OVERVIEW OF ASSET FORFEITURE

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Stefan D. Cassella
Asset Forfeiture Law, LLC
www.assetforfeiturelaw.us
Cassella@AssetForfeitureLaw.us

I. Introduction

This is an overview of asset forfeiture and how it can be used as a law enforcement tool.

I hope to answer 3 questions:

1. *Why* do we want to forfeit someone's property?

— Are we trying to make money? Punish the bad guy? Stop terrorism? Protect victims?

2. *What* property can we forfeit?

— Can we forfeit the proceeds of the offense? The property used to commit the offense? Are there other theories of forfeiture?

— Are we talking about cash? Houses? Cars, boats and airplanes?

— Are we talking just about drug cases? White collar cases? International cases?

3. *How* do we do the forfeiture?

— How does a case get started?
— How does a local case become a federal case?
— What are the property owner's rights?
— What's the difference between civil and criminal forfeiture?
— What's the procedure for making forfeiture part of a criminal case?

II. Why do forfeiture?

There are lots of reasons to invest the time to do an asset forfeiture case

- *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;

– make him pay a judgment equal to the proceeds he received, even if he has spent the money, and even if he has reimbursed the victim

- *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,

— In a money laundering case, it would make no sense to let the money launderer keep the money

— We don't want to let corrupt leaders of developing countries to use the US financial system to loot their treasuries and safeguard a nest egg to use when they have to go into exile

— 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

— it is harder for a drug organization to replace the money than to replace the drugs

— taking the money does more to interrupt the cycle than any number of buy/bust arrests

— the same is true for persons engaged in wildlife trafficking; seizing the money flowing from Asian markets back to the poaching enterprises is more effective than arresting the guy with the truck and the gun in Africa

— and seizing money destined for sanctioned countries like N. Korea and Iran disrupts their ability to evade those sanctions

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

— shutting down the crack house or meth lab removes a hazard to public health and safety and gives law enforcement the opportunity to convince the community that they're not letting the bad guys profit from their crimes

— and ensures 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

— this is the controversial feature of forfeiture

III. WHAT CAN YOU FORFEIT?

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

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

— for many crimes, it can forfeit facilitating property; that is, property used to commit the offense or to make it easier to commit

— for money laundering, it can forfeit all property involved in the financial transaction, like clean money commingled with the criminal proceeds

— for RICO, it can forfeit the defendant's entire interest in the RICO enterprise

— and in terrorism cases the Government can take everything the terrorist owns, whether the used it to commit the terrorism offense or not

— so the prosecutor needs to check the statute to see what he can forfeit in a particular case

Forfeiture statutes are scattered all over the US Code

— there is no single statute that applies to all crimes

— if the statute you're charging does not have its own forfeiture provision, look in 18 U.S.C. §§ 981-82, which are the closest Congress has come to putting all of the forfeiture authority in one place

1. Proceeds

For most crimes, you can forfeit the proceeds

— What constitutes proceeds in most cases is fairly obvious

— it's whatever the defendant acquired – or was able to retain -- as a result of the offense

— usually that's expressed in terms of his gross receipts without any reduction for costs

- *United States v. Peters*, 732 F.3d 93, 101 (2nd Cir. 2013) (the purpose of forfeiture is punishment; forfeiting defendant's profits is not punishment because it merely returns him to the economic position he occupied before he committed the offense; therefore, defendant must forfeit the gross receipts);

- *United States v. McHan*, 101 F.3d 1027, 1041-42 (4th Cir. 1996) (gross proceeds forfeitable in drug case); *United States v. Keeling*, 235 F.3d 533, 537 (10th Cir. 2000) (same); *United States v. Colon*, 522 Fed. Appx. 61, 63 (2d Cir. 2013) (same); *United States v. Heilman*, 377 Fed. Appx. 157, 211 (3d Cir. 2010) (same; following *McHan*);

- *But see United States v. Jarrett*, 133 F.3d 519, 530-31 (7th Cir. 1998) (affirming calculation that gave defendants credit for cost of heroin);

— We'll see in a moment, however, that that is not always true

The scope of the term "proceeds" can actually be quite broad:

— Courts generally apply a "but for" test: whatever the defendant would not have but for having committed the offense constitutes the proceeds

- *United States v. Shabudin,* ___ Fed. Appx. ___, 2017 WL 2859543 (9th Cir. Jul. 5, 2017) (salary that defendant would not have received but for his unlawful conduct in committing securities fraud is forfeitable as "proceeds" under § 981(a)(1)(C));

- *United States v. Cekosky*, 171 Fed. Appx. 785, 787-88 (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);

— 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);

— and it includes not only property obtained directly by the defendant as a result of the offense, but also property *retained* by the defendant, or obtained by the defendant through a third party

- *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, 199 (2d Cir. 2012) (all that is required is a "causal nexus between the wrongdoer's possession of the property and her crime"; money that defendant saved or retained as a consequence of the crime is proceeds obtained "indirectly");

- *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. 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);

While the forfeiture of proceeds is not a new concept, there are some issues that are very much alive in the courts right now

— one has to do with whether the gross proceeds rule should apply in white collar cases, or whether the defendant should be given credit for value actually provided

— some courts give the defendant the right to an offset if he was doing something otherwise legal – *i.e.*, not inherently illegal -- but did it in an illegal way

- 18 U.S.C. § 981(a)(2)(B) (providing for an offset in cases where the activity was not inherently illegal);

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

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

- *United States v. Bodouva,* 853 F.3d 76 (2nd Cir. 2017) (rejecting defendant's argument that managing a 401(k) plan is a "lawful service" and that her embezzlement conviction meant that she provided the service in an unlawful way; her crime was embezzlement, and there is no lawful way to embezzle funds);

- *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

- *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));

- *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);

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);

- *United States v. Pinson,* 2015 WL 1578726 (D.S.C. Apr. 9, 2015) (defendant who would not have submitted any invoice to the Government but for an illegal agreement that allowed him to submit inflated invoices must forfeit gross proceeds without credit for services actually performed);

Everyone agrees, however, that the proceeds of an offense include property traceable to the proceeds

– that includes property purchased with the proceeds, or the fraction thereof that is traceable to the proceeds

- *United States v. Hodge*, 558 F.3d 630, 635-36 (7th Cir. 2009) (remanding to the district court to determine what part of the revenue from defendant=s sex business was from prostitution and what part was from legal services such as massages; only the former is forfeitable under § 981(a)(1)(C));

- *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, only the portion traceable to the latter is forfeitable under § 982(a)(2);

– and it includes any appreciation in the value of the proceeds or the traceable property

- *United States v. Hawkey*, 148 F.3d 920, 928 (8th Cir. 1998) (if property is subject to forfeiture as property traceable to the offense, it is forfeitable in full, including any appreciation in value since the time the property became subject to forfeiture; the reason for the appreciation does not matter; defendant may be made to pay money judgment or forfeit traceable property, but not both);

