# OVERVIEW OF ASSET FORFEITURE

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## 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? Guns? Houses? Cars, boats and airplanes?

— Are we talking just about drug cases? Violent crime? 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?
— When would you use one instead of the other?

Then I will talk about the special rules that apply in firearms cases.

## II. Why do forfeiture?

What are the goals of an asset forfeiture program

— and why do we devote so much time and energy to it.

- *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);

— as we'll see, this reflects the three principal goals of criminal law enforcement – punishment, deterrence and incapacitation – and more

1. Punish the wrongdoer

— Many criminals care more about keeping the money than they do about serving time in jail

— So, to punish the defendant, the prosecutor seeks not just to put him jail, but to take away the fruits of the crime;

— It makes no sense to prosecute a person for fraud and to let him keep the fraud proceeds, or to let the money launderer keep the money

— That may mean making the defendant 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

Forfeiture is also a form of incapacitation

— Obviously, we take guns off the street, so they can't be used to commit more crimes in the future

— We don't want a drug dealer to use the airplane again to smuggle more drugs, or the child pornographer to have another chance to use his computer

In a broader sense, we want to close off the avenue used to commit crimes

— we don't want to allow the corrupt leaders of other 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

— we don't want to provide the means for hiding his money

— 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

Beyond punishment, deterrence and incapacitation, forfeiture serves other purposes

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

Obviously, if there are fewer guns on the street, the community is safer

— but forfeiture protects the community in other ways as well

— it prevents the wrong people from acquiring controlling interest in industries, dominating markets (e.g. the upscale housing market), or acquiring wealth used to corrupt public officials

— In white collar cases, recovering money from corrupt public officials gives law enforcement the opportunity to convince the community that they're not letting the bad guys profit from their crimes; that the law treats everyone equally; and that public officials cannot act with impunity

— 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 source

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 issue side of the asset recovery program; what's been called "policing for profit"

## 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

— Unfortunately, as we'll see later, that is true for only 2 provisions of the Gun Control Act: importation and trafficking

— But proceeds may be forfeited for other offenses that ATF enforces including drugs and cigarette trafficking

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

— if he sold drugs, the money he received for the drugs is the proceeds

— if he robbed a bank, committed fraud, or took a bribe, the money from the bank or from the fraud victim or the bribe payment would be the proceeds

— 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 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,* 701 Fed. Appx. 599 (9th Cir. 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. George*, ___ F.3d ___, 2018 WL 1444332 (1st Cir. Mar. 23, 2018) (following *Bodouva*; embezzlement is an inherently illegal activity that cannot be done lawfully; thus, § 981(a)(2)(A) applies; that the embezzlement involved the provision of a legal service did not mean defendant could deduct his direct costs under § 981(a)(2)(B));

- *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);

— If you fail to see the bright line, you are not alone

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

— if the defendant uses his stolen money to buy a boat, the boat – or at least the fraction of the boat acquired with the proceeds – is forfeitable as traceable property

- *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

Most important for our purposes today, the firearm "involved in or used" in certain violations of the CGA or a willful violation of "any . . . criminal law of the United States,"

. . . or intended to be used in a crime of violence, drug offense, or certain violations of § 922

— is subject to civil and criminal forfeiture as facilitating property under 18 U.S.C. § 924(d)

— 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 a 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. Cessa,* 872 F.3d 267 (5th Cir. 2017) (the Government having demonstrated that defendant purposefully commingled third party's drug money with his legitimate funds to facilitate its laundering, all of the commingled funds are forfeitable as property involved in the money laundering 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 (ATF if it's guns (and other offenses); HSI 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 (at ATF, this is done by the Asset Forfeiture and Seized Property Division)

— it's really not a proceeding 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);

— One benefit of uncontested forfeiture over abandonment is that the Declaration has the force of a judicial order, transferring title to the United States

**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 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

- In ATF, this function is performed by Field Division Counsel

- 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

- the deadline may be extended by the Office of Chief Counsel

Those rules apply to all adoptive forfeitures – including guns

- 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 (if none of the above apply)

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 favored because they proved "a 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 "policing 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

Note: There are special time limits that apply in firearms cases that I will talk about later

**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;

- the property is named as the defendant; persons objecting to the forfeiture must intervene (and must have standing to do so)

    - *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

- naming the property as the subject of the proceeding does not mean that the property has done something wrong

- civil forfeiture is simply a procedural device designed to get everyone with an interest in the property in the courtroom at the same time

    - *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 two things: that a crime was committed, *and* that the property was derived from or used to commit that crime

In the case of facilitating property, the owner of the property doesn't have to be the wrongdoer,

— someone else may have used his property to commit the crime

— 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 could forfeit the car in civil case even though the wife was not charged with any crime

— but if she did not know that her car was being used to commit a crime, she would have an innocent owner defense

- *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);

— The same would be true if someone used his brother's gun to rob a bank

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

— in particular, in cases where the money has already been spent, or cannot be found, civil forfeiture is not option

