Civil and Criminal Forfeiture Procedure

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defendant's section 2255 petition does not interfere with district court's jurisdiction to amend order to include substitute assets);

- *United States v. Messino,* 907 F. Supp. 1231 (N.D. Ill. 1995) (the district court retains jurisdiction over forfeiture matters while an appeal is pending; court may order forfeiture of substitute assets and enter final order of forfeiture where no third party files a claim);

- *United States* v. *McCorkle,* No. 6:98-CR-52.ORL-19JGG (M.D. Fla. Jan. 8, 2001) (rejecting contention that district court loses jurisdiction to amend order of forfeiture to include substitute asset once appeal is taken);

B. Ancillary hearing:

- *United States* v. *Christunas,* 126 F.3d 765 (6th Cir. 1997) (court retains jurisdiction to hear third party claims despite defendant's appeal from preliminary order of forfeiture);

C. Contempt:

- *United States* v. *McCorkle,* 2000 WL 33725124 (M.D. Fla. 2000) (district court retains jurisdiction to hold third party in contempt for refusal to disgorge forfeited funds even though third party has filed notice of appeal from denial of his petition in the ancillary proceeding); contempt citation dismissed as moot, *United States v. McCorkle,* 321 F.3d 1292 (11th Cir. 2003);

- *United States* v. *Hasson,* No. 99-8063-CR-KING/JOHNSON (S.D. Fla. Oct. 22, 2001) (Rule 32.2 gives the court continuing jurisdiction over forfeiture matters while an appeal is pending, including jurisdiction to hold defendant in contempt for failure to obey provisions of the order of forfeiture);

XXX. Fugitive Disentitlement Doctrine

- *United States* v. *Barnette,* 129 F.3d 1179 (11th Cir. 1997) (appellate court refuses to consider appeals by defendant and his wife who fled jurisdiction rather than comply with district court's orders regarding location and value of forfeitable property);

XXXI. Investigation to Locate Forfeited Assets

Court may authorize taking of depositions to locate assets ordered forfeited by defendant:

- *United States* v. *Saccoccia,* 898 F. Supp. 53 (D.R.I. 1995) (the Government can take depositions of defense counsel to determine source of their fees for the purpose of locating a pool of assets controlled by the defendant that is subject to forfeiture);

- *United States* v. *Saccoccia,* 913 F. Supp. 129 (D.R.I. 1996) (defendant has a right to be present at any deposition conducted for the purpose of locating his forfeitable assets);

- *United States* v. *Saccoccia,* 62 F. Supp. 2d 539 (D.R.I. 1999) (conversation that prosecutor has with cooperating witness is not a deposition even if the witness's deposition has been noticed; defendant has no right to be present at such conversation);

- *In re Grand Jury Proceedings,* 201 F. Supp. 2d 5 (D.D.C. 2001) (Government may use grand jury subpoena to discover source of fees drug dealer defendant paid to private counsel; if forfeiture of fees under *Caplin* & *Drysdale* does not burden Sixth Amendment, neither can compliance with subpoena);

• Court may issue orders to third parties to discover location and value of forfeited assets:

- *United States* v. *Barnette,* 129 F.3d 1179 (l1th Cir. 1997) (defendant and his wife held in contempt for failing to abide by order regarding value and location of stock defendant had transferred to his wife to avoid forfeiture);

- *United States v. Yerardi,* 192 F.3d 14 (1st Cir. 1999) (wife cannot assert privilege against testifying against husband's interest to avoid revealing location of husband's forfeited assets, but wife can assert privilege if the testimony could be used to prosecute husband for evading taxes on the forfeited property);

XXXII. Enforcement of Judgment

• The Government may use the Federal Debt Collection Procedure Act:

- *United States v. Bertolo,* 55 Fed. Appx. 406, 2002 WL 31875680 (9th Cir. 2002) (Table) (noting without explanation that the Government had not followed proper procedures for collection of the forfeiture judgment, and remanding to allow the Government to forfeit substitute assets or collect the judgment in accordance with the Debt Collection Act);

- *United States* v. *Bongiorno,* 106 F.3d 1027 (lst Cir. 1997) *(dicta)* (the Government may not use the Debt Collection Act to collect a restitution order entered for the benefit of a private victim; if this had been a forfeiture judgment, the result would be different);

- *United States* v. *Maxwell,* 189 F. Supp. 2d 395 *(ED.* Va. 2002) (when defendant transfers his real property to third party to prevent Government from using it to satisfy money judgment, Government may sue to void the transfer under 28 U.S..C. §§ 3304(b) and 3306(a));

- *United States* v. *Rostoff,* 966 F. Supp. 1275 (D. Mass. 1997) (the Government may use Debt

Collection Act to collect restitution owed to FDIC);

XXXIII. Abatement

- There is a split in the circuits as to whether a criminal forfeiture judgment abates upon the death of a defendant:

- *United States v. Zizzo,* 120 F.3d 1338 (7th Cir. 1997) (defendant's death before appeal was final means his conviction must be vacated, but criminal forfeiture that defendant paid before he died need not be refunded to his estate);

- *United States v. Estate of Parsons,* 314 F.3d 745 (5th Cir. 2002) (unpaid criminal forfeiture abates with the death of the defendant, but forfeiture judgment already paid to the United States need not be refunded to his estate);

- *United States* v. *Oberlin,* 718 F.2d 894 (9th Cir. 1983) (criminal forfeiture proceeding abates upon the post-verdict suicide of defendant);