- *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. 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);

2. Facilitating Property

For some crimes, you can also forfeit "facilitating property"

- that's certainly the case for drug crimes (21 U.S.C. § 853(a)(2)) and for other serious offenses like child pornography (18 U.S.C. § 2253) and sex trafficking (18 U.S.C. § 2428)

- it is even true for some white-collar crimes

  - 18 U.S.C. §§ 1028(b)(5) and 1030(i) & (j) (forfeiture of any property used to commit identity theft and computer fraud

  - 7 U.S.C. § 2024(h) (property used to commit or facilitate food stamp fraud)

- but in general, Congress has limited forfeiture in white collar cases to the proceeds of the offense

- in particular, there is no facilitating property provision in the catch-all forfeiture statute, § 981(a)(1)(C)

- so there is no forfeiture of facilitating property for mail fraud, wire fraud, securities fraud, interstate transportation of stolen property or other offenses that do not have their own asset forfeiture provision

- this is a problem Congress has yet to correct

The term "property used . . . to facilitate the commission of the offense" is very broad

- 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";

- *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. Rivera*, 884 F.2d 544, 546 (11th Cir. 1989) (defining facilitating property broadly);

In cases stretching back over decades, courts have upheld the forfeiture of real property, vehicles, and other personal assets as facilitating property

- *United States v. Diaz*, 413 Fed. Appx. 704, 708 (5th Cir. 2011) (real property where owner allowed drug dealers to park their tractor-trailers while waiting to transport drugs and money across the border forfeited as facilitating property);

- *United States v. Ortiz-Cintron*, 461 F.3d 78, 80 (1st Cir. 2006) (residences where defendants packaged drugs and stored drug money, and where telephone calls were made, was forfeitable as facilitating property);

- *United States v. Juluke*, 426 F.3d 323, 326 (5th Cir. 2005) (property is subject to forfeiture as facilitating property under § 853(a) even if only a portion of it was used to facilitate the offense; defendant's residence was forfeitable even though no drugs were found in the house because he parked his car containing heroin in the driveway and kept guns and currency in the house);

- *United States v. Singh*, 390 F.3d 168, 190 (2d Cir. 2004) (a medical license is forfeitable as facilitating property under section 853(a)(2) if the doctor uses the license to distribute controlled substances in violation of the Controlled Substances Act; under section 853(b), property includes "rights, privileges, interests, claims, and securities");

- *United States v. Harris*, 903 F.2d 770, 777 (10th Cir. 1990) (under section 853(a)(2), property used to facilitate a drug offense is forfeitable in its entirety, even if only a portion of the property was used for the illegal purpose);

– in fact, an entire business and/or all of its assets could be forfeited as facilitating property

- *United States v. $7708.78 in U.S. Currency,* 2011 WL 3489835, *3 (S.D. Miss. Aug. 9, 2011) (facilitating property is anything that makes the crime "less difficult or more or less free from obstruction or hindrance;" a pharmacy used as a cover for the illegal distribution of drugs is forfeitable as facilitating property, and hence so are all of its assets; including funds in its bank accounts that include money traceable to legitimate sales);

- *United States v. Segal*, 432 F.3d 767, 779 (7th Cir. 2005) (if a business is forfeited, then so are all of its assets, including any subsidiary business that is wholly owned by the forfeited business; that there is no independent basis for the forfeiture of the subsidiary does not matter);

But the Government does have to show that the connection between the property and the offense was more than "incidental or fortuitous";

- 18 U.S.C. § 983(c)(3) (requiring a "substantial connection" between the property and the offense)

– if the connection is too tangential, the forfeiture will not succeed

- *United States v. Herder*, 594 F.3d 352, 364-65 (4th Cir. 2010) (the substantial connection test applies in both civil and criminal forfeiture cases, but the test is satisfied by showing that the property made the offense less difficult to commit, or more or less free from obstruction or hindrance; cash in defendant's pocket at the time of his arrest forfeited as property used to facilitate possession with intent to distribute);

- *United States v. Heldeman*, 402 F.3d 220 (1st Cir. 2005) (forfeiture of the residence where physician wrote illegal prescriptions for steroids and painkillers satisfies the requirement; it served as a base of operations as surely as the place where a drug dealer stores and delivers drugs; it makes no difference that the offense could as easily have been committed in another place);

- *United States v. Coffman,* 364 Fed. Appx. 192, 193-94 2010 WL 373773, *2 (6th Cir. 2010) (evidence that defendant sold drugs to guests at his residence sufficient to establish substantial connection);

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);

3. Money Laundering

If you prove the money laundering offense, you can forfeit "all property involved" in the 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. Beltramea,* 2016 WL 427096, *6-7 (N.D. Iowa Feb. 3, 2016) (defendant's use of fraud proceeds to pay for improvements to real property was a money laundering offense, making the property forfeitable in its entirety as the "object" of the offense);

- *United States v. Aguasvivas-Castillo*, 668 F.3d 7, 17 (1st Cir. 2012) (retailer who commingled $4.4 million in food stamp fraud proceeds with legitimate funds "to shield the fraud" ordered to forfeit $20 million);

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);

- *But see United States v. Beltramea,* 2016 WL 427096, *10 (N.D. Iowa Feb. 3, 2016) (ordering forfeiture of real property involved in money laundering offense in its entirety; "money laundering inflicts significant harm on society as a whole because it attempts to legitimize criminally obtained funds and impedes law enforcement");

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 or terrorism

— now, the question is how do we do forfeiture

IV. Forfeiture Procedure

There are three ways to forfeit property in the federal system: administrative forfeiture, civil forfeiture, and criminal forfeiture

Administrative forfeiture

-- the vast majority of forfeitures are administrative forfeitures

-- *if there's an applicable forfeiture statute*, the seizing agency with enforcement authority (ICE if it's smuggling; DEA if it's drugs; FBI if it's fraud, etc.) seizes the property

-- the agency then institutes an "administrative forfeiture" under the customs laws (19 U.S.C. § 1602 et seq.)

-- they send notice (18 U.S.C. § 983(a)(1)), and if no one files a claim, the property is forfeited

- it's really not a proceeding at all in the judicial sense, but an abandonment

- the court is not involved, and with one exception that I'll mention, the US Attorney's Office is not involved

- approximately 80 percent of all forfeitures are administrative forfeitures because they are not contested

Administrative forfeiture procedure

Congress substantially revised the rules for administrative forfeiture in the Civil Asset Forfeiture Reform Act of 2000 (CAFRA)

— the intent was to make contesting a forfeiture action less burdensome to the property owner by making it easier for a property owner to file a claim, putting the burden of proof on the Government, setting deadlines for the Government to commence its case, etc.