— 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 property is seized but the forfeiture is unopposed

2. when the wrongdoer is dead or is incompetent to stand trial;

3. when the defendant is a fugitive or a foreign national beyond jurisdiction of the United States;

    — money or other property may be in the US that was derived from public corruption in Nigeria or the theft of money in Russia,

    — or it may have been left behind in the US by a person who committed a crime in the US and then fled to Mexico or Pakistan

        - *United States v. Real Property Known As 7208 East 65th Pl.,* 185 F. Supp.3d 1288 (N.D. Okla. 2016) (defendant indicted for selling worthless medicine to terminally ill cancer patients flees to Mexico);

4. when the statute of limitations has run on the criminal case;

5. when we have recovered the property but do not know who committed the crime giving rise to the forfeiture;

    — If weapons, flight simulators, contraband electronics, or money is intercepted while on the way to a country designated as a supporter of terrorism, but it is unclear who the exporter or recipient of the property

might be, there is no one to prosecute and hence no one to convict.

— The same is true if money is seized from a courier who is unable (or unwilling) to identify the owner of the property

— Or if a cultural artifact or work of art is recovered from an auction house but no one knows who stole it or imported it

— In all of those instances, a non-conviction-based order will reach the property and force the property owner to come forward to contest the forfeiture proceeding.

6. when the defendant pleads guilty to a crime different from the one giving rise to the forfeiture;

— our courts have not fully adopted the concept of 'extended confiscation' whereby a conviction for a given offense will give rise to a forfeiture order directed at the proceeds of all other crimes that the same defendant has committed.

— To the contrary, because criminal forfeiture is regarded as part of the defendant's sentence relating to the commission of a given offense, only property connected to the commission of that offense is subject to criminal forfeiture.

— So, if the defendant is convicted but not of a crime involving the gun, the gun cannot be forfeited

— In those cases, the Government must bring a non-conviction-based forfeiture action to recover any property involved in other offenses.

7. when there is no federal criminal case because the defendant has already been convicted in a state or foreign or tribal court;

— for example, the gun owner was convicted in state court, but the Government adopts the forfeiture of the gun

- *United States v. $7,679.00 U.S. Currency,* 2015 WL 7571910 (W.D.N.Y. Nov. 24, 2015) (defendant pleads guilty to state drug offense and federal agency adopts seizure for civil forfeiture under federal law);

8. when there is no criminal case because the interests of justice do not require a conviction even though there was a clear violation of a criminal law;

— suppose a convicted felon persuades his 70-year old mother to purchase a firearm on his behalf, in a situation where both of them know that it is a violation of federal law for a convicted felon to possess such a weapon.

— And suppose the mother not only buys the firearm but lies on the required document when asked if she is buying it for herself or for a third party.

— In that case, the mother has clearly violated federal law and would be subject to criminal prosecution but faced with the choice between doing nothing (and allowing the felon to retain the weapon) and bringing criminal charges against the aged woman, the Government might decide that confiscating the weapon pursuant to a non-conviction-based forfeiture order is the right thing to do.

- *United* States *v. 6 Firearms, Accessories and Ammunition,* 2015 WL 4660126 (W.D. Wash. Aug. 5, 2015) (circumstantial evidence established that claimant was actually purchasing firearms for her convicted-felon son);

9. when the evidence is insufficient to prove that the defendant committed the offense beyond a reasonable doubt;

10. when the defendant uses someone else's property to commit the crime and that person is not an innocent owner.

— For example, he may have laundered his money through a third party's business, robbed a bank with a third party's gun, or distributed drugs using a third party's airplane.

— Conviction-based forfeiture cannot reach the property of third parties;

— it would be a violation of the due process rights of third parties to attempt to confiscate their property in a proceeding in which they were not able to participate;

— but non-conviction-based forfeiture can reach third-party property, because in that setting the third party has the right to intervene and defend his property interest by contesting the Government's proof on the merits and/or by asserting that he is an innocent owner of the property.

- *United States v. One Red 2003 Hummer H2,* 234 F. Supp.3d 415 (W.D.N.Y. 2017) (forfeiting vehicle used by owner's son to transport illegal drugs; civil forfeiture necessary to forfeit interest of third party even though person in possession was charged criminally);

— I said earlier that the Government *could use* civil forfeiture in that situation

— The fact is that it *must use* civil forfeiture in that situation unless it wants to charge the third party with a criminal offense

11. When the criminal investigation will take a long time, and there is a danger that the property will disappear

— This turns out to be a key reason for enacting NCB forfeiture provisions in civil law jurisdictions, where the investigation of politically exposed persons involved in corruption cases can take years to resolve

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

**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

— so, as I said before, if the defendant is not convicted of a criminal involving the gun, there can be no criminal forfeiture of the gun

- *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);

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

- *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);

— 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

— The term "money judgment" is just a shorthand for recognizing the defendant's continuing liability to forfeit the proceeds of his offense, and the statutory authority to forfeit substitute assets if those proceeds turn out to be unavailable

