



SELECT CRIMINAL FORFEITURE FORMS

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Criminal Forfeiture Procedure

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I. Introduction

This outline summarizes the key points in criminal forfeiture procedure. It begins with the law on the drafting of the forfeiture allegation in an indictment and continues more or less chronologically through the trial, sentencing, ancillary proceeding, and post-trial phases of a criminal forfeiture case. The outline tracks the structure of Rule 32.2, Federal Rules of Criminal Procedure, which governs all criminal forfeiture proceedings.

Overview

The Supreme Court has held that criminal forfeiture is part of the defendant's sentence. *Libretti v. United States*, 516 U.S. 29 (1995). It requires a conviction on the offense giving rise to the forfeiture. *United States v. Aramony*, 88 F.3d 1369 (4th Cir. 1996) (because 18 U.S.C. § 1957 conviction was reversed on appeal, 18 U.S.C. § 982 forfeiture order had to be vacated); *United States v. Tencer*, 107 F.3d 1120 (5th Cir. 1997) (same for 18 U.S.C. § 1956).

In general, only the defendant's property can be forfeited in a criminal case. *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. 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"); *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).

So if property really belongs—in whole or in part—to a third party, criminal forfeiture will not work. *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. Kennedy*, 201 F.3d 1324 (11th Cir. 2000) (where husband and wife are tenants by the entireties, only husband's interest is forfeitable in a criminal case); *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). But property held by nominees, alter egos, and persons who did not acquire their interest until after the crime was committed can be forfeited as property of the defendant. *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. Cuartres*, 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 to a third party through the black market; 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. Simmons*, 154 F.3d 765 (8th Cir. 1998) (corporate form may be ignored where defendants received bribe money through non-defendant corporation).

This means that we can always forfeit the proceeds of the crime in a criminal case. If a person other than the defendant claims an interest in the proceeds, he or she must satisfy the bona fide purchaser requirements of 21 U.S.C. § 853(n)(6)(B). *United States v. Hooper*, 229 F.3d 818 (9th Cir. 2000) (because proceeds do not come into existence until after the crime is committed, persons contesting the forfeiture of proceeds must be bona fide purchasers). This is also how we forfeit attorneys' fees in a criminal case. *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).

II. Indictment

A. Naming property in the forfeiture allegation

Rule 32.2(a) provides that no forfeiture can be imposed unless the indictment contained a forfeiture allegation.

(a) Notice to the Defendant. A court shall not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the [G]overnment will seek the forfeiture of property as part of any sentence in accordance with the applicable statute.

The commentary explains this as follows:

Subdivision (a) is not intended to require that an itemized list of the property to be forfeited appear in the indictment or information itself. The subdivision reflects the trend in case law interpreting present Rule 7(c). Under the most recent cases, Rule 7(c) sets forth a requirement that the [G]overnment give the defendant notice that it will be seeking forfeiture in accordance with the applicable statute. It does not require a substantive allegation in which the property subject to forfeiture, or the defendant's interest in the property, must be described in detail.

This is a notice provision: The property subject to forfeiture need not be itemized. *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 States v. DeFries*, 129 F.3d 1293 (D.C. Cir. 1997) (not necessary to specify in either the indictment or a bill of particulars that the Government sought forfeiture of defendant's salary; to comply with Rule 7(c), the Government need only put defendant on notice that it would seek to forfeit everything subject to forfeiture under the applicable statute, such as all property "acquired or maintained" as a result of a RICO violation); *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. 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).

Furthermore, the extent of the 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 all 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).

B. Applying criminal forfeiture retroactively

Because criminal forfeiture is part of the defendant's sentence, it is regarded as punitive for purposes of the *Ex Post Facto* Clause. This is relevant to offenses that occurred before the effective date of the applicable forfeiture statute. *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).

So although Congress enacted legislation permitting the criminal forfeiture of all criminal proceeds in 2000, it is still necessary to charge money laundering to forfeit proceeds in most non-drug cases if the offense was committed before August 23, 2000.

III. Restraining Orders

A. Pretrial restraint of assets

The court is permitted to issue both pre-indictment and post-indictment restraining orders under 21 U.S.C. § 853(e). This is an alternative to seizing the property with either a civil forfeiture warrant (18 U.S.C. § 981(b)) or a criminal forfeiture warrant (section 853(f)). *United States v. Walker*, 943 F. Supp. 1326 (D. Col. 1996) (section 853(f) requires showing that restraining order would not be adequate to preserve the property).

No pre-restraint hearing is required for either pre-indictment or post-indictment order. *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 if the restraining order is obtained pre-indictment, it is good for only ten days, when a hearing is necessary before the temporary restraining order is converted into a preliminary injunction. *United States v. Kirschenbaum*, 156 F.3d 784 (7th Cir. 1998) (Government gets pre-indictment order *ex parte*; defendant gets hearing on Government's motion to continue the order for 90 days).

Post-restraint, most courts hold that a pretrial hearing required if Sixth Amendment is implicated. *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; but if he makes this showing, he is entitled to a hearing); *United States v. Kirschenbaum*, 156 F.3d 784 (7th Cir. 1998) (hearing is required when defendant raises Sixth Amendment issue and demonstrates lack of alternative source of funds to hire counsel); *United States v. Jamieson*, 189 F. Supp. 2d 754 (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); *but see United States v. Bissell*, 866 F.2d 1343, 1354 (11th Cir. 1989) (no post-restraint hearing required, even if Sixth Amendment is implicated); *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 Sixth Amendment rights are implicated, and suggesting *Bissell* may need to be revisited).

The courts are split as to whether a post-restraint hearing is necessary if Sixth Amendment rights are not implicated. *United States v. Musson*, 802 F.2d 384, 387 (10th Cir. 1986) (no hearing required); *United States v. Jones*, 160 F.3d 641 (10th Cir. 1998) (reaffirming *Musson* on this point); *United States v. Farmer*, 274 F.3d 800, 804-05 (4th Cir. 2001) (agreeing with *Jones*; defendant gets no hearing unless he demonstrates that he lacks an alternative source of funds to hire counsel); *see 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).

B. 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. 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); *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (pursuant to 18 U.S.C. § 1963(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). 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. Ill. 1999) (following *Kirschenbaum*; order restraining drug defendant's use of two vehicles applied to his agents, employees, and others acting in concert but cannot restrain family members or other third parties).

Section 853(e)(4) specifically authorizes the court to include a repatriation order in a pretrial restraining order. *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).

C. Pretrial restraint of substitute assets

Most courts do not permit the pretrial restraint of substitute assets, *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); *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); but the Fourth Circuit and individual district courts in the Sixth, Seventh, and Eleventh Circuits do permit such restraint. *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. 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).

If property is directly forfeitable, there is no need to apply the rule against pre-trial restraint of substitute assets. *United States v. Stewart*, 185 F.3d 112 (3d Cir. 1999) (if the money is forfeitable as criminal proceeds, and not as substitute assets, there was nothing improper about the pretrial restraint).