There may be more changes coming, but here's what you need to know about how an administrative forfeiture works under current law

- I'm speaking first about administrative forfeitures where the seizure is made by federal law enforcement agents

– I'll talk in a minute about the special rules that apply when the seizure is made by a state or local police officer and adopted for forfeiture under federal law

In all cases, the seizure must be based on probable cause, pursuant to a warrant, unless an exception to the warrant requirement applies

- 18 U.S.C. § 981(b) (authorizing seizure for civil forfeiture); 21 U.S.C. § 853(f) (same for criminal forfeiture);

- *Florida v. White*, 526 U.S. 559 (1999) (warrantless seizure of automobile did not violate the Fourth Amendment where there was probable cause to believe the automobile was subject to forfeiture and it was found in a public place);

– if the property is on private land, you probably need a warrant to seize the property unless you're already lawfully there or unless the property is in such a place that the owner could not have had an expectation of privacy

- *United States v. Mendoza,* 438 F.3d 792 (7th Cir. 2006) (police officers who have probable cause to believe that a vehicle is subject to forfeiture, may enter upon private land and seize the vehicle without a warrant unless the person contesting the seizure shows that he had an expectation of privacy in the place where the vehicle was seized; defendant failed to demonstrate that he had an expectation of privacy in an unattached, open garage in which the vehicle subject to forfeiture could be seen in plain view);

– If the seizure is made by a federal agent or by a Task Force Officer executing a federal warrant, the seizing agency has 60 days from the date of seizure to send notice of administrative forfeiture to all persons with an interest in the property; 18 U.S.C. § 983(a)(1)(A)

- *United States v. Assorted Jewelry*, 386 F. Supp. 2d 9 (D.P.R. 2005) (the 60 days begins to run when the Government seizes the container that conceals the forfeitable property, not when the Government opens the container and discovers what is inside);

– the time limit may be extended by the seizing agency, or by a court, for certain reasons, *see* sections 983(a)(1)(B), (C), and (D)

– if the agency fails to send notice, it must return the property "without prejudice to the right of the Government to commence a forfeiture proceeding at a later time"

- 18 U.S.C. § 983(a)(1)(F)

- *See* chapter 2, *Asset Forfeiture Policy Manual* (2006) (suggesting the Government file a judicial forfeiture action immediately after discovering inadvertent failure to comply with the 60-day deadline, in which case property need not first be returned to claimant);

If no one contests an administrative forfeiture, title to the property passes to the United States once the time for filing a claim has expired.

- 19 U.S.C. § 1609 (authorizing seizing agency to enter a declaration of forfeiture if no timely claim is filed);

Adoptive forfeitures

Seizures made by state or local law enforcement officers may be adopted by a federal agency for forfeiture under federal law

- These are the controversial cases that have generated a lot of negative press and have prompted some Members of Congress to introduce legislation curtailing forfeiture

- for that reason, the Attorney General has recently issued an order imposing some special rules that apply to adopted cases

  - Asset Forfeiture Policy Directive 17-1 (2017)

- Note: Seizures made as part of joint federal-state investigations or pursuant to federal seizure warrants are *not considered adoptions*

As I have said, all seizures must be based on probable cause to believe that the property is subject to forfeiture

- If the state or local agency is asking a federal agency to adopt a seizure for forfeiture under federal law, it must submit a *Request for Adoption of State and Local Seizure* ("adoption form")

- This form requires the state or local agency to provide additional information about the probable cause determination so that legal counsel for the federal agency can make an independent determination that there was probable cause before the adoption occurs

– The state or local agency will also be required to certify on the form that they have obtained a turnover order from a state judge, if required by state law

Although the federal statute allows the Government 90 days to send notice to the property owner in cases that began as state or local seizures, the policy shortens that period to 45 days

– for that reason, State and local law enforcement agencies must request federal adoption within 15 calendar days following the date of seizure

Those rules apply to all adoptive forfeitures

– there are special rules, however, for cases involving cash in amounts of $10,000 or less (because those are the cases that have caused the most trouble)

– in such cases, the adoption is permitted only if:

1. the seizure was conducted pursuant to a state warrant;

2. the seizure was incident to arrest for an offense relevant to the forfeiture;

3. contraband (e.g. drugs) was found at the same time as the cash;

4. the owner or person from whom the property is seized makes admissions regarding the criminally derived nature of the property; or

5. The U.S. Attorney concurs that the adoption may occur even though none of the first four alternatives applies. (This is the exception I mentioned earlier; it's the only instance where the U.S. Attorney is required to be involved in an administrative forfeiture).

The benefits of administrative forfeiture

Administrative forfeitures are helpful to law enforcement because they conserve judicial resources

- *United States v. Ninety-Three (93) Firearms*, 330 F.3d 414 (6th Cir. 2003) (administrative forfeitures are Afavored@ because they proved Aa mechanism

for the Government and private parties to resolve their forfeiture-related disputes without the need for judicial actions@);

- *United States v. Miscellaneous Firearms*, 376 F.3d 709 (7th Cir. 2004) (administrative forfeitures are favored because they Aprovide the potential for remission which can obviate the need for judicial proceedings);

- *In re: Application for Warrant to Seize One 1988 Chevrolet Monte Carlo*, 861 F.2d 307, 310 (1st Cir. 1988) (administrative forfeitures conserve judicial resources by allowing Government to use Asimpler, quicker, less expensive administrative proceedings@);

The adoptive forfeiture program is also touted as a good way to foster cooperation between state and federal law enforcement agencies

- And it allows property to be forfeited that might not have been forfeited under state law because of the inadequacy of the state forfeiture law, or the lack of resources or familiarity with the subject in the state prosecutor's office

- adoptive forfeiture also can provide funding to the state or local agency through the equitable sharing program which returns up to 80 percent of the forfeited assets to the state or local agency that seized the property

- but this is what leads to the "policy for profit" criticism of the forfeiture program, and is the reason why adoptive forfeitures are subject to heightened scrutiny

The claim

What if someone wants to contest the forfeiture?

Claimants have 30 days from the last date of publication to file a claim;

- alternatively, if the claimant receives a notice letter, the letter can set its own deadline for filing a claim (not less than 35 days from the date of the letter); 18 U.S.C. § 983(a)(2)

What happens if a valid claim is filed?

