CRIMINAL FORFEITURE: CURRENT ISSUES

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INTRODUCTION

This outline covers some of the topics in criminal forfeiture law that have generated a lot of case law in the past year.

- It does not cover every topic in criminal forfeiture law nor even every topic on which there was new case law

- But it does cover the areas where there has been significant litigation and some important developments

- Among other things, it will cover joint and several liability post-*Honeycutt,* forfeiture money judgments and the controversy over whether the Government is entitled to gross proceeds or only net profits, and the procedure to ensuring that a forfeiture order is included in the defendant's sentence.

MONEY JUDGMENTS

The forfeiture order may include a list of specific assets, or it may be a judgment for a sum of money

- *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);

- *United States v. Peithman,* 2017 WL 1682778 (D. Neb. May 1, 2017) ("The term 'money judgment' is a short-hand way of describing the defendant's continuing obligation to forfeit the money derived from or used to commit his criminal

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offense whether he has retained the actual dollars in his possession or not," quoting *Asset Forfeiture Law in the United States* (2d ed. 2013), § 19-4(c)), aff'd, 917 F.3d 635 (8th Cir. 2019);

— In many cases, the forfeiture order will include a combination of specific assets and a money judgment, with the order providing that the value of the specific asset will be credited against the amount of the judgment

- *United States v. Bradley,* 2017 WL 2691535 (M.D. Tenn. Jun. 22, 2017) (when forfeiture order contains both money judgment and specific assets, value of the assets is credited against the money judgment);

Money judgments are usually based on the value of the proceeds that the defendant obtained, but they may also be based on the value of the facilitating property

- *United States v. Ford,* 296 F. Supp.3d 1251 (D. Or. 2017) (defendant convicted of sex trafficking ordered to pay money judgment for value of assets spent to facilitate the offense, including rents on "employee condo," hotel rooms, and money spent recruiting prostitutes);

- *United States v. Peithman,* 2017 WL 1682778, *2 (D. Neb. May 1, 2017) (money judgments are not limited to proceeds but may include the value of facilitating property; citing *Asset Forfeiture Law in the United States* (2d ed. 2013), § 19-4(c)), aff'd, 917 F.3d 635 (8th Cir. 2019);

There is no right to have the jury determine the amount of the money judgment; that is a matter for the court to decide

- *United States v. Ponzo,* 853 F.3d 558 (1st Cir. 2017) (collecting cases and joining all other circuits in holding that there is no right to a jury determination of the amount of the money judgment under Rule 32.2(b)(5));

- *United States v. Warshak*, 631 F.3d 266, 330 (6th Cir. 2010) (noting without discussion that defendant invoked his right to have the jury retained to determine if there was a nexus between the offense and 33 specific assets, but the court held a separate hearing to determine the amount of the money judgment);

- *United States v. Peithman,* 2017 WL 1682778, *3 (D. Neb. May 1, 2017) (although jury was asked to determine the forfeitability of specific assets, it had no role in determining the amount of any money judgment, and its failure to forfeit certain specific assets does not affect the amount of the money judgment), aff'd, 917 F.3d 635 (8th Cir. 2019);

There is so controversy as to whether the court must apply the criteria in § 853(p) before it can enter a money judgment

— See § 853(p) providing that substitute assets may be forfeited only after finding that the directly-forfeitable property is unavailable due to an act or omission of the defendant

- Most courts hold that § 853(p) does not apply to the entry of a money judgment

    - *United States v. Newman*, 659 F.3d 1235, 1242-43 (9th Cir. 2011) (when seeking only a money judgment, the Government does not have to show that the requirements for forfeiting substitute assets in § 853(p) or Rule 32.2(e) are satisfied);

    - *But see United States v. Abdelsalam*, 311 Fed. Appx. 832, 847 (6th Cir. 2009) (because the only way the Government can, in the future, enforce the money judgment is by forfeiting substitute assets, it must show that § 853(p) is satisfied before the money judgment is entered);

- this case may be wrongly decided; the appropriate time to apply § 853(p) would be when the Government moves to forfeit substitute assets pursuant to Rule 32.2(e), not when the court enters a money judgment in the first instance

If the property is forfeitable under multiple theories (e.g. proceeds and money laundering), the court may enter concurrent money judgments to avoid double counting,

- but will still enter the order under both statutes in case one of the underlying convictions is reversed on appeal

