiture is "like a money judgment that runs against the defendant until satisfied in full"; judgment entered for \$10 million, which was the amount of the racketeering proceeds);
- *See cases noting that assets may be forfeited to satisfy a money judgment at page 52.*

B. If the proceeds were not cash, the money judgment is based on the value of the benefit defendant received:

- *United States v. Holland*, 160 F.3d 377,380 (7th Cir. 1998) (defendant ordered to pay judgment equal to value of property concealed from bankruptcy court and subsequently laundered);
- *United States v. Vasquez-Ruiz*, 2002 WL 1880127 (N.D. Ill. 2002) (court enters money judgment for the value of the rent defendant received as proceeds of the health care fraud

offense);

C. Money judgment may be based on value of the facilitating property:

- *United States v. Puche*, 350 F.3d 1137 (11th Cir. 2003) (affirming money judgment equal to the combined value of the commission paid to the money launderer and the untainted money used to facilitate the offense);

- *United States v. Numisgroup Intl. Corp.*, 169 F. Supp. 2d 133 (E.D.N.Y. 2001) (money judgment entered under section 982(a)(8) may be based on the value of the gross proceeds derived from the offense and the value of the property used to facilitate or promote it);

- *United States v. Harrison*, 2001 WL 803695 (N.D. Ill. 2001) (criminal forfeiture is not limited to identifiable assets; Government entitled to money judgment for the amount of money defendant used to facilitate his drug offense-i.e. the amount he used to purchase drugs; following *Baker* and *Voigt*, and relying in part on Rule 32.2);

D. Defendant is liable for proceeds directed to a third party:

- *United States v. Huber*, 243 F. Supp. 2d 996 (D.N.D. 2003) (forfeiture verdict properly included proceeds that defendant did not receive personally because he directed them to a third party);

E. Variance from the indictment:

- *United States v. Descent*, 292 F.3d 702 (11th Cir. 2002) (instructing jury that it could return special verdict for amount greater than what Government was seeking did not improperly amend indictment, but because instruction came in response to jury's question after closing argument, it violated Rule 30);

F. Enforcement of money judgment:

- *United States v. Saccoccia*, 165 F. Supp. 2d 103, 113, n.7 (D.R.I. 2001) (suggesting that Government, as judgment creditor, can reach any assets of the defendant that were fraudulently transferred), *rev'd on other grounds*, 344 F.3d 31 (1st Cir. 2003);

G. Burden of proof on money judgment:

- *United States v. Vasquez-Ruiz*, 2002 WL 1880127 (N.D. Ill. 2002) (the Government has the burden of proving the amount of the money judgment by a preponderance of the evidence; if the court has no basis for calculating the value of service received as proceeds of the offense, Government has not met its burden);

XII. Preliminary Order of Forfeiture

A. Rule 32.2(b)(2):

- Rule 32.2(b)(2) provides that the court must enter a preliminary order of forfeiture "promptly" after determining what property is subject to forfeiture.

- *United States v. Petrie*, 302 F.3d 1280, 1284 (11th Cir. 2002) (district court lacked jurisdiction to enter a preliminary order of forfeiture 6 months after defendant was sentenced, even though the judgment and consent said defendant "was subject to forfeiture as cited in count two;" the scheme set forth in Rule 32.2 is "detailed and comprehensive");

- *United States v. Iacaboni*, 239 F. Supp. 2d 119 (D. Mass, 2002) (the one-line order directing defendant to forfeit certain property that the district court issued at the conclusion of the criminal trial may not satisfy the requirements of Rule 32.2(b)(2); the better practice is to issue a format preliminary order of forfeiture);

- Order is "preliminary" because of potential third party claims:

- *United States v. McHan*, 345 F.3d 262 (4th Cir. 2003) (Rule 32.2(b)(2) provides for a preliminary order of forfeiture because of potential claims by third parties that would be resolved in the ancillary proceeding) ;

B. Preliminary order of forfeiture may describe property generically:

- *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36 (D.D.C. 1999) Just as a preliminary order in a drug case may direct the forfeiture of all "proceeds" up to a specific amount but not identify specific assets, the preliminary order in a RICO case may direct the forfeiture of "all property acquired or maintained" or "affording a source of influence"; the Government then uses post-trial discovery to identify specific assets and moves to amend the preliminary order to include them);