By filing a claim, the property owner brings the administrative forfeiture process to a halt, and forces the Government to bring a forfeiture action in federal court

- the Government has 3 choices:

- within 90 days from the date the claim is filed, the U.S. Attorney must file a civil complaint, include the property in a criminal indictment, or return the property; § 983(a)(3);

    - *United States v. Funds in the Amount of $40,000*, 2004 WL 2191576 (N.D. Ill. 2004) (section 983(a)(3)(B) gives the Government three options: to file a civil complaint, obtain an indictment, or return the property within 90 days; it is not required to obtain an indictment in every case);

- the 90 days begins to run when a claim is received by the seizing agency;

- the deadline may be extended for good cause by the court, or by agreement of the parties;

    - *United States v. Funds in the Amount of Fifteen Thousand Dollars*, 2006 WL 1049663, *2 (N.D. Ill. 2006) (that there is an ongoing grand jury investigation is "good cause" for granting an extension of the 90-day deadline under section 983(a)(3)(A));

    - *United States v. $55,140.00 in U.S. Currency*, 2005 WL 6577605 (N.D. Fla. Jan. 20, 2005) (the shutting down of the U.S. Attorney's Office for 2 weeks due to the effects of a hurricane constitutes good cause for the extension of the 90-day deadline; a motion to extend a deadline under section 983(a)(3)(A) may be filed after the deadline has expired);

- but if the Government misses the 90-day deadline for commencing a civil forfeiture action, and no extension is granted, the Government is forever barred from civilly forfeiting the property in connection with the offense that gave rise to the seizure; 18 U.S.C. § 983(a)(3)(B)

- this is called the "death penalty" for civil forfeiture

    - *United States v. Funds in the Amount of $314,900.00*, 2006 WL 794733, at *2 (N.D. Ill. 2006) (strict compliance with the 90-day deadline is required; summary judgment granted for claimant on complaint filed on the 91st day);

Obviously, it is very important for the seizing agency to get the case over to the U.S. Attorney's Office as soon as possible, and for the AUSA to act within the 90 days

- if the US Attorney gets the case too close to the 90th day, and doesn't have time to evaluate the case and prepare a complaint, the only way to avoid the "death penalty" for civil forfeiture is to return the property

Civil Forfeiture

Unless you have decided to return the property, you have two choices when a claim is filed, criminal forfeiture and civil forfeiture

- civil forfeiture is *not* part of a criminal case; it is a separate civil action *in rem* against the property;

    - *Via Mat International South America, Ltd. v. United States*, 446 F.3d 1258 (11th Cir. 2006) (a civil forfeiture proceeding is not an action against the claimant but rather is an *in rem* action against the property);

    - *United States v. All Funds in Account Nos. 747.034/278 (Banco Espanol de Credito)*, 295 F.3d 23, 25 (D.C. Cir. 2002) (ACivil forfeiture actions are brought against property, not people. The owner of the property may intervene to protect his interest.@);

- that's why civil forfeiture cases have such funny names

- It's a procedural device for getting everyone with an interest in the property into the courtroom at the same time and litigating all of their interests

    - *United States v. Ursery*, 518 U.S. 267, 295-96 (1996) (Kennedy, J. concurring) (proceedings *in rem* are simply structures that allow the Government to quiet title to criminally-tainted property in a single proceeding in which all interested persons are required to file claims contesting the forfeiture at one time);

    - *United States v. Real Property Located at 475 Martin Lane*, 545 F.3d 1134,1144 (9th Cir. 2008) ("*in rem* actions are generally considered proceedings against the world" in which "the court undertakes to determine all claims that anyone has to a thing in question");

The important thing to know about civil forfeiture is that it doesn't require a conviction or even a criminal case

- You can file the civil action before the case is indicted, after the criminal case is over, or if there is no criminal case at all
- but the Government still has to prove that a crime was committed *and* that the property was derived from or used to commit that crime

— the owner of the property doesn't have to be the wrongdoer, but the owner can assert an innocent owner defense

— 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 doesn't the Government forfeit everything civilly instead of including it as part of a 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

— recall the second requirement: that the Government must prove the property was derived from or used to commit the crime

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

— so if the Government cannot establish the connection between the particular asset and the underlying crime, there can be no forfeiture

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

When would you use civil forfeiture?

Here is a short list of the instances when you're most likely to find civil forfeiture appropriate

1. when the wrongdoer is dead or is incompetent to stand trial;
2. when the defendant is a fugitive or a foreign national beyond jurisdiction of the United States;
3. when the statute of limitations has run on the criminal case;

4. when we have recovered the property but do not know who committed the crime giving rise to the forfeiture;
5. when the defendant pleads guilty to, or has been convicted at trial, of a crime different from the one giving rise to the forfeiture;
6. when there is no federal criminal case because the defendant has already been convicted in a state or foreign or tribal court;
7. when there is no criminal case because the interests of justice do not require a conviction;
8. when the evidence is insufficient to prove that the defendant committed the offense beyond a reasonable doubt;
9. when the defendant uses someone else's property to commit the crime and that person is not an innocent owner.

Civil forfeiture procedure is derived from admiralty practice, and the rules governing civil forfeiture are set forth in the Supplemental Rules for Admiralty and Maritime Claims and Asset Forfeiture Actions

- In particular, the contents of the civil forfeiture complaint, the procedure for publishing or sending notice and for filing a claim and answer, the procedure for conducting discovery and for moving to dismiss are all set forth in Rule G

- Because your office has, at most, one or two civil forfeiture experts who handle all of the civil forfeiture cases, I am not going to go into civil forfeiture procedure now.

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) ("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. 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);

A number of things flow from that:

1. 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);

- *United States v. Lake,* 472 F.3d 1247 (10th Cir. 2007) (because underlying fraud and money laundering convictions were reversed on appeal, forfeiture had to be vacated as well);

- *United States v. Warshak,* 631 F.3d 266, 333 (6th Cir. 2010) (vacating money judgment as to one co-defendant when her conviction on the money laundering count that supported the forfeiture was reversed on appeal);

— if the defendant dies before the sentence is imposed, or before it is final, the forfeiture abates

- *United States v. Lay,* 456 F. Supp.2d 869 (S.D. Tex. 2006) (the normal rule is that a conviction abates if the defendant dies after he is sentenced but before his appeal is final, but it applies equally where the defendant dies before sentencing, and thus before judgment is even entered);

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

2. Because forfeiture is part of the sentence, Congress has to have authorized forfeiture as part of the punishment for the offense for which the defendant is convicted

— there is no common law of forfeiture

— if Congress hasn't said forfeiture can be imposed as part of the sentence for a particular crime, then there can't be a forfeiture for that crime

- *United States v. Anghaie,* 2011 WL 2671242, *1 (N.D. Fla. July 7, 2011) (because there is no general-purpose statute authorizing forfeiture of facilitating property in all cases, forfeiture in wire fraud cases must be limited to the proceeds, as provided in § 981(a)(1)(C));

- *United States v. Simon,* 2010 WL 5359708, *1 (N.D. Ind. Dec. 21, 2010) (court cannot order forfeiture based on defendant's conviction for fraud involving federal financial aid because Congress has not authorized forfeiture for that offense);

3. 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);