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

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

— the entry of a money judgment is mandatory

- *United States v. Blackman*, 746 F.3d 137, 143 (4th Cir. 2014) (§ 2461(c) makes criminal forfeiture mandatory in all cases; "The word 'shall' does not convey discretion . . The plain text of the statute thus indicates that forfeiture is not a discretionary element of sentencing. . . . Insofar as the district court believed that it could withhold forfeiture on the basis of equitable considerations, its reasoning was in error.");

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

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

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

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

- *United States v. Alamoudi*, 452 F.3d 310, 314 (4th Cir. 2006) ("Section 853(p) is not discretionary… [W]hen the Government cannot reach the property initially subject to forfeiture, federal law requires a court to substitute assets for the unavailable tainted property");

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

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

— At trial, we don't have to prove the property belonged to the defendant; we only have to prove the nexus to the offense

- *De Almeida v. United States*, 459 F.3d 377, 381 (2d Cir. 2006) (criminal forfeiture is not limited to property owned by the defendant; "it reaches any property that is involved in the offense;" but the ancillary proceeding serves to ensure that property belonging to third parties who have been excluded from the criminal proceeding is not inadvertently forfeited);

— But if a third party establishes in the post-trial ancillary proceeding that the property belonged to him, the court must vacate the forfeiture order to recognize the third party's interest

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

### *Honeycutt*

There is one other "hot issue" in criminal forfeiture that we should discuss before we stop

In *Honeycutt v. United States,* the Supreme Court held that a criminal defendant is liable to forfeit only the proceeds that he personally obtained, and is not liable vicariously for proceeds obtained by co-conspirators

- in that case, two brothers were convicted of selling drugs from the older brother's business
- altogether, they received something like $260,000 for the drugs they sold, but all of the money went to the older brother
- when the older brother agreed to forfeit $200,000 the Government sought to hold the younger brother liable for the remaining $60,000, but the Supreme Court said no
- the younger brother received none of the money, so he was not liable to forfeit anything, even though he was convicted of the same offense

    - *Honeycutt v. United States,* ___ U.S. ___, 137 S. Ct. 1626 (2017) (application of the doctrine of joint and several liability is inconsistent with statutory language limiting criminal forfeiture to "proceeds the person obtained"; defendant cannot be liable for proceeds obtained by someone else);

*Honeycutt* may not be limited to drug cases:

- *United States v. Gjeli,* 867 F.3d 418 (3rd Cir. 2017) (*Honeycutt* applies with equal force to the forfeiture of proceeds in a RICO case under § 1963(a)(3) and to the forfeiture of extortion proceeds under § 981(a)(1)(C));
- *United States v. Sanjar,* ___ F.3d ___, 2017 WL 5896395 (5th Cir. Nov. 30, 2017) (*Honeycutt* applies to forfeiture of gross proceeds of health care fraud under § 982(a)(7); following *Gjeli*);
- *United States v. Carlyle*, ___ Fed. Appx. ___, 2017 WL 4679564 (11th Cir. Oct. 18, 2017) (citing *Gjeli* and assuming without deciding that *Honeycutt* applies to forfeitures pursuant to § 981(a)(1)(C), and remanding the case to the district court);
- *United States v. Brown,* 694 Fed. Appx. 57 (3rd Cir. 2017) (*Honeycutt* applies to forfeiture for mortgage fraud under § 982(a)(2)); *United States v. Brown,* ___ Fed. Appx. ___, 2018 WL 1151785 (3rd Cir. Mar. 5, 2018) (same case; different defendant; same holding);

This has created a lot of confusion in the lower courts where *Honeycutt* has to be applied to cases involving persons acting in concert with each other

Suppose five people are convicted of receiving a $300,000 bribe to betray a law enforcement investigation

- Can the Government assume that they split the money five ways ($60,000 each), or does it have to prove how they split it up before it can hold any of them liable to forfeit anything?

  - *United States v. Lobo*, 2017 WL 2838187, *6 (S.D.N.Y. June 30, 2017) (defendant, one of five individuals who received a $300,000 kickback as part of a money laundering scheme, is not liable for the forfeiture of any part of the money unless the Government can prove how the kickback was divided among the conspirators);

Suppose a family – mom, dad and an adult child – run a shoplifting scheme and obtain hundreds of thousands of dollars selling the stolen merchandise on eBay

- Does the Government have to show how they divided the money among themselves?

  - *United States v. Bogdanov*, 863 F.3d 630 (7th Cir. 2017) (saving "for another day" the application of *Honeycutt* to proceeds received by family members who acted jointly in committing an offense);

Suppose the leader of a drug organization is convicted of heading an operation that realized a million dollars in drug proceeds, some of which he allowed his underlings to retain as their share

- Is he liable only for the amount he kept for himself

  - *United States v. Ward*, 2017 WL 4051753 (W.D. Mich. Aug. 24, 2017) (leader of a drug organization "obtains" the gross proceeds of the drug offense, even if some of the money is actually received by his employees; *Honeycutt* does not limit his liability to the money that comes into his own hands);

It will take some time to sort this all out.