IV. Guilty Pleas

The defendant, in a plea agreement, can agree to forfeit any property derived from, involved in, or used to commit the offense to which he or she is pleading guilty. If there was no forfeiture allegation in the indictment for that offense, the prosecutor may have the defendant plead to a criminal information that contains such an allegation. Possibly, a defendant could waive the notice provision in Rule 32.2(a) and agree to the forfeiture anyway, but this is an untested theory.

If the offense occurred before August 23, 2000, and there was no pre-CAFRA criminal forfeiture statute, the defendant probably can plead and agree to the criminal forfeiture by waiving the *ex post facto* objection. But this is also an untested theory.

If criminal forfeiture is impossible, the defendant can agree not to contest a parallel civil forfeiture. *United States v. Contents of Account Number 901121707*, 36 F. Supp. 2d 614 (S.D.N.Y. 1999) (defendant pleads guilty to structuring offense and agrees not to contest civil forfeiture under 18 U.S.C. § 981(a)(1)(A)). In all events, the defendant should recite, as part of the plea agreement, that the property belongs to him or her, and that he or she not only agrees to the forfeiture, but agrees to assist the Government in opposing any claims by third parties. The defendant, however, cannot agree to forfeit his or her spouse's property. If a third party's agreement not to contest the forfeiture is part of the deal, the third party should sign the plea agreement and should be represented by counsel. *Christunas 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 wife did not sign consent decree and was not represented by her husband's attorney).

Once the court accepts the guilty plea, it can enter a preliminary order of forfeiture under Rule 32.2(b) in the same manner as it would if the jury had just returned a special verdict of forfeiture at trial. The procedure for converting the preliminary order to an order that is final as to the defendant is described below.

V. Trial Procedure

A. Bifurcated proceeding

Before Rule 32.2 took effect, courts were divided as to whether bifurcation of a jury trial was required. But Rule 32.2(b)(1) resolved this issue by providing that the forfeiture proceeding takes place "as soon as practicable" after the court enters a guilty verdict. In other words, the trial must be bifurcated.

B. Special verdict/right to a jury trial

When Rule 32.2 was first proposed, it was meant to do away with the right to a jury trial on the forfeiture issue. The notion was that the Supreme Court's decision in *Libretti*, holding that there was no constitutional right to a jury trial on the forfeiture issue because forfeiture was part of sentencing gave the green light to efforts to repeal old Rule 31(e).

What was originally proposed was the language in Rule 32.2(b)(1), which provides that “the court” determines whether the requisite nexus has been established and “the court” determines the amount of any money judgment. But the Standing Committee on the Criminal Rules did not approve that version and insisted that the jury right be preserved at the defendant’s option. For that reason, while paragraph (1) remained the same, the committee added paragraph (4), which states the following:

Upon a party’s request in a case in which a jury returns a verdict of guilty, the jury shall determine whether the [G]overnment has established the requisite nexus between the property and the offense committed by the defendant.

The things to notice are: (1) the default is that the forfeiture is tried to the court—a party must request a jury trial on the forfeiture if the party wants one; *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); and (2) the Government has an equal right to demand a jury trial.

At least one court has held that because the forfeiture phase of the trial is part of sentencing, hearsay is admissible. *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; and because forfeiture is part of sentencing, such evidence may include reliable hearsay).

The trial phase of a criminal forfeiture involves only the defendant; third parties must await the ancillary proceeding to contest the forfeiture, see 21 U.S.C. § 853(k). *United States v. Pelullo*, 178 F.3d 196 (3d Cir. 1999) (criminal forfeiture occurs in two steps: first, the jury determines the forfeitability of the property and the district court enters an order of forfeiture; second, third parties assert their interests in an ancillary proceeding).

C. Burden of proof for criminal forfeiture

Virtually all courts hold that the preponderance standard applies in the forfeiture phase of a criminal trial. *United States v. Dictor*, 198 F.3d 1284 (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 (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. 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. Layne*, 192 F.3d 556 (6th Cir. 1999) (reaffirming *Smith*); *United States v. Bellomo*, 176 F.3d 580 (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).

Courts have also rejected the argument that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), changes this to require the forfeiture to be established beyond a reasonable doubt. *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. 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. Davis*, 177 F. Supp. 2d 470 (E.D. Va. 2001) (following *Corrado* and *Cabeza*; preponderance standard still applies in the Fourth Circuit).

D. Special verdict/ownership issue

There had always been a great deal of ambiguity as to whether the finder of fact—whether it be the court or the jury—was supposed to determine only whether there was a nexus between the property and the offense, or also was supposed to determine if the defendant was the owner of the property. The problem was old Rule 31(e), which provided that the jury had to return a special verdict as to the “extent of the defendant’s interest” in the property.

The commentary to Rule 32.2 describes this controversy at length, and notes the division in the case law. Some cases held that the jury had to determine both nexus and ownership, while others held that the jury’s role was to determine nexus only. Compare *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) with *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). The commentary to Rule 32.2 explains that it makes no sense for the court (or the jury) to determine the ownership issue in the Government’s case because the same issue only has to be litigated all over again if a third party files a claim asserting a superior ownership interest in the ancillary proceeding.

In the end, Rule 32.2(b)(1) provides only that the finder of fact must determine “whether the Government has established the requisite nexus between the property and the offense,” while Rule 32.2(b)(2) provides that the determination of the extent of the defendant’s interest *vis à vis* third parties is deferred to the ancillary proceeding:

If the court finds that property is subject to forfeiture, it shall promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment or directing the forfeiture of specific property without regard to any third party’s interest in all or part of it. Determining whether a third party has such an interest shall be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

So, the jury’s role is only to determine if the nexus between the property and the offense has been established; it is *not* to be concerned with whether the defendant had an ownership interest in the property. *United States v. Gaskin*, 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 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”).

This is intended not only to avoid repetitious litigation—*i.e.*, litigating the ownership issue first in the case in chief and again in the ancillary proceeding—but also to preclude a defendant from objecting to the forfeiture on the ground that the property did not belong to him or her. If the defendant says he or she does not own the property, then there is no standing to object to the forfeiture. *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).

Rule 32.2(b)(2) makes this clear, and the commentary to that provision reinforces it:

The defendant would have no standing to object to the forfeiture on the ground that the property belonged to someone else.

Prosecutors must be aware, however, that Rule 32.2 contains a peculiar procedure for what happens if no third party files a claim in the ancillary proceeding. The committee was content to allow the ownership issue to be deferred to the ancillary proceeding as Rule 32.2(b)(2) provides, but they did not want to create a situation where the Government could forfeit just any property connected to the offense, regardless of who the owner was. That would convert a criminal forfeiture into a civil *in rem* forfeiture.