    - *United States v. Bikundi,* 926 F.3d 761 (D. C. Cir. 2019) (noting that the district court entered concurrent money judgments to avoid double counting);

    - *United States v. Brown*, 2006 WL 898043, *4 (E.D.N.Y. 2006) (if the defendant is found liable to pay a money judgment under two different theories in the same case, but the judgments relate to the same funds—i.e., the proceeds of a fraud and the property involved in laundering the fraud proceeds—the judgments are concurrent);

    - *United States v. Joseph,* 185 F. Supp.3d 1290 (D. Utah 2016) (noting that the Government requested concurrent money judgments to reflect defendant's convictions for both bank fraud and money laundering);

The Supreme Court's decision in *Honeycutt* applies only to joint and several liability; it said nothing about the court's authority to enter forfeiture orders in the form of a money judgment

- So, the courts have rejected the argument that just as there can be no joint and several liability because nothing in the forfeiture statute refers to joint and several liability, there can be no money judgment because the forfeiture statutes don't expressly authorize money judgments

- *United States v. Nejad,* ___ F.3d ___, 2019 WL 3788254 (9th Cir. Aug. 13, 2019) (nothing in *Honeycutt* overrules prior decisions upholding money judgments; they are necessary to preserve the Government's ability to forfeit substitute assets if it later discovers that the defendant has such property);

- *United States v. Gorski*, 880 F.3d 27 (1st Cir. 2018) (because *Honeycutt* did not address money judgments, lower courts are bound to follow circuit precedent affirming the imposition of forfeiture orders in that form); *United States v. Green,* ___ Fed. Appx. ___, 2019 WL 4663565 (2nd Cir. Sept. 18, 2019) (same);

- *United States v. Elbeblawy*, 899 F.3d 925 (11th Cir. 2018) (nothing in the Supreme Court's decision in *Honeycutt* requires any alteration in the view that *in personam* punishments can take the form of a personal money judgment);

- *United States v. Ford,* 296 F. Supp.3d 1251 (D. Or. 2017) (noting that courts are unanimous in holding "that *in personam* money judgments are proper even where forfeiture statutes do not refer to money judgments," and rejecting argument that *Honeycutt* implicitly limited criminal forfeiture to specific assets; *Honeycutt* merely limits money judgment to proceeds defendant personally obtained); *United States v. Ayala,* 2019 WL 2518122, *5 (D. Or. Jun. 18, 2019) (same; following *Ford*);

- *United States v. Bradley,* 2019 WL 1535368, *8 (M.D. Tenn. Apr. 9, 2019) ("*Honeycutt* simply cannot be construed as negating the by-now universally recognized rule among the federal courts of appeals permitting *in personam* money judgments against criminal defendants");

- *Henry Lo v. United States*, No. 16-8327 (U.S. Oct. 16, 2017) (denying *cert.* in case asking whether *Honeycutt* undermines cases holding that forfeiture orders may take the form of money judgments);

Calculating the amount of the money judgment

There has been a lot of litigation recently regarding the methodology that the district court may use in calculating the amount of the money judgment

— In general, the court may make a fair estimate of the proceeds of the offense by extrapolating from a representative sample (i.e., of money taken from victims in a fraud case, or drug sales in a drug case)

— The courts do not require "mathematical exactitude"

- *United States v. Leyva,* 916 F.3d 14 (D.C. Cir. 2019) (approving calculation of value of cocaine imported from Mexico based on price on Mexican side of border and conservative estimate of number of plane loads and quantity in each plane);

- *United States v. Walters,* 910 F.3d 11 (2nd Cir. 2018) (district court is allowed "broad discretion" in choosing a method for calculating the proceeds the defendant realized from a criminal offense; it is not required to choose the most conservative method that results in the smallest forfeiture; using the closing price at the end of the next

trading day was a reasonable way of calculating defendant's gain from insider trading);

- *United States v. Hoffman,* 901 F.3d 523 (5th Cir. 2018) (because the proper measure of forfeiture is the gain to the defendant, it was not error for the district court to base the forfeiture judgment on the market value, not the face value, of the illegally-obtained property);

- *United States v. Bogdanov*, 863 F.3d 630 (7th Cir. 2017) (to calculate the amount realized from the sale of stolen goods, the Government need not trace all items sold on eBay to stolen property, but may rely on circumstantial evidence and calculation by victim's investigator who applied "reasonable methodology");

