Criminal Forfeiture Procedure in 2015:
An Annual Survey of Developments in the Case Law

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A survey of the developments in the case law in the past year relating to the procedure for obtaining a forfeiture judgment as part of the sentence in a federal criminal case.

I. Introduction

This is another in a series of articles on developments in the federal case law relating to criminal forfeiture procedure. It covers the cases decided in 2014 and early 2015.

Like the earlier articles in this series, this one does not attempt to address every topic related to criminal forfeiture, nor all of the exceptions and nuances that apply to the topics that are addressed; rather, it covers only those matters on which there was a significant development in the case law in the past year. Thus a basic familiarity with federal criminal forfeiture procedure is assumed.

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The Article begins with the cases that illustrate the concept that criminal forfeiture is part of the defendant’s sentence in a criminal case. It then takes the reader more or less chronologically through the litigation of a case, beginning with the seizure and restraint of the property and continuing through the trial and sentencing of the defendant and the adjudication of third-party issues in the post-trial ancillary proceeding. Except in instances where it is necessary to refer to the leading case in a given area for purposes of comparison or context, the citations are limited to the cases decided in 2014 and early 2015.3

II. The Scope and Purpose of Criminal Forfeiture

Purposes


3 A complete discussion of each of the issues covered in this article, along with the citations to the relevant cases, may be found in chapters 15-24 of Stefan D. Cassella, Asset Forfeiture Law in the United States (2d ed. 2013), Juris Publishing: New York (hereinafter “AFLUS”).
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Criminal forfeiture is part of the sentence imposed on the defendant in a criminal case, and thus is part of the defendant’s punishment, but as the Supreme Court explained last year in *Kaley v. United States*, forfeiture serves many other purposes as well. In addition to punishing the wrong-doer, forfeiture deters future illegality, lessens the economic power of criminal enterprises, compensates victims, improves conditions in crime-damaged communities, and supports law enforcement activities such as police training.

One of these purposes – criminal forfeiture’s role in compensating victims – was highlighted by the Fourth Circuit in *United States v. Blackman*, which noted that, “The Government’s ability to collect on a [forfeiture] judgment often far surpasses that of an untutored or impecunious victim of crime.” “Realistically,” the court said, “a victim’s hope of getting paid may rest on the Government’s superior ability to collect and liquidate a defendant’s assets” under the forfeiture laws. Indeed, the Government’s ability to protect victims under the forfeiture laws surpasses the Government’s ability to do so under the Mandatory Victim Restitution Act and similar provisions that provide for victim restitution in criminal cases but lack the authority that the court has under the forfeiture laws to preserve property prior to the defendant’s conviction.

**Nexus Requirement**

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6 *Kaley*, ___ U.S. ___, 134 S. Ct. 1090

7 *United States v. Blackman*, 746 F.3d 137, 143 (4th Cir. 2014).

8 *Blackman*, 746 F.3d at 143. See *Kaley*, ___ U.S. ___, 134 S. Ct. at 1094 n.1 (citing statistics on the Government’s use of forfeited funds to compensate victims).

9 See *United States v. Al Sharaf*, 2015 WL 4238784 (D.D.C. July 13, 2015) (noting that Congress provided for the pre-trial restraint of assets for forfeiture but omitted any such provision for the benefit of victims under the MVRA; declining to restrain untainted property to preserve it for restitution in the absence of statutory authority).
One of the limitations on criminal forfeiture is that there must be a nexus between the property to be forfeited and the offense for which the defendant is convicted.\textsuperscript{10} That can be a problem for the Government if a defendant is convicted of a number of substantive acts but not an overarching scheme or conspiracy. In \textit{United States v. Maye}, for example, the defendant who was acquitted of a drug conspiracy but convicted of thirty-three substantive counts of writing false prescriptions was ordered to forfeit only the $10 per prescription that he received in connection with the thirty-three counts, plus any facilitating property, but not the money that her derived from a large number of identical offenses that were no charged in the indictment.\textsuperscript{11}

In contrast, each defendant convicted of a conspiracy is liable for the proceeds of the conspiracy, even where the property relates to substantive acts which were not charged or on which the defendant was acquitted.\textsuperscript{12} And if a fraud case is alleged as a continuing scheme, the defendant is liable for the full amount derived from the scheme even if the defendant is convicted of only a few substantive counts.\textsuperscript{13}

\textsuperscript{10} See generally \textit{AFLUS}, supra note 3, § 15-3(b).
\textsuperscript{11} \textit{United States v. Maye}, 2014 WL 1671506, at *4-5 (W.D.N.Y. Apr. 23, 2014) (following \textit{Capoccia}); See \textit{United States v. Capoccia}, 503 F.3d 103, 110, 114 (2d Cir. 2007) (notwithstanding prefatory language in the indictment stating that the defendant’s acts were part of a larger scheme, defendant who was convicted of an ITSP offense under section 2314 may be made to forfeit only the proceeds of the specific acts alleged in the indictment; if the Government wants to forfeit property involved in other acts that were part of the scheme (but not alleged because of venue issues) it should have charged a conspiracy or another offense of which a scheme is an element).
\textsuperscript{12} See \textit{United States v. Molina-Sanchez}, 298 F.R.D. 311, 313 (W.D.N.C. 2014) (“property identified as criminal proceeds of a conspiracy, or as property derived from such proceeds, may be forfeited criminally from a convicted member of the conspiracy, even where the property relates to substantive acts which were not charged or on which the defendant was acquitted”).
\textsuperscript{13} See \textit{United States v. Jafari}, 2015 WL 225444, at *6 (W.D.N.Y. Jan. 16, 2015) (provider convicted of health care fraud liable for the gross proceeds of the entire scheme, not merely the proceeds of the four counts of conviction; defendant liable for proceeds of fraud count on which he was
Property of third parties

Third parties have no opportunity to participate in a criminal case: they cannot call or cross-examine witnesses, introduce or object to the introduction of evidence, or testify in their own behalf. Thus, as a matter of due process, property belonging to third parties cannot be forfeited in a criminal case. But that does not mean that mean that criminal forfeiture is limited to property of the defendant. As the court held in United States v. Molina-Sanchez, if the property was derived from the offense for which the defendant was convicted, “the fact that defendant has no legal ownership interest in the . . . property does not bar criminal forfeiture.”¹⁴

It is the nexus of the property to the criminal offense that establishes its forfeitability, not its ownership; as discussed later, the due process rights of third parties are protected by allowing such persons to file a post-conviction petition in the ancillary proceeding, but ownership issues do not arise in the forfeiture phase of the defendant’s criminal trial.¹⁵

Custody of the property

Property need not be in the Government’s possession to be forfeited in a criminal case.¹⁶ Thus, as the Fifth Circuit held

acquitted if the court finds by preponderance of the evidence that she committed that offense).


¹⁵ See United States v. Andrews, 530 F.3d 1232, 1236 (10th Cir. 2008) (when the court determines the forfeitability of the property pursuant to Rule 32.2(b)(1), it does not – “and indeed may not” – determine the rights of third parties in the property; the ownership issue is deferred to the ancillary proceeding); De Almeida v. United States, 459 F.3d 377, 381 (2d Cir. 2006) (criminal forfeiture is not limited to the property of the defendant; any property involved in the offense of conviction may be forfeited; it is only to protect the due process rights of third parties that there must be a post-trial ancillary proceeding; thus, the Government does not have to establish the defendant’s ownership of the property to seize it pending trial or to obtain a preliminary order of forfeiture, and the third party cannot complain that he was forced to wait for the ancillary proceeding to assert his rights).

¹⁶ See generally AFLUS, supra note 3, § 17-3.
in *Haberman v. United States*, while the forfeiture statutes to provide the Government with tools to take possession of forfeitable property pending trial, the Government is not required to have the property in its possession to obtain a criminal forfeiture order; it is the order of forfeiture itself that authorizes the Attorney General to take possession.\(^{17}\)

### III. Seizure Warrants—21 U.S.C. § 853(F)

One of the tools that the Government may use to take possession of forfeitable property pending trial is a seizure warrant issued pursuant to 21 U.S.C. § 853(f). Under that statute, a seizure warrant may be issued based on a showing of probable cause in the same manner as any other warrant issued in terms of Rule 41 of the Federal Rules of Criminal Procedure.\(^{18}\) But Section 853(f) does impose one additional requirement: the warrant may be issued only if the court finds that a restraining order would be inadequate to preserve the property for forfeiture at trial.

This additional requirement, however, only applies when the Government seizes property pursuant to Section 853(f) and not when it seizes property under some other statutory provision. In *United States v. Sigillito*, law enforcement agents obtained a warrant under Rule 41(c) to search for evidence that property was subject to forfeiture, and then seized property that they found in the course of the search. The defendant argued that the seizure was improper unless the Government could show that a restraining order was inadequate to preserve the property. But the Eighth Circuit held that the additional requirement in Section 853(f)


\(^{18}\) See generally *Kaley v. United States*, ___ U.S. ___, 134 S. Ct. 1090 (2014) (“Probable cause . . . is not a high bar: It requires only the kind of fair probability on which reasonable and prudent people, not legal technicians, act”).
does not apply if the warrant is a search warrant governed by Rule 41 and not a seizure warrant.\textsuperscript{19}

\textit{Pretrial challenges to a criminal seizure warrant:}

It is well-established that the claimant in a civil forfeiture case cannot use Rule 41(g) to recover his property once the Government has commenced forfeiture proceedings; because the forfeiture statutes provide the claimant with an adequate remedy at law, his remedy is to file a claim in the forfeiture case.\textsuperscript{20}

Two new cases make clear that the rule is the same in criminal forfeiture cases: once the Government commences forfeiture proceedings, a party contesting the forfeiture must follow the procedures in the applicable criminal forfeiture statute.

In \textit{United States v. Stegemann}, the district court held that if the defendant is contesting the probable cause for the seizure of his bank records, his remedy is a motion to suppress; if he is seeking the return of the seized money because it was not derived from his offense, he must raise that issue in the forfeiture phase of his trial pursuant to Rule 32.2(b)(1)(B), not in a pre-trial motion under Rule 41(g).\textsuperscript{21}

Similarly, in \textit{United States v. White} the court held that the defendant could not use Rule 41(g) to object to the forfeiture once the grand jury returned an indictment listing property in the forfeiture notice pursuant to Rule 32.2(a).\textsuperscript{22}

\textit{Effect of illegal seizure}

\textsuperscript{19} \textit{United States v. Sigillito}, 759 F.3d 913, 926 (8th Cir. 2014) (Rule 41(c) authorizes searches for forfeitable property; thus warrant issued to search for evidence of the underlying crime and for forfeitable property did not have to include a finding that the requirements of Section 853(f) were satisfied).


As in civil forfeiture cases, the illegal seizure of property may have evidentiary consequences, but it does not immunize the property from forfeiture.\textsuperscript{23}

\textit{Warrantless seizures}

Finally, as discussed earlier, although the Government may obtain a warrant under Section 853(f) to seize property for criminal forfeiture, property may be forfeited criminally if it was seized in plain view during the execution of a search warrant.\textsuperscript{24}

\section*{IV. Pretrial Restraint of Assets}

\textit{Pre-trial restraining orders / substitute assets}

In \textit{Kaley}, Justice Kagan explained that the Government needs pre-trial restraining orders to prevent defendants from spending or transferring forfeitable property, including to pay an attorney for legal services.\textsuperscript{25} In most circuits, however, the courts hold that the forfeiture statute, 21 U.S.C. § 853(e), authorizes the pretrial restraint only of \textit{directly forfeitable property} and not property forfeitable as substitute assets.\textsuperscript{26} Thus, in \textit{United States v. Perkins}, the court held that once the Government acknowledges that it is not seeking the forfeiture of the property as a directly-forfeitable asset, it cannot continue

\textsuperscript{23} See \textit{Baranski v. Fifteen Unknown Agents}, 401 F.3d 419, 435-36 (6th Cir. 2005) (it is not necessary for the Government to have seized the property prior to obtaining a criminal forfeiture order; therefore, an illegal seizure has no effect on a criminal forfeiture); \textit{United States v. White}, 2014 WL 3898378, at *6 (“the illegal seizure of property does not immunize that property from forfeiture as long as the Government can sustain the forfeiture claim with independent evidence”).

\textsuperscript{24} \textit{United States v. White}, 2014 WL 3898378 (noting that property was seized without a warrant when found in plain view during the execution of a search warrant, and was held for criminal forfeiture).


\textsuperscript{26} See, \textit{e.g.}, \textit{United States v. Toran}, 2015 WL 1968698, at *7 (C.D. Ill. May 1, 2015) (assuming Seventh Circuit would follow the majority rule and denying pre-trial restraint of portion of property forfeitable only as a substitute asset). See generally \textit{AFLUS}, supra note 3, § 17-14.
to restrain the property prior to obtaining a conviction of the defendant.\textsuperscript{27}

There are some instances, however, when the Government can restrain substitute assets under another statute: 18 U.S.C. § 1345. In United States v. Luis, the court issued a restraining order in a health care fraud case under Section 1345, even though the Government could not show that the property was traceable to the health care fraud offense. Unlike Section 853(e), the court noted, Section 1345 authorizes the pre-trial restraint of property traceable to a criminal offense or the value thereof. The defendant objected that this deprived him of his Sixth Amendment right to use untainted funds to retain counsel of his choice in a related criminal case, but applying the reasoning in the Supreme Court’s decision in Monsanto,\textsuperscript{28} the Eleventh Circuit held that there was no Sixth Amendment violation.\textsuperscript{29} The Supreme Court has granted certiorari to determine the constitutionality of that holding next Term.\textsuperscript{30}

Regardless of how the Sixth Amendment issue is ultimately resolved, Section 1345 provides the Government with a powerful way around the absence of statutory authority to restrain substitute assets in criminal forfeiture cases under Section 853(e). The statute applies in only a limited number of cases, but they include mail, wire and health care fraud, and all money laundering cases.