So, if no one files a claim in the ancillary proceeding and the ownership issue is thus not being litigated by any party, the court must nevertheless satisfy itself that at least one defendant had an interest in the property. Rule 32.2(c)(2) states the following:

If no third party files a timely claim, the preliminary order becomes the final order of forfeiture, if the court finds that the defendant (or any combination of defendants convicted in the case) had an interest in the property that is forfeitable under the applicable statute. The defendant may not object to the entry of the final order of forfeiture on the ground that the property belongs, in whole or in part, to a codefendant or third party, nor may a third party object to the final order on the ground that the third party had an interest in the property.

Note once again that even at this stage, the defendant does not get to object to the forfeiture on the ground that the property really belonged to a girl or boyfriend; nor does the court have to worry about determining whether the property belonged to Defendant “A” or Defendant “B.”

VI. ORDER OF FORFEITURE/SENTENCING

A. In general

Forfeiture is mandatory. *United States v. Corrado*, 227 F.3d 543 (6th Cir. 2000) (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. Maxwell*, 189 F. Supp. 2d 395, 400 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).

B. Preliminary order of forfeiture—procedure

Rule 32.2(b)(3) provides that a preliminary order of forfeiture may be entered at any time after the conviction or guilty plea and becomes final as to the defendant at sentencing. *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; therefore, property did not become part of the bankruptcy estate); *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 as to the defendant at sentencing; it remains preliminary as to third parties until the ancillary proceeding is concluded).

Forfeiture must be included in the verbal pronouncement of the 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).

Moreover, Rule 32.2(b)(3) provides that the order of forfeiture "shall be made part of the sentence and included in the judgment." That means that the order of forfeiture must be included in the judgment and commitment order.

Courts disagree as to what happens if the court fails to include forfeiture in the judgment. Some say the Government's only remedy is to appeal. *United States v. Seltzer*, 199 F.3d 1324, 1999 WL 1024725 (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 six weeks and then move district court to amend the sentence); *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 take such appeal, it waives the forfeiture and the judgment becomes final). Others say the Government can move to amend the judgment under Rule 36. *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, 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)). But the Eighth Circuit holds that if the district court omits the preliminary order of forfeiture from the judgment, the time for the defendant's appeal never begins to run, and the Government can return to the district court to fix the problem. *United States v. Covey*, 232 F.3d 641 (8th Cir. 2000) (defendant's appeal, on the merits, from order of forfeiture in money laundering case was premature because the preliminary order was not made part of the judgment at sentencing; case remanded for district court to include order of forfeiture in the judgment); *United States v. Coon*, 187 F.3d 888 (8th Cir. 1999) (preliminary order of forfeiture is final as to defendant and immediately appealable only if it is included in the judgment; because district court failed to make the forfeiture part of the sentence and include it in the judgment, the forfeiture order is still "preliminary" and not ripe for appeal).

C. Form of preliminary order

The court may order the forfeiture of an amount of money, specific property, or substitute assets. *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). Thus, the preliminary order of forfeiture may include specific property, include a money judgment, or 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).

If the order contains only a generic description of the property, or a money judgment, and the Government later finds property traceable to the offense, it may move to amend the order to include the newly-discovered property; *see* Rule 32.2(e).

D. Joint and several liability

Each of the defendants is jointly and severally liable for the full amount of any money judgment. *United States v. Candelaria-Silva*, 166 F.3d 19 (1st Cir. 1999) (all co-defendants held jointly and severally liable for \$6 million money judgment in drug case; even minor participants in drug conspiracy are jointly and severally liable for forfeiture of the full amount of the proceeds); *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*) (same; because person who collected the proceeds was able to do so because of his participation in a scheme, all members of the scheme are jointly and severally liable); *United States v. Bollin*, 264 F.3d 391 (4th Cir. 2001) (even minor participant who received only \$30,000 for his role in the scheme may be liable for full \$1.2 million judgment if the laundering of that amount was foreseeable to him; forfeiture of such foreseeable amount does not violate the Excessive Fines Clause).

E. Substitute assets

Substitute assets may be forfeited to satisfy a money judgment. *United States v. Candelaria-Silva*, 166 F.3d 19 (1st Cir. 1999) (once the Government has obtained a money judgment, it may forfeit defendant’s real property in partial satisfaction of that judgment).

The order of forfeiture for substitute assets must be satisfied out of something not itself subject to forfeiture; otherwise the forfeiture order would be satisfied out of something that belongs to the United States, rendering the substitute assets provision meaningless. *United States v. Candelaria-Silva*, 166 F.3d 19 (1st Cir. 1999) (absence of a nexus between the substitute asset and the offense is irrelevant; if there were a nexus, it would not be necessary to invoke the substitute assets theory); *United States v. Davis*, 177 F. Supp. 2d 470 (E.D. Va. 2001) (if property cannot be forfeited as directly traceable to the offense, it can be forfeited as a substitute asset and used to satisfy the money judgment); *United States v. McCorkle*, No. 6:98-CR-52-ORL-19JGG (M.D. Fla. Jan. 8, 2001) (there is no bar against forfeiture—as a substitute asset—of the property the jury declined to find subject to direct forfeiture).

The prosecutor can switch theories of forfeiture—from direct forfeiture to substitute assets. *United States v. Candelaria-Silva*, 166 F.3d 19 (1st Cir. 1999) (there was nothing improper in prosecutor's decision to move to strike property from the forfeiture allegation before it was submitted to the jury and later seek forfeiture of the same property as a substitute asset); *United States v. McCorkle*, No. 6:98-CR-52-ORL-19JGG (M.D. Fla. Jan. 8, 2001) (prosecutor can drop civil forfeiture case against an asset and seek forfeiture of same property as substitute asset in criminal case).

Procedure for obtaining substitute assets

Rule 32.2(e) provides unambiguously that the forfeiture of substitute assets is a matter for the court, not the jury. It is also clear from the use of the mandatory language in Rule 32.2(e)(2) that the forfeiture of substitute assets is mandatory, not discretionary, once the Government makes the necessary showing that the requirements of 21 U.S.C. § 853(p) are satisfied. *United States v. McCorkle*, No. 6:98-CR-52-ORL-19JGG (M.D. Fla. Jan. 8, 2001) (Rule 32.2(e) governs procedure for amending order of forfeiture to include substitute assets; court cannot be concerned with defendant's claim that the forfeiture of jewelry as a substitute asset would do irreparable harm in the event defendant is successful in overturning conviction on appeal because forfeiture of substitute asset is mandatory once elements of section 853(p) are satisfied); see *United States v. Candelaria-Silva*, 166 F.3d 19 (1st Cir. 1999) (the Government satisfied requirements of section 853(p) by submitting motion and affidavit reciting its efforts to trace defendant's drug proceeds). The Government just has to establish that the amount of money subject to forfeiture exceeds the value of the substitute assets. *United States v. Bennett*, 2000 WL 1505986 (S.D.N.Y. 2000).