- *United States v. Ayika,* 837 F.3d 460 (5th Cir. 2016) (affirming amount of money judgment in a health care fraud case based on accountant's review of representative sample of submitted claims);

- *United States v. Shkreli*, ___ Fed. Appx. ___, 2019 WL 3228933 (2nd Cir. July 18, 2019) (it is not necessary for the Government to present testimony from every victim to prove that all of the money defendant obtained from investors was obtained through fraud; that the fraudulent misrepresentations were routinely made and repeated in false performance reports was sufficient);

- *United States v. Ford,* 296 F. Supp.3d 1251 (D. Or. 2017) ("the calculation of forfeiture does not require mathematical exactitude," and "courts may "make reasonable extrapolations from the evidence;" extrapolating from prostitute's testimony regarding daily earnings to calculate proceeds realized by pimp convicted of sex trafficking);

- *United States v. Harris,* 2018 WL 6184878 (D. Haw. Nov. 27, 2018) (approving calculation of the forfeiture judgment based on a reasonable estimate drawn from evidence in the record; the calculation does not require "mathematical exactitude"; following *Ford*);

- *United States v. Hallinan,* 2018 WL 3141533, *11 (E.D. Pa. Jun. 27, 2018) (accepting Government's extrapolation to determine fraction of defendant's gross proceeds were attributable to the illicit part of his business) aff'd *sub nom. United States v. Neff,* ___ Fed. Appx. ___, 2019 WL 4235218 (3rd Cir. Sep. 6, 2019);

- *United States v. Dillon,* 2017 WL 4870910 (D. Idaho Oct. 27, 2017) (where all of health care provider's billings for a 4-year period were fraudulent, court may use defendant's tax returns to determine gross revenue subject to forfeiture under § 982(a)(7));

- *But see United States v. Kudmani*, 2017 WL 4540967 (W.D. Ky. Oct. 11, 2017) (rejecting Government's request for forfeit of amount derived from uncharged distribution of oxycodone as "overly speculative," and limiting forfeiture to the amounts derived from the counts of conviction);

The proceeds subject to forfeiture include property that is traceable to the proceeds, including the any appreciation in the value of that property

- *United States v. Afriyie*, 929 F.3d 63 (9th Cir. 2019) (defendant convicted of insider trading must forfeit the net profits of his offense, as defined in § 981(a)(2)(B), plus any appreciation in those net profits as property "derived from" the offense, pursuant to § 981(a)(1)(C));

- *United States v. Tartaglione,* 2018 WL 1740532, *28 (E.D. Pa. Apr. 11, 2018) (if renovations paid for with criminal proceeds account for 37 percent of defendant's equity in an asset, she must forfeit 37 of the appreciation of the asset as property traceable to the offense);

- *United States v. Caspersen,* 2017 WL 3671078 (S.D.N.Y. Aug. 25, 2017) (if a defendant takes out a home equity line of credit on the equity in his property, borrows the money and repays the loan with criminal proceeds, the entire property becomes subject to forfeiture as property traceable to the proceeds of the offense);

- *United States v. Harrold*, 2017 WL 2543891, *2 n.2 (D. Minn. Jun. 12, 2017) (following *Hawkey* and rejecting wife's claim that she purchased the forfeited property not with the proceeds of her husband's fraud, but with the appreciation on the value of other property purchased with fraud proceeds);

Substitute assets

The only way to satisfy a money judgment is to forfeit the defendant's other property as substitute assets

— This is a recent change in the law

- *United States v. Fuentes,* 2018 WL 6103028 (M.D. Tenn. Nov. 21, 2018) ("the law is clear that, once a money judgment in the form of a forfeiture order is entered . . . the Government becomes a judgment creditor and may . . . invoke the procedures authorized by the Federal Debt Collection Procedures Act"

- *United States v. Nejad,* 933 F.3d 1162 (9th Cir. 2019) (citing the Government's concession and holding that post-*Honeycutt*, the only way to enforce a forfeiture money judgment is to "return to the district court and establish that the requirements of § 853(p) have been met"), citing *Asset Forfeiture Law in the United States,* § 22-2 at 762-63 for the procedures required by § 853(p));

- *Henry Lo v. United States*, *No. 16-8327 (Brief of the United States in Opposition to Petition for Writ of* Certiorari)**,** filed in the Supreme Court September 2017

The Government may move at any time under Rule 32.2(e) to amend the forfeiture order to include substitute assets

