FORFEITURE IN WHITE COLLAR CASES

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I. INTRODUCTION

This outline summarizes the key points in criminal forfeiture procedure

— its purpose is to take the mystery out of forfeiture, to allow you to make it a routine part of the criminal case, just like applying the sentencing guidelines or obtaining a restitution order

— there are a lot of case citations, which I use to provide illustrations and examples, but this is intended to be a practical guide to how this works

— the most valuable part of this may be the checklist at the end telling you what to do and when do it; it is appended at the end of this outline

For those interested in the case law, the full list of relevant citations on all of these topics is in my Criminal Forfeiture Case Outline which most of your offices subscribe to

— They may also have a copy of a treatise called Asset Forfeiture Law in the United States

One thing you should notice about the cases is how recent most of them are

— this is an extremely hot topic with new cases coming out daily, indicating how fast the law is developing and how many prosecutors are including forfeiture in their criminal cases

— I send out a monthly newsletter summarizing the new cases, and if you want to be on the mailing list, just let me know.
Overview

I’m going to begin by talking about the reason it makes sense to include forfeiture in the criminal case.

Next, I’ll talk about what you can forfeit: the proceeds of the crime, facilitating property, and so forth.

Then I’ll talk about the procedure, beginning with civil and administrative forfeiture before spending the bulk of our time on criminal forfeiture.

Why make forfeiture part of the criminal case?

Forfeiture should be routine; it should be part of any criminal case that involves money or other valuable property.

Why?

There is great language in the Supreme Court’s decision on criminal forfeiture in Kaley:

- *Kaley v. United States*, ___ U.S. ___, 134 S. Ct. 1090 (2014) (forfeiture serves to punish the wrong-doer, deter future illegality, lessen the economic power of criminal enterprises, compensate victims, improve conditions in crime-damaged communities, and support law enforcement activities such as police training);

1. Punish the wrongdoer

   - don’t just put him jail; take away the fruits of the crime

   - in a money laundering case, it makes no sense to convict the defendant of money laundering but allow him to keep the money

     - *United States v. Peters*, 732 F.3d 93, 98-99,101 (2nd Cir. 2013) (the purpose of forfeiture is punishment; that is what distinguishes forfeiture from restitution and other remedial tools; restitution puts the defendant and the victim back in the position they were in before the crime occurred; forfeiture punishes the defendant by forcing him to pay the gross receipts of the crime, not just his net profit);

2. Deter other wrongdoers

   - the point of committing the crime was to make money.
— if the defendant does not get to keep the money, there is less incentive for the next person to commit the same offense

- *United States v. Martin*, 662 F.3d 301, 309 (4th Cir. 2011) (Criminal forfeiture is part of the defendant’s sentence; its purpose is “to deprive criminals of the fruits of their illegal acts and deter future crimes”);

3. Take away the tools of the trade and the economic resources

— we don’t want drug dealers to keep the airplane so they can use it again, or the land that where they can grow another marijuana crop

— figuring out how terrorism is financed, and taking away the money before it can be used, is a critical part of the anti-terrorism effort

4. Disrupt the organization

— money is the glue that holds organized criminal enterprises together; they have to recycle the money to keep the scheme going

5. Get money back to the victim

— forfeiture is a more effective way of recovering money for victims than ordering the defendant to pay restitution

- *United States v. Blackman*, 746 F.3d 137, 143 (4th Cir. 2014) (“The Government's ability to collect on a [forfeiture] judgment often far surpasses that of an untutored or impecunious victim of crime . . . Realistically, 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);

6. Protect the community

— Forfeiture gives us the opportunity to convince the community that we’re not letting the bad guys profit from their crimes

— and it lets us make sure that the playing field is level, so that people trying to run businesses honestly don’t have to compete with capital from illegal sources
7. Recycle the money

— forfeited funds can be shared with state & local law enforcement and used to fund law enforcement programs.

— and some forfeited property can be put into official use or handed over to community organizations

We are now including forfeiture in all of the major cases:

— forfeiture was a huge part of the Madoff case in New York, for example

— The point is, this is worth doing

II. WHAT CAN YOU FORFEIT?

Every crime carries with it a different description of the property subject to forfeiture

— in general, we can forfeit the proceeds of the offense

— for many crimes, we can forfeit facilitating property; that is, property used to make the crime easier to commit

— for money laundering, we can forfeit all property involved in the financial transaction

— and for RICO, we can for the defendant’s entire interest in the RICO enterprise

— so you need to check your statute to see what you can forfeit in your particular case

Unfortunately, the forfeiture provisions are spread all over the U.S. Code.

— There isn’t one statute that says, for all federal crimes you may forfeit the proceeds, etc.

— For some crimes, the forfeiture provision is part of the statute setting forth the criminal offense

— For example:
• 7 U.S.C. § 2024(f) (forfeiture of property used to commit food stamp fraud)

• 18 U.S.C. § 1028(b)(5) (forfeiture of personal property used to commit identity theft)

• 18 U.S.C. § 1029(c)(1)(C) (forfeiture of personal property used to commit access device fraud)

• 18 U.S.C. § 1030(i) (forfeiture of proceeds of computer fraud, and personal property used to commit computer fraud)

• 18 U.S.C. § 1037 (forfeiture of proceeds of email fraud, or “equipment, software or other technology” used to commit the offense)

Others depend on an offense-specific provision in the general forfeiture statute, 18 U.S.C. § 982


• 18 U.S.C. § 982(a)(7) (forfeiture of gross proceeds of health care fraud)

• 18 U.S.C. § 982(a)(8) (forfeiture of proceeds and property used to commit telemarketing fraud)

Note how in both cases these statutes tend to have unique limitations

— e.g., limiting the forfeiture to personal property, or only to “equipment, software, or other technology”

— while others authorize forfeiture of either proceeds or facilitating property or both

While there is no catch-all forfeiture statute, the closest Congress has come to entering a universal provision is 18 U.S.C. § 981(a)(1)(C)

— it authorizes the forfeiture of the proceeds – and only the proceeds – of a list of some 250 crimes listed by cross-reference to the money laundering

— that is where you will find the forfeiture authority for all of the most common white collar crimes:

- mail and wire fraud (18 U.S.C. §§ 1341, 1343)
- bank fraud (18 U.S.C. § 1344)
- health care fraud (18 U.S.C. § 1347)
- food stamp fraud (7 U.S.C. § 2024)
- bankruptcy fraud (18 U.S.C. § 152)
- securities fraud (e.g., 15 U.S.C. §§ 78j(b) and 78ff(a))
- Bribery (18 U.S.C. § 201)
- Embezzlement and theft (18 U.S.C. §§ 641, 656-59, 664, 666, 669)

There are several things to notice:

1. Section 981(a)(1)(C) only authorizes the forfeiture of “proceeds”; it does not authorize the forfeiture of property used to commit the offense

   — To forfeit facilitating property in a white collar case, you need to find the authority in one of the specific statutes, like those listed above

2. Section 981(a)(1)(C) is not all-inclusive; some obvious white collar statutes are omitted:

   — e.g. 18 U.S.C. § 1028A (aggravated identify theft);
   — 18 U.S.C. § 287 (false claims)