XXXIv. Parallel Forfeitures

A. Civil and criminal forfeiture:

- *United States v. Candelaria-Silva,* 166 F.3d 19 (1st Cir. 1999) (there is nothing improper in the Government's beginning a forfeiture case with a civil seizure and switching to criminal forfeiture once an indictment is returned; it is commonplace);

- *United States v. Leyland,* 277 F.3d 628 (2d Cir. 2002) (there is nothing improper about beginning forfeiture as an allegation in a criminal indictment, and then switching to civil forfeiture);

- *United States* v. *Lugo,* 63 F. Supp. 2d 896, 897 n.2 (N.D. Ill. 1999) (the Government may start a forfeiture action as an administrative forfeiture and then proceed with a criminal forfeiture if defendant files a claim and cost bond, but in that event it must return the cost bond to defendant);

- *United States v. One 1990 Arctic Cat EXT Snowmobile,* 1996 WL 132107 (S.D.N.Y. 1996) (claimant in civil forfeiture case could not object to the Government's motion to dismiss the forfeiture action once the property was forfeited in a criminal case even though the claimant saw some strategic advantage in proceeding with his civil claim);

- *United States* v. *One* 1978 *Piper Cherokee Aircraft,* 91 F.3d 1204 (9th Cir. 1996) (after obtaining criminal forfeiture verdict, the Government abandons criminal forfeiture and revives parallel civil case to perfect interest against third parties);

- *United States v. Cunan,* 156 F.3d 110 (1st Cir. 1998) (adverse decision on civil forfeiture, which has lower burden of proof, precludes criminal forfeiture of the same property where civil claimant and criminal defendant are the same person); *id.* (acquittal in criminal case with higher burden of proof does not preclude subsequent civil forfeiture of the same property);

- *United States v. St. Pierre,* 188 F.R.D. 415 (M.D. Fla. 1999) (court declines to consolidate criminal forfeiture, fol1owing defendant's conviction, with civil forfeiture; under Rule 42(a), court may decline to consolidate if it would result in delay; because defendant not yet sentenced, criminal case could delay civil one);

B. RICO and money laundering:

- *United States v. Saccoccia,* 823 F. Supp. 994 (D.R.I. 1993), *aff'd,* '58 F.3d 754 (1st Cir. 1995) (where defendant is subject to forfeiture of same property under section 982 and RICO, forfeitures are concurrent and not cumulative);

XXXV. Double Jeopardy

- *United States v. Leyland,* 277 F.3d 628 (2d Cir. 2002) (criminal conviction following civil forfeiture does not constitute double jeopardy; following *United States v. Ursery,* 518 U.S. 267 (1996));

- *United States v. Ware,* 2000 WL 1827590 (M.D. Tenn. 2000) (criminal forfeiture does not violate double jeopardy; the criminal forfeiture statute clearly expresses the congressional intent to authorize multiple punishments for the same offense at the time of conviction);

- *United States v. Ruedlinger,* 1997 WL 807925 (D. Kan. 1997) (forfeiture of same property in two different criminal cases does not implicate double jeopardy because (1) the forfeiture is based on separate conduct and (2) forfeiture is part of the sentence, not a substantive offense);

XXXVI. Federal Forfeiture Statutes Supersede State Law

- *United States* v. *Bollin,* 264 F.3d 391(4th Cir. 2001) (Georgia law exempting IRAs from forfeiture docs not insulate the defendant's account from forfeiture in a federal criminal case where the forfeiture of the account is necessary to satisfy a money judgment);

- *United States v. Infelise,* 938 F. Supp. 1352 (N.D. Ill. 1996) (bank account forfeited notwithstanding state statute protecting $2,000 in "debtor's" account);

- *United Scales* v. *Walters,* 89 F. Supp. 2d 1206 (D. Kan. 2000) (federal forfeiture law preempts homestead exemption under state constitution);

- *See United States* v. *Martinez,* 228 F.3d 587 (5th Cir. 2000) (federal preemption question not reached because, as a matter of state law, the homestead exemption does not apply to property acquired with criminal proceeds);

XXXVII. Forfeiture and Bankruptcy

- *United States* v. *Pelullo,* 178 F.3d 196 (3d Cir. 1999) (because defendant did not commence bankruptcy action until after preliminary order of forfeiture was entered, his interest in the property was already terminated before the bankruptcy action began and the property-which was forfeited as a substitute asset-never became part of the bankruptcy estate), *aff'g* 1996 WL 257345 (E.D. Pa. 1996) (because section 1963(i) "carves out RICO forfeitures from the jurisdiction of the bankruptcy courts," defendant cannot use bankruptcy proceeding to block the Government's effort to enforce money judgment obtained in forfeiture proceeding);

- *United States* v. *Ken International Co., Ltd.)* 113 F.3d 1243, 1997 WL 229114 (9th Cir. 1997) (unpublished) (Table) (property becomes part of bankrupt's estate when bankruptcy is declared; the Government's interest does not come into effect until preliminary order of forfeiture is entered);

- *United States* v. *Rashid,* 2000 WL 1622761 (E.D. Pa. 2000) (unlike a restitution order, a criminal, order of forfeiture is not dischargeable in banJa-uptcy even if the Government intends to apply the forfeited property to an unsatisfied restitution order);