## V. Forfeiture of Firearms

For the remainder of my time I want to talk about provisions – substantive and procedural – that are unique to the forfeiture of firearms

First, 18 U.S.C. § 981(a)(1)(C) authorizes the forfeiture of the *proceeds* of a violation of two provisions of the Gun Control Act:

- Section 922(l) (unlawful importation of a firearm)

- Section 924(n) (firearms trafficking)

— These are the only provisions that expressly authorize the forfeiture of the proceeds of the offense as opposed to the firearms themselves

— As with all of the provisions that I am talking about, the forfeiture can be administrative, civil or criminal (if there is a conviction)

As I mentioned earlier, Section 924(d) authorizes the forfeiture of any firearm "used in" or "involved in" a violation of certain parts of the Gun Control Act:

- 18 U.S.C. § 924(d)(1) (authorizing the forfeiture of any firearm or ammunition involved in or used in a violation of §§ 922(a)(4), (a)(6), (f), (g), (h), (i), (j), (k) or (l), or § 924);

— Or a willful violation of any other provision of the Gun Control Act or "any other criminal law of the United States"

— It also authorizes the forfeiture of a firearm or ammunition "intended to be used" in a "crime of violence", drug offense, or offense under §§ 922(a)(1), (a)(3), (a)(5) or (b)(3) (if part of a pattern), or other offense under §§ 922(d), (i), (j), (l), (n) or 924(b)

— Note: in the case of a firearm "intended to be used", the standard in a civil forfeiture case is raised from preponderance of the evidence to clear and convincing evidence

- *United States v. 477 Firearms,* 698 F. Supp.2d 890, 892 (E.D. Mich. 2010) (the 'clear and convincing' standard in § 924(d)(1) applies only where the Government's theory is that the firearm was intended to be used to commit an offense in the future; in cases where the firearm was actually involved in or used to commit an offense, the preponderance standard applies);

Here are some examples of how the statute has been used:

Criminal cases:

- *United States v. Cheeseman*, 600 F.3d 270, 278 (3d Cir. 2010) (possession of a firearm does not constitute "use" within the meaning of § 924(d), but to show that firearms were "involved in" a violation of § 922(g)(3) – possession of a firearm by a drug user – the Government only has to show that the guns were in defendant's possession, not that he used them to facilitate his drug use; all firearms in defendant's possession were therefore forfeitable under § 924(d));

- *United States v. Konopski*, 685 Fed. Appx. 63 (2nd Cir. 2017) (firearms possessed by a drug dealer and plainly visible at the place where he conducted his drug operation are forfeitable in connection with the drug offense under §§ 924(d) and 3665 even if he occasionally used some of them for skeet shooting);

- *United States v. Housholder,* 664 Fed. Appx. 720 (10th Cir. 2016) (for purposes of § 924(d), "property involved" is interpreted "expansively" to include firearm to which illegal silencer was attached);

- *United States v. Brummer*, 598 F.3d 1248, 1249 (11th Cir. 2010) (§ 924(d) authorizes forfeiture of a firearm involved in a willful violation of § 922(e));

- *United States v. Approximately 627 Firearms*, 589 F. Supp. 2d 1129, 1133-34 (S.D. Iowa 2008) (defendant convicted of engaging in firearms trafficking without a license must forfeit all of the firearms in his inventory, not just those specifically listed in the indictment);

- *United States v. Prince*, 2010 WL 2653451, *2 (D. Kan. June 29, 2010) (gun collection acquired from gun dealer to whom defendant made a false statement is subject to forfeiture under § 924(d) as property involved in a violation of § 924(a)(1)(A));

- *United States v. Kersey*, 2008 WL 4613644, *2 (S.D. Ga. Oct. 15, 2008) (defendant pleads guilty to § 922(g)(3) and agrees to forfeiture of all firearms in his possession pursuant to § 924(d)(1));

- *But see United States v. Smith*, 2007 WL 2809252, *2 (W.D. La. Sept. 24, 2007) (declining to order forfeiture of firearms found in residence of defendant convicted of being felon in possession on the ground that the firearms belonged to other family members);

- *United States v. Moody,* 2014 WL 2611742 (M.D. Ala. June 4, 2014) (that defendant is now a convicted felon is not a basis for the forfeiture of his firearm; there must be a nexus to his drug offense; that a meth dealer possessed nine firearms is not sufficient to establish that the firearms were used to facilitate the offense);

Civil cases:

- *United States v. 6 Firearms, Accessories and Ammunition,* 2015 WL 4660126 (W.D. Wash. Aug. 5, 2015) (circumstantial evidence established that claimant was actually purchasing firearms for her convicted-felon son; false statement on Form 4473 rendered guns forfeitable as property involved in violation of § 922(a)(6));