3. It can be tedious to explain to the court how to find the forfeiture authority for a given offense; fortunately there are a number of cases that explain the nested cross-references
• *United States v. Taylor*, 582 F.3d 558, 565 (5th Cir. 2009) (explaining how § 981(a)(1)(C) incorporates the money laundering predicates from §§ 1956(c)(7) and 1961(1));

• *United States v. St. Pierre*, 809 F. Supp. 2d 538, 542 n.2 (E.D. La. 2011) (explaining how § 981(a)(1)(C) authorizes forfeiture for violations of §§ 666 and 1343);

4. Section 981(a)(1)(C) is a *civil forfeiture statute* but it authorizes *criminal forfeiture* as well through 28 U.S.C. § 2461(c)

• *United States v. Razmilovic*, 419 F.3d 134, 136 (2d Cir. 2005) (§ 2461(c) “authorizes criminal forfeiture as a punishment for any act for which civil forfeiture is authorized, and allows the Government to combine criminal conviction and criminal forfeiture in a consolidated proceeding”);

• *United States v. Black*, 526 F. Supp. 2d 870, 878 (N.D. Ill. 2007) (Congress enacted section 2461(c) to allow the Government to seek forfeiture through an indictment rather than commencing a separate civil action);

• *United States v. Evanson*, 2008 WL 3107332, *1 (D. Utah Aug. 4, 2008) (§ 2461(c) was enacted to encourage greater use of criminal forfeiture by giving the Government the option of using criminal forfeiture whenever civil forfeiture is authorized; the Government make seek criminal forfeiture of the proceeds of a conspiracy to commit any offense covered by § 981(a)(1)(C));

• *United States v. Rudaj*, 2006 WL 1876664, *3-4 (S.D.N.Y. July 5, 2006) (§ 2461(c) authorizes the criminal forfeiture of any property that could be forfeited civilly, including property involved in illegal gambling; forfeitures under § 2461(c), like other criminal forfeitures, are mandatory);

Assuming you have a forfeiture statute authorizing the forfeiture of “proceeds,” what can you forfeit?

**Proceeds**

What constitutes proceeds is fairly obvious in most cases

— it’s whatever the defendant acquired as a result of the offense

— one way to approach this is with a “but for” test: what property would the defendant not have *obtained or retained* but for having committed the crime
• *United States v. Clark,* 2016 WL 361560, *4 (S.D. Fla. Jan. 27, 2016) (forfeiture of specific assets defendant would not have been able to “obtain, maintain or retain” but for the fraud scheme and his obstruction of the investigation);

• *United States v. Galemmo,* 2015 WL 4450669 (S.D. Ohio July 20, 2015) (because the right to purchase stock was limited to existing stock holders, 15 shares acquired with legitimate funds was “proceeds” because it could not have been purchased “but for” the original investment of fraud proceeds to purchase 30 initial shares);

• *United States v. Lustyik,* 2015 WL 1467260 (D. Utah Mar. 30, 2015) (an investment in an energy company that would not have been made “but for” the intent to bribe one of the company’s silent partners was the proceeds of the bribery conspiracy);

• *United States v. Cekosky,* 171 Fed. Appx. 785, 2006 WL 707129 (11th Cir. 2006) (because defendant would not have been able to open his bank account but for having committed an identity theft offense, the interest he earned on the deposits in that bank account represented the proceeds of the offense, even though the deposits themselves were made with legitimate funds);

Thus, under the “but for” test, an entire business, and all of its revenue and assets, are subject to forfeiture if the business would not exist but for the investment of criminal proceeds to start the business or to keep it going.

• *United States v. Warshak,* 631 F.3d 266, 329-330 (6th Cir. 2010) (all proceeds of defendant’s business are forfeitable because the business was “permeated with fraud;” but even if a part of the business was legitimate, the proceeds of that part are nevertheless forfeitable if the legitimate side of the business would not exist but for the “fraudulent beginnings” of the entire operation);

• *United States v. Smith,* 749 F.3d 465, 488-89 (6th Cir. 2014) (following Warshak; if business is so pervaded by fraud that its revenue stream would not have existed but for the fraud, any asset derived from that revenue stream is forfeitable as proceeds);

• *United States v. Daugerdas,* 2012 WL 5835203, *3 (S.D.N.Y. Nov. 7, 2012) (applying the “but for” test, all income to law firm was proceeds of tax shelter scheme);

Let me highlight just a few other key points about the forfeiture of proceeds

1) “Cost savings” and other property “retained” as a result of the offense is property obtained “indirectly”

• *United States v. Esquenazi,* 752 F.3d 912, 931 (11th Cir. 2014) (money defendant retained by having its debt reduced in exchange for promise to pay a bribe was the proceeds of the bribery offense);
• *United States v. Torres*, 703 F.3d 194, 204 (2d Cir. 2012) (recipient of subsidized housing must pay a forfeiture order equal to the amount saved by her fraudulent application);

• *United States v. Wong*, 2014 WL 6976080, *2 (C.D. Cal. Dec. 9, 2014) (money defendant saved on import fees by paying others to undervalue and misclassify goods is the “proceeds” of his offense; following *Torres*);

• *United States v. Tyson Foods, Inc.*, 2003 WL 8118660 (E.D. Tenn. Feb. 4, 2003) (“cost savings” realized by an employer who aids illegal aliens in obtaining false documents so that they can work in the employer’s factory may constitute the proceeds of the false document offense);

2) “proceeds” includes property the defendant obtained indirectly through a third party acting in concert with the defendant, or by defendant’s alter ego

• *United States v. Peters*, 732 F.3d 93, 102 (2nd Cir. 2013) (because the statute makes defendant liable for property obtained “directly or indirectly,” he is liable for proceeds obtained by a corporation that he dominates or controls, even if he did not obtain the money himself);

• *United States v. George*, 2010 WL 1740814, *1 (E.D. Va. Apr. 26, 2010) (property obtained “directly or indirectly” includes property defendant obtained herself as well as property obtained by third parties acting in concert with her);

3) “proceeds” includes property traceable to the proceeds, or the fraction thereof that is traceable to the proceeds

— If the defendant buys a boat with proceeds, then sells the boat, the sale proceeds are proceeds of the original crime

• *United States v. Swanson*, 394 F.3d 520, 529 n.4 (7th Cir. 2005) (a change in the form of the proceeds does not prevent forfeiture; property traceable to the forfeitable property is forfeitable as well);

• *United States v. Schlesinger*, 396 F. Supp. 2d 267, 273 (E.D.N.Y. 2005) (if property subject to forfeiture in a money laundering case has been sold, the proceeds of the sale are forfeitable under § 982(a)(1) as property traceable to the offense);

• *United States v. Miller*, 2009 WL 2949784, *7 (D. Kan. Sept. 10, 2009) (where defendant made down payment on boat and airplane with untainted funds and then made loan payments with fraud proceeds, the portion traceable to the latter is forfeitable under § 982(a)(2));
— This includes any appreciation in the value of the proceeds or the traceable property

- *United States v. Hill*, 46 Fed. Appx. 838, 839 (6th Cir. 2002) (stock that appreciates in value is forfeitable as property traceable to the originally forfeitable shares);