- *In re: Macia,* No. 97-16383-BKC-AJC (Bankr. S.D. Fla. Nov. 20, 1998) (unpublished) (the automatic stay provision of the Bankruptcy Code is not applicable to pending criminal forfeiture proceedings and crimina1 forfeiture statutes bar any intervention once an indictment has been filed);

XXXVIII. **Forfejture of Retirement** Accounts

- *United States* v. *Infelise)* 159 F.3d 300 (7th Cir. 1998) (defendant's IRA is subject to forfeiture notwithstanding provision in ERISA stating that such accounts are "non-forfeitable");

- *United States* v. *Bollin,* 264 F.3d 391 (4th Cir. 2001) (Georgia law exempting IRAs from forfeiture was meant to shield such accounts from creditors attempting to collect debts; because a criminal forfeiture judgment is not a debt, but is part of defendant's sentence, the state law did not apply; even if it did apply, it could not insulate the account from federal forfeiture under the Supremacy C1ause);

- *United States* v. *Vondette,* - F.3d _,2003 WL 22953335 (2d Cir. Dec. 16, 2003) (ERISA does not bar the criminal forfeiture of the defendant's IRA as a substitute asset; interpreting *Weiss* as holding that IRAs are not shielded from civil forfeiture either);

- *United States v. All Funds Distributed to Weiss,* 345 F.3d 49 (2d Cir. 2003) (anti-alienation provision in ERISA bars forfeiture while the funds are held in a valid ERlSA-protected pension plan);

XXXIX. Retroactivity *I Ex* ***Post Facto*** **Clause**

A. The *Ex Post Facto* Clause bars retroactive application of substantive changes to the criminal forfeiture Jaws, but not procedural changes:

- *United States* v. *Crozier,* 777 F.2d 1376, 1383 (9th Cir. 1985) (procedural changes in criminal forfeiture statute do not violate *Ex Post Facto* Clause);

- *United States v. Colon-Munoz,* 192 F.3d 210 (1st Cir. 1999) (application of section 982(a)(2) to conspiracy that began before effective date violates *Ex Post Facto* Clause where no overt act occurred after that date);

B. Forfeiture of proceeds under sections 981 (a)(l)(C) and 2461 (c):

- *United States v. Sudeen,* 2002 WL 1897095 (E.D. La. 2002) (whether forfeiture of proceeds of fraud conspiracy that straddles effective date of CAFRA would violate *ex post facto* will be determined if there is a conviction; pretrial motion is premature);

C. Substitute assets:

- *United States* v. *Reed,* 924 F.2d 1014, 1017 (11th Cir. 1991) (refusing to apply *Ex Post Facto* Clause in a RICO case where substitute assets provision merely provided "for an alternative method of collecting a forfeiture judgment" and thus did not increase defendant's penalty);

- *But see United States* v. *Jackson,* 718 F. Supp. 1288, 1292 (N.D. W. Va. 1989) (declining to apply substitute asset provision of section 982 retroactively);

D. Relation back doctrine:

- *United States* v. *Martinez,* 228 F.3d 587,590 n.5 (5th Cir. 2000) (amendment to criminal forfeiture statute codifying the relation back doctrine in 1984 applies to offenses that straddle the effective date);

- *United States v. Ianniello,* 621 F. Supp.]455, 1475-76 (S.D.N.v. 1985) (retroactive application of relation back doctrine in criminal forfeiture case does not violate *ex post facto* because it does not affect defendant's punishment);

E. Application of Rule 32.2:

- *United States* v. *Davis,* 177 F. Supp. 2d 470 (E.D. Va. 2001) *(Ex Post Facto* Clause does not bar application of Rule 32.2 to conduct occurring before December 1, 2000);

- *United States* v. *Harrison,* 200 1 WL 803695 (N.D. Ill. 2001) (ignoring suggestion that Rule 32.2 does not apply to criminal conduct completed before December 1,2000);

- *But see United States* v. *Pease,* 331 F.3d 809,810 n.l (l1th Cir. 2003) (applying old Rule 32(d)(2) because that was the rule in effect on the date of the indictment);

XL. **Disposition of** Assets

A. Appointment of trustee:

- *United States* v. *BCCI Holdings (Luxembourg) S.A. (Application of Clifford and Altman),* 980 F. Supp. 496 (D.D.C. 1997) (pursuant to section 1963(e), court may appoint truste~ to liquidate assets of corporation where such liquidation is necessary for the Government to realize defendant's 61 percent interest);

- *United States* v. *Reiners)* 934 F. Supp. 721 (E.D. Va. 1996) (court may appoint trustee to liquidate assets and transfer proceeds to U.S.. Marshals Service in liquid form);

- *United States* v. *Stewart,* 1998 WL 472466 (E.D. Pa. 1998) (when defendant's controlling interest in a corporation is forfeited, the court may appoint a trustee to conserve the corporate assets even though the corporation was not a defendant); *id.,* 1999 WL 551891 (E.D. Pa. 1999) (court approves trustee)s sale of forfeited corporation to third party, h01ding that sale below what defendant claimed was market value was fair and reasonable considering corporation was forfeited in a criminal case);

B. Sale or disposition of forfeited property:

- *United States* v. *Stewart,* 1999 WL 551891 (ED. Pa. 1999) (defendant cannot object to sale of property once his interest is extinguished, nor can defendant seek a stay under section 1963(1); whether defendant can seek a stay under Rule 38 is an open question, but stay will be denied if delay would result in potential harm to the Government and third parties; defendant is enjoined under section 1963(e) from objecting to sale);