— Or the defendant and the Government may agree on a list of assets that will satisfy the money judgment:

- *United States v. Segal*, ___ F.3d ___, 2019 WL 4399864 (7th Cir. Sep. 16, 2019) (defendant who agreed to the forfeiture of a list of substitute assets to satisfy a $15 million forfeiture money judgment cannot complain that, contrary to his expectation, the substitute assets, when liquidated, were worth more than $15 million);

- *United States v. Segal*, ___ F.3d ___, 2019 WL 4399864 (7th Cir. Sep. 16, 2019) (the court has no obligation to make an independent determination that the assets a defendant agrees to forfeit to satisfy a money judgment are not worth more than the amount of the judgment);

Gross proceeds versus net profits

There has also been a lot of litigation as to whether the Government is entitled to forfeit the gross proceeds of the offense, or is limited to the defendant's net profit

— The majority rule is that proceeds means "gross proceeds":

- *United States v. Beecroft,* 825 F.3d 991 (9th Cir. 2016) (the proceeds of a fraudulently-obtained loan are the amount of the loan, not the loss suffered by the lender);

- *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; following *Simmons*);

- *United States v. Simmons*, 154 F.3d 765, 770-71 (8th Cir. 1998) (collecting cases and holding that "the better view is the one that defines proceeds as the gross receipts of the illegal activity"; forfeiture is intended to punish all those who receive income from illegal activity, not just those whose criminal activity turns a profit);

— And *Honeycutt* does not change this rule:

— Limiting forfeiture for joint and several liability purposes to the amount that the defendant personally obtained does not mean that forfeiture must be limited to "profits"

- *United States v. Ward,* 2017 WL 4051753, *3 (W.D. Mich. Aug. 24, 2017) (nothing in *Honeycutt* requires giving the defendant credit for the costs of running a drug operation; he remains liable for the gross proceeds);

- *But see United States v. Cooper,* 2018 WL 6573454 (D.D.C. Dec. 13, 2018) (defendant who used part of the gross proceeds of a drug sale to pay his supplier is liable to forfeit only the amount he retained; to hold him liable for the

full amount would be the functional equivalent of holding him jointly and severally liable with his supplier, which *Honeycutt* forbids);

When forfeiture is based on § 981(a)(1)(C), however, the court must decide which part of the definition of proceeds in § 981(a)(2) applies;

— *See* 18 U.S.C. § 981(a)(2)(A) (authorizing the forfeiture of gross proceeds where the offense was inherently unlawful); 18 U.S.C. § 981(a)(2)(B) (giving the defendant credit for his "direct costs" if the offense was a lawful act committed in an unlawful manner)

  - *United States v. Percoco*, 2019 WL 1593882, *5 (S.D.N.Y. Apr. 15, 2019) (the general rule is that a defendant must forfeit "gross proceeds" because "the purpose of forfeiture is to disgorge the defendant of all ill-gotten gains;" but § 981(a)(2)(B) provides an exception, allowing an offset for the costs incurred in providing lawful goods and services);

— the courts are split on this issue:

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

- *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*, 886 F.3d 31 (1st Cir. 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. Fujinaga*, 2019 WL 2503939, *5 (D. Nev. Jun. 17, 2019) (holding without discussion that the defendant in an investment fraud scheme must forfeit the gross proceeds of the offense under § 981(a)(1)(C));

- *United States v. Tartaglione*, 2018 WL 1740532, *23 n.29 (E.D. Pa. Apr. 11, 2018) (defendant who defrauds company of which she is president must forfeit gross proceeds under § 981(a)(2)(A)) (collecting cases);

- *United States v. Holden,* 2016 WL 4191046, *2-3 (D. Or. June 30, 2016) (inducing investors to invest in a biodiesel company that manufactured no biofuel was inherently illegal, so § 981(a)(2)(A) applies);

Cases applying the net proceeds definition in § 981(a)(2)(B):

- *United States v. Balsiger,* 910 F.3d 942 (7th Cir. 2018) (fraudulently redeeming manufacturers' coupons that were not used by consumers to purchase goods was a lawful activity committed in an unlawful way, and thus falls within § 981(a)(2)(B));

- *United States v. Shkreli*, ___ Fed. Appx. ___, 2019 WL 3228933 (2nd Cir. July 18, 2019) (hedge fund manager who defrauded investors is entitled to deduct his costs, but the returns paid to defrauded investors are not "costs"; "at the very least, the gains to [Defendant] include the money he caused his investors to invest via fraud");

- *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);

- *See also United States v. Percoco*, 2019 WL 1593882,*3 (S.D.N.Y. Apr. 15, 2019) (decrying the difficulty in applying § 981(a)(2)(A) or (B) and collecting cases distinguishing "inherently unlawful" activity and "lawful activity provided in an unlawful way");

JOINT AND SEVERAL LIABILITY

Prior to 2015, every circuit had held that all of the defendants convicted of a given offense were jointly and severally liable to forfeit the proceeds of that offense, regardless of how much or how little of the money they personally obtained.