- *United States v. Betancourt*, 422 F.3d 240 (5th Cir. 2005) (following *Hill*; if defendant buys a lottery ticket with drug proceeds, the lottery winnings are traceable to the offense even though the value of the ticket appreciated enormously when it turned out to contain the winning number);

- *United States v. Kalish*, 2009 WL 130215, at *5-6 (S.D.N.Y. Jan. 13, 2009) (Government properly relied on defendant’s lack of other sources of income to show that property was purchased with fraud proceeds; any appreciation in value of the traceable property was also traceable to the offense);

- *United States v. Vogel*, 2010 WL 547344, *4 (E.D. Tex. Feb. 10, 2010) (following *Betancourt*; if defendant buys property with criminal proceeds and it appreciates before he sells it, the portion of the sale proceeds attributable to the appreciation is forfeitable as property traceable to the offense);

4) Finally, forfeiture is generally limited to the offense of conviction, but if the crime is not an isolated event, but is charged as a “scheme” or a “conspiracy,” we’re entitled to forfeit the proceeds of the entire course of conduct

— fraud schemes:

- *United States v. Venturella*, 585 F.3d 1013, 1015, 1016-17 (7th Cir. 2009) (forfeiture in a mail fraud case “is not limited to the amount of the particular mailing but extends to the entire scheme;” defendant’s guilty plea to one substantive count involving $477 rendered her liable for money judgment of $114,000);

- *United States v. Hailey*, 887 F. Supp. 2d 649 (D. Md. 2012) (although only $2.9 million was obtained from the 8 substantive counts on which defendant was convicted, he was required to forfeit the $9.1 million obtained from the entire scheme);

— conspiracies:

- *United States v. Newman*, 659 F.3d 1235, 1244 (9th Cir. 2011) (if the crime is part of a conspiracy, the proceeds equal the total amount of the proceeds obtained by the conspiracy as a whole);
So when you draft your mail fraud indictment, don’t limit the forfeiture to the proceeds of the counts alleged in the indictment

— allege that the proceeds of the entire scheme (or conspiracy) are subject to forfeiture

**The gross v. net controversy**

All of this was the good news

— the bad news is that the courts are divided as to whether the Government is entitled to the “gross proceeds” of the offense, or the defendant is entitled to an offset for the cost of doing business, and thus only forfeits “net proceeds”

The origin of this controversy lies in the definition of “proceeds” in 18 U.S.C. § 981(a)(2):

— in substance, it provides that:

(A) in general, the Government is entitled to gross proceeds if the case involves “illegal goods, illegal services, unlawful activities, telemarketing or health care fraud”

(B) But the defendant is entitled to deduct his “direct costs” if the case involves “lawful goods or lawful services that are sold or provided in an illegal manner”

Paragraph (A) describes what we might call “inherently illegal” activity, like drug trafficking

— The problem is that it’s not always clear when something is inherently illegal

— a court may say that an investment scheme is inherently illegal because it was entirely unlawful from the beginning

- *United States v. Sigillito*, 899 F. Supp.2d 850, 864-65 (E.D. Mo. 2012) (defendant in an investment fraud scheme must forfeit the gross amount he took from investors, without credit for his use of the later investments to pay the early investors because the scheme was entirely unlawful);
— but another court might say that handling investments or buying and selling securities is not an inherently illegal activity, so the defendant is entitled to an offset for his costs

  o  *United States v. Contorinis*, 692 F.3d 136, 145 n.3 (2d Cir. 2012) (buying and selling securities is not inherently unlawful; therefore in an insider trading case, forfeiture is limited to the net gain after deducting the costs pursuant to § 981(a)(2)(B));

This comes up a lot in Government contracting cases

— is it inherently illegal to obtain a contract through bribery, or by misrepresenting your eligibility, or do you get credit for what you actually provide

  •  *United States v. Martin*, 2014 WL 221956, *5 (D. Idaho Jan. 21, 2014) (contractor who obtains a Government contract by falsely claiming eligibility for a program for disadvantaged businesses must forfeit the net profits, not the gross proceeds, of the fraudulently-obtained contracts);

Here are some other examples:

Cases applying the gross proceeds definition in § 981(a)(2)(A):

  •  *United States v. Adetiloye*, 716 F.3d 1030, 1041 (8th Cir. 2013) (applying § 981(a)(2)(A) to identity theft / mail fraud; defendant must forfeit all property obtained directly or indirectly as a result of the offense);

  •  *United States v. Uddin*, 551 F.3d 176, 181 (2d Cir. 2009) (affirming forfeiture of gross proceeds under § 981(a)(2)(A) in a criminal forfeiture cases involving food stamp fraud; defendant must forfeit the amount he received from the Government for the food stamps without credit for the amount he had to pay for them);

  •  *United States v. Bonventre*, ___ Fed. Appx. ___, 2016 WL 1579036 (2nd Cir. Apr. 20, 2016) (Ponzi scheme in the Madoff case does not qualify as providing lawful services in an illegal manner; defendants must forfeit gross proceeds);

  •  *United States v. Gartland*, 540 Fed. Appx. 136, 139 (3rd Cir. 2013) (public official convicted of honest services fraud was required to forfeit the gross proceeds of his offense under § 981(a)(2)(A));

  •  *United States v. Patel*, 949 F. Supp.2d 642, 652 (W.D. Va. 2013) (selling contraband cigarettes is an inherently illegal activity, so the definition in § 981(a)(2)(A)) applies);

  •  *United States v. Lustyik*, 2015 WL 1467260, *4 (D. Utah Mar. 30, 2015) (because bribery is inherently illegal, any money paid to the bribee is forfeitable without any deduction for the costs the bribee incurred in carrying out the object of the bribe);
Cases applying the net proceeds definition in § 981(a)(2)(B):

- *United States v. Whicker*, 628 Fed. Appx. 361 (6th Cir. 2015) (applying § 981(a)(2)(B): defendant who actually provided services in exchange for the unlawful payments is entitled to an offset not for the value of her services, but for her “direct costs” in providing them; because defendant could not show what her costs were, she received no offset);

- *United States v. Executive Recycling*, 953 F. Supp.2d 1138, 1158 (D. Colo. 2013) (because defendant’s recycling business was not per se unlawful, fraud committed by misrepresenting to customers how the materials would be recycled is subject to forfeiture of net proceeds);


- *United States v. Hollnagel*, 2013 WL 5348317, *4-5 (N.D. Ill. Sept. 24, 2013) (an investment fraud scheme is a lawful service provided in an unlawful manner so 981(a)(2)(B) applies; defendant may deduct the distributions and return of capital made to the defrauded investors as “expenses,” even though they were made after he was aware he was under investigation; distinguishing Emerson and other cases barring credit for restitution against the forfeiture order);

- *United States v. Yass*, 2010 WL 234034, *2 (D. Kan. Jan. 8, 2010) (because there is nothing inherently illegal in providing foreclosure avoidance services, the definition of proceeds in § 981(a)(2)(B) applies, even though the services were provided as part of a scheme to defraud lenders), replacing contrary holding in *United States v. Yass*, 636 F. Supp. 2d 1177, 1184 (D. Kan. 2009), in light of Nacchio;