- *United States* v. *Macia,* 157 F. Supp. 2d 1369 (S.D. Fla. 2001) (28 U.S..C. § 2001 governs sale of property forfeited under section 853);

C. Persons eligible to buy forfeited property:

- *United States v. Kramer,* 957 F. Supp. 223 (S.D. Fla. 1997) (section 1963(f) bars any person "acting in concert with the defendant" from purchasing the forfeited property regardless of whether that person was ever charged or convicted of any crime);

D. Wan-anting dear title:

- *United States* v. *Stewart,* 1999 WL 551891 (E.D. Fa. 1999) (court wan-ants clear title to the forfeited property under section 1963(1)(7));

E. Remission to victims:

- *United States* v. *BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement),* 69 F. Supp. 2d 36 (D.D.C. 1999) (section 1963(g) gives the Attorney General power to remit criminally forfeited property to victims by agreeing, as part of plea agreement, that half of all forfeited property will go to victims);

F. Division of jointly held property:

- *United States* v. *Totaro,* 345 F Jd 989 (8th Cir. 2003) ("state property law cannot trump the Government's right to forfeiture of all of [defendant's) interest"; court must sort out how much of the property was defendant's and how much was his wife's and divide the property accordingly);

- *United States* v. *Lee,* 232 F.3d 556 (7th Cir. 2000) (defendant's interest in property held as tenancy by the entireties cannot be forfeited as a substitute asset in a criminal case because state law prohibits the transfer of one spouse's interest without the other spouse's consent; but suggesting that the federal interest would override state law if the property were directly involved in a crime);

- *United States v. 1500 Lincoln Avenue,* 949 F.2d 73 (3d Cir. 1991) (converting tenancy by the entireties to cotenancy, with Government substituted as the cotenant);

- *United States v. Martinez,* 228 F.3d 587 (5th Cir. 2000) (third party, whose one-half interest in the defendant's property is not subject to forfeiture, is entitled to one-half of the present value of the property, not one-half of the cost of the property when it was acquired);

- *United States* v. *Kennedy,* 201 F.3d 1324 (11th Cir. 2000) (the Government's interest in tenancy by the entireties property cannot be realized during the marriage, but it can be realized when the marriage ends; guilty spouse's interest does not seamlessly transfer to other spouse in a way that negates the Government's forfeiture interest, rejecting *Leroy Lane);*

- *Christunas* v. *United States.* 61 F. Supp. 2d 642 (E.D. Mich. 1999) (no part of property held as tenancy by the entireties is subject to criminal forfeiture unless both spouses are convicted; nondefendant spouse entitled to return of the entire value of the property);

- *Cf United States* v. *Craft,* 122 U.S.. 1414 (2002) (that taxpayer could not unilaterally alienate property held as tenancy by the entireties did not preclude IRS from subjecting his interest to a federal tax lien; broad language in the federal statute reveals that Congress meant to reach every property interest that a taxpayer might have);

XLI. **Forfeiture and Restitution**

A. Purpose of criminal forfeiture is punishment:

- *United States v. DeFries)* 129 F.3d 1293, 1315 (D.C. Cir. 1997) ("forfeiture is not intended to rectify the unjust enrichment of the individual, but to punish the defendant"; therefore, defendant gets no credit for taxes paid on fraud proceeds);

B. CoW"tS are split over whether defendant is entitled to credit against the forfeiture for amount paid as restitution:

- *United States* v. *Tencer,* 107 F.3d 1120 (5th Cir. 1997) (affirming restitution order for $451,000 to thud victims plus criminal forfeiture of $1 million that included the fraud proceeds plus connningled funds);

- *United States* v. *Emerson,* 128 F.3d 557 (7th Cir. 1997) (forfeiture and restitution are not mutually exclusive; dcfendant may be made to pay twice and is not entitled to reduce restitution by the amount of the forfeiture);

- *United States v. Carroll)* 346 F.3d 744 (7th Cir. 2003) *(dicta)* (defendant may be ordered to forfeit everything he owns as substitute assets; he is not entitled to retain anything with which he might pay fines or restitutlon);

- *United States* v. *Moyer,* 313 F.3d 1082 (8th Cir. 2002) (noting without discussion that defendant was ordered to pay $1.2 in restitution and forfeit another S438.934);

- *United States v. RQllins,* 65 Fed. Appx. 215, 2003 WL 1930336 (1 Oth Cir. 2003) (Table) (restitution is mandatory; defendant is not entit1ed to any deduction for the amount recovered and forfeited by state authorities);

- *United States v. Palll,* 2002 WL 31018291 (11th Cir. 2002) (Table) (noting without discussion that district court was "correct" in ordering forfeiture as welJ as restitution and a fme, but holding

defendant's appeal on Eighth Amendment grounds moot because the forfeited property no longer had any valu~);

- *United States v. Ste'tvart,* 1999 WL 551891 (E.D. Pa. 1999) (although defendant cannot object to the sale of forfeited property, where: court orders that defendant receive credit against restitution order for the amount realized from the sale of the property, defendant may seek additional credit ifhe establishes that the property was sold below market value);

- *United States v. Henry,* 1999 WL 1457437 (M.D. Tenn. 1999) (defendant cannot object that criminal forfeiture and paying restitution to the Government in a Medicare fraud case result in double recovery for the Government; restitution and forfeiture are separate matters-one is intended to make the victim whole, while the other forces a wrongdoer to disgorge ill-gotten gains);