Like the forfeiture order itself, forfeiture of substitute assets is mandatory. *United States v. Bollin*, 264 F.3d 391 (4th Cir. 2001) (Congress requires forfeiture of property as a substitute asset; the forfeiture judgment that the substitute asset is used to satisfy is part of the defendant's criminal sentence; cannot insulate certain types of property from forfeiture as a substitute asset); *United States v. McCorkle*, No. 6:98-CR-52-ORL-19JGG (M.D. Fla. Jan. 8, 2001) (court cannot be concerned with defendant's claim that the forfeiture of jewelry as a substitute asset would do irreparable harm in the event defendant is successful in overturning conviction on appeal because forfeiture of substitute asset is mandatory once elements of section 853(p) are satisfied).

Rule 32.2(e)(2) also makes it clear that whenever a court modifies an order of forfeiture to include a substitute asset, it must conduct an ancillary proceeding. *United States v. Lester*, 85 F.3d 1409 (9th Cir. 1996); *United States v. Morgan*, 224 F.3d 339 (4th Cir. 2000) (wife challenges forfeiture of joint bank accounts as substitute assets). But challenging the forfeiture of a substitute asset in the ancillary proceeding is not just an option for the third party; it is the only way to make such a challenge. In other words, the third party cannot object to the Government's motion to amend the order of forfeiture to include the substitute asset at the time the motion is made. If a third party wants to challenge the forfeiture of substitute assets, he or she must do so in the ancillary proceeding. *United States v. Davis*, 2001 WL 47003 (S.D.N.Y. Jan. 17, 2001) (wife's objection to the forfeiture of substitute asset must be made in the ancillary proceeding).

A defense attorney cannot object that substitute assets are needed to pay his fee. *United States v. Numisgroup Intl. Corp.*, 169 F. Supp. 2d 133 (E.D.N.Y. 2001) (Supreme Court's decision in *Monsanto* applies with even greater force to post-conviction restraint of property, including property forfeitable as substitute assets); *United States v. Stewart*, 1998 WL 961363 (E.D. Pa. 1998) (*Caplin & Drysdale* applies to substitute assets), *order aff'd*, 189 F.3d 465 (3d Cir. 1999); *United States v. O'Brien*, 181 F.3d 105,

1999 WL 357755 (6th Cir. 1999) (Table) (same); *United States v. Helms*, 2001 WL 1057751 (W.D. Va. 2001) (same; assets restrained pretrial as substitute assets are not available for attorneys' fees unless there is reason to believe that they won't be forfeited).

F. Property transferred to third parties

As mentioned in the introduction, transactions transferring forfeitable property to third parties may be voided under the relation back doctrine. See 18 U.S.C. § 1963(c); 21 U.S.C. § 853(c); *United States v. Gilbert*, 244 F.3d 888, 902 n.38 (11th Cir. 2001) (under the relation back doctrine, Government's interest dates back to the time of the act that made the property subject to forfeiture; Congress included the provision to prevent a defendant from attempting to transfer property to a third party prior to his or her conviction; third party who objects to application of the relation back doctrine must file a claim in the ancillary proceeding). So, if the Government has established that the property was subject to forfeiture in the forfeiture phase of the trial—or pursuant to a guilty plea—the prosecutor can have it named in the preliminary order of forfeiture even if it has been transferred to a third party.

The procedure is to give the third party notice of the preliminary order and let him or her file a claim in the ancillary proceeding. *United States v. Bennett*, 252 F.3d 559 (2d Cir. 2001) (the procedure for recovering criminal proceeds transferred by a defendant to a third party is codified at sections 853(c) and (n)(6)(B); the Government forfeits the property in the criminal case, subject to the third party's right to contest the forfeiture in the ancillary proceeding); *United States v. McCorkle*, 143 F. Supp. 2d 1311, 1318 (M.D. Fla. 2001) (any property of the defendant that is subsequently transferred to a third party may be the subject of a special verdict of forfeiture; the district court thereafter orders the forfeiture of the property, subject to any claim made by the transferee in the ancillary proceeding); *United States v. McCorkle*, 2000 WL 133759 (M.D. Fla. 2000) (same).

The court should also order the third party to turn the property over to the court or to the Marshals Service pending the conclusion of the ancillary proceeding. *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). If the third party has dissipated forfeitable property, the Government may file a conversion action in federal court to recover the property. *United States v. Swiss American Bank*, 191 F.3d 30 (1st Cir. 1999) (the United States has a cause of action in conversion and unjust enrichment against a third party who receives property subject to criminal forfeiture and converts it to his own use, and may file suit in federal court because the action arises under federal law; Rule 4(k)(2) gives the court personal jurisdiction over third parties located outside of the United States); *United States v. Moffitt, Zwerling & Kemler*, 83 F.3d 660 (4th Cir. 1996) (conversion action under Virginia tort law may be based on Government's rightful ownership of forfeitable property under the relation back doctrine and filed in federal court), *rev'd* 875 F. Supp. 1190 (E.D. Va. 1995) (*Moffitt IV*). Or the Government can sue to recover the property under the Federal Debt Collection Act. *United States v. Maxwell*, 189 F. Supp. 2d 395 (E.D. Va. 2002) (when defendant transfers his real property to a third party to prevent the Government from using it to satisfy the money judgment, the Government may sue to void the transfer under 28 U.S.C. §§ 3304(b) and 3306(a)).

G. Effect on sentencing

Forfeiture is not a basis for a downward departure from the U.S. Sentencing Guidelines. *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).

VII. THIRD PARTIES

As mentioned before, criminal forfeiture is limited to the property of the defendant. A third party who was the true owner of the property when it was used to commit the crime, or who received the property subsequently, may be able to object to the forfeiture. The place where all of that gets worked out is not in the criminal trial, but in the ancillary proceeding.

A. Right of third party to object to the forfeiture

A third party has no right to intervene in a criminal case until after conviction. 18 U.S.C. § 1963(i); 21 U.S.C. § 853(k); *United States v. Messino*, 122 F.3d 427 (7th Cir. 1997) (under sections 853(k) and (n), third parties must wait until the court has entered a preliminary order of forfeiture to challenge the forfeiture action); *United States v. Bennett*, 2000 WL 1505986 (S.D.N.Y. 2000) (wife cannot object to amendment of order of forfeiture to include substitute assets except by filing claim in the ancillary proceeding).

B. Ancillary hearing—procedural issues

In 1999, the last decision in the *BCCI* case set forth an excellent summary of the procedures involved in the ancillary proceeding. Much of the case law summarized in that opinion now appears in Rules 32.2(c) and (e). For example, under Rule 32.2(e), the court may amend the preliminary order of forfeiture at any time to include specific property that has been recently discovered, *e.g.*, pursuant to post-conviction discovery under section 853(m). This might happen if, for example, the preliminary order stated that all proceeds of the crime up to \$20 million were forfeited (*i.e.*, a money judgment) and then, years later, the Government discovered a load of gold bars in the defendant's garage that were directly forfeitable as part of the \$20 million. In that case, the Government would have the option, under Rule 32.2(e)(1), of seeking to forfeit the gold bars as a substitute asset or as newly-discovered property. *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (each time the court amends the preliminary order to add new property, it must conduct another ancillary hearing; but claimants may only assert interests in the property named in the amendment to the order).