- *United States v. 477 Firearms*, 2010 WL 1981023, *7 (E.D. Mich. May 18, 2010) (a gun dealer convicted of selling guns without a license must forfeit all guns offered for sale from his business; but the conviction does not bar the dealer from arguing that the guns seized from the basement of his store were part of his personal collection and were not offered for sale);

- *United States v. 1,679 Firearms*, 2009 WL 3233518, *3 (C.D. Cal. Sept. 30, 2009) (any firearm possessed by a convicted felon is subject to forfeiture under 18 U.S.C. §§ 924(d) and 922(g)(1));

- *United States v. 13 Firearms and Ammunition*, 2006 WL 1913360, *2 (E.D. Ky. July 11, 2006) (section 922(g)(3) makes it an offense for a drug addict to possess a firearm or ammunition; therefore, to forfeit a firearm under section 924(d), the Government need only show that a drug addict possessed it; distinguishing *Bailey v. United States*, 516 U.S. 137 (1995));

- *United States v. Twelve Firearms*, 16 F. Supp. 2d 738, 743-44 (S.D. Tex. 1998) (section 924(d)(1) authorizes forfeiture for any "willful violation," including misdemeanor record keeping violations under section 922(m));

- *United States v. Assorted Firearms*, 201 F. Supp. 2d 496, 498 (D. Md. 2002) (basis for section 924(d) forfeiture remains valid if defendant was a convicted felon on the date the firearms were seized, even if his underlying conviction was later vacated);

- *United States v. Fifty-Two Firearms*, 362 F. Supp. 2d 1308, 1313-15 (M.D. Fla.) (magistrate judge decision), *adopted by district judge*, 362 F. Supp. 2d 1323 (M.D. Fla. 2005) (finding probable cause for forfeiture of firearms involved in section 922(a)(1) offense of dealing firearms without a license, but no probable cause for section 922(d)(1) offense of selling firearms to convicted felon);

The general rule is that no conviction is required for there to be a civil forfeiture

— But when it comes to firearms there is an exception in § 924(d)(1) for cases where the claimant was acquitted of the underlying criminal charges:

- *United States v. One Smith & Wesson 66 Revolver*, 2015 WL 1505975 (S.D. Ga. Mar. 31, 2015) (denying summary judgment on § 924(d)(1) forfeiture based on § 922(g)(5) violation because record contained no showing as to the disposition of any criminal charges, and thus the court could not determine whether the "acquittal defense" applied); *United States v. One Smith & Wesson 66 Revolver,* 2016 WL 1276443 (S.D. Ga. Mar. 30, 2016) (granting motion for reconsideration to allow Government to show claimant is illegally in the U.S., but maintaining that § 924(d) requires a criminal conviction, not just the absence of an acquittal);

Civil forfeiture is often used in felon-in-possession cases:

- *United States v. Japanese Rifle,* 571 F. Supp.2d 685 (E.D. Va. 2008) (to forfeit firearms under the felon-in-possession statute, Government must prove person had actual or constructive possession, was a felon, and knew he had possession; possession of third party's firearms is sufficient);

— a family member who lawfully owns the firearm but allows the convicted felon to possess it is not an innocent owner

- *United States v. Jones' Personal Property*, 2017 WL 3526655 (E.D.N.C. Aug. 16, 2017) (granting summary judgment as to firearm wife of convicted felon allowed him to possess in her residence; wife is not an innocent owner);

**Procedural issues: the 120-day rule:**

As mentioned earlier, in civil forfeiture cases, the Government is required to commence the administrative forfeiture action within 60 days of a federal seizure, 45 days (under the Sessions policy) of a state seizure, and to commence a judicial forfeiture within 90 days of the filing of a claim

— On the other hand, there is no deadline for commencing a criminal forfeiture action (other than the statute of limitations)

Section 924(d)(1), however, has its own rule requiring the commencement of a forfeiture proceeding involving a firearm or ammunition

— It requires that the "action or proceeding" be commenced within 120 days of the seizure

— Even since the more general rules were enacted in CAFRA in 2000, there has been confusion as to which deadline applies, and when.

The majority rule is that only the administrative forfeiture must be commenced within 120 days (which, of course, is more than the 60 days allowed by CAFRA):

- *United States v. Ninety-Three (93) Firearms*, 330 F.3d 414, 417 (6th Cir. 2003) (requirement in 18 U.S.C. § 924(d)(1) that forfeiture of firearms or ammunition must be commenced within 120 days of seizure is satisfied by commencement of either administrative or judicial forfeiture proceedings within that period); *United States v. Twelve Firearms*, 16 F. Supp. 2d 738, 740-41 (S.D. Tex. 1998) (same);

- *United States v. Seven Firearms and Ammunition*, 116 Fed. Appx. 51, 52 (8th Cir. 2004) (Government satisfies the 120-day rule for commencing a forfeiture action against a firearm if it publishes notice of administrative forfeiture within that time period);

- *United States v. Miscellaneous Firearms*, 376 F.3d 709, 713 (7th Cir. 2004) (same; if Congress had meant "all" forfeiture actions had to be commenced within 120 days, it could easily have said so);