- *United States v. Maye,* 2014 WL 1671506, *4-5 (W.D.N.Y. Apr. 23, 2014) (following *Capoccia*; defendant acquitted of drug conspiracy but convicted of 33 substantive counts of writing false prescriptions may be ordered to forfeit only the $10 per prescription that he received from the 33 counts, plus any facilitating property);

— the same is true if you limit the offense of conviction to a particular drug deal or a particular period of time

- *United States v. Juluke*, 426 F.3d 323 (5th Cir. 2005) (the Government must prove that the property subject to forfeiture was the proceeds of the drug activity that formed the basis for the defendant's conviction, not of the defendant's drug trafficking generally*);*

- *United States v. Robbins,* 2011 WL 3862054, *5 (N.D. Iowa Aug.11, 2011) (because defendant pled guilty only to manufacturing marijuana during a two-month period, money judgment must be limited to proceeds received from selling marijuana manufactured during that period);

— one way around this is to charge a conspiracy or a crime involving a "scheme" and draft the indictment as broadly as possible, because in such cases the "offense of conviction" is the entire conspiracy or scheme

- *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;"

4. Because forfeiture is part of the sentence, the forfeiture issues are handled separately in a forfeiture hearing after the defendant is convicted

- *United States v. Meffert,* 2010 WL 2360776, *17 (E.D. La. June 7, 2010) (denying defendant's pre-trial motion to bifurcate the trial as unnecessary; bifurcation is automatic under Rule 32.2(b)(1));

- *United States v. Impastato,* 2008 WL 373698, at *2 (E.D. La. 2008) (granting motion to bifurcate without mentioning Rule 32.2(b)(1));

- *See* Rule 32.2(b)(1) (forfeiture proceeding takes place "as soon as practicable" after court enters guilty verdict);

–- in fact, the defendant can plead guilty to the offense and still contest the forfeiture

- *United States v. Silvious*, 512 F.3d 364, 369-70 (7th Cir. 2008) (defendant pleads guilty to mail fraud but contests the forfeiture at sentencing on the ground that the Government cited the wrong forfeiture statute in the indictment);

- *United States v. Iacaboni*, 363 F.3d 1 (1st Cir. 2004) (noting that defendant pled guilty to money laundering and requested bench trial on the forfeiture);

- *United States v. Ivanchukov,* 405 F. Supp. 2d 708 (E.D. Va. 2005) (defendant pled guilty but contested forfeiture of $100,000 paid to attorney as attorney's fee on the ground that it wasn't proceeds of the offense);

— we'll come back to the procedure in the forfeiture phase of the trial when we talk about the procedure for requesting a jury to determine the forfeiture and the need for jury instructions and special verdict forms

5. Because forfeiture is part of the sentence, the burden of proof in the forfeiture proceeding is preponderance of the evidence

— this is still true under *Apprendi* and *Southern Union*

- *United States v. Stevenson*, 834 F.3d 80 (2nd Cir. 2016) (because criminal forfeiture has no maximum, *Southern Union* does not apply to the determination of the amount of a money judgment; *Fruchter* and *Libretti* are still good law);

- *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);

  - *United States v. Phillips,* 704 F.3d 754, 770 (9th Cir. 2012) (*Southern Union* does not apply to criminal forfeiture for the same reasons that *Apprendi* and *Booker* do not apply: *Libretti* remains binding on the lower courts until the Supreme Court reconsiders it, and the *Apprendi* cases only apply if there is a statutory maximum and there is no statutory maximum for forfeiture);

  - *United States v. Day,* 700 F.3d 713, 732-33 (4th Cir. 2012) (*Southern Union* does not apply to forfeiture because there is no statutory maximum for forfeiture, and because nothing in *Southern Union* suggests Supreme Court meant to overrule *Libretti* without saying it was doing so);

— and hearsay is admissible

- *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); id. (proffer letter does not preclude use of proffered statement in forfeiture hearing where the letter precludes use only in the case-in-chief);

  - *United States v. Ali,* 619 F.3d 713, 720 (7th Cir. 2010) (because forfeiture is part of sentencing, less stringent evidentiary standards apply in the forfeiture phase of the trial; the evidence need only be "reliable");

  - *United States v. Capoccia*, 503 F.3d 103, 109 (2d Cir. 2007) (Rule 32.2(b)(1) allows the court to consider "evidence or information," making it clear that the court may consider hearsay; this is consistent with forfeiture being part of the sentencing process where hearsay is admissible);

  - *United States v. Hatfield*, 795 F. Supp. 2d 219, 229-30 (E.D.N.Y. 2011) (because the Federal Rules of Evidence do not apply in the forfeiture phase of a criminal trial, the Government does not have to satisfy the *Daubert* standard with respect to the testimony of its expert witnesses);

6. 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

–- this is why, in criminal cases, we can get a forfeiture order in the form of a money judgment, and why 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);

7. 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, **property that belongs to third parties cannot be forfeited**

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

- *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. Singh*, 518 F.3d 236, 241 (4th Cir. 2008) (property belonging to a corporation cannot be forfeited unless the corporation is found guilty; when the corporation's previously vacated conviction is reinstated on appeal, the forfeiture judgment may be reinstated as well);

The good news is that the criminal AUSA doesn't have to worry about establishing the ownership of the property in the criminal case

— you can include property in an indictment even if it was titled in the name of a nominee or alter ego, or if the defendant transferred it to a third party after the crime occurred

- *United States v. Cox,* 575 F.3d 352, 358 (4th Cir. 2009) ("Rule 32.2 *requires* the issuance of a preliminary order of forfeiture when the proper nexus is shown, whether or not a third party claims an interest in the property") (emphasis in original);

- *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);

- *United States v. Lazarenko*, 476 F.3d 642, 648 (9th Cir. 2007) (“Upon a finding that the property involved is subject to forfeiture, a court must promptly enter a preliminary order of forfeiture without regard to a third party’s interests in the property”);

- *United States v. Egan,* 2015 WL 4772688, *6-7 (S.D.N.Y. Aug. 13, 2015) (Rule 32.2 and Section 853(n) establish a “shoot first and ask questions later” procedure whereby whatever interest the defendant had in the property is extinguished by the entry of the preliminary order of forfeiture, and third parties enter thereafter to protect any interest they may have; thus third parties have no standing to object to the entry of the preliminary order because it does not affect their rights), aff’d*,* 654 Fed. Appx. 520 (2nd Cir. 2016);

— third parties cannot intervene in the trial to contest the forfeiture, *see* 21 U.S.C. § 853(k)

- *United States v. Holy Land Foundation for Relief and Development*, 493 F.3d 469, 477 (5th Cir. 2007) (*en banc*) (section 853(k) ensures an orderly process that relieves the Government of the burden of having to defend the forfeiture against third party claims during an ongoing prosecution while protecting the third party’s right to a day in court in the ancillary proceeding; this procedure does not violate the third party’s right to due process);