**Facilitating Property**

As we’ve seen, the forfeiture of property used to commit the offense is not authorized for most white collar offenses

— But when it is authorized, the term “property used . . . to facilitate the commission of the offense” is interpreted broadly

— facilitating property is anything that makes the crime easier to commit or harder to detect

- *United States v. Schifferli*, 895 F.2d 987, 990-91 (4th Cir. 1990) (dentist’s office “provided an air of legitimacy and protection from outside scrutiny,” and thus made the crime of writing false prescriptions less difficult to commit and “more or less free from obstruction or hindrance”;

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• United States v. Huber, 404 F.3d 1047 (8th Cir. 2005) (facilitating property is anything that “makes the prohibited conduct less difficult or more or less free from hindrance”);

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

• United States v. Rivera, 884 F.2d 544, 546 (11th Cir. 1989) (defining facilitating property broadly);

• United States v. Thornton, 2012 WL 2866467, *2 (S.D. Miss. July 2, 2012) (defendant’s residence forfeited as facilitating property under § 1028(b)(5) because defendant used the address to perpetrate the identity theft);

This is not entirely open-ended:

— All forfeitures of facilitating property are limited by the Excessive Fines Clause of the Eighth Amendment.

— that means that a claimant can ask the court to reduce or eliminate the forfeiture if it would be “grossly disproportional to the gravity of the offense”

• 18 U.S.C. § 983(g) (codifying the Bajakajian decision for civil forfeiture cases)

• United States v. Bajakajian, 524 U.S. 321, 323 (1998) (full forfeiture of unreported currency in a CMIR case would be ‘grossly disproportional to the gravity of the offense’ unless the currency was involved in some other criminal activity);

**Money Laundering**

If you prove that your defendant used the proceeds of his white collar crime to commit a money laundering offense, you can forfeit “all property involved” in that offense

— this term is broader than proceeds and facilitating property

— it includes, for example, any clean money commingled with the proceeds when the money laundering offense takes place

— and it includes the property that is acquired in the course of the money laundering transaction, even if commingled funds are involved
• *United States v. Huber*, 404 F.3d 1047, 1056, 1058 (8th Cir. 2005) (Forfeiture under section 982(a)(1) in a money laundering case allows the Government to obtain a money judgment representing the value of all property ‘involved in’ the offense, including the money or other property being laundered [the corpus], and ‘any property used to facilitate the laundering offense’; the corpus includes untainted, commingled property);

• *United States v. Coffman*, 2014 WL 354632, *3* (E.D. Ky. Jan. 31, 2014) (following McGauley; third party cannot complain that the forfeited funds include money not derived from the defendant’s fraud; the Government’s theory is that the defendant used the money to facilitate the money laundering offense);

• *United States v. Tencer*, 107 F.3d 1120, 1135 (5th Cir. 1997) (entire bank account balance is forfeitable even though less than half the balance was criminal proceeds if the purpose of the deposit was to conceal or disguise proceeds among legitimate funds; distinguishing cases where commingling of SUA proceeds with untainted funds was merely fortuitous); Again, this is limited by the Eighth Amendment

• *United States v. Stanford*, 2014 WL 7013987, *4-6* (W.D. La. Dec. 12, 2014) (declining to forfeit residence when defendant pays down mortgage with commingled funds in violation of § 1957 drug proceeds were a relatively small part of the commingled funds);

OK. That’s what you can forfeit in some of the typical cases:

— proceeds and facilitating property, and perhaps much more if you charge RICO or money laundering

— now, the question is how do we do forfeiture

**III. OVERVIEW OF FORFEITURE PROCEDURE**

**A. Administrative and Civil Forfeiture**

**How do we do forfeiture?**

There are three kinds of forfeiture: administrative, civil and criminal

**Administrative forfeiture:**

— most forfeitures start out as administrative forfeitures handled by the seizing agency;
— these can be purely federal cases or cases that the federal agency adopts from State or local law enforcement

— the agency sends out notice and if no one claims the property, it is forfeited by default;

— there is no prosecution; no court or prosecutor gets involved

— in 80 percent of the cases, no one files a claim to the property

Administrative forfeiture is great way to save time and effort

— the administrative forfeiture ties up the property, so you don’t have to do anything special in your criminal case to preserve it for trial

— if a case is being handled administratively -- i.e., by default -- there may be no need to include the forfeiture in the indictment

— the forfeiture may be complete before you even get to the grand jury

BUT BE SURE TO CHECK THE STATUS OF ANY ADMINISTRATIVE FORFEITURE BEFORE PROCEEDING WITH FORFEITURE IN A CRIMINAL CASE

— if someone has contested the forfeiture, you will need to include the property in your indictment or commence a civil forfeiture action to comply with the statutory deadline (90 days unless extended); 18 U.S.C. § 983(a)(3)

If you included boilerplate forfeiture notice in your indictment, complying with the 90-day deadline is easy

— You just file a bill of particulars adding the property to the notice

If you have not yet indicted, you just include the forfeiture in the indictment within 90 days

— Or ask for an extension of time, or for help filing a civil forfeiture action

If you indicted the case without including a forfeiture notice, and a claim is filed, you have to supersede the indictment or learn how to do civil forfeiture
— The most common mistake criminal AUSAs make is forgetting to ask the case agent if any property was seized and whether it has been forfeited administratively

— **Unless you’re sure that no one is going to file a claim, the way to avoid having to supersede or to learn civil forfeiture is to include a boilerplate forfeiture notice in the indictment**

If you included the property in the indictment but later learn that it has been forfeited administratively, you should move to take the forfeiture out of the indictment to avoid confusion and giving the defendant a second chance to contest the forfeiture.

— You don’t want the defendant saying, “I didn’t contest the administrative forfeiture because I thought the Government had decided to do the forfeiture criminally”

- *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);

- *Taylor v. United States*, 2016 WL 3920238 (N.D. Miss. July 18, 2016) (there was nothing wrong with the Government’s commencing parallel administrative and criminal forfeiture proceedings, and striking the criminal forfeiture when defendant did not contest the administrative forfeiture);

**Civil judicial forfeiture:**

If someone does contest the forfeiture we have the option of doing it civilly or criminally

Civil forfeiture cases are *in rem* actions against the property; that’s why they have funny names

— the important thing to know about civil forfeiture is that it doesn’t require a conviction or even a criminal case, and it doesn’t matter who the owner of the property is

— we are bringing the case to confiscate the property because it was derived from or used to commit a crime
— yes, the owner can assert an innocent owner defense, but the owner doesn’t have to be the wrongdoer

— so, for example, if someone uses his wife’s car to commit a crime, and the wife knew all about it and let it happen, we can forfeit the car in civil case even though the wife is not charged with any crime

- *Bennis v. Michigan*, 516 U.S. 442, 446 (1996) (innocent property owners have no protection from civil forfeiture under the Due Process Clause; unless the legislature enacts an innocent owner defense by statute, property may be forfeited based solely on its use in the commission of an offense);

- 18 U.S.C. § 983(d) (creating a statutory innocent owner defense for civil forfeiture cases);

If civil forfeiture is so wonderful, why don’t we have the forfeiture expert forfeit everything civilly instead of having to include it in our criminal case?