- *United States v. Twelve Miscellaneous Firearms*, 816 F. Supp. 1316, 1317 (C.D. Ill. 1993) (forfeiture action is timely so long as at least an administrative action is commenced within 120 days of seizure); *United States v. 60 Firearms*, 186 F. Supp. 2d 538, 543-44 (M.D. Pa. 2002) (same); *United States v. Assorted Firearms*, 201 F. Supp. 2d 496, 498 (D. Md. 2002) (same);

- *United States v. Shipley,* 546 Fed. Appx. 450, 458 (5th Cir. 2013) (not deciding whether the 120-day rule applies to criminal forfeiture because defendant waived the argument by not raising it in the district court);

- *United States v. Karriem*, 2008 WL 5118200, *9 (D.N.J. Dec. 4, 2008) (assuming, arguendo, that the 120-day deadline even applies to criminal forfeitures, the deadline does not begin to run until the Government asserts personal jurisdiction over the defendant by indicting him; thus, including a firearm in a criminal indictment is always timely);

- *United States v. McDaniel*, 2008 WL 1816455, *2-3 (S.D. Ga. Apr. 22, 2008) (the 120-day rule in § 924(d) is satisfied if the Government commences an administrative forfeiture within that time; criminal forfeiture may be commenced any time thereafter, within the statute of limitations for the underlying offense), magistrate judge's opinion adopted by the district court, 2008 WL 2620108 (S.D. Ga. June 30, 2008);

- *But see United States v. Mowatt*, 74 Fed. Appx. 250, 251(4th Cir. 2003) (affirming district court on this point and citing *93 Firearms* with approval);

— But some courts hold that both the administrative and judicial forfeitures must be filed within the same 120-day period:

- *United States v. Fourteen Various Firearms*, 889 F. Supp. 875, 877 (E.D. Va. 1995) (interpreting *any* to mean the same as *every* and concluding that any administrative forfeiture action and any judicial forfeiture action must be commenced within 120 days of seizure);

- *United States v. Fifty-Two Firearms*, 362 F. Supp. 2d 1308, 1321-22 (M.D. Fla.) (magistrate judge decision), *adopted by district judge*, 362 F. Supp. 2d 1323 (M.D. Fla. 2005) (agreeing with *Fourteen Various Firearms* and declining to follow Sixth and Seventh Circuits);

The 60- and 90-day deadlines in CAFRA may override the 120-day rule in section 924(d):

— *See* H. Rep. 106-192, 106th Cong. (1999) at 21 ("To the extent that these procedures are inconsistent with any pre-existing federal law, these procedures apply and supersede existing law."), quoted in "The Civil Asset Forfeiture Reform Act of 2000," 27 *Notre Dame J. Legislation* 97, 102 n.36 (2001);

Right to a jury trial

— There is a right to a jury trial in all civil forfeiture cases (Rule G(9)) and in all criminal cases that are tried to a jury (Rule 32.2(b)(5))

— But one court has held that the jury right may not apply in some criminal cases where the forfeiture is necessarily mandatory and automatic

— To be guilty of being a felon-in-possession the defendant must have been in possession; so, there is no point in a jury trial on that issue

- *United States v. Boston*, 2011 WL 4101109, *1 (E.D.N.Y. Aug. 16, 2011) (there is no right to a jury under Rule 32.2(b)(5) in a firearms case under § 922(g)(1) because, in finding the defendant guilty, the jury necessarily must have found that defendant illegally possessed the firearm, which automatically makes the forfeiture of the firearm mandatory);

**Is it necessary to forfeit the firearm?**

A recurring question is, is it really necessary to do all of this?

— What happens if I seize the firearm for evidence and don't forfeit it

— If the owner is now a convicted felon, he can't get it back anyway, right?

In general, if a criminal case ends without any administrative, civil or criminal forfeiture of a firearm that was seized as evidence, the defendant has the right to file a Rule 41(g) motion for the return of his property

— This is true whether the gun *could not have been forfeited* (because is was not involved in the offense of conviction) or if the Government didn't bother to forfeit it

— The theory is that if the property no longer has evidentiary value, the Government's only basis for retaining it is a formal forfeiture action.