Notice requirement under section 853(n)(1)

The Government is required by statute to provide notice of the criminal order of forfeiture to interested third parties. *United States v. Phillips*, 185 F.3d 183 (4th Cir. 1999) (even if the Government is required to send direct written notice under section 853(n)(1)—which is not at all certain, given the permissive language in the statute—it does not have to send notice to persons who lack standing to contest the forfeiture); *United States v. Boulter*, 927 F. Supp. 911 (W.D.N.C. 1996) (even though section 853(n)(1) states that the Government “may” send direct notice to third parties, such notice is mandatory under 19 U.S.C. § 1607, which applies to criminal forfeitures).

Amendments to the preliminary order of forfeiture

Each time the court amends the preliminary order to add new property, it must conduct another ancillary hearing; but claimants may only assert interests in the property named in the amendment to the order. *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36 (D.D.C. 1999).

Motions to dismiss

Rule 32.2(c)(1)(A) provides that in the ancillary proceeding, the court can grant a motion to dismiss the third party claim for lack of standing or for some procedural violation. For example, third party claims may be dismissed as untimely. *United States v. Strube*, 58 F. Supp. 2d 576 (M.D. Pa. 1999) (to the extent that claimant amended her claim to add a constructive trust theory after the 30-day period for filing a claim had expired, it was untimely, and the court was free to ignore the additional ground for relief); *BCCI Holdings, supra*. Or it may be dismissed on the pleadings for lack of standing or failure to state a claim. *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36 (D.D.C. 1999) ("if a third party fails to allege in its petition all elements necessary for recovery, including those relating to standing, the court may dismiss the petition without providing a hearing").

A claim can be dismissed for failure to spell out the claimant's grounds for relief in the ancillary proceeding. *Pegg v. United States*, No. 98-9617 (11th Cir. April 10, 2000) (unpublished) (section 853(n) requires a third party to state his or her interest in the property with particularity; a petition that merely tracks the language of section 853(n)(6) and does not provide the details it requires is insufficient and subject to dismissal on motion of the Government).

Discovery

Under Rule 32.2(c)(1)(B), the court can order discovery in the ancillary proceeding and can consider a motion for summary judgment. *United States v. Martinez*, 228 F.3d 587 (5th Cir. 2000) (ancillary hearing is necessary only where there are facts in dispute that must be resolved; if petitioner's claim lacks merit as a matter of law, it can be disposed of on a motion for summary judgment); *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Banque Indosuez)*, 961 F. Supp. 282 (D.D.C. 1997) (applying Fed. R. Civ. P. 56(f), court denies claimant's motion for summary judgment because the Government has not yet had opportunity to conduct discovery); *United States v. BCCI Holdings (Luxembourg) S.A. (Petitions of People's Republic of Bangladesh and Bangladesh Bank)*, 977 F. Supp. 1 (D.D.C. 1997) (the Government is entitled to summary judgment if it demonstrates that under undisputed facts, claimant cannot show that it had a legal right, title, or interest in the property at the time the crime occurred).

Note that Rule 32.2(c)(1) clearly states that no ancillary proceeding is necessary if the preliminary order of forfeiture contains only a money judgment.

C. Choice of law

Federal law is used to determine whether a legal interest is the kind of interest Congress intended to protect. *United States v. Lester*, 85 F.3d 1409 (9th Cir. 1996) (when claim is filed in the ancillary proceeding, court looks to state law to see what interest the claimant has in the property and looks to the

federal statute to see if that interest is subject to forfeiture); *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (“The nature of the claimant’s interest is determined by reference to applicable state property law, but the determination of whether such an interest defeats the United States’ claim to the property under [section] 1963(l) is a matter of federal law”).

D. Standing under sections 853(n)(2) and 1963(l)(2)

General creditors do not have a legal interest in the forfeited property and therefore lack standing to contest the forfeiture in the ancillary proceeding. *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Chawla)*, 46 F.3d 1185 (D.C. Cir.), cert. denied, *Chawla v. United States*, 515 U.S. 1160 (1995); *United States v. Schwimmer*, 968 F.2d 1570, 1581 (2d Cir. 1992); *United States v. Campos*, 859 F.2d 1233 (6th Cir. 1988) (trade creditors); *United States v. Ribadeneira*, 105 F.3d 833 (2d Cir. 1997) (person holding check drawn on defendant’s forfeited bank account is a general unsecured creditor with no interest in specific funds); *United States v. Strube*, 58 F. Supp. 2d 576 (M.D. Pa. 1999) (family members who obtained a judgment lien against defendant personally were general creditors, and not bona fide purchasers of any interest in a specific parcel of property).

The third party’s ability to trace assets is irrelevant. *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (a person who voluntarily transfers his property to the defendant is no longer the owner of that property; his ability to trace his property to the defendant’s assets is irrelevant; therefore, victims who transferred their property to the defendant have no greater standing to contest the forfeiture order than other unsecured creditors). Stockholders do not have standing to challenge forfeiture of corporate assets. *United States v. Wyly*, 193 F.3d 289 (5th Cir. 1999) (because stockholders, as a matter of state law, do not have a legal interest in corporate assets, they cannot challenge the forfeiture of those assets when the corporation is convicted).

E. Grounds for recovery in ancillary proceeding

The only grounds on which a third party can prevail in the ancillary proceeding are those set forth in sections 853(n)(6)(A) and (B). *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (“The only grounds on which a third party can prevail in the ancillary proceeding are those set forth in [s]ections 1963(l)(6)(A) and (B). That is, the claimant must establish either that he had a superior right, title or interest in the property at the time the crime occurred, or that he acquired the property as a bona fide purchaser for value without cause to know that the property was subject to forfeiture. If the claimant fails to establish facts supporting his claim under one or the other of these theories, he is not entitled to any relief in the ancillary proceeding.”); *United States v. Schechter*, 251 F.3d 490 (4th Cir. 2001) (forfeiture is effective at the time of the commission of the illegal act; to succeed with a third-party claim, a third party must have had an interest in the property at that time or must have acquired it later as a bona fide purchaser); *United States v. Hooper*, 229 F.3d 818 (9th Cir. 2000) (given the clear direction in section 853(n)(6) limiting recovery to two categories of claimants, the courts are not at liberty to create additional grounds for relief); *United States v. Kennedy*, 201 F.3d 1324 (11th Cir. 2000) (the alternative grounds set forth in sections 853(n)(6)(A) and (B) are the only grounds for recovery in the ancillary proceeding, and one of them “is emphatically not that the criminal defendant gave the third party a gift”).