— first, it’s a lot of extra work for something that can be done easily if there is a criminal case

— also, civil forfeiture has a serious limitation

— because it is an *in rem* action against specific property, there are no substitute assets or money judgments in civil forfeiture cases

— the forfeiture is limited to property directly traceable to the offense

So civil forfeiture should be reserved for cases where the criminal forfeiture is not possible or appropriate, or where a criminal case is not ready to indict

In particular, civil forfeiture is likely your only option if:

- the defendant is dead, a fugitive or incompetent to stand trial

  *United States v. $506,069.09 Seized from First Merit Bank*, 2014 WL 7185585, *7 (N.D. Ohio Dec. 16, 2014) (medical doctor indicted on drug and money laundering charges arising from his writing huge volume of unnecessary prescriptions for pain killers; fled the jurisdiction and returned to native Pakistan);

  *United States v. Real Property Known As 7208 East 65th Pl.*, ___ F. Supp.3d ___, 2016 WL 2609292 (N.D. Okla. May 5, 2016) (owner of medical clinic providing worthless treatment to terminally ill cancer patients flees to Mexico after being indicted);
• the crime is a violation of foreign law
  
  *United States v. One Gulfstream G-V Jet Aircraft*, 941 F. Supp.2d 1, 10 (D.D.C. 2013) (the U.S. has the right to use forfeiture to enforce its money laundering laws and to prevent its becoming the repository of the proceeds of foreign crimes);

• the defendant has already been convicted in a state, foreign or tribal court

• the defendant pleads to a different offense than the one giving rise to the forfeiture

• the property you want to forfeit as facilitating property belongs not to the defendant but to a non-innocent third party (such as his spouse)

**Criminal Forfeiture**

The Supreme Court has held that criminal forfeiture is part of the defendant’s sentence.

• *Libretti v. United States*, 516 U.S. 29, 39 (1995) (*a*criminal forfeiture is an aspect of punishment imposed following conviction of a substantive criminal offense); *see* Rule 32.2(b)(3) (*the* order of forfeiture shall be made part of the sentence and included in the judgment);

• *United States v. Christensen*, ___ F.3d ___, 2015 WL 11120665 (9th Cir. 2015) (*forfeiture is an aspect of the sentence, not an element of the underlying crime*; citing *Libretti*);

• *United States v. Smith*, 770 F.3d 628, 637 (7th Cir. 2014) (*Criminal forfeiture is considered to be punishment and therefore is part of the sentencing process*; therefore, the Government’s burden at the forfeiture hearing is preponderance of the evidence, and the rules of evidence do not apply);

A number of things flow from that:

— here are a few of the most important points

Because forfeiture is part of the sentence, there is no forfeiture unless the defendant is convicted

— if the conviction is vacated, so is the forfeiture
• United States v. Harris, 666 F.3d 905, 910 (5th Cir. 2012) (reversal of defendants’ money laundering conviction means that $1.5 million money judgment must be reversed as well);

which is why it’s useful to have a parallel civil forfeiture case available as an option

Because forfeiture is part of the sentence, the forfeiture is limited to the property connected to the particular crime for which the defendant was convicted

— if you convict the defendant of Crime A, you can only forfeit the property connected to Crime A

— it doesn’t matter that the defendant could have been convicted of Crimes B and C

• United States v. Capoccia, 503 F.3d 103, 110, 114 (2nd 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 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);

— one way around this is to charge a conspiracy or a “scheme to defraud”

• United States v. Venturella, 585 F.3d 1013, 1015, 1016-17 (7th Cir. 2009) (forfeiture in a mail fraud case is not limited to the amount of the particular mailing but extends to the entire scheme);

Because forfeiture is part of sentencing, it’s an in personam punishment

— the punishment is directed against the defendant, not his property

— which means we are not limited, as we are in civil forfeiture cases, to the traceable property

— we can get a forfeiture order in the form of a money judgment, and we can forfeit substitute assets

• United States v. Vampire Nation, 451 F.3d 189, 202 (3d Cir. 2006) (a criminal forfeiture order is a judgment in personam against the defendant; this
distinguishes the forfeiture judgment in a criminal case from the in rem judgment in a civil forfeiture case);

- *United States v. Lazarenko*, 476 F.3d 642, 647 (9th Cir. 2007) (criminal forfeiture operates *in personam* against a defendant; it is part of his punishment following conviction);

- *United States v. Roberts*, 696 F. Supp.2d 263, 270 (E.D.N.Y. 2010) (forfeiture order may take the form of a money judgment because the forfeiture order is an *in personam* judgment);

The criminal forfeiture statutes allow the court to order the forfeiture of any property derived from or used to commit the offense, but because third parties are excluded from the criminal case, facilitating property that belongs to third parties cannot be forfeited

— this is the flip side to the *in personam* nature of criminal forfeiture

— We don’t have to prove the property belonged to the defendant; we only have to prove the nexus to the offense

- *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; but the ancillary proceeding serves to ensure that property belonging to third parties who have been excluded from the criminal proceeding is not inadvertently forfeited);

- *United States v. Watts*, 477 Fed. Appx. 816, 817-18 (2d Cir. 2012) (following *De Almeida*; property may be forfeited based on its nexus to the offense, regardless of ownership; the purpose of the ancillary proceeding is to allow third parties to challenge the forfeiture on ownership grounds);

- *United States v. Dupree*, 919 F. Supp.2d 254, 274-275 (E.D.N.Y. 2013) (criminal forfeiture is not limited to property of the defendant; it reaches any property derived from or used to commit the offense; in the case of proceeds, the *in personam* nature of forfeiture is satisfied if the property is the proceeds of the crime the defendant committed; older cases such as *O’Dell* and *Gilbert* were based on former Rule 31(e) which was replaced by Rule 32.2 and are no longer good law);

- *United States v. Molina-Sanchez*, 298 F.R.D. 311, 312-13 (W.D.N.C. 2014) (same);

— But if it turns out that the property that was used to commit the offense belonged to a third party, it cannot be forfeited in the criminal case
— this is the major disadvantage to criminal forfeiture

— there is, of course, a procedure for forfeiting the property of third parties who knowingly allowed their property to be used to commit a crime

— it’s called civil forfeiture

IV. CRIMINAL PROCEDURE

OK, so how do we make sure we forfeit the property in a criminal case

— Criminal AUSAs are always saying the process is too complicated

— I’m here to tell you that it’s not; just follow these steps

1. Include Forfeiture in the Indictment.

Rule 32.2(a) says that a notice of forfeiture must be included in the indictment.