- *United States v. Sims*, 376 F.3d 705, 708-09 (7th Cir. 2004) (if the property was never forfeited, the claimant may file a motion under Rule 41(g));

- *Bertin v. United States*, 478 F.3d 489 (2d Cir. 2007) (following *Sims*; Rule 41(g) is the proper vehicle for seeking the return of property seized but neither forfeited nor returned at the conclusion of a criminal case);

Exceptions: Contraband, abandonment and estoppel

— Contraband need not be returned:

- *United States v. Tran*, 472 Fed. Appx. 629, 631 (9th Cir. 2012) (weapons illegally imported from Vietnam need not be returned although not forfeited);

- *United States v. Carn,* 2017 WL 8288088 (D. Nev. Dec. 11, 2017) (although Rule 41(g) is the proper vehicle for the return of property not forfeited once the criminal case is over, equitable considerations apply; denying motion for return of contraband firearms);

— Abandonment: it is possible to clear title to a firearm with an abandonment form, but it is not a good idea to do it that way

— The defendant can relinquish his right to the property, but there may be third parties with property rights that he cannot relinquish

— Estoppel: Government need not return the property if the defendant agreed to the forfeiture in his plea agreement:

- *Leech v. United States*, 2012 WL 4341760 (D. Md. Sept. 20, 2012) (motion for return of property never forfeited denied because defendant agreed to forfeiture in his plea agreement; order of forfeiture belatedly entered);

***Henderson***

What if the owner of the firearm is now a convicted felon:

— If the Government does not forfeit a firearm, it must allow the defendant to designate its transfer to anyone he chooses, as long as that person does not allow the defendant to exercise constructive possession:

— Under *Henderson*, the convicted felon may not have the right to *possess* a firearm, but he retains his right to own one

- *Henderson v. United States,* ___ U.S. ___, 135 S. Ct. 1780 (2015) (a convicted felon may transfer a firearm to whomever he chooses, as long as the court is satisfied that the recipient will not allow the felon to exercise constructive possession by having access to the firearm or directing its use);

- *United States v. Carn,* 2017 WL 8288088 (D. Nev. Dec. 11, 2017) (agreeing that non-contraband firearms cannot be returned to defendant once he is a convicted felon or to his family members, as that would give defendant constructive control, but ordering that firearms be transferred to independent gun dealer to sell on the open market);

Before *Henderson,* some courts held that the forfeiture of a firearm was unnecessary because once the defendant was convicted of a felony, he lost the authority even to designate the person to whom a gun would be transferred;

— those cases are probably no longer be good law.

- *United States v. Felici*, 208 F.3d 667, 671 (8th Cir. 2000) (forfeiture is not necessary to prevent the return of seized firearms and drug paraphernalia to convicted drug dealer);

- *United States v. Howell*, 425 F.3d 971, 974 (11th Cir. 2005) (following *Felici*; convicted felon cannot use Rule 41(g) to recover firearm or have it returned to a relative);

- *United States v. Harvey*, 78 Fed. Appx. 13, 15 (9th Cir. 2003) (following *Felici*; convicted felon has no right to seek return of seized firearms even though they were not forfeited and are no longer needed as evidence);

- *United States v. Smith*, 142 Fed. Appx. 100, 102 (3d Cir. 2005) (following *Felici*; convicted felon cannot lawfully possess guns and ammunition, nor can he request that they be transferred to his wife);

- *United States v. Story*, 170 F. Supp. 2d 863, 867-68 (D. Minn. 2001) (defendant not entitled to return of firearms even if they were not forfeited because he is now a convicted felon, but baggies and scales are not contraband per se);

- *United States v. Flores,* 2014 WL 4410207 (W.D. Ark. Sept. 8, 2014) (because defendant is a convicted felon, he is not entitled to the return of a firearm that the Government turned over to the local Sheriff's Dept in lieu of forfeiture);

- *United States v. Rodriguez,* 2011 WL 5854369, *7 (W.D. Tex. Feb. 18, 2011) (agreeing with *Felici* and its progeny that convicted felon would have "constructive possession" of a firearm if he were permitted to designate a family member to receive it);

- *United States v. Pawlik*, 2008 WL 2184400 (D. Idaho 2008) (following *Felici* and *Howell*, convicted felon's Rule 41(g) motion for the return of firearms used as evidence but never forfeited denied because felon has no right of possession);

- *United States v. Jones*, 2004 WL 2784974, *4 (E.D. La. 2004) (defendant's Rule 41(g) motion for the return of his handgun, which was never forfeited, denied on the ground that defendant is a convicted felon);

- *United States v. Blackshear*, 2002 WL 1765603, *1 (N.D. Ill. 2002) (even if guns were not forfeited, defendant would not be entitled to their return under Rule 41(e) because he is now a convicted felon);

- *United States v. Henderson*, 2002 WL 1611653, *1 (N.D. Ill. 2002) (convicted defendant's Rule 41(e) motion for return of firearms and ammunition denied because he is a convicted felon);

- *Cf. United States v. Cheeseman,* 600 F.3d 270, 274 n.2 (3d Cir. 2010) (holding that firearms were forfeitable under § 924(d) but noting that even if they were not, or if the forfeiture were unconstitutionally excessive, "it is less than certain that" they could be released to defendant's family members, citing *Felici*);

- *But see United States v. Yeley*, 346 F. Supp. 2d 969, 973 (S.D. Ind. 2004) (felon who may not possess a firearm may nevertheless contest its forfeiture and if successful may transfer his ownership to third party);