Just because a third party has standing under section 853(n)(2) does not necessarily mean he or she will prevail under section 853(n)(6). *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of*

Forfeiture and Disbursement), 69 F. Supp. 2d 36 (D.D.C. 1999); *United States v. Hooper*, 229 F.3d 818, 819 n.4 (9th Cir. 2000) (a spouse in a community property state has a colorable interest in the defendant's property sufficient to establish Article III standing, but the spouse may not have the legal interest necessary to challenge the forfeiture on the merits). A third party may have a present ownership interest sufficient to establish standing yet may not have had an interest at the time of the offense, which he or she must have to prevail under paragraph (6)(A), and may not be bona fide purchaser, which he or she must be to prevail under paragraph (6)(B). For example, a donee has standing because he or she has an ownership interest but cannot prevail under either paragraph (6)(A) or (6)(B).

Third parties cannot challenge the determination made during trial that the property was subject to forfeiture. *United States v. Strube*, 58 F. Supp. 2d 576 (M.D. Pa. 1999) (third party cannot challenge the propriety of the forfeiture order; whether the order of forfeiture is proper or not is not the third party's problem; his only issue is ownership; thus, claimant could not challenge forfeiture on the ground that the preliminary order was inconsistent with the jury's special verdict).

F. Superior legal interest under section 853(n)(6)(A)

Section 853(n)(6)(A) embodies the relation back doctrine. *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (paragraphs (A) and (B) are the procedural complements to the relation back doctrine); *United States v. Hooper*, 229 F.3d 818 (9th Cir. 2000) (the temporal requirement in section 853(n)(6)(A) requiring the claimant to show that the property interest was vested at the time the acts giving rise to the forfeiture were committed is the complement to sections 853(c) and (n)(6)(B), which prevent the defendant from transferring the forfeitable property to anyone other than a bona fide purchaser). Thus, the legal interest must exist at the time of the crime giving rise to forfeiture. *United States v. Hooper*, *supra* (to prevail under section 853(n)(6)(A), the claimant must have a preexisting interest in the forfeited property; because proceeds do not exist before the commission of the underlying offense, section 853(n)(6)(A) can never be used to challenge the forfeiture of proceeds); *United States v. Brooks*, 112 F. Supp. 2d 1035 (D. Haw. 2000) (spouse cannot assert marital interest under section 853(n)(6)(A) in property acquired with criminal proceeds because such property was necessarily acquired after the commission of the act giving rise to the forfeiture); *Rashid v. United States*, 1996 WL 421855 (E.D. Pa. 1996) (same).

G. Bona fide purchasers under section 853(n)(6)(B)

The court does not reach a bona fide purchaser claim if the claimant does not first establish a legal right, title or interest in the property. *United States v. O'Brien*, 181 F.3d 105, 1999 WL 357755 (6th Cir. 1999) (Table) (because claimant had no legal interest in the property as a matter of state law, court need not reach bona fide purchaser claim). The bona fide purchaser provision comes from commercial law. *United States v. Harris*, 246 F.3d 566 (6th Cir. 2001) (bona fide purchaser provision comes from "hornbook commercial law"); *United States v. Lavin*, 942 F.2d 177, 185-86 (3d Cir. 1991) (same); *United States v. McCorkle*, 143 F. Supp. 2d 1311 (M.D. Fla. 2001) (the bona fide purchaser provision in section 853(n)(6)(B) is a codification of the protection for bona fide purchasers in section 2-403 of the UCC). Creditors and victims are not bona fide purchasers. *United States v. Meister*, No. 4:97-CR-120-G (N.D. Tex. May 18, 1999) (innocent victims who record judgment liens are not bona fide purchasers; remedy is to file remission petitions; following *McClung* and *Lavin*).

To be a purchaser, the claimant must give something of value. *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (claimant gave nothing in return for the judgment lien on the property; therefore, vendor was not a bona fide purchaser under section 853(n)(6)(B)); *United States v. Brooks*, 112 F. Supp. 2d 1035 (D. Haw. 2000) (wife cannot assert a bona fide purchaser interest in husband's criminal proceeds on the ground that she contributed uncompensated services that increased the value of the marital estate).

The claimant also must be reasonably without cause to believe property was subject to forfeiture. *United States v. Cuartes*, 155 F. Supp. 2d 1338 (S.D. Fla. 2001) (the test for the reasonableness of claimant's belief is objective, not subjective; a genuinely held belief that the property is not subject to forfeiture is unavailing if it is not objectively reasonable; Colombian businessman who bought dollars from a broker without concern for the source of the money, under circumstances that would have alerted him to serious questions about the legitimacy of the transaction, was not a bona fide purchaser; "blind reliance" on the broker is not objectively reasonable).

VIII. POST-TRIAL PROCEEDINGS

A. Appeals

The criminal rules apply to appeals from the forfeiture judgment. *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 by the defendant). The Government has a right to appeal from the district court's refusal to enter a forfeiture judgment. *United States v. Corrado*, 227 F.3d 543 (6th Cir. 2000) (Government may appeal from district court's refusal to enter forfeiture judgment; because forfeiture is mandatory, such refusal constitutes a sentence imposed in violation of law for which appeal is authorized under 18 U.S.C. § 3742(b)).

B. Investigation to locate forfeited assets

The court may authorize the taking of depositions to locate assets ordered forfeited by the defendant. *United States v. Saccoccia*, 898 F. Supp. 53 (D.R.I. 1995) (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).

The court may also issue orders to third parties to discover the location and value of forfeited assets. *United States v. Barnette*, 129 F.3d 1179 (11th 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).

C. Parallel forfeitures

Parallel civil and criminal forfeiture proceedings are commonplace. *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. 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 the defendant files a claim and cost bond, but in that event it must return the cost bond to the defendant); *United States v. St. Pierre*, 188 F.R.D. 415 (M.D. Fla. 1999) (court declines to consolidate criminal forfeiture with civil forfeiture following defendant's conviction; 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).

D. Stay of sale or disposition of forfeited property

The defendant may not seek a stay under 18 U.S.C. § 1963(f); 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. *United States v. Stewart*, 1999 WL 551891 (E.D. Pa. 1999).

E. Remission to victims

Section 1963(g) gives the Attorney General power to remit criminally forfeited property to victims by agreeing, as part of a plea agreement, that half of all forfeited property will go 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).

Courts are split, however, over whether the defendant is entitled to credit against the forfeiture for the amount paid as restitution. Compare *United States v. Emerson*, 128 F.3d 557 (7th Cir. 1997) (forfeiture and restitution are not mutually exclusive; defendant may be made to pay twice and is not entitled to reduce restitution by the amount of the forfeiture) with *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). See *United States v. Stewart*, 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 if he establishes that the property was sold below market value).

Summary of Terms

PROTECTIVE ORDERS

Under 21 U.S.C. § 853(e), the Government may obtain either pre- or post-indictment restraining orders to secure property subject to criminal forfeiture. Jurisdiction to enter a restraining order lies only in the district in which the criminal investigation or prosecution is being conducted. However, the restraining order applies to all forfeitable assets within its scope, regardless of their location. The authority to issue a restraining order lies solely with district court judges and cannot be delegated to a magistrate judge. Procedures on issuance of restraining orders are contingent on whether restraint is pre-indictment or post-indictment.