C. Corrections to the preliminary order:

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Bank of California International)*, 980 F. Supp. 522 (D.D.C. 1997) (the preliminary order may be amended as often as necessary to include additional property subject to forfeiture that the Government may identify through post-trial discovery);

- *United States v. Libretti*, 161 F.3d 18, 1998 WL 644265 (10th Cir. 1998) (Table) (district court may correct oversights and make clerical changes to the order of forfeiture without having to give the defendant appointed counsel a jury trial; nor does defendant have a right to appeal from such changes);

- *United States v. St. Pierre*, 188 F.R.D. 415 (M.D. Fla. 1999) (because preliminary order is not a final judgment, district court may correct clerical mistake pursuant to either Criminal Rule 36 or Civil Rule 60(a));

D. Preliminary order does not become final, or appealable, until sentencing:

1. Rule 32.2(b)(3) sets forth the authority of the Attorney General under the preliminary order of forfeiture, and provides that it becomes final as to the defendant at sentencing;

2. The defendant must appeal from the preliminary order of forfeiture and may not wait until it is final as to third parties:

- *United States v. De Los Santos*, 260 F.3d 446 (5th Cir. 2001) (preliminary order of forfeiture is final as to defendant and is immediately appealable; defendant cannot wait until court enters final order resolving rights of third parties) (collecting cases);

- *United States v. Christunas*, 126 F.3d 765 (6th Cir. 1997) (preliminary order of forfeiture is final pertaining to defendant and is immediately appealable, notwithstanding ongoing ancillary proceeding); *United States v. Bennett*, 147 F.3d 912 (9th Cir. 1998) (same);

- *United States v. Pelullo*, 178 F.3d 196 (3d Cir. 1999) (preliminary order is final as to the defendant and divests him of any interest he had in the property, including property forfeited as a substitute asset);

- *United States v. Petrie*, 302 F.3d 1280, 1283-84 (11th Cir. 2002) ("a preliminary forfeiture order is a final and appealable order if the order finally determines the defendant's rights in the forfeited property"); *United States v. Gilbert*, 244 F.3d 888 (11th Cir. 2001) (preliminary order of forfeiture is not final as to defendant until sentencing, and is not immediately appealable; following *Derman*); but see *United States v. Gross*, 213 F.3d 599 (11th Cir. 2000) (preliminary order of forfeiture is final as to the defendant and is immediately appealable);

- *United States v. Derman*, 211 F.3d 175 (1st Cir. 2000) (time for appeal runs from the time of sentencing-not from the time the preliminary order is entered);

- *United States v. Libretti*, 161 F.3d 18, 1998 WL 644265 (10th Cir. 1998) (Table) (preliminary order is final as to defendant and is his one and only opportunity for direct appeal);

- *United States v. Rashid* No. 97-1421 (3d Cir. Oct. 28, 1998) (unpublished) (preliminary order terminates defendant's interest in the property; final order adjudicates only third party rights; therefore, defendant must appeal from the preliminary order and lacks standing to challenge the final order);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (preliminary order transfers defendant's interest to the United States and is final pertaining to the defendant at sentencing; it remains preliminary pertaining to third parties until the ancillary proceeding is concluded);

E, Seizure of property pursuant to preliminary order:

1. Section 853(g):

- *United States v. McCorkle*, 143 F. Supp. 2d 1311 (M.D. Fla. 2001) (under section 853(g), court

may authorize the Attorney General to seize property named in the preliminary order or take any other action to preserve the Government's interest, without regard to the location of the property);

2. Contempt for failure to produce forfeited property:

- *United States v. McCorkle*, 321 F.3d 1292 (11 th Cir. 2003) (third party may be ordered to deposit property named in the preliminary order of forfeiture in the registry of the court pending the ancillary proceeding; refusal to do so may result in contempt);

F. Preliminary order may include order to repatriate property:

- 21 U.S.C. § 853(P)(3) authorizes a court to include a repatriation order in the order of forfeiture; failure to comply may result in higher penalties under the sentencing guidelines:

- *United States v. Hasson*, No. 99-8063-CR-KING/JOHNSON (S.D. Fla, Oct. 22, 2001) (repatriation order may be included in the preliminary order of forfeiture and need not await the final order);

XIII. Order of Forfeiture / Sentencing

A. Forfeiture is mandatory:

- *Alexander v. United States*, 509 U.S. 544, 562 (1993) ("a RICO conviction subjects the violator not only to traditional, though stringent, criminal fines and prison terms, but also mandatory forfeiture under [section] 1963");

