

ETHICAL CONSIDERATIONS IN RESOLVING FORFEITURE ALLEGATIONS

Eastern District of Tennessee Law Enforcement Training Knoxville – August 10, 2017

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I. Forfeiture and Restitution

In any case involving identifiable victims, the primary goal of seeking forfeiture is to use the forfeiture tools to recover the property for the victims.

- *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);
- *See Kaley, supra*, ___ U.S. ___, ___ n.1, 134 S. Ct. 1090, 1094 n.1 (citing statistics on the Government’s use of forfeited funds to compensate victims);

The forfeiture laws provide more powerful tools to preserve and recover property than the restitution statutes do

— For example, the MVRA has no authority to restrain or seize property pre-trial, but criminal proceeds can be restrained or seized under the forfeiture laws.

- *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);

Also, post-conviction, property subject to forfeiture, including substitute assets, can be restrained immediately as soon as a forfeiture order is entered

- *United States v. Numisgroup Int’l Corp.*, 169 F. Supp. 2d 133, 138 (E.D.N.Y. 2001)

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(the Second Circuit's decision in *Gotti*, holding that § 853(e) does not authorize the pretrial restraint of substitute assets, does not preclude the post-conviction restraint of such assets under separate statutory authority);

- *United States v. Kilbride*, 2007 WL 2990116, *2 (D. Ariz. 2007) (court freezes defendant's commingled bank account so that Government may file a motion under § 853(p) to forfeit the untainted funds as substitute assets);
- *United States v. Salvagno*, 2006 WL 2546477, *16 (N.D.N.Y. 2006) (if the Government wants to prevent a defendant from transferring property, post-conviction, to third parties, so that it can forfeit the property as substitute assets, it may obtain a post-conviction restraining order);

— And the Government can conduct post-conviction discovery to locate forfeitable assets

- 21 U.S.C. § 853(m) and Rule 32.2(b)(3)
- *United States v. Saccoccia*, 354 F.3d 9, 13 (1st Cir. 2003) (the Government may use its post-conviction discovery powers to trace what became of the forfeitable property transferred by the defendant to a third party, and may forfeit that property or anything traceable to it);

Requesting forfeiture and restitution orders

Procedurally, the AUSA should request both a forfeiture order and a restitution order;

— both are mandatory, and the defendant is not entitled to have one offset against the other

- *United States v. Blackman*, 746 F.3d 137, 143 (4th Cir. 2014) (“Forfeiture is mandatory even when restitution is also imposed”);
- *United States v. Bodouva*, 853 F.3d 76 (2nd Cir. 2017) (the court has no discretion to offset forfeiture by the amount of restitution paid; joining all other circuits and collecting cases);
- *United States v. Navarrete*, 667 F.3d 886, 888 (7th Cir. 2012) (restitution and forfeiture are cumulative; that are “a form of punitive damages piled on top of the other penalties for the defendant’s crime”);
- *United States v. Newman*, 659 F.3d 1235, 1241-43 (9th Cir. 2011) (because forfeiture and restitution serve different purposes—one for punishment, the other to make the victim whole—the defendant must pay both; “the district court may not reduce forfeiture because of an order of restitution to a victim or because the victim already has been made whole);

The rationale for this is that forfeiture and restitution serve different purposes

— restitution is intended to make the victim whole, while forfeiture is a form of punishment

- *United States v. Sanjar*, 853 F.3d 190 (5th Cir. 2017) (“Restitution is remedial in nature; its goal is to make the victim whole. Forfeiture is punitive; it seeks to disgorge any profits or property an offender obtains from illicit activity.”);
- *United States v. Blackman*, 746 F.3d 137, 143 (4th Cir. 2014) (“These two aspects of a defendant’s sentence serve distinct purposes: restitution functions to compensate the victim, whereas forfeiture acts to punish the wrongdoer”);
- *United States v. Joseph*, 743 F.3d 1350, 1354 (11th Cir. 2014) (“While restitution seeks to make victims whole by reimbursing them for their losses, forfeiture is meant to punish the defendant by transferring his ill-gotten gains to the United States Department of Justice.”);

— Therefore it is not uncommon for the amount subject to forfeiture and the amount to be paid in restitution to be different