\textsuperscript{27} United States v. Perkins, 2014 WL 119326, at *3 (E.D.N.Y. Jan. 10, 2014) (once the Government opposed defendant’s Rule 32.2(b)(5) motion to retain the jury on the ground that it was seeking only a money judgment, it had to release any seized property because it has no authority to detain substitute assets pre-trial).
\textsuperscript{28} United States v. Monsanto, 491 U.S. 600 (1989) (affirming pre-trial restraint of criminal proceeds with no exemption for attorney’s fees).
\textsuperscript{29} United States v. Luis, 966 F. Supp. 2d 1321 (S.D. Fla. 2013) (issuing an order restraining substitute assets in a health care fraud case under § 1345(a)(2), and holding that the pre-trial restraint of substitute assets does not violate the Sixth Amendment right to counsel if the Government establishes probable cause and survives a challenge to the probable cause at a post-restraint hearing), aff'd, 564 Fed. App'x 493 (11th Cir. 2014).
\textsuperscript{30} United States v. Luis, 2015 WL 2473302 (U.S. June 8, 2015).
Kaley v. United States

Once a post-indictment restraining order is issued, the defendant has only a limited right to challenge it before trial. The procedure for doing so was the issue before the Supreme Court in Kaley.

Immediately after obtaining an indictment charging the defendants with money laundering in that case, the Government obtained an order restraining a $500,000 certificate of deposit that the defendants intended to use to retain counsel. The district court found that the defendants lacked other funds with which to retain counsel, and so granted their request for a hearing at which they could challenge the probable cause for the restraining order. The issue in the case was what the scope of that hearing should be.

At the hearing, the defendants conceded that there was probable cause to believe that the restrained funds were traceable to the conduct alleged in the indictment, but they disputed the grand jury’s finding that that conduct constituted a money laundering offense. In other words, they were not contesting the property’s forfeitability; they were contesting the probable cause for the underlying crime. The district court and the Eleventh Circuit declined allow the defendants to relitigate the grand jury’s finding of probable cause and the Supreme Court granted certiorari to resolve the split in the circuits on that issue.

The issue before the Court was a narrow one: in a case where a defendant has demonstrated that he has the right to challenge the probable cause for the pre-trial restraint of his property because he needs that property to retain counsel, is the defendant limited to challenging the probable cause to believe that the property is connected to the alleged offense, or may he also challenge the grand jury’s finding of probable cause to believe that he committed the underlying crime?

It is critical to understand that there are two parts to the probable cause determination: 1) there must be probable cause to believe that the defendant has committed an offense
permitting forfeiture, and 2) there must be probable cause to believe that the property at issue has the requisite connection to that offense.\(^{31}\)

In *Kaley*, the defendants did not contest the second point, and the Government conceded, as all circuits have held, that if they had contested it, they would have been allowed to do so. Thus the only issue was the defendants’ right to contest the first point: the probable cause for the underlying crime, as found by the grand jury in returning the indictment. That was the issue on which the circuits were split.\(^{32}\)

The Court held that there is no right to judicial review of the grand jury’s finding of probable cause regarding the commission of the underlying crime. Allowing the defendant to seek “a judicial re-determination of the conclusion the grand jury already reached,” the Court said, would be contrary to the “fundamental and historic commitment of our criminal justice system” to entrust probable cause findings to grand juries.\(^{33}\)

That holding was excellent news for the Government and it reversed adverse decisions on that issue in the Second and District of Columbia Circuits. But the opinion also touched on a number of related points that arise often in criminal forfeiture cases.

For example, the Court recognized that “there is a strong governmental interest in obtaining full recovery of all forfeitable assets,” reaffirmed that the standard for obtaining a restraining order is probable cause, and held that the court may rely on the grand jury’s finding of probable cause to issue the restraining order.\(^{34}\) And it reaffirmed what it held twenty-


\(^{32}\) See generally *AFLUS*, supra note 3, § 17-7.


\(^{34}\) *Kaley*, ___ U.S. ___, 134 S. Ct. 1090 (just as it is sufficient to support the issuance of a warrant for the defendant’s arrest, the grand jury’s finding of probable cause is sufficient to support the restraint of his property). See *United States v. Cosme*, 2014 WL 1584026, at * 2 (S.D.N.Y. Apr. 21, 2014) (citing *Kaley*; indictment listing the property subject to forfeiture supplied the probable cause for a pre-trial restraining order).
five years ago in Caplin & Drysdale and Monsanto: a criminal defendant has no Sixth Amendment right to use property directly traceable to a criminal offense to retain counsel in his criminal case; such property may be forfeited as part of the defendant’s sentence, and may be *restrained pending trial* if there is probable cause to believe that it will be forfeited in the event the defendant is convicted.\(^{35}\) As mentioned earlier, whether that rule extends to the pre-trial restraint of substitute assets is the issue on which the Court granted *certiorari* in *Luis*.

Although it was the scope of the probable cause hearing and not the defendant’s right to a hearing in the first place that was the issue in *Kaley*, the Court nevertheless signaled that defendants may face an uphill battle when seeking a pre-trial hearing in circumstances where their Sixth Amendment right to counsel is not implicated. Defendants have an obvious interest in retaining counsel of their choice, the court said, but the Government “has a substantial interest in freezing potentially forfeitable assets without an evidentiary hearing about the probable cause underlying the criminal charges.”

A “pre-trial mini-trial (or maybe a pre-trial not-so-mini-trial),” the Court continued, “could consume significant prosecutorial time and resources,” and could force the Government to choose between preserving the forfeitable assets and disclosing its case and strategy “well before the rules of criminal procedure – or principles of due process – would otherwise require.” “It is small wonder,” the Court concluded, “that the Government wants to avoid that lose-lose dilemma.”\(^{36}\)

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\(^{36}\) *Kaley*, 134 S. Ct. at ___ (in support of its holding that the defendant has no right to a judicial redetermination of the grand jury’s finding of probable cause when his property is restrained pre-trial, the Court explains that the Government should not have to choose between preserving the property and giving the defendant a “sneak preview” of its case and strategy beyond what the criminal rules or due process requires).
Aside from these comments, the majority opinion in *Kaley* says nothing about what triggers the right to a hearing in the first place. Thus, it does not affect the circuits that have adopted the *Jones-Farmer* rule, granting a probable cause hearing only if the defendant shows that he lacks other funds with which to retain counsel. But ironically, there is language on that point that is helpful to the Government in the dissent.

Writing for himself and Justices Sotomayor and Breyer, the Chief Justice argued that allowing the broader challenge to the restraining order would impact relatively few cases, because hearings in such cases are not automatic. “To even be entitled to the hearing,” the Chief Justice said, “defendants must first show a genuine need to use the assets to retain counsel of choice.”

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

So what is the status of *Jones-Farmer* after *Kaley*? In circuits that have adopted the rule in full, a post-restraint, pretrial hearing is required only if the Sixth Amendment is implicated, and only if the defendant makes a prima facie showing that there is no probable cause for the forfeiture of the

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37 See *United States v. Jones*, 160 F.3d 641, 647 (10th Cir. 1998) (defendant has the initial burden of showing that he has no funds other than the restrained assets to hire private counsel or to pay for living expenses, and that there is bona fide reason to believe the restraining order should not have been entered); *United States v. Farmer*, 274 F.3d 800, 804-05 (4th Cir. 2001) (following *Jones*; same two-part test applies where property defendant says he needs to hire counsel in criminal case has been seized or restrained in related civil forfeiture case). See generally *AFLUS*, supra note 3, § 17-6.

restrained property. Other courts apply a rule similar to Jones-Farmer, or cite it with approval.

Under the first Jones-Farmer requirement, the defendant has the burden of showing that he lacks other funds with which to retain counsel; otherwise his Sixth Amendment rights are not implicated. Thus, the defendant has to produce sufficient evidence of his available assets to allow the court to assess their value.

The second Jones requirement, that there be a prima facie showing that the Government lacked probable cause for the restraint, protects against the defendant’s use of the probable cause hearing to gain pretrial access to the Government’s trial witnesses when there is no reason to believe the pre-trial restraint of his property was in error. On that issue, the language in Kaley regarding the avoidance of a mini-trial will likely be helpful to the Government.

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39 See Jones, 160 F.3d at 647; Farmer, 274 F.3d at 804-05; United States v. White, 2014 WL 3898378, at *3 (D. Md. Aug. 7, 2014) (dicta) (“The only significant exception to a pre-trial restraining order is when the defendant needs access to seized assets to hire counsel of his choice and can show that the property in question is untainted by the crime alleged”; citing Farmer).

40 See United States v. Kielar, ___ F.3d ___, 2015 WL 3941498 (7th Cir. June 29, 2015) (defendant has no right to a post-restraint hearing unless he demonstrates with reliable evidence that he lacks other funds with which to retain counsel); United States v. Bonventre, 720 F.3d 126, 131 (2d Cir. 2013) (adopting the first prong of Jones-Farmer but not the second; a defendant is not entitled to a probable cause hearing unless he shows that his Sixth Amendment rights are implicated, but he need not make a formal prima facie showing that the initial probable cause finding was erroneous); United States v. Toran, 2014 WL 6434394, at *2 (C.D. Ill. Nov. 17, 2014) (under Kaley, defendant retains the right to challenge the probable cause for the nexus between the property and the offense, but only if he shows that he lacks other funds with which to retain counsel); United States v. Cosme, 2014 WL 1584026, at *5 (S.D.N.Y. Apr. 21, 2014) (following Bonventre; no right to a Monsanto hearing for defendant who fails to show he lacks other funds).

41 See United States v. Fishenko, 2014 WL 4804041 (E.D.N.Y. Sept. 25, 2014) (applying Bonventre, to establish right to a hearing, defendant must provide court with sufficient evidence of his unrestrained assets to allow it to assess their value).
In all events, the Federal Rules of Evidence should not apply in a probable cause hearing, but as the Second Circuit held in *United States v. LaVilla*, even if they did apply, the district court may take steps to protect the Government from the premature disclosure of its evidence.\(^{42}\)

**Evidence needed to establish probable cause for restraint**

Another recurring question is whether the Government, in establishing probable cause to believe that the restrained funds in a bank account are subject to forfeiture, must strictly trace the funds to the underlying offense even as untainted funds are commingled with the criminal proceeds. The law remains unclear on that point, but the more recent cases suggest that for probable cause purposes, either strict tracing is not required at all, or the Government may employ the accounting principles described in *United States v. Banco Cafetero Panama*,\(^{43}\) such as last in/first out, or first in/last out, to satisfy the tracing requirement.\(^{44}\)

**Restraining assets of third parties**

The prevailing view is that property held by third parties may be restrained to preserve the Government’s interest.\(^{45}\) For example, in *United States v. 19012 Lake Road*, the district court held that the non-forfeitable interest of the defendant’s

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\(^{42}\) *United States v. LaVilla*, 553 Fed. App’x 45, 48-49 (2d Cir. 2014) (assuming arguendo the Rules of Evidence apply, the district court did not abuse its discretion in refusing to order the production of documents, witness interviews, or other evidence on which the agent relied in giving her testimony; district court was properly cognizant of the need to protect the Government from the unwarranted and premature disclosure of evidence in a criminal pretrial hearing).

\(^{43}\) *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1160 (2d Cir. 1986).

\(^{44}\) See *United States v. Toran*, 2015 WL 1968698, at *6 (C.D. Ill. May 1, 2015) (showing that property was purchased with funds from a commingled bank account, at least 50 percent of which represented fraud proceeds, is sufficient to establish probable cause without further tracing); *United States v. Cosme*, 2014 WL 1584026, at *4 (S.D.N.Y. Apr. 21, 2014) (Government may rely on Banco Cafetero to establish probable cause for restraint of criminal proceeds in a commingled bank account).

\(^{45}\) See generally *AFLUS*, supra note 3, § 17-12.
wife in his real property did not prevent the court from entering a pre-trial restraining order. The wife’s interest, the court reasoned, will be protected in the post-conviction ancillary proceeding.\footnote{United States v. 19012 Lake Road, 2014 WL 1682826, at *2 (W.D. Va. Apr. 29, 2014).}

Whether and under what circumstances a third party may have a right to a post-restraint probable cause hearing is a separate question. The third party’s situation is not analogous to the defendant’s because his Sixth Amendment right to counsel cannot be implicated. Accordingly, the Second, Fifth, and Ninth Circuits and some district courts require the third party to wait until the ancillary proceeding to contest the forfeiture.\footnote{See generally AFLUS, supra note 3, § 17-13.} The most recent case on that point is the district court’s decision in United States v. White.\footnote{United States v. White, 2014 WL 3898378, *5-6 (D. Md. Aug. 7, 2014) (because § 853(n) adequately protects third party rights, due process does not require court to consider third party’s Rule 41(g) motion pre-trial).}

\section*{V. Application of CAFRA Deadlines to Criminal Forfeiture}

With one exception, the deadlines that Congress enacted for instituting a forfeiture action in the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), do not apply to criminal forfeiture proceedings. The exception appears in 18 U.S.C. § 983(a)(3), which provides that if the Government elects to toll the ninety-day deadline for commencing a judicial forfeiture action by including the claimant’s property in a criminal indictment, it must obtain criminal process authorizing it to maintain custody of the property, or it must have the consent of the defendant. This is a requirement that the Government often fails to observe because it is not obvious what purpose it serves when the property is already in the Government’s lawful possession.\footnote{See generally AFLUS, supra note 3, § 17-2.}
In *United States v. Cosme*, the court held that the Government violated § 983(a)(3) when it obtained an indictment but did not obtain a restraining order within ninety days of defendant’s filing a claim to the property. The good news for the Government was that while this error barred the Government from reverting to a civil forfeiture action, it had no effect on the Government’s ability to pursue criminal forfeiture.\(^{50}\)

In *United States v. Torres*, the Government missed the ninety-day deadline but obtained the defendant’s consent on the ninety-first day to allow Government to retain the property for sixty more days so that it could decide whether to indict. In that case, the court found no due process violation and allowed the case to proceed.\(^{51}\)

The Government can generally avoid these problems altogether by seizing the property in the first instance with a dual-purpose, civil-criminal seizure warrant so that if it elects to pursue criminal forfeiture instead of civil forfeiture, it already has the property in its possession pursuant to criminal process.\(^{52}\)

**Deadline for commencing administrative forfeiture**

Under CAFRA, when the Government seizes property for the purpose of civil forfeiture, it has sixty days to commence an administrative forfeiture proceeding.\(^{53}\) As is the case with respect to the ninety-day deadline for commencing a judicial forfeiture proceeding under Section 983(a)(3), the


\(^{52}\) See *United States v. Dupree*, 2011 WL 1004824, at *12 n.9 (E.D.N.Y. Mar. 18, 2011) (because it obtained a seizure warrant under both § 981(b) and 853(f), the Government was already in compliance with § 983(a)(3)(B) when it included the property in an indictment without commencing a parallel administrative or civil forfeiture proceeding); *United States v. Wiese*, 2012 WL 43369, at *2 (E.D. Mich. Jan. 9, 2012) (following *Dupree*; when the Government uses a dual-purpose warrant it need not commence a civil forfeiture proceeding but may decide to pursue criminal forfeiture only).