SUMMARY OF *LIS PENDENS*

State law may require that the *lis pendens* be re-recorded each year. Some states also provide that a *lis pendens* may be filed in a criminal case prior to an indictment or information being filed. Other states may require that an action must be pending prior to filing a *lis pendens*.

The term *lis pendens* (Latin for "a pending suit") originally referred to the common law doctrine that a pending lawsuit is notice to all the world that property involved in litigation is subject to any judgment ultimately rendered in the suit. Over the years, the doctrine has been modified by state law, which now generally provides that a litigant claiming an interest in real property may record a notice of *lis pendens* with the county recorder's office in the county where the property is located. This constitutes constructive notice that the property in question may be subject to a judgment. As a practical matter, the filing of a notice of *lis pendens* creates a cloud on title that will block transfer of the property until the notice is removed, either through a legal challenge to the filing, the posting of sufficient security, or resolution of the lawsuit.

Pursuant to 28 U.S.C. § 1964, the Government must comply with the requirements of state law in order to give constructive notice of a pending action in U.S. district court. Of course, those requirements vary from state to state, and even from county to county. In many jurisdictions, a civil complaint or an indictment must be filed before a notice of *lis pendens* can be recorded. State law may also require that the *lis pendens* be re-recorded each year.

GENERAL SUMMARY OF INDICTMENTS

Form of Indictment

An indictment or information must provide notice that the defendant's interest in property is subject to forfeiture. Rule 7(c)(2) Fed. R. Crim. P. Forfeiture in a criminal indictment is merely an "allegation," not a separate criminal charge. *Libretti v. United States*, 516 U.S. 29, 38-39 (1995). You may choose to allege the forfeiture with the title "Forfeiture Allegation" or you may be in a district where the court docketing system requests that it be listed as a "count" for purposes of tracking it through the docketing system. Refer to your local practice to determine how the forfeiture should appear in the indictment.

The sample indictment forms that follow are suggestions for your use. You may choose to describe or list the property in a different format. There is no established format required.

As noted *supra*, page 2, the property subject to forfeiture need not be itemized in the indictment. It is sufficient to track the language of the forfeiture statute. But only property named in the indictment or a bill of particulars can be restrained pretrial. Also, the defendant is entitled to notice of what property the Government intends to forfeit before the forfeiture phase of the trial begins.

You may wish to place the forfeiture portion of the indictment at the end of the indictment on a separate page so that it may easily be redacted for jury deliberation on the substantive criminal charges. Forfeiture trials must be bifurcated, allowing the jury to deliberate on the criminal charges without knowledge of the forfeiture allegations. Then upon returning a verdict of guilty, the jury is advised of the forfeiture allegations and deliberates again on only the forfeiture questions.

Substitute Asset Issues

The substitute assets section in these sample indictments is not essential. You may choose to eliminate that portion from your indictment. If you allege specific property as substitute assets, your ability to restrain those assets prior to trial depends on the circuit in which you are bringing the indictment. Fourth Circuit law allows substitute assets to be restrained pretrial. *In Re Billman*, 915 F.2d 916 (4th Cir. 1990). Two district court cases also allow pre-trial restraint of substitute assets: *United States v. Scardino*, 956 F. Supp. 771 (N.D. Ill. 1997) and *United States v. O'Brien*, 836 F. Supp. 438 (S.D. Ohio 1993). The majority of courts, however, do not allow substitute assets to be restrained prior to trial. *United States v. Gotti*, 15 F.3d 144 (2d Cir. 1998); *United States v. Field*, 62 F.3d 246 (8th Cir. 1995); *United States v. Ripinsky*, 20 F.3d 359 (9th Cir. 1994); *In Re Assets of Martin*, 1 F.3d 1351 (3d Cir. 1993); *United States v. Floyd*, 992 F.2d 498 (5th Cir. 1993); *In Re: Account Nos...Located at Bank One*, 9 F. Supp. 2d 1015 (E.D. Wis. 1998).

State law may permit a notice of pendency to be filed in the local property records against real property listed in the substitute assets section of the indictment. You must refer to the law of the state in which the property is located.

Effective Dates

Several criminal forfeiture provisions were added by Congress with the passage of CAFRA, which became effective on August 23, 2000. If the criminal conduct you are charging occurred before that date and the criminal forfeiture provision was not available until CAFRA, you will likely not be able to charge the forfeiture. See Form CRM9004 for a legal discussion of *ex post facto* issues regarding CAFRA changes.

Forfeiting Businesses

In the event you are considering forfeiting a business, please refer to Department of Justice Policy 9-111.124 and the Criminal Resource Manual 2206 and 2207. Many businesses are

successful due only to the illegal activity and will fail once the criminal investigation is apparent. There are many issues to consider before seizing a business including the liabilities as well as the assets of the business and the feasibility of running the business. You may consider seizing specific assets of the business rather than the business itself, such as the real property. You are required to contact the Asset Forfeiture and Money Laundering Section of the Criminal Division of the Department of Justice prior to initiating a forfeiture action against or seeking a temporary restraining order affecting an ongoing business.

Corporations

Property is often titled in the name of corporate entities. If the corporation is the true owner of the property, you may consider indicting the corporation; criminal forfeiture is limited to the property of convicted defendants and if only individuals are convicted, only the individuals' interest in the corporation is forfeitable—not the corporate asset.

JURY INSTRUCTIONS

Where the Government seeks criminal forfeiture of property identified in the indictment or a bill of particulars, additional factual findings must be made with respect to such property after the defendant is found guilty of an offense triggering forfeiture before such property can be forfeited. Pursuant to Fed. R. Crim. P. 32.2(b)(4), such factual findings may be made by the judge or, at the request of either party, by the jury. While we typically desire the forfeiture issues to be resolved by the judge, we might want the jury to resolve them. In that event, we should make our request as early as possible so that the jurors won't be surprised when they learn that they can't leave upon rendering a guilty verdict.

Before December 1, 2000, the defendant had the right to have criminal forfeiture considered by a jury. As a result, prosecutors often were put in the distasteful position of asking the judge to keep the jury to hear the forfeiture even as the jurors were packing up to leave, thinking that their tasks were completed. Now, if the defendant does not ask that the forfeiture be resolved by the jury, we need not ensure that the jury is kept after a guilty verdict is rendered. Nevertheless, if the defendant asserts a right to a jury finding on forfeiture, the responsibility remains with the prosecutor to ensure that the jury is not released before it considers the forfeiture issues.

To avoid landing in the distasteful position of asking the judge to keep the jury to consider the forfeiture even as the jurors are gathering their belongings to go home, consider filing forfeiture jury instructions before trial. Then, if the defendant asserts his or her right to have the jury hear the forfeiture questions (or we want the jury to do so), the judge can notify the jurors of that task before they render their verdict on guilt or innocence. Conversely, if we file our instructions early but the defendant fails to request the forfeiture be heard by the jury, then we can sit by placidly as the jury departs or even state in their presence that the Government does not need them to stay.