— When the D.C. Circuit held that defendants in a drug case were *not* jointly and severally liable, the Supreme Court granted *cert.* in *Honeycutt* to resolve the split in the circuits

In *Honeycutt,* two brothers were convicted of a drug offense and were held jointly and severally liable to forfeit the proceeds under 21 U.S.C. § 853(a)

— But the Supreme Court held that there was nothing in the statute that authorized joint and several liability,

— And that accordingly, each brother was liable to forfeit only the amount of money that he personally obtained

— Because the older brother obtained all of the drug money (paying his younger brother only his salary for working in his shop), the younger brother was not liable to forfeit any part of the drug proceeds.

- *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);

Application of *Honeycutt* to Other Forfeiture Statutes

The decision in *Honeycutt* turned on the language of the forfeiture statute for drug offenses: 21 U.S.C. § 853(a)

- The statute says that a person convicted of a drug violation must forfeit "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as a result of such violation."

- It was the limitation to proceeds that "the person obtained" that was critical to the Court's decision that the statute did not authorize joint and several liability

- The question is whether the bar on joint and several liability applies to other forfeiture statutes that contain different language.

It is now clear that the courts will have to resolve this issue on a statute-by-statute basis

  - *United States v. Chow,* 772 Fed. Appx. 429 (9th Cir. 2019) (*Honeycutt* abrogated prior case law holding that joint and several liability applies in all cases, but it did not hold that joint and several liability is never authorized; rather, courts must examine each forfeiture statute to determine if joint and several liability is authorized);

- So, what have the courts been deciding?

Forfeitures under 18 U.S.C. § 982(a)(2):

In cases where the forfeiture statute contains language substantially similar to the language in § 853(a)(1), the courts hold that *Honeycutt* applies

For example, § 982(a)(2) authorizes the forfeiture of the proceeds of a list of offenses including bank fraud and other crimes "affecting a financial institution"

- Like § 853(a), it provides for the forfeiture of "property constituting, or derived from, proceeds the person obtained, directly or indirectly, as a result of [the offense]"

- So, it is not surprising that the courts have held that there is no joint and several liability in cases where the forfeiture is imposed under that statute

  - *United States v. Chittenden,* 896 F.3d 633 (4th Cir. 2018) (because § 982(a)(2) contains the same language as § 853(a) regarding property that the person "obtained," *Honeycutt* applies equally to forfeitures under that statute);

  - *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,* 714 Fed. Appx. 1173 (3rd Cir. 2018) (same case; different defendant; same holding);

Forfeitures Under § 981(a)(1)(C)

With respect to other statutes, the case is not so clear.

18 U.S.C. § 981(a)(1)(C) is the forfeiture statute for run-of-the-mill mail and wire fraud cases as well as a host of other offenses classified as "specified unlawful activity"

- It provides for the forfeiture of "any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of" any of the listed offenses

- Nothing in the statute limits the forfeiture to the property personally obtained by a given defendant

- Focusing on this critical difference in the statutory language, the Sixth and Eighth Circuits and some district courts have held that *Honeycutt* does not apply to forfeitures under § 981(a)(1)(C) and accordingly, defendants may be held jointly and severally liable regardless of what part of the proceeds they personally obtained.