Government’s failure to observe this deadline – or is decision to by-pass the administrative forfeiture option altogether – has no effect on its ability to pursue criminal forfeiture in the event the defendant is convicted.\textsuperscript{54}

\textbf{VI. INDICTMENT}

Rule 32.2(a), Fed. R. Crim. P., provides that there can be no forfeiture in a criminal case unless there was a forfeiture notice in the indictment.\textsuperscript{55} A recurring question is whether the defendant can object to a forfeiture order on the ground that the forfeiture notice that appeared in the indictment referenced the wrong forfeiture statute.

Most times an incorrect statutory citation will be considered harmless if the allegation otherwise adequately informs the defendant that his property will be subject to forfeiture. For example, in \textit{United States v. Davies}, the Third Circuit held that an incorrect citation to 18 U.S.C. § 2253 (the criminal forfeiture statute for child pornography) instead of to § 2428 (the statute for sex trafficking) in the plea agreement was a “scrivener’s error” that did not negate the defendant’s agreement to the forfeiture given that he was adequately informed of the forfeiture in other ways.\textsuperscript{56}

\textsuperscript{54} See \textit{United States v. White}, 2014 WL 3898378, at *6 (D. Md. Aug. 7, 2014) (the deadlines in § 983(a) apply only if the Government is pursuing administrative forfeiture; they do not apply if the Government seizes the property for criminal forfeiture and never commences administrative forfeiture; denying motion for return of property named in criminal indictment on the ground that the Government failed to commence administrative forfeiture within 60 days of the warrantless seizure).

\textsuperscript{55} See generally \textit{AFLUS}, supra note 3, § 16-2.

\textsuperscript{56} \textit{United States v. Davies}, ___ Fed. App'x ___, 2015 WL 545333 (3d Cir. Feb. 9, 2015). See also \textit{United States v. Silvious}, 512 F.3d 364, 369 (7th Cir. 2008) (Government’s acknowledged error in citing section 982(a)(2) instead of sections 981(a)(1)(C) and 2461(c) in a mail fraud case did not deprive defendant of his right to notice under Rule 32.2(a)); \textit{United States v. McManus}, 2014 WL 4977504, at *2-3 (E.D. Pa. Oct. 6, 2014) (following \textit{Silvious}; Government’s error in citing the wrong forfeiture statute in the indictment did not deprive the defendant of fair notice regarding the
But that is not always true. In *United States v. Annabi*, the indictment cited the civil forfeiture statute for forfeiting the proceeds of a fraudulently-obtained loan instead of the criminal statute. Normally that would make no difference: most civil forfeiture statutes are co-extensive with their criminal forfeiture counterparts in terms of what can be forfeited. But in this case, under the civil statute the defendant was entitled to credit for any loan payments that he made, while under the criminal statute he was not.

In that situation, the Second Circuit held that the mis-citation was material, and the Government had to give the defendant credit for the payments he made on the fraudulently-obtained loan, even though he was convicted of a criminal offense.\(^{57}\)

**Itemizing the property**

Rule 32.2(a) is a notice provision; its purpose is to inform the defendant that one of the consequences of his conviction will be the forfeiture of property. It is not necessary, however, for the specific property subject to forfeiture to be itemized in the indictment. Rather, it is sufficient if the indictment tracks the applicable forfeiture statute. The Government can later provide the defendant with a list of the specific property that it is seeking to forfeit by way of a bill of particulars.\(^{58}\)

**Motion to dismiss the forfeiture notice**

The Government may move to dismiss the forfeiture notice from the indictment once the property has been forfeited administratively. This precludes the defendant from have a

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\(^{57}\) See *United States v. Annabi*, 746 F.3d 83, 86 (2d Cir. 2014) (forfeiture is limited to what is authorized by the statute listed in the indictment, even if greater forfeiture would have been authorized by a different statute, where the Government fails to invoke the broader forfeiture provision prior to or during sentencing; distinguishing *Silvious*).

“second bite at the apple” by opposing the criminal forfeiture of property that has already been administratively forfeited to the Government by virtue of the defendant’s default in the administrative forfeiture proceeding.\(^{59}\)

**VII. GUILTY PLEAS**

In negotiating a guilty plea, the Government will generally insist that the defendant agree to the forfeiture of property as part of the written plea agreement. Because the plea agreement is a contract, once the defendant agrees to forfeit his property in return for some valuable consideration, he has no right to recover it even if the Government decides not to proceed with the forfeiture. This may happen, for example, if the Government determines that the property has little value, is contaminated, or is subject to liens held by third parties. The point is that once the plea agreement is signed, what happens to the property is no longer the defendant’s concern.

This unusual situation arose in *United States v. Mendez* in which the court held that the Government’s decision not to proceed with the forfeiture of property notwithstanding the defendant’s agreement did not give the defendant the right to complain that the Government should have paid his property taxes or was responsible for the property’s being sold in a tax sale.\(^{60}\)

*References to third parties in the plea agreement*

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\(^{59}\) See *United States v. Dunn*, 723 F.3d 919, 931 (8th Cir. 2013) (defendant may move to vacate an administrative forfeiture under Section 983(e) on the ground that the Government’s including a forfeiture notice in his criminal indictment led him to believe he did not have to contest the administrative forfeiture). Cf. *United States v. Ceja*, 2015 WL 478296, at *3 (S.D. Ga. Feb. 4, 2015) (criminal AUSA’s “redaction” of the forfeiture notice from a criminal indictment during trial, and his statement that the Government was unlikely to seek forfeiture, did not vitiate the DEA’s administrative forfeiture of the property).

Because a plea agreement is a contract between the defendant and the Government, however, third parties— including corporations—are not bound by the terms of the agreement unless they voluntarily make themselves parties to it. Thus, third parties such as the defendant’s family members or corporations that he controls may be able to contest the forfeiture in the ancillary proceeding even though the defendant has agreed to the forfeiture.

The Government learned this the hard way in United States v. Ribeiro. In that case, the defendant pled guilty and agreed to the forfeiture of his property, but the Government failed to require him to have a corporation that he controlled agree to the forfeiture of its interest as well. Thus, nothing prevented the defendant from transferring the corporation to his son and daughter who filed claims contesting the forfeiture in the ancillary proceeding on the corporation’s behalf.61

Waiver of procedural rights

The plea agreement can and should provide that the defendant is waiving the requirements of Rule 32.2. This saves much post-conviction litigation between the Government and federal prisoners who assert that the court or the Government did not follow one or another of the procedural requirements in the rule. For example, in United States v. Martinez-Mata, the court held that because the plea agreement waived the requirements of Rule 32.2, the defendant could not complain that the Government did not list specific property either in the indictment or in a bill of particulars.62

While express waivers are favored, a waiver may also be implicit. In Davies, the court held that the defendant implicitly waived the notice provision in Rule 32.2(a) when he agreed to

61 United States v. Ribeiro, 2014 WL 5148180 (W.D. Va. Sept. 10, 2014) (Government could have had defendant waive corporations’ right to file claims in the ancillary proceeding as part of his plea agreement, but because agreement referred only to the defendant’s interest, the waiver did not preclude defendant from transferring corporations to son and daughter so they could file on corporations’ behalf).
the forfeiture in his plea agreement and did not object when informed of the forfeiture when he entered his guilty plea and at sentencing.  

VIII. FORFEITURE PHASE OF THE TRIAL

Government’s motion for order of forfeiture

Unless the defendant is agreeing to the entry of a consent order of forfeiture, the court must determine, following the return of a guilty verdict or the acceptance of a guilty plea, whether any property is subject to forfeiture. Generally, the issue is raised by the Government in a motion for the entry of a preliminary order of forfeiture.

Rule 32.2(b)(1) requires that the forfeiture determination take place as soon as practicable, but there is no deadline for the Government’s submission of a motion for a forfeiture order. In United States v. Tardon, the court held that a motion submitted four days before the scheduled sentencing hearing was timely.

In the same case, the defendant made the novel but unsuccessful argument that the Government waived its right to seek forfeiture by failing to object to a pre-sentence report on the ground that it did not mention that the Government was seeking forfeiture as part of the defendant’s sentence.

Standard of Proof

Because forfeiture is part of sentencing, the Government’s burden is to establish the forfeitability of the property by a preponderance of the evidence. The Supreme Court of the United States has noted that while forfeiture is extraordinary, it is not a penalty. Therefore, the standard of proof should be the same as that applied in any other criminal proceeding. United States v. Davies, __ Fed. App’x ___, 2015 WL 545333 (3d Cir. Feb. 9, 2015).
Court so held in *Libretti v. United States*, and the rule has remained unchanged despite more recent Supreme Court cases holding that other aspects of the sentencing process must be submitted to the jury and determined beyond a reasonable doubt.

Many defendants have argued that the more recent decisions compel a change in the rule. If, as the Supreme Court held in *Southern Union*, any fact that increases the defendant’s maximum fine must be submitted to a jury and found beyond a reasonable doubt, it is argued, why should a fact that determines what property must be forfeited not be treated in the same way. But the courts thus far have not taken that view.

The Eighth Circuit’s decision in *United States v. Sigillito* is typical. Criminal forfeiture, the court said, is unlike a fine because it there is no statutory maximum that a forfeiture order might exceed. Thus the rationale in *Southern Union* and similar cases dating back to *Apprendi v. New Jersey* does not apply to forfeiture. Moreover, the Supreme Court’s decision in *Libretti* will remain binding on the lower courts unless and until the Supreme Court itself revisits the issue; that later Supreme Court decisions have undermined the reasoning in the older case is not a ground on which a lower court can decline to follow binding precedent that is directly on point.

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sentencing process;” therefore, the Government’s burden at the forfeiture hearing is preponderance of the evidence, and the rules of evidence do not apply).


70 *Southern Union Company*, 132 S. Ct. at 2357.

71 *United States v. Sigillito*, 759 F.3d 913, 935-36 (8th Cir. 2014) (collecting cases and holding that *Southern Union* does not apply to criminal forfeiture because *Libretti* controls, and because forfeiture has no statutory maximum).
In the past year, many other courts have reached the same conclusion.\textsuperscript{72} Thus, until the Supreme Court decides to review Libretti, criminal defendants will not have a constitutional right to insist that forfeiture issues be submitted to a jury and that the forfeitability of the property be established beyond a reasonable doubt with admissible evidence.

\textit{The right to a jury under Rule 32.2(b)(5)}

While there is no \textit{constitutional} right to a jury determination of forfeiture, Rule 32.2(b)(5) does create a limited statutory right to a jury if one of the parties requests that the jury be retained to determine the forfeiture after it renders a guilty verdict.\textsuperscript{73} It now appears well-settled, however, that Rule 32.2(b)(5) only applies when the Government is seeking the forfeiture of specific property in connection with an offense for which the defendant has been convicted. It does not apply when the Government is seeking a money judgment or when it is seeking to forfeit substitute assets. In the past year, three more district courts joined all other courts in reaching that conclusion.\textsuperscript{74}

\textsuperscript{72} See \textit{United States v. Simpson}, 741 F.3d 539, 560 (5th Cir. 2014) (because criminal forfeitures are “indeterminate and open-ended,” there is no statutory maximum that would be exceeded by any fact-finding by the judge; so \textit{Apprendi} and \textit{Southern Union} do not apply); \textit{United States v. Espada}, ___ Fed. App’x ___, 2015 WL 3823735 (2d Cir. June 22, 2015) (reaffirming Fruchter and holding that nothing in \textit{Southern Union} requires a different result because it dealt with criminal fines and not forfeiture); \textit{United States v. Perkins}, 2014 WL 119326, at *1 (E.D.N.Y. Jan. 10, 2014) (following appellate cases holding that \textit{Southern Union} doesn’t overrule Rule 32.2(b)(5) because \textit{Libretti} is binding on the lower courts, and that forfeiture has no statutory maximum); \textit{United States v. McManus}, 2014 WL 4977504, at *4 (E.D. Pa. Oct. 6, 2014) (until and unless the Supreme Court overrules \textit{Libretti}, there is no constitutional requirement that the amount of the money judgment in a criminal case be determined beyond a reasonable doubt by a jury); \textit{United States v. Carpenter}, 2014 WL 2178020 (D. Mass. May 23, 2014) (rejecting argument that because criminal forfeiture is essentially a mandatory minimum sentence, it must be determined by the jury).