- *St. Paul Fire* & *Marine Ins. Co. v. Genova,* 172 F. Supp. 2d 1001 (N.D. Ill. 2001) (forfeiture and restitution are different concepts; forfeiture of criminal proceeds does not relieve the defendant of the obligation to make the victim whole; indemnity policy that would have required insurance company to reimburse city for "damage" caused by official misconduct does not apply to criminal forfeiture judgment);

- *United States v. Erhart,* 2002 WL 398835 (D. Minn. 2002) (noting that forfeiture and restitution are separate maners, court enters forfeiture order and defers restitution order to later date);

- *Cf United States* v. *Trotter,* 912 F.2d 964 (8th Cir. 1990) (defendant can't use forfeited funds to offset or satisfy his fine);

- *See* Civil Forfeiture Outline for cases on interplay of forfeiture and restitution;

- *But cf United States v. Hawkey,* 148 F.3d 920 (8th Cir. 1998) (remanding forfeiture judgment to the district court to reduce it by the amount defendant returned to the victims of the underlying fraud);

C. Defendant is not entitled to credit against the restitution or fine for the amount forfeited:

- *United States* v. *Alalade,* 204 F.3d 536 (4th Cir. 2000) (under the Mandatory Victims Restitution Act, the defendant is not entitled to an offset against the restitution order for the value of the fraud proceeds that the Government forfeited administratively); *United States v. Bright,* - F.3d_, No. 02-50492, 2004 WL 25017 (9th Cir. Jan. 5. 2004) (same. following *A/alade);*

- *United States v. Leon-DelflS,* 203 F.3d 103 (1st Cir. 2000) (defendant cannot object to restitution order On the ground that the Government has seized the criminal proceeds in a parallel civil forfeiture case; defendant may be entitled to credit for any restitution actually paid, but because the civil case was stayed pending the criminal trial, the seized funds have not yet been used to pay any restitution);

- *United States v. Bollin,* 264 F.3d 391 (4th Cir. 2001) (defendant ordered to pay $1.2 mil1ion forfeiture judgment and $783,000 restitution order; no discussion of whether that was proper);

- *United States v. McGauley,* 279 F.3d 62 (1st Cir. 2002) (noting without discussion that the sentence inc1uded both fine and forfeiture of $243,000);

- *See United States v. Kline,* 2002 WL 539074 (D. Minn. 2002) (declining to resolve apparent conflict between MYRA and forfeiture law; holding that MVRA does not apply to matters that, because of their complexity, would unduly prolong the sentencing process);

D. Government may forego forfeiture in favor ofrestitution:

- *United States v.Mvill,* 299 F.3d 123 (2d Cir. 2002) (instead'ofpursuing forfeiture, Government used seized funds to satisfy restitution order);

- *United States* v. *Gallant,* 306 F.3d 1181 (1 st Cir. 2002) (order directing defendant to sell his assets so that he could pay restitution was a restitution order under section 3663, not a forfeiture order; no notice of forfeiture per Rule 32.2(a) was required);

E. The court will not second guess the Government's decision to pursue forfeiture versus restitution:

- *United States v. Geno\la,* 333 F.3d 750 (7th Cir. 2003) (restitution is based on loss; forfeiture is based on gain; therefore, in some cases restitution may net more for the victim than forfeiture would net for the Government; but the court will not second guess the Government's decision to pursue forfeiture ins,tc:ad of restitution);

- *United States* v. *Bright,* - F.3d -' No. 02.50492, 2004 Wi 25017 (9th Cir. Jan. 5, 2004) (district court may urge the Government to apply the forfeited funds to restitution, but ordering the Government to do so would conflict with Section 98 I (e)(6) which gives the Government the discretion to apply forfeited funds in that fashion);

F. Restitution order may be offset to reflect amount of forfeited funds remitted to victims:

- *United States* v. *Johnston,* 199 F.3d 1015 (9th Cir. 1999) (under pre-1996 law, courts were obligated to reduce restitution by amount victims had already recovered through petitions for remission of forfeited funds);

- *United States* v. *Alalade,* 204 F.3d 536, 540 n.4 (4th Cir. 2000) (reserving judgment as to whether defendant would be entitled to offset against restitution order for amount victims recovered from the Department of Justice via the remission of forfeited funds);

G. All Writs Act may be used for post-conviction restrnint of property for restitution:

- *United States* v. *Numisgroup International. Corp,* 169 F. Supp. 2d 133 (E.D.N.v. 2001) (restraining property post-conviction on two theories: (1) forfeiture as substitute assets and (2) to preserve property until restitution order is entered at sentencing);

XLII. DOJ Approval Requirements

- *United States v. Jamieson,* 189 F. Supp. 2d 754 (N.D. Ohio 2002) (internal rule requiring approval of indictment by Main Justice confers no rights on defendant);

XLIII. Extradition

• Criminal forfeiture is not a separate offense for extradition purposes:

- *United States v. Saccoccia,* 58 F.3d 754 (1st Cir. 1995) (defendant may be subjected to criminal forfeiture even ifhe was not extradited on forfeiture charges and even if the law of the foreign state does not provide for criminal forfeiture in comparable circumstances);

XLIv. Section 2255/ Court of Federal Claims

A. Section 2255 motion does not apply to criminal forfeiture:

- *Rodriguez v. United States,* 132 F.3d 30, 1997 WL *ii0636* (Ist Cir. 1997) (Table) (relief from monetary-type penalty, as opposed to release from c.onfinement, not cognizable under sec.tion 2255);