— the forfeiture should not be designated as a count in the indictment, and the property need not be itemized

— all you have to do is track the language of the applicable forfeiture statute

- *United States v. Hampton*, 732 F.3d 687, 690 (6th Cir. 2013) (it was proper, under Rule 32.2(a), for the indictment to say that the Government was seeking a money judgment and not to identify any specific assets subject to forfeiture);

- *United States v. Lazarenko*, 504 F. Supp. 2d 791, 796-97 (N.D. Cal. 2007) (Rule 32.2(a) requires only that the indictment give the defendant notice of the forfeiture in generic terms; that the Government did not itemize the property subject to forfeiture until much later was of no moment; older cases like *Gilbert*, holding that property had to be listed in the indictment, are no longer good law);

- *United States v. Galestro*, 2008 WL 2783360, at *10-11 (E.D.N.Y. 2008) (Rule 32.2(a) does not require an itemized list of the property subject to forfeiture; older cases requiring such an itemization appear to reflect an outmoded, minority view);

- *United States v. Woods*, 730 F. Supp.2d 1354, 1372-73 (S.D. Ga. 2010) (forfeiture notice that tracks the language of 2253 is sufficient to give defendant notice of what property will be forfeited if he is convicted of a child pornography offense);
• United States v. Clemens, 2011 WL 1540150, *4 (D. Mass. Apr. 22, 2011) (declining to dismiss forfeiture notice on the ground that it did not itemize the property subject to forfeiture; such placeholders are neither improper nor prejudicial);

2. Preserve the Property Pending Trial.

Often the property will already be in the Government’s possession when the indictment is returned, but if not, ask for a pre-trial restraining order or seizure warrant.

— the Government simply files an ex parte application stating that an indictment has been returned and that the property in question will be subject to forfeiture if the defendant is convicted

• United States v. Holy Land Foundation for Relief and Development, 493 F.3d 469, 475 (5th Cir. 2007) (en banc) (“a court may issue a restraining order without prior notice and a hearing”);

Restraining orders are limited to directly forfeitable property

— only the Fourth Circuit permits the pretrial restraint of substitute assets

— if you’re in the Fourth Circuit, or if you are restraining the substitute property under 18 U.S.C. § 1345, you have to worry about the Supreme Court’s decision in Luis v. United States, which exempts substitute assets needed to retain counsel from pre-trial restraining orders

• Luis v. United States, 578 U.S. ___, 136 S. Ct. 1083 (Mar. 30, 2016) (not questioning the Government’s authority seek the restraint of substitute assets under § 1345, but creating a Sixth Amendment exception);

• United States v. Chamberlain, 2016 WL 2899255 (E.D.N.C. May 17, 2016) (Luis does not change Fourth Circuit law permitting the pre-trial restraint of substitute assets, it only creates an exemption if the property is needed to retain counsel; because defendant did not allege that he needed the property to retain counsel, there was no occasion to determine what procedure to apply under Luis if he had done so);

3. Plea Agreements

The defendant should agree to the forfeiture in the plea agreement, which should be as specific as possible in naming the property.
Your office’s model plea agreement should have forfeiture language that may need to be modified to fit the facts of the case.

it should spell out what the defendant is agreeing to forfeit, say that he is waiving all of his rights under the federal rules, and provide a factual basis for the forfeiture

- *United States v. Beltramea, 785 F.3d 287 (8th Cir. 2015)* (defendant’s consent to the entry of a forfeiture order without a factual stipulation does not relieve the Government of its obligation to establish the nexus between the property and the offense of conviction; without any factual support in the records, forfeiture order vacated as plain error);

If criminal forfeiture is impossible, the defendant can be required to agree not to contest a parallel civil forfeiture.

- *Rodriguez v. United States, 2004 WL 3035447, *4 (S.D.N.Y. 2004) (defendant who agreed in his plea agreement not to contest a civil forfeiture cannot complain, in a section 2255 petition, that he did not have adequate notice of the civil forfeiture);

In general, it is a bad idea to agree to return property to obtain a guilty plea

- This creates the appearance of buying a guilty plea, undermines the purpose of forfeiture (to punish the defendant by taking away the fruits of the crime) and is devastating to the morale of the agents who worked hard to locate the property

- Moreover, the agreement not to seek forfeiture is *Giglio* material, if the defendant is a cooperator

- *United States v. Bulger, 2013 WL 2146202, *6 (D. Mass. May 14, 2013) (Government’s forbearance in not seeking forfeiture from a cooperating co-defendant is a “promise, inducement or reward” that must be disclosed to the defendant as *Giglio* material);

It is equally wrong to agree to a lesser jail sentence for a defendant who is willing to give up property (“buying his way out of jail”)

4. Consent Order of Forfeiture

Rule 32.2(b) says that the preliminary order of forfeiture must be entered as soon as practicable after the conviction or entry of the guilty plea
- United States v. Marquez, 685 F.3d 501, 510 (5th Cir. 2012) (failure to enter forfeiture order as soon as practical after guilty plea was error, but caused no prejudice);

- the order of forfeiture then becomes final as to the defendant at sentencing

- the idea is that the defendant is entitled to have all aspects of his sentence imposed at one time -- i.e., as part of a single package

- United States v. Yeje-Cabrera, 430 F.3d 1 (1st Cir. 2005) (Rule 32.2(b)(3)'s requirement that the forfeiture be part of the sentence ensures that all aspects of the defendant's sentence are part of a single package that is imposed at one time);

- this means that you can't show up six weeks after the sentencing and say, "oh, now would be a good time to enter an order of forfeiture"

- United States v. Shakur, 691 F.3d 979, 988-89 (8th Cir. 2012) (wholesale violation of Rule 32.2(b), including failure to issue preliminary order of forfeiture prior to sentencing, failure to conduct evidentiary hearing and make finding of forfeitability at sentencing, and failure to issue any forfeiture order until 83 days after sentencing, deprived defendant of due process rights and right to appeal all aspects of his sentence at one time; forfeiture order vacated);

- United States v. Ferguson, 385 Fed. Appx. 518, 530 (6th Cir. 2010) (if the Government completely ignores Rule 32.2(b) and forgets about the forfeiture until the criminal case is over, it cannot salvage the forfeiture);
The easiest way to comply is to have the defendant sign a Consent Order at the time of the rearraignment.

— there are different versions of the consent order of forfeiture depending on whether the defendant is agreeing to forfeit specific assets, only a money judgment, or a combination

In general, your consent order should say that the defendant is being ordered to forfeit the proceeds of his crime in the form of a money judgment, with credit for the value of any specific assets that have been recovered

— and if there is any facilitating property to be forfeited, it should list that as well

Money Judgments

Sometimes the defendant no longer has the proceeds of his offense, or any property traceable to it, at the time his is convicted criminal forfeiture’s claim to fame is that when that happens, we can still get an order of forfeiture in the form of a money judgment

- United States v. Vampire Nation, 451 F.3d 189, 202 (3d Cir. 2006) (expressly rejecting the argument that a forfeiture order must order the forfeiture of specific property; as an in personam order, it may take the form of a judgment for a sum of money equal to the proceeds the defendant obtained from the offense, even if he no longer has those proceeds, or any other assets, at the time he is sentenced);

- United States v. Hampton, 732 F.3d 687, 691-92 (6th Cir. 2013) (following all other circuits and holding that forfeiture being a mandatory part of the defendant’s sentence, the court may enter a money judgment in the amount of the proceeds of the offense even though the defendant has dissipated the traceable property and has no other funds with which to satisfy the judgment);

— the entry of a money judgment is mandatory

- United States v. Viloski, 814 F.3d 104, 110 n. 11 (2nd Cir. 2016) (“As long as the factual predicate for the application of [the forfeiture statutes] has been satisfied, … a district court has no discretion not to order forfeiture in the amount sought. The court’s only role is to conduct the gross disproportionality inquiry required by Bajakajian.”);