\textsuperscript{73} See generally AFLUS, supra note 3, § 18-4.

\textsuperscript{74} See \textit{United States v. Reese}, 36 F. Supp. 3d 354, 361 (S.D.N.Y. 2014) (because Rule 32.2(b)(5) applies only when the Government is seeking
Moreover, at least one court has held that the defendant has no right to insist that the Government forfeit specific assets instead of seeking a money judgment so that he can assert his right to a jury.\footnote{See Christie v. United States, 2014 WL 2158432, at *9-10 (S.D.N.Y. May 23, 2014) (Government has the discretion to choose between seeking a money judgment and specific assets, and defendant has no right to object on the ground that by seeking a money judgment, the Government deprived him of his right to a jury under Rule 32.2(b)(5)).}

Finally, in \textit{United States v. Ponzo}, a district court held that if the Government is seeking both a money judgment and specific assets, it is proper to have the jury determine the forfeiture of the specific assets first, and have the court determine the amount of the money judgment later in a separate hearing.\footnote{\textit{United States v. Ponzo}, 2014 WL 3893790, at *2 (D. Mass. Aug. 6, 2014) (court submits the forfeiture of specific assets to the jury, at defendant’s request, but overrules defendant’s objection that the amount of the money judgment be determined by the jury as well).}

\textbf{Evidence}

In \textit{United States v. Smith}, the Seventh Circuit held that because the rules of evidence do not apply in the forfeiture phase of the trial, the Government could use statements that the defendant made in plea negotiations to establish the forfeitability of the property.\footnote{\textit{United States v. Smith}, 770 F.3d 628 (7th Cir. 2014) (because the rules of evidence do not apply in the forfeiture hearing, the Government is not precluded by Rule 410 from using a statement made by the defendant in plea negotiations to establish forfeitability). See generally AFLUS, supra note 3, § 18-5(a).} Moreover, the panel also held that because the proffer letter advising the defendant that the Government would not use the information that he provided in specific assets and not when it is seeking only a money judgment, there was no error in failing to ask the defendant if he wanted the jury retained, and no reason to have given the jury a copy of the indictment that contained the forfeiture notice); \textit{United States v. Perkins}, 2014 WL 119326, at *2 (E.D.N.Y. Jan. 10, 2014) (Rule 32.2(b)(5) makes it clear that the right to a jury applies only when the Government is seeking forfeiture of specific assets); \textit{United States v. Jameel}, 2014 WL 5317860, at *3 (E.D. Va. Oct. 16, 2014) (denying request for a jury where the Government is seeking only a money judgment).  See generally AFLUS, supra note 3, § 18-5(a).
a proffer session against him only referred to the use of his statements in the case-in-chief, the Government was permitted to use his proffered statements to establish forfeitability in the forfeiture phase of the trial as well.\textsuperscript{78}

**Right to a hearing**

If the defendant opposes the forfeiture, he has a right to a hearing, even if he has waived his right to a jury, or even if the right to a jury doesn't apply. In *United States v. Reese*, the court entered a money judgment without giving him a chance to object to the calculation of the amount to be forfeited, so the judgment had to be vacated, and a hearing granted, before the order could be reimposed.\textsuperscript{79}

**Determining ownership**

Rule 32.2(b)(2) expressly provides that the determination of the ownership of the property is not part of the forfeiture phase of the defendant’s trial, but rather is deferred to the ancillary proceeding.\textsuperscript{80} The point is that the forfeiture phase is concerned only with whether the Government is able to establish the forfeitability of the property by showing by a preponderance of the evidence that it has the required nexus to the offense for which the defendant has been convicted. Who owns the property becomes relevant only if a third party files a claim in the ancillary proceeding asserting that the property belongs to him.

Accordingly, the defendant cannot object to the forfeiture on the ground that the property belongs to a third party. As the district court said in *United States v. Rivers*, “any objection [the defendant] may have on the basis that a third

\textsuperscript{78} *Smith*, 770 F.3d 628 (proffer letter does not preclude use of proffered statement in forfeiture hearing where the letter precludes use only in the case-in-chief).


\textsuperscript{80} See generally *AFLUS*, supra note 3, § 18-6.
party holds an interest in forfeitable property is not his objection to make.”

Tracing Analysis

The courts are divided with respect to the degree of tracing required to forfeit an asset derived from commingled funds. Some courts hold that it is impossible for the Government to trace criminal proceeds through a commingled account, and thus can only obtain a money judgment and seek to satisfy it by forfeiting substitute assets.

But in Smith, the Sixth Circuit held that if an asset is derived from a bank account into which criminal proceeds greatly exceeding the value of the asset were deposited, the district court may infer that the asset is traceable to the criminal offense.

IX. MONEY JUDGMENTS

Authority to enter a money judgment

Ten years ago, it was uncertain that a court had the statutory authority to enter a forfeiture order in the form of a personal money judgment if the property subject to forfeiture could not be found or was otherwise unavailable. But it is now

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81 United States v. Rivers, 60 F. Supp. 3d 1262, 1265 (M.D. Fla. 2014). But see United States v. Moreno, ___ Fed. App’x ___, 2015 WL 4100070 (9th Cir. July 8, 2015) (defendant in a community property state has standing to object to the criminal forfeiture of his wife’s property because he necessarily also has a marital interest in that property).
82 See United States v. Voigt, 89 F.3d 1050 (3d Cir. 1996) (Government cannot satisfy its tracing burden where criminal proceeds have been commingled with legitimate funds in a bank account; it’s remedy is to obtain a money judgment and forfeit substitute assets); United States v. Louthian, 2013 WL 594232 (W.D. Va. Feb. 15, 2013) (following Voigt and refusing to enter forfeiture order against specific assets purchased with commingled funds; accounting principles approved in Banco Cafetero do not satisfy the Government’s tracing burden of proof by a preponderance of the evidence).
well-established that criminal forfeiture is not limited to the amount of money still in the defendant’s possession at the time he is sentenced, or by the availability of substitute assets.⁸⁴ As the Fourth Circuit said in United States v. Blackman, “To conclude otherwise would enable wrongdoers to avoid forfeiture merely by spending their illegitimate gains prior to sentencing.”⁸⁵

In United States v. Encinares, a district court suggested that rather than seeking to hold every defendant liable for the forfeiture of 100% of the proceeds of the crime, the Government might want to negotiate a realistic money judgment based on defendant’s ability to pay. But there is no requirement that the Government do so. The Government, the court said, “may be unwilling to discount the possibility that a defendant may strike it rich someday.”⁸⁶

**Application of § 853(p) to money judgments**

When the Government seeks the forfeiture of substitute assets, it must show that the requirements of 21 U.S.C. § 853(p) are satisfied. For example, it must show that the directly-forfeitable property is unavailable due to an act or omission of the defendant.

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⁸⁴ See generally AFLUS, supra note 3, § 19-4(c).
⁸⁵ United States v. Blackman, 746 F.3d 137, 143 (4th Cir. 2014) (forfeiture is mandatory even if the defendant lacks the present ability to satisfy the judgment; collecting cases and following all other circuits). See also United States v. Darji, ___ Fed. App’x ___, 2015 WL 3372729 (6th Cir. May 26, 2015) (following Hampton; “a defendant’s ability to pay is not relevant in the forfeiture analysis”); United States v. Tardon, 56 F. Supp. 3d 1309 (S.D. Fla. 2014) (Government is entitled to a money judgment equal to the amount involved in the money laundering offense) (collecting cases); United States v. Ponzo, 2014 WL 3893790, at *5 (D. Mass. Aug. 6, 2014) (court orders defendant to pay money judgment with credit for the value of the specific assets found to be forfeitable by the jury); United States v. Jafari, 2015 WL 225444, at *5 n.6 (W.D.N.Y. Jan. 16, 2015) (defendant’s lack of financial resources and inability to pay are irrelevant in determining liability for money judgment).
The requirements in Section 853(p), however, do not apply when the Government is seeking only a money judgment.\textsuperscript{87}

\textit{Enforcement of money judgment}

It is common for a forfeiture order to include both a list of specific assets that were derived from the defendant’s offense and a money judgment for the entire amount of the proceeds of that offense. When the Government seeks to enforce the money judgment in that situation, it must give the defendant credit for the value of the specific assets at the time they were liquidated.\textsuperscript{88}

\textbf{X. Preliminary Order of Forfeiture}

Rule 32.2(b)(2)(C) provides that if the court cannot identify all of the specific property subject to forfeiture, or calculate the amount of the money judgment, before sentencing, it may enter an order that describes the property in general terms. In this way, the court is able to comply with the requirement that the forfeiture order be entered at

\textsuperscript{87} \textit{United States v. Newman}, 659 F.3d 1235, 1242-43 (9th Cir. 2011) (when seeking only a money judgment, the Government does not have to show that the requirements for forfeiting substitute assets in § 853(p) or Rule 32.2(e) are satisfied). But see \textit{United States v. Jameel}, 2014 WL 5317860, at *2 (E.D. Va. Oct. 16, 2014) (holding that the Government does not have to satisfy the requirements of Section 853(p) to obtain a money judgment, but nevertheless requiring Government to show the directly forfeitable property was unavailable).

\textsuperscript{88} \textit{United States v. Ponzo}, 2014 WL 3893790, at *5 (D. Mass. Aug. 6, 2014) (court orders defendant to pay money judgment with credit for the value of the specific assets found to be forfeitable by the jury). Cf. \textit{Robers v. United States}, ___ U.S. ___, 134 S. Ct. 1854, 1858-59 (2014) (if defendant returns the property that secured a fraudulently-obtained loan to the victim-lender, the amount credited toward the restitution obligation is the amount the victim got when it liquidated the property, not its value on the date of the transfer of title).
sentencing even though the specifics of the order will have to entered at a later date. 89

When the Government is ready to have the court amend the order to include those specifics — *viz.*, a list of specific assets to be forfeited and/or the amount of the money judgment — it need only file a motion in terms of Rule 32.2(e). 90

**XI. ORDER OF FORFEITURE/ SENTENCING**

*Forfeiture is mandatory*

A number of new cases discuss the mandatory nature of criminal forfeiture. 91 In *Blackman*, for example, the defendant was convicted of serving as the fence for a ring of armed robbers. He was sentenced to ten years in prison and ordered to pay $136,600 in restitution to the robbery victims, but the district court denied the Government’s motion for an order of forfeiture in the same amount on the ground that defendant lacked the assets necessary to satisfy a forfeiture judgment. The Government appealed and the Fourth Circuit reversed.

The plain text of the forfeiture statute, the panel said, “indicates that forfeiture is not a discretionary element of sentencing.” To the contrary, forfeiture is mandatory even when restitution is also imposed, and even if the defendant appears to have no present ability to satisfy the order. To the extent that the district court thought that it had discretion not to impose a forfeiture order, the panel concluded, “[I]ts reasoning was in error.” 92

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89 See generally AFLUS, supra note 3, § 19-2(b).
90 See *United States v. Abrahams*, 2014 WL 2532473 (D. Md. June 4, 2014) (noting that court issued consent order in general terms per Rule 32.2(b)(2)(C), and is amending it to include a calculation of the money judgment).
91 See generally AFLUS, supra note 3, § 20-2.
92 *United States v. Blackman*, 746 F.3d 137, 143 (4th Cir. 2014) (§ 2461(c) makes criminal forfeiture mandatory in all cases; “The word ‘shall’ does not convey discretion . . . . The plain text of the statute thus indicates that forfeiture is not a discretionary element of sentencing. . . . Insofar as the
As mentioned earlier, the panel went on to explain that it makes no difference that the defendant lacks the present ability to satisfy the forfeiture order. “Forfeiture is calculated on the basis of the total proceeds of a crime, not the percentage of those proceeds remaining in the defendant’s possession at the time of the sentencing hearing,” the court said. Accordingly, the district court must order the defendant to forfeit the proceeds of his crime whether he has retained those proceeds or not.93

Forfeiture is also mandatory even if a third party has an interest in the property. In United States v. Dorman, for example, the court held that the forfeiture of the defendant’s interest in real property was mandatory even though his mother had a jointly-held interest under state law.94 The third party’s interest will be addressed in the ancillary proceeding.

93 Blackman, 746 F.3d at 143. See also United States v. Louthian, 756 F.3d 295, 306-07 (4th Cir. 2014) (if the Government follows the procedures in Rule 32.2 and establishes the forfeitability of the property, the forfeiture is mandatory despite the defendant’s preference for civil forfeiture); United States v. Smith, 749 F.3d 465, 488 (6th Cir. 2014) (“Criminal forfeiture judgments are mandatory for mail fraud convictions”); United States v. Depue, 585 Fed. App’x 388, 389 (9th Cir. 2014) (“Because the Government included notice of forfeiture in its criminal information, entry of a forfeiture judgment against [Defendant] is mandatory pursuant to 28 U.S.C. § 2461(e), and the district court erred in refusing to enter such judgment at the Government’s request”); United States v. Tardon, 56 F. Supp. 3d 1309 (S.D. Fla. 2014)(§ 982(a)(1) makes criminal forfeiture mandatory in money laundering cases); United States v. Jafari, 2015 WL 225444, at *3 (W.D.N.Y. Jan. 16, 2015) (criminal forfeiture is mandatory; “a procedurally proper request for forfeiture must be granted”); United States v. White, 2014 WL 3898378, at *3 (D. Md. Aug. 7, 2014) (criminal forfeiture is mandatory; “a court does not have discretion in this area”).