If no party requests that the jury make such factual findings, the judge will do so pursuant to Fed. R. Crim. P. 32.2(b)(1). If either party requests that the jury make such factual findings, then the judge must instruct the jury regarding their additional task and provide them a special verdict form. The jury instructions and special verdict forms included in this section obviously must be tailored to the specific charges and assets at issue in each case.

BASIC CRIMINAL FORFEITURE CHECKLIST

Rule 32.2, Federal Rules of Criminal Procedure, governs all criminal forfeiture proceedings, most of which are also governed by 21 U.S.C. § 853.

This is a basic checklist—it does not address every possible situation that could arise in a criminal forfeiture proceeding, and does not take into account any variations in practice or procedure that may exist in your district. Forfeiture law and procedures can change unexpectedly so *please* make sure to consult with your forfeiture Assistant U.S. Attorney (AUSA) early and often. Along with this checklist, your district's forfeiture AUSA is available to provide assistance and advice on specific procedures, forms, and required agency notifications during the criminal forfeiture process.

PRE-INDICTMENT

- ☐ Identify forfeitable assets
- ☐ Ensure that counts charged provide adequate basis for forfeiture.
- ☐ Use *civil* or *criminal* seizure warrants and criminal restraining orders to preserve assets pre-indictment.
- ☐ Coordinate with agency and U.S. Marshals Service (in DOJ agency cases) regarding assets.
- ☐ Have agent fill out pre-seizure planning form.
- ☐ Prepare post-indictment seizure warrants and restraining orders for property named in the Indictment to be signed when Indictment is filed.

INDICTMENT

- ☐ Indictment or Information must include forfeiture allegation or count according to local practice, which at least tracks forfeiture statute language, including substitute assets provision (include specific property and/or specific substitute assets).
- ☐ Obtain all necessary post-indictment criminal seizure warrants or protective orders for seized property named in the indictment.
- ☐ For real property, ensure that *lis pendens* or other notice of pendency is immediately recorded in the county in which the property is located.
- ☐ Once Indictment/Information is filed, send a copy of the Indictment/Information to data entry personnel in the U.S. Attorney's office, seizing agency, and U.S. Marshals Service or Treasury.
- ☐ If additional forfeitable property is identified post-indictment, supplement the forfeiture allegation, either through a Superseding Indictment (if you are planning to supersede) or by a Bill of Particulars.

TRIAL

- ☐ During the trial, make sure to include asset-related evidence while establishing proof of the underlying crimes.
- ☐ Determine whether there will be a jury on the issue of forfeiture, which can be elected by the United States or the defendant. The forfeiture AUSA in your district can provide you with jury instructions and special verdict forms if a jury trial is elected.

PLEA AGREEMENTS

- ☐ Consult with agent and forfeiture AUSA before entering plea agreement with defendant.
- ☐ Never promise return of property that has already been administratively forfeited.
- ☐ Check status of any property seized during the investigation and address the forfeiture or the return of the assets in the agreement.
- ☐ Defendant must agree to plead to a criminal count which supports the forfeiture allegation/count.
- ☐ Make sure plea agreement includes the following:
 - ☐ A brief statement of defendant's ownership interest in the property to be forfeited;
 - ☐ Defendant's consent to the forfeiture and to any related civil forfeiture;
 - ☐ Defendant's agreement to cooperate in resolving third-party claims in favor of the United States; and
 - ☐ Defendant's agreement to endorse a preliminary order of forfeiture to be submitted to judge at the time the guilty plea is entered.

PRELIMINARY ORDER OF FORFEITURE

- ☐ Send proposed Preliminary Order to opposing counsel and to pre-sentence report writer in advance, prior to entry of plea or immediately after return of jury verdict.
- ☐ Submit proposed Preliminary Order to the court after defendant has entered plea or after Special Verdict has been returned.
- ☐ Make sure the Preliminary Order refers to the correct Official—Attorney General or Secretary of the Treasury.
- ☐ Once the Preliminary Order is entered by the court, coordinate with forfeiture AUSA to send copy of the Preliminary Order to the data entry personnel in the U.S. Attorney's office, seizing agency, and U.S. Marshals Service or Treasury. *In real property cases*, if local practice requires it, coordinate to file the Preliminary Order in county property records.
- ☐ If necessary to identify and locate the defendant's assets, apply to the court for discovery pursuant to 21 U.S.C. § 853(m) after entry of the Preliminary Order.
- ☐ Once Preliminary Order of Forfeiture is entered, serve notice of intended forfeiture on any person with known potential interest in property, informing lienholders of expedited settlement procedure.
- ☐ Forfeiture AUSA should be notified (1) if you receive a request from a legitimate lienholder for an Expedited Settlement Agreement or (2) if you require proper procedures for the publication of notice of a Preliminary Order of Forfeiture.

ANCILLARY PROCEEDING

- ☐ Upon receiving any third-party petitions, review to ensure they comply with the pleading requirements of 21 U.S.C. § 853(n)(3). If petition does not comply or if claimant has failed to establish standing or to state a claim upon which relief may be granted pursuant to 21 U.S.C. § 853(n)(6), file a motion to dismiss the petition without a hearing.
- ☐ Apply to the court for civil discovery pursuant to Fed. R. Crim. P. 32.2(c)(1)(B) (where appropriate).
- ☐ File Motion for Summary Judgment (where appropriate).
- ☐ Inform Forfeiture AUSA prior to entering into any settlement agreements with third parties.

FINAL ORDER OF FORFEITURE

- ☐ After 30 days have passed since last publication and all third-party interests have been resolved, file Motion for and proposed Final Order of Forfeiture.
- ☐ Order should recite publication dates, notice sent to known potential third-party interests, and resolution of each third-party petition received.
- ☐ Once court enters Final Order of Forfeiture, send copy to the data entry personnel in the U.S. Attorney's office, seizing agency, and U.S. Marshals Service or Treasury.
- ☐ Send notification to the U.S. Marshals Service or Treasury to dispose of property consistent with Final Order, including paying recognized third-party interests.
- ☐ For forfeited real property, coordinate with forfeiture AUSA to file Final Order in county property records to show vesting of title in the United States.

SENTENCING & JUDGMENT

- ☐ In addition to obtaining a Preliminary Order of Forfeiture and a Final Order of Forfeiture, ensure that all criminal forfeitures are included in the court's oral pronouncement at sentencing and in the written judgment. If forfeiture is omitted from the written judgment, move immediately to have the omission corrected.

EQUITABLE SHARING

- ☐ Once Final Order of Forfeiture is entered, coordinate with forfeiture AUSA to present any equitable sharing package with copy of Final Order for U.S. Attorney's signature/approval.
- ☐ After approval, ensure that your office's data entry personnel enters equitable sharing information in CATS.

REPORTING DISPOSITION OF PROPERTY

- ☐ Provide your office's FLU Unit with a copy of the Final Order of Forfeiture and all necessary information for data entry.