- *United States v. Monsanto*, 491 U.S. 600, 606 (1989) ("Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied...");

- *United States v. Carpenter*, 317 F.3d 61S (6th Cir. 2003) (because criminal forfeiture is mandatory~ the court must order the forfeiture of the property used to commit the offense in its entirety, even if the defendant used only part of it for that purpose; the only limitation is the Excessive Fines Clause of the Eighth Amendment);

- *United States v. Corrado*, 227 F.3d 543 (6th Cir. 2000) (*Corrado I*) (forfeiture is a mandatory aspect of the sentence; district court erred in refusing to order forfeiture of , "sufficiently quantifiable" proceeds of a RICO offense); *United States v. Corrado*, 286 F.3d 934 (6th Cir. 2002) (*Corrado II*) (same);

- *United States v. Gilbert*, 244 F.3d 88S, 909 (11th Cir. 2001) ("forfeiture is a *mandatory* element of sentencing") (emphasis in original);

- *United States v. Johnston*, 199 F.3d 1015,1022 (9th Cir. 1999) (criminal forfeiture is mandatory

and designed to ensure that a defendant does not profit from his crimes);

- *United States v. Tencer*, 107 F.3d 1120, 1134 (5th Cir. 1997) (criminal forfeiture for money laundering under section 982(a)(1) is mandatory); *United States v. Hendrickson*, 22 F.3d 170, 175 (7th Cir. 1994) (same);

- *United States v. Bieri*, 68 F.3d 232, 235 (8th Cir. 1995) (under section 853(a)(2), criminal forfeiture of property used to facilitate a drug trafficking offense "is mandatory, not discretionary");

- *United States v. Hill*, 167 F.3d 1055 (6th Cir. 1999) (court may not ignore mandatory language of forfeiture statute and give defendant option of substituting cash for forfeited items unless section 853(p) applies); *United States v. Hill*, 2002 WL 31119692 (6th Cir. 2002) (Table) (same case, on appeal from modification of order of forfeiture to include substitute assets) (forfeiture of property involved in money laundering is mandatory);

- *United States v. Maxwell*, 399 F. Supp. 2d 395, 399 n.2 (E.D. Va. 2002) (because criminal forfeiture is mandatory, the primary issue before the trial court is not whether to issue a forfeiture order, but its size and scope);

- *But see United States v. O'Dell*, 247 F.3d 655 (6th Cir. 2001) (although forfeiture is mandatory, court need not enter order of forfeiture if it determines the property interest subject to forfeiture no longer exists);

B. Forfeiture must be included in the "verbal pronouncement" of defendant's sentence:

- *United States v. Gaviria*, 116 F.3d 1498 (D.C. Cir. 1997) (failure to announce the forfeiture portion of the defendant's sentence in his presence, as required by Rule 43(a), means that forfeiture order must be vacated);

- *United States v. Shannon*, 87 F.3d 1325, 1996 WL 341352 (9th Cir. 1996) (Table) (order of forfeiture vacated because judge failed to mention forfeiture at sentencing, even though forfeiture was included in indictment and plea agreement and court amended judgment eight days after sentencing to include order of forfeiture);

- *United States v. Gilbert*, 244 F.3d 888 (11th Cir. 2001) (forfeiture must be imposed in a proceeding where defendant has the right to allocution);

C. Order of forfeiture must be included in the judgment and commitment order:

- Rule 32.2(b)(3) provides that the order of forfeiture "shall be made part of the sentence and included in the judgment."

- *United States v. Petrie*, 302 F.3d 1280, 1284-85 (11th Cir. 2002) (district court lacked jurisdiction to enter the preliminary order of forfeiture after sentencing; forfeiture vacated);

D. Courts are split as to whether a district court retains the power to amend the judgment to include a forfeiture order once 7 days have elapsed from the entry of the judgment:

1. Courts holding that the judgment may be amended:

- *United States v. Loe*, 248 F.3d 449 (5th Cir. 2001) (if district court forgets to include forfeiture in the judgment, it may, pursuant to Rule 36, Fed. R. Crim. P., amend the judgment *nunc pro tunc*; even if the judgment is not so amended, oral pronouncement of the forfeiture at the sentencing hearing is sufficient to comply with former Rule 32(d)(2));