- *United States v. Adetiloye*, 716 F.3d 1030, 1041 (8th Cir. 2013) (forfeiture and restitution are different concepts; one is based on defendant’s gain and the other on the victim’s loss; district court erred in assuming forfeiture in a fraud case is limited to the amount of measurable loss to the victims);
- *United States v. Torres*, 703 F.3d 194, 203 (2d Cir. 2012) (the measures of forfeiture and restitution are different as their purposes are distinct; in a given case, the amounts may be identical, but they may often be different);
- *United States v. Navarrete*, 667 F.3d 886, 889-90 (7th Cir. 2012) (explaining how, in a commercial bribery case, the defendant must forfeit the proceeds of the sales obtained via the bribe, but the victim’s loss may be much less, because the victim may have paid the same amount to a competitor but for the bribe, or only slightly more to the defendant);

If the court enters both a forfeiture order and a restitution order, the Department of Justice may apply the forfeited funds to the restitution order

— In fact, DOJ policy states that the Government *will* do that if it appears that the defendant cannot satisfy the restitution order without resort to the forfeited property

- *United States v. Newman*, 659 F.3d 1235, 1241 n.5 (9th Cir. 2011) (noting that the Government explained its policy of giving priority to restitution if the defendant has insufficient funds to pay both);
- *Adkins v. United States*, 113 Fed. Claim. 797, 807 n.12 (Fed. Cl. 2013) (noting that the Attorney General has the authority under § 853(i) to use forfeited funds for restitution);

- *United States v. Martin*, 662 F.3d 301, 309 n.14 (4th Cir. 2011) (noting that § 853(i) authorizes the Attorney General to use forfeited funds for restitution to victims);

But the decision to apply forfeited funds to restitution is up to the Attorney General

— the court may not order the Government to apply the forfeited funds to restitution

- *United States v. Sanjar*, 853 F.3d 190 (5th Cir. 2017) (applying forfeited funds to restitution may be “sensible policy,” but Congress left it to the Attorney General to decide whether to implement it; citing the *Asset Forfeiture Policy Manual*, § 12E2 (2016));
- *United States v. Joseph*, 743 F.3d 1350, 1354-55 (11th Cir. 2014) (once property has been ordered forfeited, “the Attorney General alone has discretion to determine whether to retain forfeited property or apply it toward the restitution owed to the victims of a defendant’s offense;” accordingly, “a district court generally has no authority to offset a defendant’s restitution obligation by the value of the forfeited property”) (collecting cases);
- *United States v. Gonzalez-Torres*, 656 Fed. Appx. 844 (9th Cir. 2016)(only the Attorney General – not the courts – can apply forfeited funds to restitution; moreover, even the AG can do so only if the forfeiture and restitution arise out of the same offense; district court therefore lacked authority to order that forfeited drug proceeds be used to satisfy restitution order in unrelated food stamp fraud case);

— and an AUSA cannot bind the Attorney General by agreeing to apply the forfeited funds to restitution

— the plea agreement can only say that the US Attorney will “recommend” that the AG so apply the forfeited funds

- *United States v. Pescatore*, 637 F.3d 128, 131 (2d Cir. 2011) (the US Attorney may “recommend” that forfeited funds be applied to restitution, but final decision rests with the Attorney General);
- *United States v. Feldman*, ___ F. Supp.3d ___, 2017 WL 3172854 (W.D.N.Y. Jul. 17, 2017) (plea agreement that leaves it to the Government’s discretion whether to recommend that forfeited funds be applied to restitution does not obligate the Government to make that recommendation);

It is highly unusual for DOJ to reject a recommendation that the forfeited funds be applied to restitution, but it may do so if the defendant has the resources to pay both

- In that case, the Government takes the position that the proceeds of the crime should be forfeited to the Government as punishment, while the defendant uses his own funds to reimburse his victims
- Otherwise, a defendant who simply returned the proceeds to the victims would suffer no pecuniary loss – and hence, no pecuniary punishment.
 - *United States v. Pescatore*, 637 F.3d 128, 131 (2d Cir. 2011) (AFMLS did not abuse the discretion Congress gave to the Attorney General in 18 U.S.C. § 981(e)(6) when it denied an AUSA’s recommendation on the ground that the defendant had sufficient assets to pay the restitution order out of his own funds);
 - *United States v. Madison*, 226 Fed. Appx. 535, 548 (6th Cir. 2007) (affirming order directing Defendant to pay \$578,000 forfeiture judgment and \$751,000 in restitution after determining that Defendant had the resources to pay both);

II. 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);
 - *United States v. Pollard*, 850 F.3d 1038 (9th Cir. 2017) (holding that defendant waived his right to insist on the notice requirement in Rule 32.2(a));

The plea agreement should reference any administratively forfeited property so the defendant cannot later say, “I didn’t agree to the forfeiture and the property wasn’t named in the judgment, so I want my property back”