    - *United States v. Peithman,* 917 F.3d 635, 652 (8th Cir. 2019) (agreeing with *Sexton; Honeycutt* does not apply to forfeitures under § 981(a)(1)(C) because, unlike § 853, the statute does not limit the forfeiture to the value of property that each person obtained; rather, each defendant is liable to forfeit the property traceable to the offense)

    - *United States v. Sexton,* 894 F.3d 787, 798-99 (6th Cir. 2018) (rejecting *Gjeli;* the "linchpin" of the *Honeycutt* decision was the phrase "proceeds the person obtained;" because § 981(a)(1)(C) contains no such limitation, *Honeycutt* does not apply; so, as long as the property is connected to the crime, the defendant can be made to forfeit proceeds obtained by a co-defendant); *United States v. Bates*, ___ Fed. Appx. ___, 2019 WL 3451052 (6th Cir. Jul. 31, 2019) (same; following *Sexton);*

    - *United States v. Shelton*, 336 F. Supp.3d 940 (W.D. Ark. 2018) (following *Sexton* and rejecting *Gjeli*; the difference in the statutory language between § 853(a) and § 981(a)(1)(C) means that *Honeycutt* does not apply to the latter; that § 2461(c) incorporates the procedures in § 853 does not matter because the definition of what is forfeitable is not a procedure);

    - *United States v. McIntosh,* 2017 WL 3396429 (S.D.N.Y. Aug. 8, 2017) (*Honeycutt* was limited to Section 853(a); it does not mention and does not apply to forfeitures under § 981(a)(1)(C) which is not limited by property obtained *by a particular person*);

    - *United States v. Lasher,* 2018 WL 3979596 (S.D.N.Y. Aug. 20, 2018) (following *McIntosh* and holding that until and unless the Second Circuit overrules pre-

Honeycutt precedent applying joint and several liability to § 981(a)(1)(C), lower courts are bound by precedent);

– Other courts have held that the applicability of *Honeycutt* to forfeitures under § 981(a)(1)(C) is an open question, or that it applies only if the Government so concedes

- *United States v. Bikundi,* 926 F.3d 761 (D. C. Cir. 2019) (whether *Honeycutt* applies for forfeitures under the money laundering statute is an open question in the D.C. Circuit);
- *United States v. Carlyle,* 776 Fed. Appx. 565 (11th Cir. 2019) (assuming based on Government's concession that *Honeycutt* applies to § 981(a)(1)(C) but noting the split in the circuits and leaving the issue open);
- *United States v. Reed*, 908 F.3d 102 (5th Cir. 2018) (holding that in light of the Government's concession that *Honeycutt* applies to forfeitures under § 981(a)(1)(C), it is not necessary to "pick a side" in the "burgeoning circuit split" on that issue);
- *United States v. Gil-Guerrero,* 759 Fed. Appx. 12 (2nd Cir. 2018) (finding it unnecessary to resolve the split in the circuits in light of the Government's concession that *Honeycutt* applies to § 981(a)(1)(C));
- *See also United States v. Chittenden,* 896 F.3d 633, 635 n.2 (4th Cir. 2018) (leaving open the possibility that forfeitures under § 981(a)(1)(C) might fall outside of *Honeycutt*, but holding that the Government cannot rely on that statute when there is a more specific statute such as § 982(a)(2) applicable to the offense, as is the case for bank fraud);

– Only the Third Circuit has held that *Honeycutt* applies to forfeitures under § 981(a)(1)(C)

- *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));
- *See also United States v. Vescuso,* ___ Fed. Appx. ___, 2019 WL 3526394 (9th Cir. Aug. 2, 2019) (assuming without discussion that *Honeycutt* applies to forfeiture based on conviction for theft of Government property, and remanding case to the district court);

Forfeiture Under the Money Laundering Statute

The criminal forfeiture statute for money laundering is 18 U.S.C. § 982(a)(1), which provides that the defendant must forfeit "any property, real or personal, involved in" the money laundering offense

- Far from limiting the forfeiture to property that the defendant personally obtained or retained, the statute expressly provides that defendants who "handled but did not retain the property" in the course of the money laundering offense remain liable for the forfeiture of the property that they handled, as long as they laundered more than $100,000 in a 12-month period

    - 18 U.S.C. § 982(b)(2)

Thus, the courts that have considered the issue have held that *Honeycutt* does not apply to forfeitures in money laundering cases

- *United States v. Fujinaga*, 2019 WL 2503939, *5 n.1 (D. Nev. Jun. 17, 2019) (*Honeycutt* does not apply to the forfeiture of the property involved in money laundering under § 982(a)(1));

- *United States v. Alquza,* 2017 WL 4451146 (W.D.N.C. Sept. 20, 2017) (questioning whether *Honeycutt* applies to forfeitures under § 982(a)(1), which authorizes the forfeiture of all property "involved in" a money laundering offense and is not limited to the proceeds obtained by the defendant), aff'd 722 Fed. Appx. 348 (4th Cir. 2018);