94 United States v. Dorman, ___ F. Supp. 2d ___, 2014 WL 4060716 (M.D. Fla. July 17, 2014) (partial forfeiture of the defendant’s interest in property used to commit a drug offense is mandatory, even if the property is jointly-held with an innocent third party), aff’d ___ Fed. App’x ___, 2015 WL 1020170 (11th Cir. Mar. 10, 2015).
Rules 32.2(b)(1), (2) and (4)

Rule 32.2(b)(4)(B) requires that the court include the forfeiture in the oral announcement of the sentence or otherwise ensure that the defendant is aware of the forfeiture at sentencing. Because of the latter provision, the courts are not finding reversible error when the judge forgets to mention the forfeiture at sentencing so long as the defendant was “otherwise aware” of that the Government was seeking forfeiture. 95

For example, in United States v. Esquenazi, the Eleventh Circuit held that the court’s failure to include the forfeiture in the oral announcement of the sentence did not violate Rule 32.2(b)(4) where defense counsel’s objection to the amount of the forfeiture indicated that defendant was “otherwise aware” that there would be a forfeiture order. 96

Similarly, in United States v. Cano, the same court held that a defendant who signed a consent order of forfeiture was “otherwise aware” of the forfeiture at sentencing, even though the court failed to include it in the oral announcement. 97

The courts are likewise loathe to hand the defendant a windfall when the judge fails to comply with other aspects of Rule 32.2(b), such as the requirement that the preliminary order of forfeiture be entered in advance of sentencing. In such cases there is reversible error only if the result would have been different if the court had complied with the rule. 98

95 See generally AFLUS, supra note 3, § 20-3(b).
96 United States v. Esquenazi, 752 F.3d 912, 939 (11th Cir. 2014).
97 United States v. Cano, 558 Fed. App’x 936, 939-40 (11th Cir. 2014). See also United States v. Gomez, 548 Fed. App’x 221, 227 (5th Cir. 2014) (the rule is worded in the alternative: court must make the forfeiture part of the oral announcement or otherwise ensure the defendant is aware of the forfeiture; asking the defendant if he objected to the entry of a forfeiture order satisfied the second alternative).
98 See United States v. Mandell, 752 F.3d 544, 553-54 (2d Cir. 2014) (absent defendant’s objection or showing that the outcome would have been different if the court had complied with the rule, the trial judge’s failure to issue a preliminary order of forfeiture in advance of sentencing per Rule 32.2(b)(2)(B) is not reversible error).
Finally, the oral announcement of the sentence figured in one other appellate case of note. In *United States v. Joseph*, the defendant argued that when the oral announcement of the sentence differs from the judgment, the oral announcement controls; accordingly, if the court orally agrees to offset its restitution order by the amount forfeited, but omits that provision from the written judgment, it is the oral announcement that controls. But the court held that that rule does not apply when the oral announcement is contrary to law, as it was in that case.99

**Including the forfeiture in the judgment**

Rule 32.2(b) also provides that the order of forfeiture must be included in the judgment and commitment order.100 Most courts have treated the trial court’s failure to observe that rule as a clerical error, but prior to the 2009 amendment to the Rule, the Eleventh Circuit considered the omission a substantive defect that rendered the forfeiture order void.101

In *Cano*, however, the Eleventh Circuit agreed that amended Rule 32.2(b)(4)(B) overrules the court’s pre-2009 decision and held that the judgment could be corrected pursuant to Rule 36.102

**Jurisdiction to enter a forfeiture order**

Some states require their state and local law enforcement agencies to comply with certain procedures – such as obtaining a “turnover order” – before they can transfer property to a federal law enforcement agency for forfeiture under federal law. Some claimants have argued that the State’s failure to comply with those requirements renders any subsequent federal forfeiture proceeding invalid. But lack of compliance with state law or federal policy on adopting state

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99 *United States v. Joseph*, 743 F.3d 1350, 1353 (11th Cir. 2014) (where judge’s oral announcement gave defendant offset against restitution order to reflect amount forfeited, and written judgment did not, oral announcement was contrary to law and did not control).
100 See generally *AFLUS*, supra note 3, § 20-3(c).
101 *United States v. Pease*, 331 F.3d 809 (11th Cir. 2003).
seizures has no effect on the authority of a federal court to order the forfeiture of property as part of a defendant’s criminal sentence.

In *United States v. Caruthers*, for example, the defendant argued that no state court had issued a turnover order as required by state law. The panel acknowledged that under the concurrent jurisdiction doctrine, a turnover order may be necessary to allow a federal court to assert *in rem* jurisdiction over seized property, but such an order is not necessary to allow a federal court to assert *in personam* jurisdiction in a criminal case. Because only *in personam* jurisdiction is involved in a criminal forfeiture case, the panel concluded, the lack of a turnover order was irrelevant.\(^\text{103}\)

**Amendments to the order of forfeiture**

Rule 32.2(e) permits the Government to ask the court at any time to amend the order of forfeiture to include newly-discovered property. In *United States v. Haberman*, the indictment listed some specific assets that were forfeited and credited toward a $20 million money judgment, but the government later found an additional asset that had not been listed in the indictment.

The court held that the additional asset could be forfeited pursuant to Rule 32.2(e) because the indictment prefaced the list of assets with the phrase “including by not limited to.”\(^\text{104}\)

**XII. Joint and Several Liability**

\(^{103}\) *United States v. Caruthers*, 765 F.3d 843, 845 (8\(^{th}\) Cir. 2014).

\(^{104}\) *Haberman v. United States*, 2014 WL 717200, at *2 (N.D. Tex. Feb. 24, 2014). But see *United States v. Huynh*, ___ Fed. App’x ___, 2014 WL 7145604 (5\(^{th}\) Cir. Dec. 16, 2014) (noting in *dicta* that Rule 32.2(e)’s requirement that the property be newly discovered or a substitute asset apparently forecloses amendments that would add directly-forfeitable property of which the Government was aware at the time the forfeiture order was entered).
Liability for the amount subject to forfeiture:

All defendants are liable to forfeit the amount subject to forfeiture whether a given defendant personally obtained any of the forfeitable property for himself or not.\(^{105}\) Thus, the general rule is that defendants in conspiracy cases are jointly and severally liable because “the proceeds of a conspiracy are a debt owed by each of the conspirators.”\(^{106}\)

This rule was applied in an unusual way in two cases in which the proceeds of the crime were bribe payments that one conspirator paid to another. Because both defendants were liable to forfeit the proceeds of the conspiracy, and because the bribe payments were the proceeds, the defendant who paid the bribe was subject to the same forfeiture liability as the defendant who received it.\(^{107}\)

Apportioning the forfeiture among the defendants

Notwithstanding joint and several liability, defendants in the same case may be ordered to forfeit different amounts of money based on their roles in the offense and whether they chose to cooperate with the Government.\(^{108}\) Thus in United States v. Guillen-Cervantes, the Ninth Circuit held that a defendant has no right to insist that her co-defendants be ordered to pay money judgments so that she could seek contributions from them.\(^{109}\)

\(^{105}\) See generally AFLUS, supra note 3, § 19-5.


\(^{107}\) See United States v. Wong, 2014 WL 6976080, at *1 (C.D. Cal. Dec. 9, 2014) (the amount of money that one co-conspirator pays to another co-conspirator to receive some illegal benefit is “proceeds” of the conspiracy; and because all co-conspirators are jointly and severally liable, the payor may be ordered to forfeit the amount that he paid); United States v. Encinarees, 2015 WL 507530, at *2 (N.D. Ill. Feb. 5, 2015) (same).

\(^{108}\) See United States v. Lyons, 740 F.3d 702, 733 (1st Cir. 2014).

\(^{109}\) United States v. Guillen-Cervantes, 748 F.3d 870, 873-74 (9th Cir. 2014). But see United States v. Mandell, 752 F.3d 544, 553-54 (2d Cir. 2014) (affirming forfeiture order directing defendants to forfeit different amounts, but joint and several liability means that the defendant forfeiting the larger amount is entitled to credit for the amount recovered from the others).
Finally, joint and several liability extends to property traceable to the proceeds of the offense. So in *United States v. Molina-Sanchez*, a district court held that if the defendant is liable for the forfeiture of proceeds of the conspiracy, including proceeds he did not personally obtain, he is also liable for the forfeiture of real property purchased by a co-conspirator with proceeds the defendant did not personally obtain.\(^\text{110}\)

**Credit for amounts forfeited by others**

Each defendant is entitled to credit for the amount forfeited by his or her codefendants if they have been found jointly and severally liable for the forfeiture of the same property. In *United States v. Swenson*, the district court held that this meant a defendant should receive credit against the amount of substitute property he was required to forfeit — reflecting the amount forfeited by co-defendant — instead of credit against the money judgment he was required to pay.\(^\text{111}\)

**XIII. SUBSTITUTE ASSETS**

**Procedure for obtaining substitute assets**

When the Government is seeks the forfeiture of a substitute asset, it has the burden of showing that the value of the asset does not exceed the value of the directly forfeitable property or the amount of the money judgment that the asset is intended to satisfy.\(^\text{112}\) The “value” of the substitute asset, however, is not necessarily its appraised value, but the amount

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\(^{112}\) See *United States v. McCrea*, 2014 WL 123172 (W.D. Va. Jan. 13, 2014) (explaining that the term “money judgment” is simply shorthand for the proceeds of defendant’s crime, and that therefore § 853(p), which authorizes the forfeiture of substitute assets in place of other “property” allows the forfeiture of any property of the defendant to satisfy a money judgment); *McCrea*, 2014 WL 123172, at *3 n.4 (if sale of defendant’s residence yields more than is needed to satisfy the money judgment, defendant will be paid the excess).
the Government will realize after deducting the costs of maintaining and selling the property.\footnote{113}{See United States v. Sperrazza, 2014 WL 5310545, at *3 (M.D. Ga. Oct. 16, 2014).}

As mentioned earlier, Rule 32.2(e) is the vehicle for moving to forfeit substitute assets.\footnote{114}{See United States v. Sheth, 759 F.3d 711, 716-17 (7th Cir. 2014) (rejecting the Government’s argument that it properly invoked the Mandatory Victims Restitution Act procedures as the means of recovering assets for forfeiture; it must use Rule 32.2(e)).}

\textit{Ownership}

When the court forfeits a substitute asset, ownership issues are deferred to the ancillary proceeding just as they are in cases involving directly forfeitable property.\footnote{115}{In United States v. Coffman, a third party complained that this unnecessarily prolonged the forfeiture determination, but the Sixth Circuit held that this was a policy decision that Congress was entitled to make. In United States v. Coffman, 574 Fed. App'x 541, 564 (6th Cir. 2014).}

In any event, just as it is with respect to directly-forfeitable property, the defendant cannot object to the motion to forfeit substitute assets on the ground that the property does not belong to him.\footnote{116}{See United States v. Coffman, 574 Fed. App'x at 563-64 (the defendant cannot object to the forfeiture of a substitute asset on the ground that it belongs to a third party; if the defendant lacks any interest in the property, the Government has taken nothing from him); United States v. Sperrazza, 2014 WL 5310545, at *3 (M.D. Ga. Oct. 16, 2014) (whether the relation back doctrine applies to substitute assets is an argument for the third party to make in the ancillary proceeding; it is not an object defendant may make in opposition to the Government’s Rule 32.2(e) motion to forfeit the asset).}

\textit{Section 853(p)}

Before it can forfeit substitute assets, the Government must show that the criteria set forth in 21 U.S.C. § 853(p) have been satisfied.\footnote{117}{See generally AFLUS, supra note 3, § 22-3.}

Among other things, the Government must
show that it has exercised due diligence in attempting to locate
the directly forfeitable property, and that the unavailability of
the property is due to an act or omission of the defendant. Its
burden, however, is not high with respect to either point.

In United States v. Martin, for example, the Government
satisfied the “due diligence” requirement by having its case
agent testify that he could not locate or trace the criminal
proceeds due to unreliable records, intervening transactions,
and the commingling of funds.119 And in United States v. Lane,
the district court found that the Government satisfied the “act
or omission” requirement by showing, through an agent’s
affidavit, that the missing money had been deposited into a
bank account of which the defendant was the sole owner.120

In multi-defendant cases, the Government may satisfy
the “act or omission” requirement by showing that the directly
forfeitable property is unavailable due to the act or omission of
any one of the several defendants. Thus, in United States v.
Chittenden, a district court held that just as a criminal
defendant is jointly and severally liable to forfeit the proceeds
of a conspiracy under a Pinkerton theory, she is liable for the
acts or omissions of her co-conspirators in rendering the
directly-forfeitable property unavailable; accordingly, the
Government was entitled to forfeit the defendant’s substitute
assets even if she was not personally responsible for the
unavailability of the criminal proceeds.121

119 United States v. Martin, 2014 WL 221956, at *6 (D. Idaho Jan. 21, 2014). See also United States v. Tardon, 56 F. Supp. 3d 1309 (S.D. Fla. 2014) (agent’s affidavit stating that directly forfeitable property could not be located was sufficient to satisfy § 853(p)); United States v. Swenson, 2014 WL 3748301, at *9-10 (D. Idaho July 29, 2014) (if defendant has caused the directly forfeitable proceeds to be commingled, and an agent testifies that they cannot be traced and separated without significant effort and expense, the court may order the forfeiture of substitute).
Property the jury declined to forfeit

What happens if the Government attempts to forfeit a given asset as property directly traceable to the offense, but the jury declines to return a verdict of forfeiture? If the defendant is nevertheless subject to a personal money judgment for the proceeds of his offense, can the property that the jury declined to forfeit be forfeited as a substitute asset? The answer is yes: any property of the defendant is potentially forfeitable as a substitute asset.122 That the Government failed to prove that a particular asset was traceable to the crime simply puts that asset in the same status of any other untainted property that may be forfeited to satisfy a money judgment.123 In fact, most courts hold that the Government has the option of forfeiting property as a substitute asset even if it may be directly forfeitable.124

Post-conviction order restraining substitute assets:

Several courts hold that while substitute assets may not be restrained prior to trial, they may be restrained after conviction.125 It is not clear what the authority is for those cases, but it is likely 21 U.S.C. § 853(g), which authorizes the court to take any action necessary to preserve the Government’s interest in property once an order of forfeiture has been entered. Critically, that statute, unlike its pre-trial counterpart, Section 853(e), does not limit the authority to enter a restraining order to directly forfeitable property.