— it is not until the end of the trial, in the **ancillary proceeding,** that a third party can say, “wait a minute, the property being forfeited belongs to me, not to the defendant”; Rule 32.2(b)(2)

- *DSI Associates LLC v. United States,* 496 F.3d 175, 186-87 (2nd Cir. 2007) (limiting third parties to the ancillary proceeding, where, as unsecured creditors they will lack standing to contest the forfeiture, does not violate due process, as long as the third party can file a remission petition with the Attorney General;

- *United States v. Cox,* 575 F.3d 352, 358 (4th Cir. 2009) (“Third parties claiming an interest in the property have no right to intervene in the criminal proceeding or to receive notice of the forfeiture proceedings before the entry of a preliminary order of forfeiture.”);

- *United States v. Lazarenko*, 476 F.3d 642, 648 (9th Cir. 2007) (“Section 853(n) provides the process for vindicating a third party’s interest in forfeited property. The law appears settled that an ancillary proceeding constitutes the only avenue for a third party claiming an interest in seized property.”) (citing section 853(k) and the Advisory Committee Note to Rule 32.2(b));

The procedure is to include the forfeiture in a plea agreement, or get a special verdict finding that the property is subject to forfeiture pursuant to § 853(c)

- *United States v. McCorkle*, 321 F.3d 1292, 1294 n.1 (11th Cir. 2003) (describing the procedure for obtaining a special verdict under section 853(c) against forfeitable property in the hands of a third party, and allowing the third party to contest the forfeiture in the ancillary proceeding);

- *United States v. Moffitt, Zwerling & Kemler*, 83 F.3d 660, 665-66 (4th Cir. 1996) (property transferred to lawyer as attorney's fee);

— then the court issues a preliminary (or consent) order of forfeiture and we send notice to third parties that they have 30 days to file a claim

— you don't have to wait until sentencing to do this

- *United States v. Marion*, 562 F.3d 1330, 1337-38 (11th Cir. 2009) (the court is not required to issue a preliminary order of forfeiture before sentencing, but if it does so, the Government may immediately commence the ancillary proceeding by sending notice to third parties; the third parties then have 30 days to file claims);

— if a third party has an interest in the property – e.g., the defendant's wife, a lienholder or a co-tenant – the third party will be able to contest the forfeiture in the post-trial ancillary proceeding

- *Bayview Loan Servicing, LLC. v. United States,* 288 Fed. Appx. 63, 64-65 (4th Cir. 2008) (the ancillary proceeding provides a process for protecting the interests of third parties in forfeited property; if the third party establishes an interest that satisfies the criteria in the statute, the court must modify the order of forfeiture);

— if the property really belonged to the defendant, you should prevail in the ancillary proceeding

- *United States v. Timley*, 507 F.3d 1125, 1130 (8th Cir. 2007) (denying third party's claim on the ground that he had no legal interest in the forfeited property as a matter of State property law);

— but if the property really did belong to a third party, the third party will prevail

- *United States v. Nava,* 404 F.3d 1119, 1124 (9th Cir. 2005) (because defendant's daughter was the true owner and not merely a nominee, she was entitled to prevail in the ancillary proceeding);

— 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

8. Because forfeiture is part of sentencing, the forfeiture order must be entered *at sentencing* – not days or weeks after the sentencing is complete

— 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);

— Rule 32.2(b)(4)(B) requires that the court include the forfeiture in the oral announcement or otherwise ensure that the defendant is aware of the forfeiture at sentencing

- *United States v. Esquenazi,* 752 F.3d 912, 939 (11th Cir. 2014) (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);

- *United States v. Cano,* 558 Fed. Appx. 936, 939-40 (11th Cir. 2014) (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);

- *United States v. Gomez,* 548 Fed. Appx. 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);

— 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. Petrie*, 302 F.3d 1280, 1284 (11th Cir. 2002) (district court lacked jurisdiction to enter a preliminary order of forfeiture 6 months after defendant was sentenced);

- *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);

- *United States v. Crutcher*, 689 F. Supp.2d 994 (M.D. Tenn. 2010) (Rule 36 cannot be used to correct the judgment to include a forfeiture order where there was no preliminary order of forfeiture and no jury verdict specifying the property to be forfeited; failure to comply with Rule 32.2(b) at sentencing was fatal);

- *United States v. Westmoreland,* 2010 WL 5441976, *2 (D. Conn. Dec. 28, 2010) (where there was no preliminary order of forfeiture and no mention of the forfeiture at sentencing, court cannot belatedly enter a forfeiture order, even though defendant agreed to the forfeiture in his plea agreement);

- *United States v. Young,* 2009 WL 661901, *1 (S.D. Ala. Mar. 12, 2009) (prosecutor's oversight in failing to obtain order of forfeiture prior to sentencing, or to have the court mention the forfeiture at sentencing, was not a clerical error that court be corrected after the sentence became final, even though Defendant had agreed to the forfeiture in his plea agreement);

- *United States v. Diaz-Rivera,* 806 F. Supp. 2d 479, 483 (D.P.R. 2011) (Government cannot wait until after sentencing to request an order of forfeiture; that the defendant lacks standing to object to the forfeiture – because he avers that the property belongs to a third party – does not overcome the court's lack of jurisdiction to amend the judgment at that point);

— you must get the forfeiture order at sentencing

There are cases where we have been able to survive even though the court did not comply with the rule

— for example, in *Martin* the judge held a forfeiture hearing, said there would be a forfeiture order and asked the Government to draft it, but did not enter the order until a month after sentencing

— the Fourth Circuit said that was error, but it was not fatal because the defendant was aware of the forfeiture at the time she was sentenced

— otherwise, we would have had to give the property back or commence a new civil forfeiture (if the statute of limitations had not run and the property was traceable)

- *United States v. Martin,* 662 F.3d 301, 307 (4th Cir. 2011) ("missing the deadline set in Rule 32.2 does not deprive a district court of jurisdiction to enter orders of criminal forfeiture so long as the sentencing court makes clear prior to sentencing that it plans to order forfeiture");

- *United States v. Schwartz,* 503 Fed. Appx. 443, 447-48 (6th Cir. 2012) (the entry of a preliminary order of forfeiture prior to sentencing is mandatory and the failure to enter one – even if the Government is seeking only a money judgment – is error, but the error was harmless where there was notice of the forfeiture in the charging document, the defendant was aware of the amount the Government was seeking, and the court made a factual finding supported by the record at the sentencing hearing);

- *United States v. Dahda,* ___ F.3d ___, 2017 WL 1228547 (10th Cir. Apr. 4, 2017) (failure to enter preliminary order of forfeiture prior to sentencing, while plain error, did not affect defendant's substantial rights where defendant was not deprived of opportunity to be heard and did not show that he would have made additional arguments if the preliminary order had been entered; distinguishing *Shakur*);

- *United States v. Farias*, 836 F.3d 1315 (11th Cir. 2016)(trial judge's failure to issue a preliminary order of forfeiture prior to sentencing, as Rule 32.2(b) requires, is harmless error if the defendant was on notice of the Government's intent to seek forfeiture and of the amount it intended to seek);

— we'll talk more about how you should handle the forfeiture in the plea agreement, and at sentencing later.