- *United States v. Parsons*, 472 F. Supp. 2d 1169 (N.D. Iowa 2007) (distinguishing *Felici* and declining to follow *Howell*; person who was not a convicted felon at the time he acquired a firearm, may designate the person to whom the firearm may be returned after he is convicted, if the firearm is not forfeited);

*Henderson* also calls into question the cases holding that if the Government fails to bring a forfeiture action against a firearm, but cannot return it to a convicted felon, it may use the All Writs Act to obtain the court's approval for the firearm's destruction:

— This was a favored way of clearing out the evidence lockers that were filled with un-forfeited firearms

- *United States v. Roberts*, 322 Fed. Appx. 175, 176-77 (3d Cir. 2009) (following *Felici* and *Howell*; affirming order allowing Government to destroy firearms seized from defendant at the time of his arrest once he was convicted of a felony);

- *United States v. Smith*, 142 Fed. Appx. 100, 102 (3d Cir. 2005) (affirming order granting Government's motion to destroy firearms that could not lawfully be returned to a convicted felon);

- *United States v. Miscellaneous Firearms, Silencers and Ammunition,* 2012 WL 3877797, *3 (N.D. Cal. Sept. 6, 2012) (Government may destroy an un-forfeited firearm that cannot be returned to a convicted felon; it need not commence a new forfeiture proceeding or sell the firearm and give the felon the proceeds);

- *In re: Destruction of Firearms and Ammunition*, 2009 WL 2425971 (N.D. Cal. July 1, 2009) (granting motion to destroy firearms and ammunition under the All Writs Act after owner was convicted of a felony);

- *United States v. Szpyt,* 783 F. Supp. 2d 177, 178-79 (D. Me. 2011) (using the All Writs Act to allow the Government to destroy firearms that cannot be forfeited and cannot be returned to a convicted felon, if no one files a claim after the Government has published notice of its intent to destroy the firearms);

- *United States v. Miller,* 2009 WL 1228560, *4 (N.D. Ind. Apr. 28, 2009) (following *Howell*; Government may not be ordered to return firearm to either a convicted felon or his designee, nor may it be ordered to sell the firearm and turn the proceeds over to the felon; Government's motion to destroy the firearm granted under the All Writs Act);

The cases most likely to survive *Henderson* are those holding that although a felon may not possess a firearm he may still own one, and thus has a property interest that may only be extinguished through forfeiture proceedings:

- *Cooper v. City of Greenwood*, 904 F.2d 302, 306 (5th Cir. 1990) (defendant has constitutionally protected property interest that can only be extinguished through formal forfeiture proceedings);

- *United States v. Posey*, 217 F.3d 282, 283-84 (5th Cir. 2000) (following *Cooper*; because the Government did not institute forfeiture proceedings against the property in question or include criminal forfeiture counts in the indictment, there was no basis to grant the Government's post-conviction motion for an order authorizing disposal of the firearms used in the drug trafficking offense for which the defendant was convicted);

- *United States v. Rodriguez,* 2011 WL 5854369, *11 (W.D. Tex. Feb. 18, 2011) (ordering destruction of firearms under the All Writs Act is not a solution if the owner, though now a convicted felon, is asserting his property interest in the firearms; property interests may only be extinguished through forfeiture proceedings);

- *See also United States v. Brown,* 754 F. Supp. 2d 311, 316-17 (D.N.H. 2010) (person who is convicted of a felony is not immediately divested of ownership of his firearm collection, but may transfer title to any person of his choosing);

Some courts have ordered the Government to sell the firearm and pay the proceeds to the convicted felon:

- *Watts v. United States*, 2002 WL 999320, *2-3 (N.D. Tex. 2002) (following *Cooper*; if the Government seizes but does not forfeit handguns, it does not have to return them to the convicted felon, but it may be ordered to pay defendant fair market value of the guns);

- *But see United States v. Rodriguez,* 2011 WL 5854369, *12 (W.D. Tex. Feb. 18, 2011) (declining to follow *Watts*; a court may not order the Government to compensate a property owner without violating sovereign immunity);

The middle ground may be to transfer the firearms to a state court or neutral trustee:

- *United States v. Libretti*, 161 F.3d 18, 1998 WL 644265, *6 (10th Cir. 1998) (Table) (if the district court lacks a basis for the forfeiture of firearms under federal law, it does not necessarily have to release the firearms to the defendant; instead, the court may release the firearms to a state court that has its own forfeiture action underway);

- *United States v. Rodriguez,* 2011 WL 5854369, *15 (W.D. Tex. Feb. 18, 2011) (agreeing with *Cooper* and *Posey* that a convicted felon retains a property interest in his firearm unless it is forfeited; if the firearm cannot be returned, the solution is to order the Government to turn it over to a neutral trustee who may sell it and transfer the proceeds to the felon);

If the firearm has already been destroyed, the defendant has no relief under Rule 41(g):

- *United States v. Smith*, 2007 WL 3475759, *4 (S.D. W.Va. 2007) (denying Rule 41(g) motion for lack of subject matter jurisdiction if the Government has already destroyed firearm by the time defendant files his motion);