The problem for the Government and the court is that Section 853(g) does not take effect immediately after conviction.

122 See generally AFLUS, supra note 3, § 22-3(b).
123 See United States v. Tardon, 56 F. Supp. 3d 1309 (S.D. Fla. 2014) (property jury declined to forfeit is forfeitable as substitute assets). Cf. United States v. Smith, 770 F.3d 628, 641-42 (7th Cir. 2014) (noting that the Government has the right to seek the forfeiture of property as substitute assets if it is unsuccessful in establishing direct forfeitability).
124 See United States v. Smith, 770 F.3d 628, 642 (7th Cir. 2014) (Government may argue that property is directly forfeitable or, in the alternative, that it is a substitute asset, and the court may enter an order forfeiting the property under both theories).
125 See generally AFLUS, supra note 3, § 19-6.
but only after a preliminary order of forfeiture has been entered. In *United States v. Swenson*, the district court finessed this problem by holding that the substitute property could be restrained under the All Writs Act until a preliminary order of forfeiture could be entered.\(^{126}\)

*Forfeiture of substitute assets is mandatory*

It is well-established that the forfeiture of substitute assets is mandatory if the requirements in Section 853(p) are satisfied.\(^{127}\) In *United States v. McCrea*, the Fourth Circuit reaffirmed its view on this point and held that there is no exception when the substitute asset is the defendant’s residence.\(^{128}\)

**XIV. Property Transferred To Third Parties**

*The relation back doctrine*

To prevent criminal defendants from attempting to avoid the forfeiture of their property by transferring it to third parties, the Government may use the relation back doctrine, codified at 21 U.S.C. § 853(c), to void any transaction involving forfeitable property that occurs after the Government’s interest

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\(^{126}\) *United States v. Swenson*, 2014 WL 2506300 (D. Idaho June 3, 2014) (if property is seized or restrained pre-trial as directly-forfeitable property, but the defendant is acquitted on the offense supporting the forfeiture, the Government’s authority to retain possession no longer exists, but if the property is subject to forfeiture as a substitute asset in connection with another offense, it may be restrained post-conviction under the All Writs Act until the court issues an order of forfeiture).

\(^{127}\) See, e.g., *United States v. Alamoudi*, 452 F.3d 310, 314 (4th Cir. 2006) (“Section 853(p) is not discretionary. . . . [W]hen the Government cannot reach the property initially subject to forfeiture, federal law requires a court to substitute assets for the unavailable tainted property”).

\(^{128}\) *United States v. McCrea*, 548 Fed. App’x 157, 158 (4th Cir. 2014). But see *United States v. Tardon*, 56 F. Supp. 3d 1309 (S.D. Fla. 2014) (holding that court has discretion to decline to forfeit substitute asset so that it may be used to pay attorney’s fee).
in the property has vested. With respect to directly forfeitable property, the Government’s interest vests at the time of the offense giving rise to the forfeiture, but it is not clear when the Government’s interest vests in a substitute asset.

The Fourth Circuit and some district courts hold that the Government’s interest in substitute assets vests at the time of the offense, just as it does for directly forfeitable property. But the Sixth Circuit has expressly rejected that rule, and other courts remain undecided.

Courts in the Sixth Circuit have found a way to void transfers of substitute assets to third parties without invoking the relation back doctrine, however. In United States v. Coffman, the court held that it makes no difference that the relation back doctrine does not apply to substitute assets if, in the ancillary proceeding, the third party cannot rebut evidence that the transfer was fraudulent under state law and that therefore she never acquired a legal interest.

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129 See United States v. Morales, 36 F. Supp. 3d 1276, 1290 (M.D. Fla. 2014) (defendant’s attempt to transfer his interest in marital property to his wife after his arrest was void under the relation back doctrine). See generally AFLUS, supra note 3, § 21-2.


131 See United States v. Erpenbeck, 682 F.3d 472, 477-78 (6th Cir. 2012) (the relation back doctrine does not apply to substitute assets; declining to follow McHan; the Government’s interest does not vest until it fails to collect the directly-forfeitable property, which is not until the defendant is convicted); United States v. Coffman, 574 Fed. App’x 541, 562-63 (6th Cir. 2014) (same; following Erpenbeck); Hunter v. United States, 2014 WL 4385852 (W.D. Tenn. Sept. 4, 2014) (applying Erpenbeck, because the Government’s interest in the substitute asset did not vest until the property was included in a forfeiture order, claimant to whom the property was transferred after defendant pled guilty could make a claim under § 853(n)(6)(A)).

132 See generally AFLUS, supra note 3, § 21-3.

**XV. Right Of Third Parties To Object To The Forfeiture**

*Section 853(k)*

Section 853(k) ensures an orderly process for resolving ownership issues in criminal forfeiture cases by establishing Section 853(n) as the exclusive procedure for determining third party rights, and expressly barring third parties from contesting the forfeiture in any other forum.\(^{134}\) In *Coffman*, the Sixth Circuit held that this procedure reflects a policy choice that Congress was entitled to make, even if it has the effect of prolonging the forfeiture process.\(^{135}\)

Among many other things, Section 853(k) bars third parties from commencing any action against the United States, including filing a Rule 41(g) motion for the return of seized property, after an indictment has been filed.\(^{136}\) It also bars third parties from commencing an action in another court to circumvent the forfeiture procedure.\(^{137}\)


\(^{135}\) *United States v. Coffman*, 574 Fed. App’x at 564. See also *United States v. White*, 2014 WL 3898378, at *3 (D. Md. Aug. 7, 2014) (explaining that it is because criminal forfeiture is *in personam*, not *in rem* that a third party may not intervene in the criminal case to assert property rights).

\(^{136}\) See *United States v. Rodgers*, 2014 WL 136678 (E.D. Mich. Jan. 9, 2015) (third parties barred by § 853(k) from filing Rule 41(g) motion for return of Rolls Royce seized with warrant and named in criminal indictment; ancillary proceeding provides them adequate remedy); *United States v. White*, 2014 WL 3898378, at *4 (D. Md. Aug. 7, 2014) (§ 853(k) bars a third party from filing a Rule 41(g) motion for the return of property seized without a warrant and held for criminal forfeiture, once the property is named in the indictment).

\(^{137}\) See *SKL Investments, Inc. v. United States*, 2014 WL 4365297, at *6 (W.D. Tenn. Sept. 2, 2014) (§ 853(k) bars a post-indictment tax sale just as
XVI. Ancillary Hearing – Procedural Issues

The ancillary proceeding is civil in nature; it is essentially a procedure to quiet title to the forfeited property; but it is nevertheless part of the criminal case.138 Thus, as the district court held in United States v. Holovko, claims should be docketed under the criminal case number, not as separate civil complaints, and no civil filing fee is required.139

Notice requirement to potential claimants

Rule 32.2(b)(6) provides that the Government must send direct notice to persons who reasonably appear to have a potential claim to the forfeited property.140 In United States v. Bowser, a third party complained that the Government failed to send him notice, but the court accepted the representation of the prosecutor assigned to the case that he had never heard of Claimant and had no reason to believe Claimant had a potential claim. Moreover, the court held that just because other prosecutors in other districts might have heard of the claimant there was no reason to impute that knowledge to the prosecutor handling this case.141

Pleading requirements under § 853(n)(3)

The pleading requirements governing third party claims are set forth in 21 U.S.C. § 853(n)(3).142 Among other things, the claim must be filed under penalty of perjury,143

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138 See generally AFLUS, supra note 3, § 23-2.
140 See generally AFLUS, supra note 3, § 23-3(b).
142 See generally AFLUS, supra note 3, § 23-5.
the basis for the claimant’s assertion of a legal interest in the property, and must state the time and circumstances of the acquisition of that interest.144

In United States v. Caruthers, the Eighth Circuit held that a claim stating only that the claimant was in possession of the forfeited currency when it was seized did not satisfy the “nature and extent” requirement. That requirement is important, the court said, because it allows the court to assess whether the claimant is asserting a legal interest in the property, which is cognizable in the ancillary proceeding, or only an equitable interest, which is not.145

The “time and circumstances” requirement is likewise strictly enforced. For example, in United States v. Vithidkul, the district court held that simply stating that the property was acquired “through previous employment” was not sufficient; rather, third-party claimants must state how they obtained possession of the property, from whom they obtained it, and the place and time when that occurred.146

Time for filing claim

Section 853(n)(2) provides that third party petitions must be filed within thirty days of the final publication of

but without prejudice to refiling even though the time to file a claim had expired).

144 See United States v. Fabian, 764 F.3d 636, 638 (6th Cir. 2014) (affirming dismissal of claim that asserted only a “conclusory legal interest;” under § 853(n)(3), the claim must describe the nature and extent of the legal interest the time and circumstances of claimant’s acquisition of it).
145 United States v. Caruthers, 765 F.3d 843, 845 (8th Cir. 2014).
146 United States v. Vithidkul, 2014 WL 979206, at *2-3 (D. Md. Mar. 12, 2014). See also United States v. Barber, 2014 WL 5473570, at *4 (M.D. Fla. Oct. 28, 2014) (denying wife’s assertion of interest in real and personal property titled in husband’s name without prejudice; § 853(n)(3) requires her to describe the time and circumstances of her acquisition of her interest, and to support it with “evidentiary support”); United States v. McDonald, 2014 WL 1911554 (D. Me. May 13, 2014) (claim asserting only that forfeited firearm was missing from claimant’s firearms collection was insufficient; the claim must state the time and circumstances of claimant’s acquisition of the firearm; that he cannot recall how or when he acquired it is no excuse).
notice, or the receipt of actual notice, whichever is earlier.\textsuperscript{147} A claim that is filed outside of this period must be dismissed as untimely.\textsuperscript{148}

In \textit{United States v. Knoll}, for example, the claimant attempted to amend the original claim outside the thirty-day claims period to add two additional claimants. But the court held that the claim was out of time and did not relate back to the original filing date with respect to the two additional claimants.\textsuperscript{149}

\textit{Failure to state a claim}

As is true in civil litigation generally, if the claim fails to set forth grounds on which the claimant could prevail, even if the facts alleged in the complaint are assumed to be true, the claim must be dismissed.\textsuperscript{150}

\textit{Right to Attorney's fees}

The attorney fee provision in 28 U.S.C. \S\ 2465(b) applies only to civil forfeiture actions and not to the ancillary proceeding in a criminal forfeiture case.\textsuperscript{151} Accordingly, a

\textsuperscript{147} See generally AFLUS, supra note 3, \S\ 23-4.
\textsuperscript{148} See \textit{United States v. Sharma}, 585 Fed. App'x 861, 862 (5th Cir. 2014) (affirming denial of claimant's second attempt to file a claim; amendment to defendant's restitution order did not restart the clock for the third party).
\textsuperscript{150} See \textit{United States v. Salti}, 579 F.3d 656, 669-70 (6th Cir. 2009) (third party claim may be dismissed on the pleadings if, assuming all facts alleged in the claim to be true, claimant has not asserted a legal interest in the forfeited property); \textit{Hunter v. United States}, 2014 WL 4385852, at *5 (W.D. Tenn. Sept. 4, 2014) (because claimant alleged facts that, if true, would establish a legal interest in the forfeited asset, Government's motion to dismiss must be denied; but in the evidentiary hearing, Claimant will have the burden of proving he is not merely a nominee by a preponderance of the evidence). See generally AFLUS, supra note 3, \S\ 23-6.
\textsuperscript{151} See \textit{United States v. Moser}, 2008 WL 3891489, at *2 (E.D. Ark. Aug. 19, 2008) (denying fee award; ancillary proceeding is not a proceeding to forfeit property; its purpose is to ensure that property of a third party is not forfeited in a criminal case), aff'd, 586 F.3d 1089, 1095-96 (8th Cir. 2009) (finding it unnecessary to decide if the ancillary proceeding is a
successful claimant’s only vehicle for seeking attorney’s fees is the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d).\(^\text{152}\)

**Rule 32.2(c)(2)**

Rule 32.2(c)(2) provides that if no third party files a claim, the court must find that the defendant had an interest in the property before it issues a final order of forfeiture.\(^\text{153}\) Criminal forfeiture, however, does not depend on a finding that the property belonged to the defendant; it is only necessary to show that that property was traceable to the proceeds of the crime for which the defendant was convicted.\(^\text{154}\) In *United States v. Molina-Sanchez*, the district court reconciled this apparent inconsistency by holding that the rule is satisfied if the property was traceable to the proceeds of the offense for which the defendant was convicted, and if the defendant would be liable to forfeit the proceeds of that crime under the doctrine of joint and several liability.\(^\text{155}\)

**XVII. CHOICE OF LAW**

*The role of state law*

“proceeding to forfeit property” because, given the arguments on both sides and the rule that waivers of sovereign immunity must be clear and unequivocal, it was not clear that Congress intended § 2465(b) to apply to the ancillary proceeding); *United States v. Coffman*, 2014 WL 6750603, at *4 (E.D. Ky. Dec. 1, 2014) (following Moser; request for attorney’s fees denied because it is unclear Congress intended to waive sovereign immunity in the ancillary proceeding). See generally AFLUS, supra note 3, § 23-10.