- *United States v. Hatcher*) 323 F.3d 666 (8th Cir. 2003) (if there was a preliminary order of forfeiture) the failure to include the forfeiture in the judgment at sentencing is a clerical error that may be corrected at any time; pursuant to Rule 36);

- *United States v. Thomas*, 67 Fed. Appx. 819) 2003 WL 21465365 (4th Cir. 2003) (amendment of the judgment pursuant to Rule 36 to include the forfeiture judgment 4 years after sentencing was appropriate as *it* accurately reflected the district court's intention at sentencing);

- *United States v. Mitchell*, 70 Fed. Appx. 707, 2003 WL 21757309 (4th Cir. 2003) (where defendant had notice of the forfeiture in the indictment, and the court entered a preliminary order, the failure to comply with the technical requirements of Rule 32.2(b)(3) was a ministerial error that did not affect the fairness of the proceedings; thus defendant not entitled to any relief; declining to follow *Pease* as factually distinguishable);

- *United States v. Arevalo*, No. 02-15388 (11th Cir. May 13,2003) (unpublished) (preliminary order of forfeiture becomes final at sentence automatically; the failure to memorialize that in writing by making the forfeiture part of the judgment is a clerical error that may be corrected pursuant to Rule 36);

- *United States v. Harold Queen*, No. 94-14068-CR-DAVIS(Paine)/Lynch (S.D. Fla. May 16, 2002) (unpublished) (distinguishing *Gilbert*; failure to include forfeiture order in the judgment does not negate the forfeiture where defendant said before sentencing that he was not contesting the forfeiture, and the rule prior to 1996 did not require including the forfeiture in the judgment);

- *See also United States v. Coon*, 187 F.3d 888 (8th Cir. 1999) (*dicta*) (suggesting that the district court retains authority to enter a final" forfeiture order, from which the defendant may appeal~ if it fails to include the forfeiture in the sentence); *United States v. Covey*, 232 F.3d 641 (8th Cir. 2000) (holding that appeal from the preliminary order of forfeiture was premature, and remanding case to the district court to review defendant's objections to the order of forfeiture on the merits at the time it corrects its omission and includes a final order of forfeiture in the judgment);

2. Courts holding that the judgment may not be amended:

- *United States v. Pease*, 331 F.3d 809 (11 th Cir. 2003) (the omission of the order of forfeiture from the judgment in a criminal case is not a clerical error that can be corrected pursuant to Rule

36; if the district court does not make the order of forfeiture part of the judgment at sentencing, and the Government does not appeal, the forfeiture is void);

- *United States v. Gilbert*, 244 F.3d 888, 925 n.81 (11th Cir. 2001) (because forfeiture is mandatory, Government may appeal any judgment that fails to contain an order of forfeiture as an illegal sentence; but if Government fails to make such appeal, it waives the forfeiture and the judgment becomes final);

- *United States v. Seltzer*, 199 F.3d 1324 (2d Cir. 1999) (Table) (when district court inadvertently failed to include forfeiture as part of the sentence, the Government's only remedy was to appeal; it could not wait 6 weeks and then move district court to amend the sentence);

- *But see United States v. Moreno*, Cr. No. 95-00091 (S.D. Ala. Nov. 12, 2003) (district court avoids having to apply *Pease* and release property to defendant by holding that Rule 41 (g) is the wrong vehicle for seeking such relief; technical errors such as failing to include forfeiture in the judgment are not the basis for exercise of equitable jurisdiction where defendant had an adequate remedy at law-appeal, waited 7 years to seek relief, and made no showing of injustice);

E. Frustrating the forfeiture is punishable as an obstruction of justice:

- *United States v. Baker*, 227 F.3d 955 (7th Cir. 2000) (defendant's attempt to frustrate the forfeiture by transferring assets to a third party constitutes an obstruction of justice warranting an increase in the sentencing offense level for the underlying criminal offense); *United States v. Keeling*, 235 F.3d 533 (10th Cir. 2000) (same, where defendant quitclaimed property to avoid forfeiture of substitute assets);

- *United States v. Carroll*, 346 F.3d 744 (7th Cir. 2003) (defendant's false statements regarding the nexus between his assets and the offense may be the basis for an obstruction of justice enhancement of his sentence under the sentencing guidelines, but only if the false statement is material; if the assets in question would be forfeitable as substitute assets even if they are not traceable to the offense, a false statement regarding the source of the funds is not material);