V. CRIMINAL PROCEDURE CHECKLIST

The following (in **bold**) is the checklist I game to all of the criminal AUSAs in my office (with the citations added)

— the "clean" version (without annotations) is attached to the outline

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.

— 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. 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);

— likewise, the Government does not have to specify the amount of the money judgment it will be seeking

- *United States v. Kalish,* 626 F.3d 165, 169 (2nd Cir. 2010) (forfeiture notice that advised defendant he would have to forfeit an amount of money equal to the proceeds of his offense was sufficient; the indictment need not to use the words "money judgment"); *United States v. Smith,* 656 F.3d 821, 827 (8th Cir. 2011) (same, following *Kalish*);

- *United States v. Bridges,* 2006 WL 3716653, *5 (E.D. Tenn. 2006) (denying request for bill of particulars stating the exact amount of currency possessed by the defendant as illegal proceeds, and stating the exact time and place where the currency was possessed; a "bill of particulars may not be used by a defendant to obtain detailed disclosure of all evidence held by the Government before trial");

— but if you do include a specific figure or specific asset, use terms like “at least” or “not limited to”

- *United States v. Ponzo,* 853 F.3d 558 (1st Cir. 2017) (in light of the “including but not limited to” language in the indictment and the precedents on this issue, it was not plain error for the district court to order forfeiture of more than the amount set forth in the indictment);

- *United States v. Segal*, 495 F.3d 826, 839-40 (7th Cir. 2007) (because the forfeiture notice used terms like “at least” and “including but not limited to” in describing the proceeds subject to forfeiture, the indictment did not limit the forfeiture to any specific figure or assets);

- *United States v. Poulin,* 2010 WL 538722, *4-5 (E.D. Va. Feb. 12, 2010) (the Government is not required to specify *any* dollar amount in the indictment, so notice that said Government would forfeit *at least* $850,000 did not allow defendant to claim surprise when the Government sought forfeiture of $1.3 million);

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.

- *United States v. Adams,* 2009 WL 1766794, *3 (W.D. Va. June 24, 2009) (“The indictment may use general language tracking the applicable forfeiture statute as long as specific assets are later identified by the Government 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.

— if the forfeiture notice is simply boilerplate tracking the forfeiture statute, there is nothing for the grand jury to do

— if it lists specific property, or if it contains a dollar figure for the money judgment, you say to the grand jury that there is a forfeiture notice at the end of the indictment, and that you are asking them to find probable cause to believe the property is forfeitable based on the testimony they have heard

- *United States v. Fisher,* 2015 WL 5824359, *7 (W.D.N.Y. Oct. 6, 2015) (there is no "grand jury finding of probable cause" for forfeiture unless the grand jury conducts a separate vote on forfeitability);

- *United States v. Cosme,* 796 F.3d 226 (2nd Cir. 2015) (where Government concedes grand jury did not actually vote on the probable cause for the forfeiture of the property listed in the indictment, the district court erred in relying solely on the indictment to enter a restraining order; remanded for a judicial determination of probable cause);

- *See also United States v. Patel*, 949 F. Supp.2d 642 (W.D. Va. 2013) (that indictment said grand jury found probable cause for amount of money judgment may have been negated by record showing AUSA told jury it did not need to concern itself with the forfeiture, but issue moot because probable cause established at a hearing and grand jury received sufficient evidence to establish probable cause as well);

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");

---- the defendant has no right to a post-restraint hearing unless he shows 1) that he has no funds other than the restrained property with which to hire counsel; *and* 2) that there is a reasonable basis to believe that the court erred in granting the restraining order

— this is called the *Jones-Farmer* Rule after the two leading cases:

- *United States v. Jones*, 160 F.3d 641 (10th Cir. 1998) (defendant has initial burden of showing that he has no funds, other than the restrained assets, to hire private counsel or to pay for living expenses, but if he makes this showing, he is entitled to a hearing);

- *United States v. Farmer*, 274 F.3d 800, 804-05 (4th Cir. 2001) (defendant entitled to pretrial hearing if property is seized for civil forfeiture if he demonstrates that he has no other assets available; following *Jones*);

Only traceable property can be restrained

- *United States v. Parrett*, 530 F.3d 422, 430-31 (6th Cir. 2008) (Section 853(e) does not authorize the district court to restrain or to take any other action to preserve substitute assets prior to the entry of an order of forfeiture);

- *United States v. Gotti*, 155 F.3d 144 (2d Cir. 1998) (same); *United States v. Floyd*, 992 F.2d 498 (5th Cir. 1993) (same); *In Re Assets of Martin*, 1 F.3d 1351 (3rd Cir. 1993) (same); *United States v. Ripinsky*, 20 F.3d 359 (9th Cir. 1994) (same); *United States v. Field*, 62 F.3d 246 (8th Cir. 1995) (same);

- *But see In Re Billman*, 915 F.2d 916, 919 (4th Cir. 1990) (§ 853(e) applies equally to substitute assets and directly forfeitable property);

If the property is real property, you can also file a notice of *lis pendens* on the local land records.

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.

–- but if it was seized for administrative forfeiture and we decide to "go criminal" because someone filed a claim, we need a housekeeping order to allow us to retain the property pending trial

- *United States v. Scarmazzo*, 2007 WL 587183, *3 (E.D. Cal. 2007) (neither a seizure warrant nor a restraining order is appropriate when the property is already in the Government's possession; rather, all that is required is an order issued pursuant to section 853(e) directing the Government to continue to maintain its custody of the property);

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.

— the plea agreement should spell out what the defendant is agreeing to forfeit, and that he is waiving all of his rights under the federal rules

— the standard plea agreement language is attached to this outline

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), and is devastating to the morale of the agents who worked hard to locate the property

— it is equally wrong to agree to a lesser jail sentence for a defendant who is willing to give up the property ("buying his way out of jail")

We *may not* agree to return property that has already been administratively forfeited.

Remember, the defendant must plead to an offense that supports the forfeiture

–- there is no authority to forfeit property not connected to the crime to which the defendant pleads guilty

- *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);

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);

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.