\(^\text{152}\) See *United States v. Bailey*, 2015 WL 1893610 (W.D.N.C. Apr. 27, 2015) (granting EAJA fees where Government failed to show a nexus between the forfeited property and defendant’s offense, and thus should have known from the outset that claimants would be able to show a superior interest under § 853(n)(6)(A)).

\(^\text{153}\) See generally AFLUS, § 23-17.

\(^\text{154}\) *United States v. Molina-Sanchez*, 298 F.R.D. 311, 312-13 (W.D.N.C. 2014) (following *De Almeida v. United States*, 459 F.3d 377, 381 (2d Cir. 2006); criminal forfeiture is not limited to property owned by the defendant; “it reaches any property that is involved in the offense”).

When a claim is filed in the ancillary proceeding, the court must look first to the law of the jurisdiction that created the property right to determine the nature of the claimant’s interest in the property.\(^1\) Thus, in *United States v. Morales*, the district court looked to state law to determine the validity and effect of a deed by which the defendant’s wife created a tenancy by the entireties by quitclaiming her interest in the forfeited property to herself and her husband, only to later claim in the ancillary proceeding that the quitclaim deed was invalid, and that she remained the sole owner of the property.\(^2\)

Similarly, in *United States v. Barber*, the court held that because under state law a spouse has no interest in the defendant spouse’s 401(k) account until dissolution of the marriage, the defendant’s wife’s had basis to object to the forfeiture of her husband’s account.\(^3\)

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\(^1\) See generally AFLUS, supra note 3, § 23-12.

\(^2\) *United States v. Morales*, 36 F. Supp. 3d 1276, 1285-86 (M.D. Fla. 2014) (court looks to state law to determine validity and effect of deed by which wife created tenancy by the entireties by quitclaiming her interest to herself and her husband).

\(^3\) *United States v. Barber*, 2014 WL 5473570, at *3 (M.D. Fla. Oct. 28, 2014). See also *United States v. Kermali*, ___ F. Supp. 3d ___, 2014 WL 6601004 (M.D. Fla. Nov. 12, 2014) (because Florida law gives wife no interest in property titled solely in husband’s name until the marriage ends, wife lacks standing to contest forfeiture under § 853(n)(2), even though the property was acquired in the course of the marriage); *United States v. Dorman*, 38 F. Supp. 3d 1328 (M.D. Fla. 2014) (under Florida law, persons holding property in “joint tenancy with right of survivorship” each have an equal one-half interest in the property; third party therefore has no right to object to partial forfeiture of defendant’s interest); *United States v. Gines*, 2015 WL 461630, at *5 (E.D. Tenn. Feb. 3, 2015) (looking to state law to determine if the name on the title to a vehicle is dispositive on the question of ownership); *United States v. Alquzah*, ___ F. Supp. 3d ___, 2015 WL 1263142 (W.D.N.C. Mar. 13, 2015) (wife’s standing to contest the forfeiture of the real property held solely in defendant’s name turns on state law); *United States v. Satava*, 2015 WL 1538824 (N.D. Ohio Apr. 7, 2015) (because under state law wife acquired no interest in husband’s retirement account until divorce was final, and because divorce was still pending when court issue order forfeiting account as substitute asset, which was when Government’s interest vested, wife could not prevail under § 853(n)(6)(A)).
XVIII. STANDING UNDER SECTION 853(N)(2)

Claimants in the ancillary proceeding must establish standing to contest the forfeiture by satisfying the “legal interest” requirement in Section 853(n)(2). Simple possession of the property is not enough.

The defendant’s general creditors cannot meet the “legal interest” requirement because they do not have a legal interest in the specific asset that has been forfeited. The Fourth Circuit makes an exception where the defendant’s “entire estate” has been forfeited; but every year there seems to be an occasion for another court in that circuit to limit that exception to the facts of the case that created it.

The rule against allowing general creditors to establish standing to contest the forfeiture prevents the ancillary proceeding from being used as liquidation proceeding for the benefit of the defendant’s victims. The ancillary proceeding is simply a quiet title proceeding intended to ensure that property that actually belongs to a third party is not inadvertently forfeited; the defendant’s victims have other

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159 See United States v. Morales, 36 F. Supp. 3d 1276, 1282 (M.D. Fla. 2014) (in the ancillary proceeding, the court looks first to see if claimant has standing under § 853(n)(2) and then to the merits of the claim in terms of § 853(n)(6)). See generally AFLUS, supra note 3, § 23-13(a).

160 See United States v. Caruthers, 765 F.3d 843, 845-46 (8th Cir. 2014) (naked possession without an explanation is insufficient to establish standing; claim asserting only possession may be dismissed on the pleadings).


162 United States v. Reckmeyer, 836 F.2d 200, 206 (4th Cir. 1987) (general creditors have a legal interest in forfeited property if defendant’s entire estate is forfeited).

163 See United States v. Ribeiro, 2014 WL 2195065 (W.D. Va. May 27, 2014) (declining to dismiss unsecured creditor’s claim for lack of standing where record was unclear as to whether all of defendant’s assets were forfeited, but inviting Government to supplement the record and file a motion for summary judgment); United States v. Ribeiro, 2014 WL 5148180 (W.D. Va. Sept. 10, 2014) (same).
remedies, including restitution and petitioning the Attorney General for the remission of the forfeited property.\textsuperscript{164}

*Present interest v. former interest*

To satisfy the “legal interest” requirement, the claimant must have a *present interest* in the forfeited property; his ability to show that he had a *former interest* by tracing the forfeited property to assets that he once owned is irrelevant.\textsuperscript{165} So, in *United States v. Singleton*, the district court held that because a lender retains no legal interest in the money that he lends, his ability to trace the money forfeited by the defendant to the money that he loaned does not give him grounds to contest the forfeiture under § 853(n)(6)(A).\textsuperscript{166} And in *United States v. Morales*, the court held that a wife who transferred half of her interest in the forfeited property to her husband, and thus had only a one-half interest at the time he used the property to molest children, could recover only the half-interest that she retained.\textsuperscript{167}

*Right of a codefendant to challenge the forfeiture as a third party*

A co-defendant who has not been convicted of the offense giving rise to the forfeiture has the same right to contest the forfeiture as any other third party.\textsuperscript{168} But as the district court

\textsuperscript{164} See *United States v. Lavin*, 942 F.2d 177, 185 (3d Cir. 1991) (“Congress did not intend section 853(n) to serve as a vehicle by which all innocent third parties who are aggrieved by an order of forfeiture can petition for judicial relief); *United States v. Galemmo*, 2014 WL 7340365, at *7 (S.D. Ohio Dec. 23, 2014) (following *Lavin*; victims cannot use the ancillary proceeding to convert the forfeiture proceeding into a restitution proceeding; whether a victim is entitled to restitution has nothing to do with whether property is forfeitable to the Government”).

\textsuperscript{165} See *United States v. Salti*, 579 F.3d 656, 669-701 (6th Cir. 2009) (that forfeited funds were previously in claimant’s bank account does not by itself confer standing; former ownership of the forfeited property does not mean claimant has a present legal interest).


\textsuperscript{167} *United States v. Morales*, 36 F. Supp. 3d 1276, 1291-93 (M.D. Fla. 2014).

\textsuperscript{168} See *United States v. Davenport*, 668 F.3d 1316, 1320-21 (11th Cir. 2012) (a former co-defendant who pled guilty to an offense other than the one giving rise to the forfeiture, is a third party with respect to the forfeiture
held in *United States v. Ford*, in a two-defendant case, once both defendants have been convicted, neither has the right to file a claim in the ancillary proceeding.\(^\text{169}\)

*Titled owners / assignees*

Legal title is not necessary to establish standing;\(^\text{170}\) but a person who bases standing on having legal title does not have standing if his title is invalid or if it was obtained via a fraudulent transfer. So, in *United States v. Coffman*, the defendant’s wife could not establish a legal interest in property that the defendant transferred to her with the intent to hide it from his victims and from the Government because the transfers were void under state law as fraudulent transfers.\(^\text{171}\)

**XIX. GROUNDS FOR RECOVERY IN THE ANCILLARY PROCEEDING**

*Section 853(n)(6)*

The grounds for recovery in the ancillary proceeding are set forth in 21 U.S.C. § 853(n)(6)(A) and (B).\(^\text{172}\) Mirroring the standing requirement in Section 853(n)(2), both provisions provide that the claimant must have a legal interest in the forfeited property. Thus, in *United States v. Hernandez-Morales*, a bank account holder could not successfully contest

\(^{169}\) *United States v. Ford*, 2014 WL 1334223 (D. Me. Apr. 2, 2014) (co-defendants tried separately; second defendant’s claim in the ancillary proceeding held until she is convicted in her trial, then dismissed).

\(^{170}\) See *United States v. Oregon*, 671 F.3d 484, 488 n.1 (4th Cir. 2012) (holding that there are ways to satisfy statutory standing without having legal title).

\(^{171}\) *United States v. Coffman*, 2014 WL 354632, at *8 (E.D. Ky. Jan. 31, 2014) (following *United States v. Peterson*, 820 F. Supp. 2d 576, 585-86 (S.D.N.Y. 2011) (to the extent the claimant relies on a transfer of real property from the defendant that is void under state law as a fraudulent conveyance, he has no interest to assert in the ancillary proceeding), aff'd 537 Fed. App'x 3 (2d Cir. 2013)).

\(^{172}\) See generally AFLUS, supra note 3, § 23-15.
the forfeiture of the money in his bank account because the money was deposited by third parties, and he could not show that it actually belonged to him; rather, it appeared he had allowed third parties to use his account as part of a money laundering scheme.173

Relitigating the entry of the forfeiture order

In general, third parties cannot relitigate the district court’s finding that the property was subject to forfeiture, nor assert that the entry of the forfeiture order suffered from procedural defects. The only issue in the ancillary proceeding is ownership; it is a complete defense to the forfeiture: “if the property really belongs to the third party, he will prevail and recover his property whether there were defects in the criminal trial or the forfeiture process or not; and if the property does not belong to the third party, such defects in the finding of forfeitability are no concern of his.”174

In SKL Investments, Inc. v. United States, a district court applied this rule to the claimant’s attempt to argue that the forfeited property was a substitute asset and not directly forfeitable property. The claimant wanted to contest the forfeiture on those grounds so that it could argue that it had a pre-existing interest under § 853(n)(6)(A) (because, in the claimant’s view, the relation back doctrine does not apply to substitute assets), or so that it could argue that the lis pendens on the property was invalid, which would have cleared the way for the claimant to assert that it acquired the property as a

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174 United States v. Andrews, 530 F.3d 1232, 1237 (10th Cir. 2008). See United States v. Fabian, 764 F.3d 636, 638 (6th Cir. 2014) (following all other circuits: “§ 853(n) does not permit relitigation of the district court’s antecedent determination that an item of property is subject to forfeiture”); SKL Investments, Inc. v. United States, 2014 WL 4365297, at *3 (W.D. Tenn. Sept. 2, 2014) (collecting cases and holding claimant may not challenge district court’s finding that property was directly forfeitable and not a substitute asset). See generally AFLUS, supra note 3, § 23-14(c).
bona fide purchaser for value under § 853(n)(6)(B). But the court held that it could not do so.\footnote{SKL Investments, Inc. v. United States, 2014 WL 4365297, at *5-6 (W.D. Tenn. Sept. 2, 2014).}

Likewise, a third party cannot argue that the court committed a procedural error in issuing the forfeiture order, nor that the forfeiture was barred by another provision of law. Thus, in \textit{United States v. Huynh}, the Fifth Circuit held that whatever the merits of claimant’s argument that the property was not properly forfeited under Rule 32.2(e), procedural defects in the entry of the order of forfeiture are not the third party’s concern; third parties are limited to seeking relief on the ownership grounds in § § 853(n)(6)(A) and (B).\footnote{United States v. Huynh, ___ Fed. App'x ___, 2014 WL 7145604 (5th Cir. Dec. 16, 2014).}

In the same case, the panel added that limiting third parties to the ownership issues embodied in Section 853(n)(6) does not violate due process.\footnote{Huynh, ___ Fed. App'x ___, 2014 WL 7145604 (noting that in \textit{Libretti}, the Supreme Court rejected the view that it was necessary for the district court to find a factual basis for the entry of a forfeiture order to which the defendant agreed, even though the entry of the order forced third parties to file claims in the ancillary proceeding) (citing \textit{United States v. McHan}, 345 F.3d 262, 270 (4th Cir. 2003)).}

\textit{When forfeitability may be revisited}

There are circumstances, however, when the Government’s proof that the property was derived from the underlying crime is inconsistent with the third party’s assertion that he is the owner of the property. In such cases, the claimant necessarily is permitted to revisit the court’s finding as to the provenance of the property in order to establish his ownership of it.