- *Mosley v. United States,* 1995 WL 118180 (N.D.N.v. 1995) (unpublished) (section 2255 only applies to re1ease from custody~ it cannot be used to vacate criminal forfeiture order);

B. Section 2255 cannot be used to challenge criminal forfeiture on any ground that could have been raised on direct appeal:

- *United States* v. *Lewis,* 156 F. Supp. 2d 1280 (M.D. Fla. 2001) (section 2255 proceeding is not proper forum for challenge to criminal forfeiture on issues that could have been raised on direct appeal);

- *Rivera* v. *United States,* 2003 WL 22118976 (S.D.N.v. 2003) (defendant may not use section 2255 to challenge a criminal forfeiture judgment that he failed to challenge on direct appeal)~

C. Court of Federal Claims:

- *Maracalin* v. *United States,* 52 Fed. CL 736 (Fed. Cl. 2002) (criminal forfeiture is not a Fifth Amcndment "taking"; Court of Federal Claims has no jurisdiction over criminal forfeiture);

- *Bailey. v. United States,* 54 Fed. Cl. 459 (Fed. CI. 2002) (Court of Federal Claims lacks jurisdiction to review the merits of an asset forfeiture action, but it may consider a claim for attorney's fees by a defense attorney who claims that the Government promised him part of the forfeited property as his fee);

D. Conflict ofinterestJforfeiturc of attorney's fees:

- *United States* v. *Atkin,* 80 F. Supp. 2d 779 (N.D. Ohio 2000) (no conflict of interest created by Government's agreement not to forfeit asset so that defense attorney could get pa1d);

- *Casso v. United States,* 2001 WL 1517537 (E.D.N.v. 2001) (not improper for defense attorney to ask Government to pennit defendant to keep otherwise forfeitable assets to pay legal fees);

XLv. Prosecutorlallmmunlty

- *Younce v. Hurst,* 173 F. Supp. 2d 664 (E.D. Mich. 2001) (doctrine of absolute immunity applies to prosecutor's request for post-conviction order of forfeiture);

XLVI. Pre-Judgment Interest

- *United States v. Ford,* 64 Fed. Appx. 976, 2003 Wi 21212547 (6th Cir. 2003) (28 U.S..C. § 2465(b) does not apply to criminal cases; nevertheless the Government is liable to a defendant for intcrest accrued on property held pending trial if the criminal forfeiture fails);

- *United States v. Ford,* 64 Fed. Appx. 976,2003 WL 21212547 (6th Cir. 2003) (because substitute assets cannot be seized or restrained pretrial, if a jury ultimately finds that property is not traceable to the offense, but is forfeitable only as a substitute asset,. the pretrial restraint was unlawful, and the Government must pay the defendant interest that accrued between the time of the seizure and the time the property was ordered forfeited as a substitute asset);

XLVII. Property Subject to Forfeiture

A, "'Proceeds":

1. Property defendant would not have obtained or retained but for the criminal offense:

- *United States v. Horak,* 833 F.2d 1235,1242-43 (7th Cir. 1987) ("in order to win a forfeiture order, the [G]ovemment must show...that (the defendant's] racketeering activities were a caUSe in fact of the acquisition or maintenance of' the property sought.); *United States v. Angiulo,* 897 F.2d 1169, 1213 (1st Cir. 1990); *United States* v. *Of chi nick,* 883 F.2d 1172, 1183 (3d Cir. 1989); *United States v. Porcelli,* 865 F.2d 1352, 1365 (2d Cir. 1989);

- *United States v. DeFries,* 129 F.3d 1293, 1312 (D.C. Cir. 1997) ("because the but-for test usefully articulates the requirement of a nexus between the targeted property and the racketeering activity, we adopt it");

- *United States* v. *Vasquez-Ruiz,* 2002 WL 1880127 (N.D. m. 2002) (services and benefits that defendant received £Tom third party who was the beneficiary of defendant's insurance fraud were proceeds received "indirectly" as a result of the fraud);

- *United States v. Cianci,* 218 F. Supp. 2d 232 (D.R.I. 2002) (following *Angiulo;* "a 'but for' test is wed to determine whether [G]ovemment has proven required nexus between interest in question and RICO violation");

- *United States v. Tyson Foods, Inc.,* No 4:01-CR-061 (E.D. Tenn. Feb. 4, 2003) ("cost savings" realized by an employer who aids illegal aliens in obtaining false documents so that they can work in the employer's factory may constitute the proceeds of the false document offense);

2. Possession with intent to distribute/conspiracy:

- *United States v. Thompson,* 2002 WL 31667859 (N.D.N.Y. 2002) (there are no proceeds of a conspiracy that ends with the defendant's arrest before the drugs are distributed);

3. Gross proceeds versus net profits:

• The majority rule is that "proceeds" means "gross proceeds":

- *United States v. Simmons,* 154 F.3d 765 (8th Cir. 1998) (collecting cases and holding that "the better view is the one that defines proceeds as the gross receipts of the illegal activity"; forfeiture is intended to punish all those who receive income tram illegal activity, not just those whose criminal activity turns a profit);

- *United States v. McHan,* 10 I F.3d 1027 (4th Cir. 1996) (gross proceeds forfeitable in drug case); *United States v. Keeling,* 235 F.3d 533 (10th Cir. 2000) (same); *United Stares v. Hurley,* 63 F.3d 1 (1 st Cir. 1995) (same in RICO/money laundering case);