- *See also United States v. Bikundi*, 926 F.3d 761 (D. C. Cir. 2019) (whether Honeycutt applies for forfeitures under the money laundering statute is an open question in the D.C. Circuit);

- *United States v. Chow*, 772 Fed. Appx. 429 (9th Cir. 2019) (remanding for the district court to determine in the first instance if Honeycutt applies to RICO and money laundering);

Other Forfeiture Statutes

There is very little case law with respect to the other, less frequently used, criminal forfeiture statutes

The statute for federal health care fraud, Section 982(a)(7), contains no language limiting the forfeiture to property that the defendant personally obtained.

- Rather, it provides that the defendant must forfeit "property, real or personal, that constitutes or is derived, directly or indirectly, from gross proceeds traceable to the commission of the offense"

- Nevertheless, the Fifth and Eleventh Circuits, following the Third Circuit's decision in *Gjeli* with respect to § 981(a)(1)(C), holds that *Honeycutt* applies to § 982(a)(7)

    - *United States v. Sanjar*, 876 F.3d 725 (5th Cir. 2017) (*Honeycutt* applies to

forfeiture of gross proceeds of health care fraud under § 982(a)(7); following *Gjeli*);

- *United States v. Elbeblawy,* 899 F.3d 925 (11th Cir. 2018) (following *Sanjar*, *Honeycutt* applies to forfeitures under § 982(a)(7); that § 982(a)(7) incorporates the procedures in § 853 makes this clear);

- *But see United States v. Bikundi,* 926 F.3d 761 (D. C. Cir. 2019) (whether *Honeycutt* applies to forfeitures under § 982(a)(7) is an open question in the D.C. Circuit);

Finally, the only court to consider whether *Honeycutt* applies to a RICO forfeiture remanded the case to the district court to determine that issue in the first instance.

- *United States v. Chow,* 772 Fed. Appx. 429 (9th Cir. 2019) (remanding for the district court to determine in the first instance if *Honeycutt* applies to RICO and money laundering);

When does the defendant "personally obtain" criminal proceeds?

Finding that *Honeycutt* applies to criminal forfeiture under a given statute doesn't end the inquiry

— The court must still determine what it means to "personally obtain" the criminal proceeds

In *Honeycutt,* the Court held that a minor player in a criminal offense could not be held jointly and severally liable to forfeit proceeds that he did not obtain

— Does that apply equally to the leader of the criminal organization?

— Suppose the defendant, who was the leader of the operation, took all of the proceeds for himself but then parceled out a portion of it to his underlings, or allowed them to retain portions as their share without turning them over to him

— The case law is still developing on that issue, but several courts have held that the leader of the organization, who controls how the proceeds of the crime will be distributed, personally obtains *all of the money* for purposes of *Honeycutt,* even if he does not keep it all for himself

- *United States v. Leyva,* 916 F.3d 14 (D.C. Cir. 2019) (*Honeycutt* did not deal with the leader of an organization and it is "far from clear" that the leader should not be liable to forfeit the proceeds obtained by his organization; it was not plain error for the district court to so hold);

- *United States v. Potts*, 765 Fed. Appx. 638 (3rd Cir. 2019) (distinguishing *Honeycutt*; the leaders of a drug organization "obtain" whatever the organization obtains regardless of how they divide the money among themselves and their subordinates);

- *United States v. Bergstein*, ___ Fed. Appx. ___, 2019 WL 4410240 (2nd Cir. Sep. 16, 2019) (defendant committing investment fraud "personally acquired" the fraud proceeds for purposes of Honeycutt if "at some point" the funds were under his control; forfeiture of $22.6 million affirmed);

- *S.E.C. v. Metter*, 706 Fed. Appx. 699, 702 n.2 (2nd Cir. 2017) (*Honeycutt* is limited to cases involving "incidental figures" whose role in the offense does not justify joint and several liability and does not apply to a person with a controlling interest who determined how the proceeds of the offense were distributed);

- *United States v. Bangiyev*, 359 F. Supp.3d 435 (E.D. Va. 2019) (following *Metter* and *Ward* and limiting *Honeycutt* to cases involving incidental figures who did not personally obtain the criminal proceeds; it does not apply to the leaders who obtained all of the money before distributing it among themselves);