- *United States v. Jackson-Randolph*, 282 F.3d 369 (6th Cir. 2002) (defendant's transfer of her property to herself and husband as tenants by the entireties, knowing that such transfer would make criminal forfeiture of the property more difficult, was properly subject to the obstruction of justice enhancement);

- *United States v. Bennett*, 252 F.3d 559 (2d Cir. 2001) (district court may not penalize a defendant by enhancing his sentence when a third party refuses to withdraw a petition contesting the forfeiture in the ancillary proceeding, but it may enhance his sentence as punishment for transferring the property to the third party in the first place);

- *United States v. Merold*, 2002 WL 1853644 (11th Cir. Aug. 6, 2002) (Table) (lying about ownership of property, and transferring it to third party to avoid forfeiture, justified obstruction of justice enhancement) ;

- But defendant cannot be penalized for reserving the right to contest the forfeiture:
 - *United States v. Cunningham*, 201 F.3d 20 (1st Cir. 2000) (defendant who pleads guilty but reserves right to contest the forfeiture does not lose his right to I-level adjustment for guilty plea under section 3E1.1(b)(2));

F. Forfeiture cannot be used to offset the defendant's fine:

- *United States v. Trotter*, 912 F.2d 964 (8th Cir. 1990) (defendant can't use forfeited funds to offset or satisfy his fine);
- *But see United States v. Pease*, 331 F.3d 809, 816 n. 18 (11th Cir. 2003) (*dicta*) (forfeiture may be cause to reduce or eliminate the fine);

G. Forfeiture is not a basis for a downward departure from the U.S. Sentencing Guidelines:

- *United States v. Bright*, - F.3d - No. 02-50492, 2004 WL 25017 (9th Cir. Jan. 5, 2004) (forfeited amount is not deducted from the amount used to calculate the offense level under the sentencing guidelines)~
- *United States v. Coddington*, 118 F.3d 1439, 1441 (10th Cir. 1997) (forfeiture is expressly considered by the guidelines and thus cannot be the basis for a downward departure) (collecting cases); *United States v. Shirk*, 981 F.2d 1382, 1397 (3d Cir. 1992); *United States v. Weinberger*, 91 F.3d 642, 644 (4th Cir. 1996); *United States v. Crook*, 9 F.3d 1422, 1425 (9th Cir. 1993);
- *United States v. Hendrickson*, 22 F.3d 1701 176 (7th Cir. 1994) (forfeiture pursuant to plea agreement does not reflect "extraordinary acceptance of responsibility" meriting downward departure; under the sentencing guidelines, forfeiture is imposed in addition to, not in lieu of, incarceration);
- *United States v. Shalash*, 36 F. Supp. 2d 1013 (S.D. Ohio 1999) (section 5E1.4 shows that the sentencing commission intended for forfeitures to be considered separate and apart from sentencing; therefore forfeiture of the family residence cannot be a valid basis for downward departure) (collecting cases);
- *But see United States v. Faulks*, 143 F.3d 133 (3d Cir. 1998) (even though exposure to forfeiture is not a ground for downward departure, a voluntary surrender of a meritorious defense to forfeiture may provide evidence of extraordinary acceptance of responsibility);

I. Revocation of supervised release:

- *United States v. Hale*, 2001 WL 1631816 (9th Cir. 2001) (Table) (failure to pay forfeiture judgment not a valid basis for revocation of supervised release where court failed to make such payment an explicit condition of the release at the time of sentencing);

L. Effect of the sentence on the forfeiture:

- *United States v. Bennett*, 2000 WL 1505986 (S.D.N.Y. 2000) (court's decision to depart from the sentencing guidelines in the criminal case has no impact on the Government's ability to forfeit the property involved in a money laundering offense);

J. Inconsistent findings:

- *United States v. Love*, 134 F.3d 595 (4th Cir.), *cert. denied*, 118 S. Ct. 2332 (1998) (jury's forfeiture verdict, which suggested that defendants were responsible for a smaller amount of drugs, did not bar

district court from calculating sentencing level based on greater amount; there is no requirement that jury's forfeiture verdict and court's factual finding in support of sentence be consistent);

- *United States v. Rhynes*, 206 F.3d 349, 381 (4th Cir. 2000) (for sentencing purposes, court not bound by jury's calculation of amount subject to forfeiture; following *Love*);