- *United States v. DeFries,* 129 F.3d 1293, 1315 (D.C. Cir. 1997) (the Government forfeits gross proceeds in RICO case; no deduction on taxes paid on salary that is subject to forfeiture);

- *United States* v. *Huber,* 243 F. Supp. 2d 996 (D.N.D. 2003) (defendant must forfeit the amount illegally obtained from a farm program even though he used the proceeds for legitimate fanning expenses);

- *See* S. Rep. No. 98-225, 98th Cong., 2d Sess. (1984) at 199 (reprinted in 1984 U.S. Code Cong. & Administrative News 3182) ("the term 'proceeds' has been used [in 18 U.S.C. § 1963 and 21 U.S.C. § 853] in lieu of the term 'profits' in order to alleviate the unreasonable burden on the [G]overnment of proving net profits");

- *Cf United States v. Whatley,* 133 F.3d 601 (8th Cir.), *cert. denied,* 118 S. Ct 2347 (1998) (for sentencing purposes, court should use gross receipts, not net profits; "we are not inclined to allow the defendants a profit for defrauding people or a credit for money spent perpetuating a fraud");

- The Seventh Circuit, however, defines proceeds as net profits:

- *United States* v. *Masters,* 924 F.2d 1362 (7th Cir. 1991) (RICO forfeiture limited to net profits);

- *United States* v. *Jarrett.* 133 F.3d 519 (7th Cir. 1998) (affirming calculation that gave defendants credit for cost of heroin);

- *United States v. Genova,* 333 F.3d 750 (7th Cir. 2003) (under Seventh Circuit law, a person paying a kickback to a corrupt public official is entitled to deduct from the forfeiture the amount of the kickback as well as his office overhead expenses);

4. Proof that proper!)' is drug proceeds:

- *United States v. Alaniz,* 148 F.3d 929 (8th Cir. 1998) (where agents seized $2,000 in currency from a ski jacket found in a closet in a "safehouse" used by drug conspirators, and the money was "folded in a manner consistent with drug trafficking," there was sufficient evidence to support the jury's finding that the money was drug proceeds);

5. Application of section 853(d):

- *United States* v. *Garcia-Guizar,* 160 F.3d 511 (9th Cir. 1998) (rebuttable presumption in section 853(d) does not help the Government establish that money found in defendant's locker was proceeds of the offense of conviction where there was no evidence that the money was acquired during the time period covered by the offense);

B. Traceable property/property that appreciates in value/double counting:

- *United States v. Genova,* 333 F.3d 750 (7th Cir. 2003) (if the defendant obtains proceeds from an offense, he may be made to pay a money judgment for the value of the proceeds, or ordered to forfeit property traceable to those proceeds, but not both);

- *United States v. Hawkey,* 148 F.3d 920 (8th Cir. 1998) (if property is subject to forfeiture as property traceable to the offense, it is forfeitable in full, including any appreciation in value since the time the property became subject to forfeiture; defendant may be made to pay money judgment or forfeiture traceable property, but not both);

- *United States v. Hill,* 2002 WL 31119692 (6th Cir. 2002) (Table) (following *Hawkey;* stock that appreciates in value is forfeitable as property traceable to the originally forfeitable shares);

- *United States v. Young,* 2001 WL 1644658 *2 n.3 (1vI.D. Ga. 2001) (defendant, whose residence was forfeited upon his conviction, cannot complain that in the year between the conviction and the time the order of forfeiture became final he continued to make repairs to the residence);

C. Facilitating property:

- *United States v. Dieter,* 198 F .3d 1284 (11 th Cir. 1999) (a medical license is forfeitable as facilitating property under section 853(a)(2); the license is intangible property that made it possible for doctor to write illegal prescriptions);

- *See United States v. Rivera,* 884 F.2d 544,546 (l1th Cir. 1989) (defining facilitating property broadly);

- *United States* v. *Schifferli,* 895 F.2d 987 (4th Cir. 1990) (facilitating property is anything that makes the offense easier to commit or harder to detect);

- *United States* v. *Puche,* 350 F.3d 1137 (11th Cir. 2003) ("facilitation occurs when the property makes the prohibited conduct less difficult or more or less free from obstruction or hindrance");

- *United States* v. *Harrison,* 2001 WL 803695 (N.D. Ill. 2001) (in a drug case, the Government is entitled to a money judgment for the amount of money the defendant used to buy drugs during the course of the conspiracy, as such funds are facilitating property under section 853(a)(2));

- *United States* v. *Thompson,* 2002 WL 31667859 (N.D.N.Y. 2002) (vehicle and cash found on defendant's person are forfeitable under section 853(a)(2) as property used to facilitate an incomplete conspiracy to distribute marijuana);

D. RlCO:

1. All interests in the *RlCO* enterprise (18 U.S..C. § 1963(a)(2)(A)):

- *United States v. Anderson,* 782 F.2d 908, 918 (11th Cir. 1986) ('ca defendant's conviction under the RICO statute subjects *all* his interests in the enterprise to forfeiture 'regardless of whether those assets were themselves "tainted" by use in connection with the racketeering activity'"). quoting *United States* v. *Cauble,* 706 F.2d 1322, 1359 (5th Cir.1983);

- *United States v. Busher,* 817 F.2d 1409, 1413 (9th Cir. 1987) ("forfeiture is not limited to those assets of a RICO enterprise that are tainted by use in connection with racketeering activity, but rather extends to the convicted person's entire interest in the enterprise");