- United States v. Hernandez, 803 F.3d 1341 (11th Cir. 2015) (explaining why criminal forfeiture is mandatory under § 2461(c) if defendant is convicted of an offense for which civil forfeiture is authorized under § 981(a)(1)(C));
- *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 district court believed that it could withhold forfeiture on the basis of equitable considerations, its reasoning was in error.");

- *United States v. Newman*, 659 F.3d 1235, 1240 (9th Cir. 2011) (When the Government has met the requirements for criminal forfeiture, the district court must impose criminal forfeiture, subject only to statutory and constitutional limits); *id.* (The district court has no discretion to reduce or eliminate mandatory criminal forfeiture; overruling district court’s refusal to enter money judgment);

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- Moreover, pursuant to 21 U.S.C. § 853(p), we can satisfy the money judgment by forfeiting substitute assets

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- The forfeiture of substitute assets is mandatory, and can be any property the defendant owns, even though it is not traceable to the offense

- *United States v. Fleet*, 498 F.3d 1225, 1231 (11th Cir. 2007) (Congress chose broad language providing that any property of the defendant may be forfeited as a substitute asset; it is not for the courts to strike a balance between the competing interests or to carve out exceptions to the statute; thus, defendant’s residence can be forfeited as a substitute asset notwithstanding state homestead and tenancy by the entireties laws);

- *United States v. Carroll*, 346 F.3d 744, 749 (7th Cir. 2003) (defendant may be ordered to forfeit every last penny he owns as substitute assets to satisfy a money judgment);

- *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”);

- *United States v. Garza*, 407 Fed. Appx. 322, 324 (10th Cir. 2011) (same; following Alamoudi); *United States v. McCrea*, 548 Fed. Appx. 157, 158 (4th Cir. 2014) (same; there is no exception for the defendant’s residence);

- *United States v. Weitzman*, 936 F. Supp.2d 218, 221 (S.D.N.Y. 2013) (there is no exception in § 853(p) for the defendant’s IRA account; it may be forfeited as a substitute asset);

Calculating the amount of the money judgment is not an exact science:
• United States v. Roberts, 660 F.3d 149, 166 (2d Cir. 2011) (because forfeiture is punitive, not restitutive, the calculation of the forfeiture money judgment need not be exact and is not improper if it exceeds what the defendant obtained to some extent); id. (in a drug case, the Government need not produce actual sales receipts but may rely on reasonable estimates of the quantity of drugs imported and their value; whether to use retail or wholesale value depends on whether the importer sold the drugs at retail himself or sold them at wholesale to others);

• United States v. Uddin, 551 F.3d 176, 180 (2d Cir. 2009) (detailing how the court calculated what percentage of defendant’s food stamp redemptions were fraudulent);

• United States v. Jafari, 2015 WL 225444, *12 (W.D.N.Y. Jan. 16, 2015) (calculating the money judgment in a case in which the defendant has kept poor records and attempted to disguise the extent of her fraud, the court may extrapolate from the evidence introduced at trial to produce a reasonable estimate of the gross proceeds);

Joint and several liability:

All co-defendants are jointly and severally liable for the full amount obtained by them as a group, without regard to how much was personally obtained by any one of them

• United States v. Beecroft, ___ F.3d ___, 2016 WL 3240304 (9th Cir. June 13, 2016) (applying Pinkerton and holding that all conspirators in a mortgage fraud scheme are jointly and severally liable for the loan proceeds obtained by the conspiracy, but limiting the defendant’s liability under the Eighth Amendment);

• United States v. Honeycutt, 816 F.3d 362 (6th Cir. 2016) (applying Corrado: if there is joint and several liability under RICO, there must be under § 853 as well; no need to consider the D.C. Circuit’s reasoning in Cano-Flores); United States v. Wolford, ___ Fed. Appx. ___, 2016 WL 3878213 (6th Cir. July 18, 2016) (following Honeycutt and Corrado);

• United States v. Nagin, 810 F.3d 348 (5th Cir. 2016) (“As a general matter, co-conspirators subject to criminal forfeiture are held jointly and severally liable for the full amount of the proceeds of the conspiracy”);

• But see United States v. Cano-Flores, 796 F.3d 83 (D.C. Cir. 2015) (declining to follow all other circuits and holding that neither rationale for joint and several liability – Pinkerton liability and the language authorizing forfeiture of property obtained “indirectly” – justifies holding a defendant liable for more than the amount of money he obtained personally);

• United States v. Honeycutt, 816 F.3d 362 (6th Cir. 2016) (Moore, J., concurring) (urging the Sixth Circuit to grant rehearing en banc and to follow Cano-Flores);
Is it worth the effort?

There is a difference of opinion among AUSAs nationally as to whether it makes sense to get a money judgment in every criminal case

— Some believe that it is a waste of time to get a money judgment when there is little likelihood that the defendant will ever be able to pay it

— Others believe that the Government should not discount the possibility that the defendant has concealed assets, or that he might obtain some money later in life

  • United States v. Encinares, 2015 WL 507530, *3 (N.D. Ill. Feb. 5, 2015) (Government might want to negotiate a realistic money judgment based on defendant’s ability to pay, but it is not required to do so; Government “may be unwilling to discount the possibility that a defendant may strike it rich someday”);

A recent study by the USMS revealed that there are 30+ inmates in the BOP who were convicted in Maryland and who have a total of $500,000 in funds in their BOP accounts

— But in none of those cases could the money be forfeited because the Government did not ask for a money judgment

— In other cases, however, the Government has recovered money from inmate accounts

  • United States v. Napoli, 2015 WL 4404789 (E.D. Pa. July 17, 2015) (Rule 32.2(e) motion to forfeit $10,537 in Defendant’s inmate trust account as a substitute asset to satisfy, in part, an outstanding $6 million criminal forfeiture money judgment);

My view is that as long as there are victims, and the amount recovered is insufficient to satisfy the restitution order, there should be a forfeiture money judgment that allows the Government to confiscate other assets wherever or whenever found so that they can be applied to restitution.

— If the victim’s loss is forever, so should be the defendant’s forfeiture liability

5. Special Verdict / Jury Instructions

If the case goes to trial, the forfeiture does not come up until the jury has returned a verdict, at which point there is a post-verdict forfeiture hearing.

— there is no constitutional right to a jury in the forfeiture phase of the trial:
• *Libretti v. United States,* 516 U.S. 29, 49 (1995) (“the nature of criminal forfeiture as an aspect of sentencing compels the conclusion that the right to a jury verdict on forfeitability does not fall within the Sixth Amendment’s constitutional protection”);

• *United States v. Valdez,* 726 F.3d 684, 699 (5th Cir. 2013) (“There is no constitutional right to a jury determination of forfeiture,” following *Libretti*);

— but Rule 32.2(b)(5) creates a statutory right to have the jury determine the forfeiture if the Government is seeking specific assets

If the jury is retained, we must prepare jury instructions and special verdict forms. We can provide these, but please give us as much advance notice as possible.