- *United States v. Czichray*, 2002 WL 1763998 (D. Minn. 2002) (jury's refusal to return a verdict of forfeiture, while inconsistent with its finding of guilty on the underlying substantive charges, does not undermine the validity of the guilty verdict or require entry of a judgment of acquittal);

K. Consent decree:

- *ChristunGS v. United States*, 61 F. Supp. 2d 642 (E.D. Mich. 1999) (wife's apparent consent to forfeiture of her interest in real property was void because she did not sign consent decree and was not represented by her husband's attorney);

L. Stay pending appeal:

- *United States v. Hill*, 167 F.3d 1055 (6th Cir. 1999) (court abused its discretion when it stayed forfeiture order pending appeal, thus preventing bona fide purchasers from recovering property in the ancillary proceeding and preventing the Government from seeking substitute assets);

XIV. Mitigation of Forfeiture

- Forfeiture is mandatory:

- *United States v. DeFries*, 909 F. Supp. 13 (D.D.C. 1995) (the court has no discretion to withhold forfeiture or adjust the amount; the court's role is "merely to ascertain if the requisite nexus exists"), *rev'd on other grounds*, 129 F.3d 1293 (D.C. Cir. 1997);

XV. Joint and Several Liability

- All defendants are liable to forfeit the total amount of money laundered by the organization or obtained as criminal proceeds:

- *United States v. Genova*, 333 F.3d 750 (7th Cir. 2003) (because all codefendants are liable for

the sum of the proceeds realized by each other, the payer of a kickback to a city official is liable for what he received from the city as well as the amount of the kickback, and the city official is liable for the same);

- *United States v. Pitt*, 193 F.3d 751t 765 (3d Cir. 1999) (sections 853 and 982 both impose joint and several liability on convicted defendants; district court did not err in converting special verdict, in which jury found each defendant liable for a specific sum, into a judgment making both defendants . liable for the aggregate amount);

- *United State£ v. Simmons*) 154 F.3d 765 (8th Cir. 1998) (each defendant is jointly and severally liable for all foreseeable proceeds of the scheme; the Government is not required to prove the specific portion of proceeds for which e.wh defendant is responsible; RICO defendant cannot limit his liability to proceeds of the racketeering acts he was charged with committing personally);

- *United States v. Corrado*, 227 F.3d 543 (6th Cir. 2000) (*Corrado I*) (all defendants in a RICO case are jointly and severally liable for the total amount derived from the scheme; the Government is not required to show that the defendants shared the proceeds of the offense among themselves, nor to establish how much was distributed to a particular defendant); *United States v. Corrado*, 286 F.3d 934 (6th Cir. 2002) (*Corrado II*) (samc; because person who collected the proceeds was able do so because of his participation in a scheme, all members of the scheme are jointly and severalty liable);

- *United States v. Edwards*, 303 F.3d 606 (5th Cir. 2002) (fol10wing *Corrado I*; defendant, who was not personally involved in one part of the racketeering activity, is jointly and severally liable for money judgment that included the proceeds of that part of the offense because codefendant's conmission of it was foreseeable to him);

- *United States v. Candelaria-Silva*, 166 F.3d 19 (1st Cir. 1999) (even minor participants in drug conspiracy are jointly and severally liable for forfeiture of the full amount of the proceeds; no Eighth Amendment violation);

- *United States v. Hurley*, 63 F.3d 123 (1st Cir. 1995) (the Government can collect the total amount subject to forfeiture only once, but subject to that cap, it can collect it from any defendant so much of that amount as was foreseeable to that defendant); *United States v. Cleveland*, 1997 WL 602186 (ED. La, 1997) (unpublished) (same); *United States v. McCarroll*, 1996 WL 355371 at *9 (N .D. Ill. 1996) (following *Hurley*), *aff'd sub nom. United States v. Jarrett*, 133 F.3d 519 (7th Cir.), *cert. denied*, 118 S. Ct. 1688 (1998);

- *United States v. Coleman Commercial Carrier, Inc.*, 313 F. Supp. 2d 1082 (S.D.N.Y. 2002) (*following Hurley*; individual defendant and corporate codefendant jointly and several liable for \$1 million money judgment; because purpose of criminal forfeiture is punishment, not recovery of specific property, it is not necessary to show given defendant actually received any proceeds);

- *United States v. DeFries*, 909 F. Supp, 13, 19-20 (D.D.C. 1995) (defendants are jointly and severally liable even where the Government is able to determine precisely how much each