- *United States v. Pescatore*, 637 F.3d 128, 131 (2nd Cir. 2011) (the US Attorney may "recommend" that forfeited funds be applied to restitution, but final decision rests with the Attorney General; 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. Fenner,* 2011 WL 2014939, *2 (M.D. Pa. May 23, 2011) (noting that the Government's agreement to "recommend" that the AG apply proceeds of sale of forfeited boat to restitution is not binding on the AG);

- *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);

The defendant cannot be penalized for failing to convince his wife not to contest the forfeiture of her part of the property in the ancillary proceeding

- *United States v. Bennett*, 252 F.3d 559 (2d Cir. 2001) (district court may not penalize a defendant by enhancing his sentence when a third party refuses to withdraw a petition contesting the forfeiture in the ancillary proceeding, but it may enhance his sentence as punishment for transferring the property to the third party in the first place);

— but as the court noted in *Baker,* the defendant can be penalized under the sentencing guidelines for attempting to frustrate the forfeiture by transferring the property to third parties

- *United States v. Baker*, 227 F.3d 955, 967 (7th Cir. 2000) (defendant's attempt to frustrate the forfeiture by transferring assets to a third party constitutes an obstruction of justice warranting an increase in the sentencing offense level for the underlying criminal offense); *United States v. Keeling*, 235 F.3d 533, 536-37 (10th Cir. 2000) (same, where defendant quitclaimed property to avoid forfeiture of substitute assets);

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.

Do not wait until the day of sentencing to get the forfeiture order.

— the rule requires the court to enter the order sufficiently in advance of sentencing to allow the parties to review it and suggest revisions

- *United States v. Perez,* 2010 WL 1704078, *1 (S.D. Ga. Apr. 27, 2010) (the entry of a preliminary order is mandatory, even in cases involving only a money

judgment; the Government is not free to wait until sentencing to submit a proposed order);

- *United States v. Fitzmartin*, 2010 WL 2994216, *2 (E.D. Pa. July 27, 2010) (suggesting without holding that the Government has some obligation to assist the court in complying with the rule by submitting a proposed preliminary order in advance of sentencing; holding that the Government's submission of the proposed order the day before sentencing, while late, did not prejudice a defendant who had agreed to the forfeiture in his plea agreement);

  - *But see United States v. Fabian,* 798 F. Supp. 2d 647, 685 n. 17 (D. Md. 2011) (court did not violate Rule 32.2(b) when it waited until the day of sentencing to issue the preliminary order where the parties did not reach agreement relating to the money judgment until shortly before);

— 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

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.

- *United States v. St. Pierre,* 809 F. Supp. 2d 538, 541 (E.D. La. 2011) (noting that the court complied with Rule 32.2(b)(5) by confirming, before the jury began deliberating, that neither party was requesting that the jury be retained);

— the burden is on the defendant to make an affirmative request to have the jury retained

- *United States v. Nichols,* 429 Fed. Appx. 355, 356 (4th Cir. 2011) (per curiam) ("although a defendant has a right to have a jury decide a forfeiture issue, the defendant must affirmatively assert that right," citing Rule 32.2(b)(5));

— but some courts think the rule puts the burden on the court to make an affirmative inquiry, and may hold that the defendant did not waive his right if the court did not inquire

- *United States v. Mancuso*, 718 F.3d 780, 799 (9th Cir. 2013) (Rule 32.2(b)(5) places an affirmative duty on the court to ensure that the defendant does not inadvertently waive his right to have the jury determine the forfeiture, but the court's failure to comply with the rule was harmless error where the prosecutor stated on the record, before the jury was excused, that defendant had not requested that the jury be retained, and the defendant did not say otherwise);

- *United States v. Gregoire,* 638 F.3d 962, 972 (8th Cir. 2011) (finding it unnecessary to decide if the court's failure to advise the defendant of his right to a jury under Rule 32.2(b)(5) would invalidate the forfeiture judgment because if the Government is seeking only a money judgment, there is no right to a jury under the rule);

- *United States v. Poulin,* 461 Fed. Appx. 272, 287-88 nn. 7-8 (4th Cir. 2012) (per curiam) (following *Davis*; defendant who did not request jury before it was dismissed waived his right under former Rule 32.2(b)(4); but leaving open how that rule will be applied under new Rule 32.2(b)(5)) to the extent it places a burden on the court to inquire);

- *United States v. Grose*, 461 Fed. Appx. 786, 804-07(10th Cir. 2012) (following *Gregoire*; there was no error in the district court's failure to advise the defendant of his right to a jury where the Government was seeking only a money judgment, but suggesting that Rule 32.2(b)(5) would require such affirmative notice if the Government were seeking to forfeit specific property);

- *But see United States v. Evick*, 286 F.R.D. 296, 299 (N.D. W. Va. 2012) (the judge's failure to ask the defendant if he will request that the jury be retained to determine the forfeiture, as Rule 32.2(b)(5) requires, does not preclude the court from entering a forfeiture order);

— to avoid this, you *must* remind the court of its duty to inquire

If the jury is waived, the court may postpone the forfeiture hearing to a later date.

If the jury is retained, you must prepare jury instructions and special verdict forms.

— 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 2017 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);

The Government may rely on evidence from the "guilt phase" of the trial, supplemented by additional evidence, which means we don't have to repeat any evidence already admitted:

- *United States v. Sabhnani*, 599 F.3d 215, 262-63 (2nd Cir. 2010) (forfeiture may be based on testimony in the record from the guilt phase of the trial, including evidence of the harm done to the victims);

- *United States v. Roberts,* 696 F. Supp.2d 263, 271 (E.D.N.Y. 2010) (court is not limited to evidence admitted in the guilt phase of the trial; defendant's proffer statements regarding the quantity of drugs sold was admissible to rebut his assertion that the Government's expert witness was overestimating that quantity in calculating the amount of the money judgment);

- *United States v. Martinez,* 146 F. Supp.3d 497 (W.D.N.Y. 2015) (holding that no hearing is necessary if the evidence from the guilt phase of the trial is sufficient to allow the court to calculate the amount of a money judgment);

— as mentioned earlier, hearsay is admissible in the forfeiture phase of the trial

Also as I mentioned earlier, none of this has anything to do with the ownership of the property

— that issue is deferred to the ancillary proceeding by Rule 32.2(b)(2)

— therefore, the defendant cannot object to the forfeiture on the ground that the property belongs to someone else

- *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);

- *United States v. Armstrong*, 2007 WL 809508, *4 (E.D. La. Mar. 14, 2007) ("the extent of the defendant's ownership interest in the property is examined in the ancillary proceeding;" thus the jury may be instructed "not to concern itself with

anyone's ownership interest in the property" and defendant may not object to the forfeiture on the ground that the property belongs to a third party);

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

- *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. The court's failure to issue a forfeiture order at or before sentencing *is fatal*.

— see the cases cited *supra*.

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 sentence, 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. Mays,* 2011 WL 2650015, *1 (S.D. Ill. July 6, 2011) (if the court enters a forfeiture order but simply fails to make it part of the J&C, the error may be corrected pursuant to Rule 32.2(b)(4)(B));

- *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 at R:\Forfeiture\Forms. 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, they will assist you in responding to the claim in the ancillary proceeding.