- *United States v. Angiulo,* 897 F.2d 1169, 1211 (1st Cir. 1990) ("any interests *in* an enterprise, including the enterprise itself, are subject to forfeiture in their entirety, regardless of whether some portion of the enterprise is not tainted by the racketeering activity");

- *United States v. Sarbello,* 985 F.2d 716, 724 & n.13 (3d Cir. 1993) (criminal forfeiture under RICO must be subjected to a proportionality test under the Eighth Amendment because 100 percent of a defendant's interest in the enterprise is subject to forfeiture under section 1963(a)(2)(A), even if those "interests are acquired legitimately and the enterprise is primarily engaged in legitimate activity");

- *United States* v. *Porcelli.* 865 F.2d 1352, 1364 (2d Cir. 1989) ("a RICO enterprise found in violation of section 1962(c) is indivisible and is forfeitable in its entirety");

- *United States* v. *Najjar,* 300 F.3d 466 (4th Cir. 2002) (all of the assets ofa corporation convicted of a RICO offense are subject to forfeiture under section 1963);

- *United States* v. *BCCI Holdings (Luxembourg) S.A. (Petition of Pacific Bank),* 956 F, Supp. 5, 12 (D.D.C. 1997) (even untainted property received by the enterprise *after* the racketeering activity had ceased is subject to forfeiture under subsection (a)(2)(A) because *"all* of a RICO defendant's interests in an enterprise, including the enterprise itself, are subject to forfeiture in their entirety, regardless of whether some portion of the enterprise is untainted by racketeering activity");

- *United States v. BCCI Holdings (Luxembourg) S.A. (petition of Banque lndosuez),* 961 F. Supp. 282 (D.D.C. 1997) (claimant cannot assert fact that wire transfer was received by defendant after criminal activity ceased as ground for challenging order of forfeiture);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petitions of Bank Austria),* 1997 WL 695668 (D.D.C. 1997) (property acquired after defendant's property was restrained pretrial could be forfeited, but property acquired after entry of the preliminary order of forfeiture could not), order amended on reconsideration by 994 F. Supp. 18 (D.D.C. 1997);

- *United States v. Cianci,* 218 F. Supp. 2d 232 (D.R.I. 2002) (defendant's entire interest in enterprise is forfeitable under section 1963(a)(2)(A) whether or not it was obtained illegally, but only if defendant is convicted of a substantive RICO offense and not just a conspiracy);

- *But see United States* v. *Modi,* 178 F. Supp. 2d 658 (W.D. Va. 2001) (in a RICO case based on heath care fraud, Government is entitled upon conviction to forfeit only the income derived from the fraud scheme, and not legitimate income derived from the RICO enterprise);

2. Calculation of the amount subject to forfeiture:

- *United States v. Corrado,* 227 F.3d 543 (6th Cir. 2000) (Corrado I) (district court erred in refusing to impose a forfeiture judgment on the ground that the amount subject to forfeiture was not sufficiently quantifiable; the court is required to make a reasonable approximation, based on the evidence in the record, of the amount derived from the offense and enter a money judgment accordingly) ;

E. Health care fraud:

- *United States* v. *Vasquez-Ruiz,* 2002 WL 1880127 (N.D. Ill. 2002) (what health care provider receives from third party in return for submitting false insurance claims on third party's behalf are proceeds of health care fraud offense forfeitable under section 982(a)(7));

F. Money laundering:

Forfeiture under the money laundering statutes, 18 U.S.C. § 981.82 and 31 U.S..C. § 5317(c), is covered in a separate outline: *Federal Money Laundering Cases, Part II.*

G. Real property:

- *United States v. Sherman,* 262 F.3d 784 (8th Cir. 2001) (if real property is used to facilitate an offense, forfeiture of the entire parcel is appropriate);

- *United States* v. *Carpenter.* 317 F.3d 618 (6th Cir. 2003) (forfeiture of entire parcel of real property is mandatory; whether property consists of a single parcel or more than one parcel depends on the instruments creating the defendant's interest; property conveyed at one time by one deed is a single parcel);

H. Conspiracy:

- *United States v. Vondette,* 76 Fed. Appx. 358, 2003 WL 22018878 (2d Cir. 2003) (as long as the last act of a conspiracy fans within the statute of limitations, the earlier acts in the conspiracy may be considered in ca1culating the amount of forfeiture);

I.

Civil forfeiture:

- *See* "Substantive Forfeiture Statutes" in Civil Forfeiture Case Outline.

XLVIII. Application of Section 2461(c)

1. 28 U.S..C. § 2461(c) provides that the Government may bring a criminal forfeiture action whenever a defendant is convicted of an offense for which any form of forfeiture - civil or criminal - is authorized.

- *United States v. Baranski,* 75 Fed. Appx. 566, 2003 WL 22176185 (8th Cir. 2003) (section 2461(c) authorizes criminal forfeiture for violation of26 U.S..C. § 5861(1) because civil forfeiture is authorized by section 5872);

- But section 2461(c) does not apply if there is already a criminal forfeiture provision on point:

- *United States* v. *Thompson,* 2002 WL 31667859 (N.D.N.Y. 2002) (section 2461 (c) is a gap filler that allows criminal forfeiture where there is no other criminal forfeiture provision; it cannot be used to convert a section 881(a)(6) civil forfeiture into a criminal forfeiture because there is a specific criminal forfeiture provision for drug offenses in section 853(a)).