For example, in \textit{United States v. Davis}, the defendant’s girlfriend was permitted to challenge the district court’s finding that the forfeited vehicle was purchased with the defendant’s drug proceeds by showing that she had purchased it with her own money. Her assertion that the vehicle had an
untainted source, in other words, was part of her proof that she was the rightful owner of the property, and thus was properly raised in the ancillary proceeding even though it forced the district court to revisit the finding of forfeitability that it made in the forfeiture phase of the defendant’s trial. Unfortunately for the claimant, however, the court found her evidence insufficient to satisfy her burden of proof on the ownership issue and denied her claim.\textsuperscript{178}

XX. \textbf{SUPERIOR LEGAL INTEREST UNDER SECTION 853(N)(6)(A)}

\textit{Section 853(n)(6)(A) embodies the relation back doctrine}

To prevail under Section 853(n)(6)(A), the claimant must show that he had a legal interest in the forfeited property before the crime giving rise to the forfeiture – \textit{i.e.}, before the Government’s interest vested under the relation back doctrine.\textsuperscript{179} A person who acquired an interest in the property after it became subject to forfeiture – \textit{i.e.}, after the Government’s interest vested – cannot recover under Section 853(n)(6)(A) but can only prevail if he was a bona fide purchaser for value in terms of Section 853(n)(6)(B).\textsuperscript{180}

In \textit{United States v. Huynh}, the defendant deposited money into the claimant’s bank account in the course of a money laundering conspiracy. The claimant laid claim to the

\textsuperscript{178} \textit{United States v. Davis}, 2014 WL 7236997 (E.D. Ky. Dec. 17, 2014). See also \textit{United States v. Coffman}, 2014 WL 354632, at *3-5 (E.D. Ky. Jan. 31, 2014) (defendant’s wife was entitled to contest the forfeiture of the untainted property in her bank account that defendant used to facilitate his money laundering offense, not because she was challenging the Government’s forfeiture theory, but because if she was the true owner of the money, it was not forfeitable).


\textsuperscript{180} See generally \textit{AFLUS}, supra note 3, § 23-15(a),
funds in the ancillary proceeding, but the Fifth Circuit held that the claimant had no interest in the funds until they were deposited into its account, by which time the money was already forfeitable to the Government as property involved in the conspiracy. Because the Government’s interest vested before the claimant acquired any interest in the forfeited property, the claimant could not prevail under Section 853(n)(6)(A).181

Because a third party cannot prevail under Section 853(n)(6)(A) unless he had an interest in the forfeited property before the crime giving rise to the forfeiture occurred, a third party can never assert an interest under that statute to the proceeds of the crime.182

The same rule applies to property traceable to the proceeds of the crime. Thus, in United States v. Davis, the court held that because the Government’s interest in criminal proceeds vested when crime was committed, its interest in property purchased with those proceeds vested immediately when the purchase was made, preventing the third party who used the proceeds to make the purchase from asserting any claim under Section 853(n)(6)(A).183

Nominees and equitable interests

The claimant must have an actual legal interest in the forfeited property; nominal ownership and equitable and possessory interests are not sufficient.184 Thus, in United

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181 United States v. Huynh, 2014 WL 7145604. See also United States v. Hernandez-Morales, 2014 WL 7252045, at *7 (because the Government’s interest vested immediately when a third party deposited drug proceeds into the claimant’s bank account as part of a money laundering scheme, the claimant could not show that he any pre-existing interest in the deposited money).

182 See United States v. Hooper, 229 F.3d 818, 821-22 (9th Cir. 2000) (to prevail under § 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, § 853(n)(6)(A) can never be used to challenge the forfeiture of proceeds).


184 See generally AFLUS, supra note 3, § 23-15(b).
States v. Velasquez, the district court denied a claim filed by the defendant’s mother to a vehicle titled in her name because she exercised no dominion or control over it, and so was merely a nominee with no legal interest in the property.\(^\text{185}\)

In United States v. Knoll, the district court granted the Government’s motion for summary judgment against a claimant who alleged only that he had an equitable interest in the forfeited property arising from his having assumed responsibility for maintaining the property as a clubhouse for a motorcycle club. Such equitable interests are not legal interests, the court said, and thus cannot support a claim in the ancillary proceeding.\(^\text{186}\)

In another case involving a motorcycle club and its property, a district court held that a claim cannot be based on a “communal interest” in the forfeited property, or the claimants’ “collective ownership” of it. Rather, the claimant must show that he has a particular, personal interest in the forfeited property.\(^\text{187}\)

\(^{185}\)United States v. Velasquez, 2014 WL 2781837 (N.D. Tex. June 19, 2014). See also United States v. Coffman, 2014 WL 354632, at *3-5 (E.D. Ky. Jan. 31, 2014) (defendant’s wife had the right to contest the forfeiture of the money in her bank account that defendant used to commit his money laundering offense only if she was the true owner; because defendant’s use of the money in money laundering scheme indicated that he, not claimant, exercised dominion and control over the money, she could not establish a true legal interest).

\(^{186}\)United States v. Knoll, 2014 WL 4058721, at *2 (S.D. Ind. Aug. 15, 2014). See also United States v. Barber, ___ F. Supp. 3d ___, 2014 WL 6645302 (M.D. Fla. Nov. 24, 2014) (person making payments on mortgage secured by the real property has no ownership interest in it, even if she is obligated to make the payments as a party to loan).

\(^{187}\)See United States v. Rosga, 864 F. Supp. 2d 439, 448 (E.D. Va. 2012) (members of motorcycle club lacked standing to contest forfeiture of property other members agreed to forfeit by asserting a communal interest; claimants must exercise dominion and control, otherwise criminal organizations would be able to insulate their property from forfeiture by declaring that all non-defendants had a communal interest); United States v. Bowser, 2014 WL 5392093 (S.D. Ind. Oct. 22, 2014) (following Rosga; motorcycle club member cannot contest the forfeiture of the club’s paraphernalia by asserting a collective or shared interest in the forfeited property).
Using accounting rules to trace ownership interests

In some cases, the claimant’s ability to show that the forfeited property is traceable to her own legitimate funds as opposed to the defendant’s criminal proceeds comes down to the ability of one party or the other to use accounting rules to satisfy the tracing requirements.

As discussed earlier, the Government may be able to use accounting rules such as “first in, first out” to meet its burden of proof in the forfeiture phase of the criminal trial. In the ancillary proceeding, where it is the claimant who has the burden of proof, the Government may employ those same accounting techniques to rebut the claimant’s attempt to trace the forfeited property to a legitimate source.188

XXI. BONA FIDE PURCHASERS UNDER SECTION 853(N)(6)(B)

Section 853(n)(6)(B) is an exception to the relation back doctrine: it allows a person who acquired his interest in the forfeited property after the Government’s interest vested to prevail if he was a bona fide purchaser for value.189

The defense has three elements: the claimant must show (1) a legal interest in the property; (2) that the interest was acquired as a bona fide purchaser for value; and (3) that the interest was acquired at a time when the claimant was reasonably without cause to believe that the property was subject to forfeiture.190

188 See United States v. Corey, 2006 WL 1281824, at *8-9 (D. Conn. 2006) (Government may rely on the Banco Cafetero tracing analysis to rebut Claimant’s assertion in the ancillary proceeding that the forfeited property was acquired with legitimate funds in a commingled bank account, not the criminal proceeds); United States v. Lewis, 2014 WL 3630287 (D.S.C. July 16, 2014) (same; burden of proof is on claimant, and Government may use “first in, first out” analysis to rebut his attempt to trace his assets to commingled funds in a forfeited bank account).

189 See generally AFLUS, supra note 3, § 23-16(a).

are not bona fide purchasers because, as discussed earlier, they have no legal interest in the specific assets that are subject to forfeiture.\textsuperscript{191}

\textit{Claimant must give something of value}

The term “purchaser” comes from commercial law and includes someone who acquires the property in an arm’s length transaction.\textsuperscript{192} It does not include a person who receives the property as a gift;\textsuperscript{193} but the “thing of value” given in exchange for the property need not be money. In \textit{Coffman}, the district court held that a person who borrows funds from the defendant, not knowing that they are criminal proceeds, and gives the defendant a mortgage in return, is the “purchaser” of the borrowed funds for purposes of Section 853(n)(6)(B).\textsuperscript{194}

\textit{“Without cause to believe”}

Most important, to qualify as a bona fide purchaser, the claimant must be reasonably without cause to believe property was subject to forfeiture.\textsuperscript{195} A person who is willfully blind cannot satisfy the “without cause to believe” requirement. Thus, in \textit{Hernandez-Morales}, the court held that a third party who allowed drug dealers and their money launderers to use his bank account under circumstances that indicated he was aware they were engaged in some form of criminal activity

\textsuperscript{192} See \textit{United States v. Smith}, 953 F. Supp. 2d 1260, 1268 (M.D. Fla. 2013) (entity that defendant used to receive the money he fraudulently obtained from victims had no claim under § 853(n)(6)(B) because it did not receive the money in an arm’s length commercial transaction). See generally \textit{AFLUS}, supra note 3, §23-16(b).
\textsuperscript{193} See \textit{United States v. Williams}, 2015 WL 3916440 (D. Md. June 24, 2015) (defendant’s girlfriend, who admitted in response to discovery that she received the forfeited items as gifts, was not a BFP; summary judgment for the Government).
\textsuperscript{195} See generally \textit{AFLUS}, supra note 3, § 23-16(c).
could not satisfy the “without reasonable cause to believe” element.\textsuperscript{196}

Moreover, the claimant’s belief must be objectively reasonable. In \textit{Coffman}, the court held that it makes no difference what the defendant’s wife actually believed about the source of the money that she obtained from him; she is not a bona fide purchaser if it was not objectively reasonable for her, in the circumstances, not to think that the money might be derived from his fraud.\textsuperscript{197}

**XXII. DISCOVERY IN THE ANCILLARY PROCEEDING**

Under Rule 32.2\textsuperscript{(c)(1)(B)}, the court may permit the parties to conduct discovery in the ancillary proceeding in accordance with the Federal Rules of Civil Procedure “if the court determines that discovery is necessary or desirable to resolve factual issues.”\textsuperscript{198}

In the interests of judicial economy, however, the Government may withhold making discovery requests until the court rules on its motion to dismiss the third party’s claim.\textsuperscript{199}

**XXIII. POST-CONVICTION ISSUES**


\textsuperscript{199} See \textit{United States v. Cordero}, 2014 WL 3378356 (S.D. Tex. May 30, 2014) (Government is not required to make disclosures under Rule 26 until its motion to dismiss for lack of standing is resolved).
Enforcement of a money judgment

In *United States v. Bryant*, a district court held that the Government may use the Federal Debt Collection Procedure Act and the Inmate Financial Responsibility Program to collect a forfeiture money judgment from a prisoner while he is serving his sentence.200

Rule 41(g) motion for the return of property never forfeited

Rule 41(g) is the vehicle that property owners may use to seek the return of property that was seized but never forfeited.201 But if the property is no longer, or was never, in the Government’s possession, the property owner cannot use Rule 41(g) to obtain an order directing the Government to return it.

In *United States v. Watkins*, for example, the court denied a Rule 41(g) motion for return of property seized by local police and not included in the defendant’s federal forfeiture order when he was convicted and sentenced. That the police officers who seized the money were executing a federal arrest warrant when they did so, the court said, does not mean that the Government ever had actual or constructive possession of his property.202

When there is a dispute as to what happened to property that was seized from the defendant, the district court usually must conduct a hearing to determine if the Government has the property and if it should be returned.203

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201 See *United States v. Sims*, 376 F.3d 705, 708-09 (7th Cir. 2004) (if the property was never forfeited, the claimant may file a motion under Rule 41(g)). See generally AFLUS, supra note 3, § 3-8(c).
202 *Watkins v. United States*, 2014 WL 3661219, at *3 (D. Md. July 21, 2014). See also *Awan v. United States*, 2014 WL 1343129 (E.D.N.Y. Mar. 31, 2014) (denying Rule 41(g) motion as to property that has been forfeited, that belongs to a third party, that is still needed as evidence, or that is no longer in the Government’s possession).
203 See *United States v. Askeu*, 564 Fed. App’x 638, 639-40 (3d Cir. 2014) (reversing summary denial of Rule 41(g) motion for return of property never
Contraband, however, need not be returned. Thus, in *Awan v. United States*, the court denied a Rule 41(g) motion when the defendant failed to establish that the property—credit cards and checking accounts used to provide support to terrorists—was not derivative contraband.\(^{204}\)

The Government is also not required to return commingled property that cannot be separated without difficulty. So in *United States v. Gladding*, the Ninth Circuit held that non-contraband images and files on a forfeited computer in a child pornography case need not be returned if the cost and difficulty of separating the files is too great. In such a case, however, the Government bears the burden of proving the cost and difficulty of separating the files.\(^{205}\)

Finally, seized property that was never forfeited may be retained to satisfy restitution orders or other debts owed to the Government.\(^{206}\) This issue usually arises when property is seized from the defendant, is never forfeited, but is retained by the Government to satisfy the defendant’s debt. But in *Haberman v. United States* it arose when the property was forfeited in the criminal case, but a third party prevailed in the ancillary proceeding only to have the Government refuse to release the property because the third party herself owed an outstanding criminal fine.\(^{207}\)

**Appeals**


\(^{205}\) *United States v. Gladding*, 775 F.3d 1149, 1153-54 (9th Cir. 2014).

\(^{206}\) See generally AFLUS, supra note 3, § 24-13.

If property is forfeited criminally, the forfeiture is part of the defendant’s sentence and may be challenged only on direct appeal.\textsuperscript{208} So, in \textit{United States v. Noyes}, the Third Circuit held that while a defendant may use a Rule 41(g) motion to seek the return of property that was not forfeited, he may not use such a motion to contest a forfeiture order itself; such challenges must be made on direct appeal, and because the defendant’s property was forfeited in its entirety, the court regarded his motion for the return of part of it as a challenge to the forfeiture order itself that should have been raised on direct appeal.\textsuperscript{209}

\textbf{XXIV. CONCLUSION}

Criminal forfeiture is now a routine part of federal criminal prosecution and sentencing. The courts will continue to explore and refine the contours of the procedures that govern criminal forfeiture practice for some time to come, and there are still some issues waiting to be resolved at the constitutional level by the Supreme Court, but it seems clear that the imposition of a forfeiture order as part of the defendant’s sentence in a federal criminal case is an aspect of criminal practice that is here to stay.

\textsuperscript{208} See generally AFLUS, supra note 3, § 24-2.