- *Adams v. U.S. Customs and Border Protection*, 2016 WL 206463 (N.D. Cal. Jan. 14, 2016) (because defendant’s plea agreement did not mention the administrative forfeiture of his property, his agreement to forfeit \$50,000 in criminal proceeds is assumed to be a separate matter, with no credit for the property already forfeited);
- *Benjamin v. United States*, 2016 WL 4539206 (D. Md. Aug. 30, 2016) (defendant who fails to contest the administrative forfeiture of his property cannot later complain

that the property should be returned to him because it was not included in his plea agreement or the order of forfeiture in his criminal case);

- Likewise, if you plan to forfeit substitute assets, the plea agreement should make clear that the defendant is agreeing to their forfeiture
- That saves the trouble of litigating whether the requirements of the substitute asset statute, 21 U.S.C. § 853(p), have been satisfied
- but make clear that the forfeiture of particular substitute assets does not satisfy the money judgment entirely
 - *United States v. Sosa*, 782 F.3d 630 (11th Cir. 2015) (“to satisfy the personal money judgment” did not mean “to satisfy in full” where the value of the substitute asset was \$500,000 less than the amount of the money judgment, and did not preclude the Government from seeking the forfeiture of additional substitute assets);

If the property being forfeited is jointly owned – e.g., by the defendant and his wife – it is a good idea to have the third party, represented by counsel, sign off on the forfeiture

- This obviates the possibility of the third party contesting the forfeiture in the post-trial ancillary proceeding
 - *United States v. Madoff*, 2012 WL 1142292 (S.D.N.Y. Apr. 3, 2012) (if defendant’s wife signs the plea agreement and agrees that property held in her name is subject to forfeiture as the proceeds of defendant’s fraud, it is forfeitable like any other proceeds);
 - *But see United States v. Tracts 31A, Lots 31 and 32*, ___ Fed. Appx. ___, 2017 WL 946288 (5th Cir. Mar. 9, 2017) (wife raised no objection when defendant, in his criminal case, agreed not oppose the parallel civil forfeiture of community property, but in the civil case she claimed that although she and husband were jointly represented by same counsel, she did not sign the plea agreement and did not agree to waive her interest; wife’s claim denied on the merits);

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")

- *United States v. Imadu*, 2007 WL 295515, *2 (M.D. Fla. Jan. 30, 2007) (district court declines to accept plea to charge that does not adequately reflect the actual conduct; that defendant agreed to forfeit \$300,000 is not a sufficient reason to accept the plea);

Global settlements

It is not clear whether the defendant can agree to the forfeiture of property involved in offenses other than the one to which he is pleading guilty:

- *United States v. Pollard*, 850 F.3d 1038 (9th Cir. 2017) (defendant's waiver of his right to appeal an illegal sentence is not binding on either the defendant or the appellate court; thus, a defendant may appeal a forfeiture based on a offense for which there is no statutory forfeiture authority, notwithstanding his agreement to the forfeiture);
- *United States v. Venturella*, 585 F.3d 1013, 1016, 1017 (7th Cir. 2009) (noting that in the Seventh Circuit, a defendant's agreement to a sentence not authorized by law is not binding on the defendant, but holding that defendant's agreement to forfeit money involved in entire fraud scheme was authorized because the court's forfeiture authority extends to the entire scheme);

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

- *United States v. Contents of Account Number 901121707*, 36 F. Supp. 2d 614, 615 (S.D.N.Y. 1999) (defendant pleads guilty to structuring offense and agrees not to contest civil forfeiture under section 981(a)(1)(A));
- *United States v. \$15,314, More or Less, in U.S. Currency*, 2004 WL 2595937, *1 (W.D. Tex. 2004) (defendant pleads guilty in criminal case, withdraws claim in parallel civil case, and acknowledges that the property is drug proceeds that belongs solely to him);

A plea agreement can also resolve a parallel or related civil case:

- To avoid the appearance of having brought a criminal case to leverage the resolution of a civil case, the Government should treat every case as a criminal case from the outset, and have the defendant be the one to

propose a global resolution in which a related civil case is (or is not) resolved

- *United States v. Ellis*, 470 F.3d 275, 283 (6th Cir. 2006) (where plea agreement provided that if defendant paid \$200,000 money judgment in his criminal case, Government would forego civil forfeiture of his farm, it was implicit that defendant's failure to pay the money judgment would allow the Government to proceed with the civil forfeiture; that the plea agreement did not specifically contemplate the civil forfeiture was no reason to allow defendant to withdraw his plea);

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 easiest way to comply is to have the defendant sign a Consent Order at the time of the arraignment.

— 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