— the form should have an entry for each item you want to forfeit:

— Q. Has the Government established by a preponderance of the evidence that the 2001 Lexus automobile was used to facilitate the offense alleged in Count 7 of the Indictment? Yes or No.

• *United States v. Armstrong,* 2007 WL 809508, *2 (E.D. La. Mar. 14, 2007) (noting that the special verdict form required the jury to make detailed findings as to whether the property was forfeitable as facilitating property or proceeds and as property involved in a money laundering offense);

There is no right to have the jury retained if we are only asking for a money judgment.

• *United States v. Phillips,* 704 F.3d 754, 771 (9th Cir. 2012) (there is no statutory right to a jury under Rule 32.2(b)(5) when the Government is seeking only a money judgment);

• *United States v. Curbelo,* 726 F.3d 1260, 1277, 1278 n. 10 (11th Cir. 2013) (the right to a jury under Rule 32.2(b)(5) applies only to specific property, not to the amount of a money judgment; the rule does not infringe on defendant’s Sixth Amendment rights because there is no right to a jury under *Libretti*);

• *United States v. Tedder,* 403 F.3d 836, 841 (7th Cir. 2005) (the defendant’s right under Rule 32.2(b)(5) is to have the jury determine if the Government has established the required nexus between the property and his crime; the rule does not give the defendant the right to have the jury determine the amount of a money judgment);

• *United States v. Gregoire,* 638 F.3d 962, 972 (8th Cir. 2011) (following *Tedder,* there is no right to a jury if the Government announces that it is abandoning its request to forfeit specific assets and is seeking only a money judgment; but in that
case the Government cannot use the money judgment to recover the value of specific assets traceable to the offense that are available for forfeiture);

6. Sentencing

Rule 32.2(b)(4) says that the forfeiture must be included in the oral announcement of the sentence and included in the judgment.

— as mentioned earlier, this means that the court has to enter the forfeiture order no later than the date of sentencing

— if the defendant is pleading guilty, the easiest way to avoid having a problem is to have the defendant agree to a Consent Order of Forfeiture and have the court enter it at the time of the guilty plea

If the court entered a consent order at the rearraignment, it will become final by its own terms at sentencing

— if the court forgets to include it in the judgment, we can correct the judgment later as a clerical error

- *United States v. Smith*, 656 F.3d 821, 828 (8th Cir. 2011) (district court’s failure to make the previously-entered preliminary order of forfeiture part of the judgment until two weeks after sentencing was a clerical error that may be corrected under Rule 36);

- *United States v. Holder*, 2010 WL 478369, *3 (M.D. Tenn. Feb. 4, 2010) (under new Rule 32.2(b)(4), the court’s failure to make the order of forfeiture part of the judgment at sentencing may be corrected at any time as a clerical error, as long as the defendant was aware at sentencing that forfeiture would be part of his sentence);

— but if there was no consent order the court MUST issue an order at sentencing.

7. Third Parties

Per Rule 32.2(b)(1), the forfeiture order must be entered without regard to the ownership of the property. Determining the ownership of the property is deferred to the ancillary proceeding.
Give a copy of your order of forfeiture to the paralegals in the Forfeiture Unit to publish and send to potential third party claimants. If a claim is filed, they will assist you in responding to the claim in the ancillary proceeding.
CRIMINAL FORFEITURE CHECK LIST

Follow these steps to make forfeiture part of the defendant's sentence.

1. Include Forfeiture in the Indictment.

Rule 32.2(a) says that a notice of forfeiture must be included in the indictment. The notice does not have to list the property, but it must at least track the applicable forfeiture statute.

Including a boilerplate forfeiture notice preserves the forfeiture option. If you later decide to seek forfeiture, you can identify the assets in a bill of particulars. If you omit the forfeiture notice, forfeiture is not possible unless the defendant waives the notice requirement.

If you do list the property in the indictment, ask the grand jury to find probable cause to believe that the listed property is subject to forfeiture. The form indictments for the most commonly-charged crimes contain model forfeiture language, but call us if you need a go-by.

Check with your agent about the status of any administrative forfeiture proceeding. If the property has already been forfeited administratively, there is no need to include it in the indictment. If someone has filed a claim, you have 90 days to include the property in the indictment, file a civil forfeiture action, or ask for an extension of time.

Including the property in the indictment avoids having to supersede later if someone files a claim.

2. Preserve the Property Pending Trial.

Often the property will already be in the Government's possession when the indictment is returned, but if not, ask for a pre-indictment restraining order or seizure warrant. Both directly forfeitable property and substitute assets may be seized or restrained.

3. Plea Agreements

The defendant should agree to the forfeiture in the plea agreement, which should be as specific as possible in naming the property. The model plea agreement has forfeiture language that may need to be modified to fit the facts of the case.

In general, it is a bad idea to agree to return property to obtain a guilty plea, or to offer a more lenient plea if the defendant will agree to forfeiture. We may not agree to return property that has already been administratively forfeited.

The plea agreement can state that the Office will recommend that any forfeited property be used to satisfy a restitution order, but it cannot bind the Attorney General. Recommendations have to be approved by Main Justice.

4. Consent Order of Forfeiture
Rule 32.2(b) says that the court must enter a preliminary order of forfeiture prior to sentencing. The easiest way to comply is to have the defendant sign a Consent Order at the time of the rearraignment. There are model consent orders available from the forfeiture paralegals. Do not wait until the day of sentencing to get the forfeiture order. Case law says this may be reversible error.

5. Special Verdict / Jury Instructions

If the case goes to trial, the forfeiture does not come up until the jury has returned a verdict, at which point there is a post-verdict forfeiture hearing. Per Rule 32.2(b)(5), the court must ask the parties, before the jury begins to deliberate, if they will waive the jury or ask that the jury be retained to determine the forfeiture.

If the jury is waived, the court may postpone the forfeiture hearing to a later date. If the jury is retained, we must prepare jury instructions and special verdict forms. We can provide these, but please give us as much advance notice as possible.

There is no right to have the jury retained if we are only asking for a money judgment, but we cannot deprive the defendant of his right to a jury by asking only for a money judgment if we have his property in our possession, and then ask to forfeit it as a substitute asset.

6. Sentencing

Rule 32.2(b)(4) says that the forfeiture must be included in the oral announcement of the sentence and included in the judgment. The court’s failure to issue a forfeiture order at or before sentencing is fatal. If the court entered a consent order at the rearraignment, it will become final by its own terms at sentencing, but if there was no consent order the court MUST issue an order at sentencing.

If there are victims, we generally want to have both a forfeiture order and a restitution order, even if we are agreeing to recommend that the forfeited funds be applied to restitution. This is because the forfeiture laws have provisions for recovering assets that the restitution laws do not.

The one exception to this rule applies if the property that would be forfeited is cash, and it is sufficient to satisfy the restitution order but not sufficient to satisfy a forfeiture order as well. In that case, a forfeiture order is probably unnecessary.

7. Third Parties

Per Rule 32.2(b)(1), the forfeiture order must be entered without regard to the ownership of the property. Determining the ownership of the property is deferred to the ancillary proceeding.

Give a copy of your order of forfeiture to the forfeiture paralegals to publish and send to potential third party claimants. If a claim is filed, we will assist you in responding to the claim in the ancillary proceeding.