- *United States v. Bradley*, 2019 WL 3934684, *6-9 (M.D. Tenn. Aug. 20, 2019) (for *Honeycutt* purposes, leader of a drug organization obtains all of the proceeds of the organization's wrongdoing, not just the amount that he personally retains, because under the "gross v. net" analysis, the amount the subordinates receive or are allowed to retain are "expenses" defendant is not entitled to deduct);

- *United States v. Masino*, 2019 WL 1045179, *9 (N.D. Fla. Mar. 5, 2019) (*Honeycutt* does not bar holding leaders of illegal gambling operation jointly and severally liable where they acted in concert in running the operation and deciding how to distribute its proceeds);

- *United States v. McFadden*, 2018 WL 8950924, *10 (E.D. Pa. Oct. 26, 2018) (for purposes of *Honeycutt*, the leader of a drug organization "obtains" all of the proceeds of the entire drug operation, directly or indirectly, even if he used intermediaries to distribute the drugs);

- *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);

- *See also United States v. Djibo*, 730 Fed. Appx. 52 (2nd Cir. 2018) (remanding forfeiture order holding ringleader of heroin conspiracy jointly and severally liable for the wholesale value of the drugs seized from his co-conspirators);

Defendants who act in concert:

What about defendants who are equal players in a criminal enterprise, such as partners or a husband and wife who act in concert in carrying out the scheme

– Is it necessary in that case to determine how they divided the proceeds among themselves and to limit to forfeiture to what each personally obtained?

The first case to address that question held that the answer was yes: unless the Government can determine how the defendants divided the spoils among themselves, it can forfeit nothing

- *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);

– Since then, however, other courts have held that defendants who act in concert with each other remain jointly and severally liable for the forfeiture of the proceeds that they jointly obtained

- *S.E.C. v. Amerindo Investment Advisors, Inc.,* 2019 WL 3526590 (S.D.N.Y. Aug. 2, 2019) (even if *Honeycutt* applies to investment fraud cases, defendants who acted jointly in perpetrating the scheme and who jointly obtained the proceeds through a company that they controlled as equal partners remain jointly and severally liable for the forfeiture);

- *United States v. McIntosh*, 2017 WL 3396429 (S.D.N.Y. Aug. 8, 2017) (notwithstanding *Honeycutt*, when defendants act in concert, jointly acquiring proceeds and dividing them among themselves by joint decision, they each remain liable to forfeit the total proceeds; applying Contorinis and holding that it was not overruled by *Honeycutt*);

- *See also 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);

- *United States v. Hoffman*, 901 F.3d 523, 561 n.27 (5th Cir. 2018) (speculating that defendants may not have raised a *Honeycutt* objection to the money judgment in their appeal because they were co-owners of the company that received the illegal proceeds, and thus all "acquired" the money);

- *But see United States v. Peithman*, 917 F.3d 635 (8th Cir. 2019) (Honeycutt does not apply to § 981(a)(1)(C), but in drug cases, it bars joint and several liability even as to two leaders of the offense who are equally culpable);

The D.C. Circuit has taken a middle road on this issue, holding that the court may assume that equal partners divided the proceeds equally, so that each is liable for half of the proceeds

- *United States v. Bikundi,* 926 F.3d 761 (D. C. Cir. 2019) (endorsing district court's decision to hold husband and wife who acted in concert each liable for half of the criminal proceeds; because "equal division of liability between the two masterminds of the conspiracy" is not joint and several liability, it was unnecessary to decide if *Honeycutt* applies in that situation);

OBTAINING A FORFEITURE ORDER: RULE 32.2(B)

The preliminary order of forfeiture

Rule 32.2(b)(1) provides that "as soon as practical after a verdict or finding of guilty, or after a plea guilty . . . is accepted, . . . the court must determine what property is subject to forfeiture . . . ."

Rule 32.2(b)(2)(A) provides that the court must enter a preliminary order of forfeiture "promptly" after making that determination

- and Rule 32.2(b)(2)(B) provides that unless doing so is impractical, the court must do this "sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order become final at sentencing"

  - *United States v. Prejean*, 2006 WL 2414256, *2 (E.D. La. 2006) (if the defendant believes that the order of forfeiture is incorrect or should otherwise be amended, he may ask the court to make the correction before the order becomes final at sentencing);

- Taken together, these rules mean that the Government cannot wait until sentencing to tell the court and the defendant that it wants to forfeit the defendant's property

  - *United States v. Marquez*, 685 F.3d 501, 509 (5th Cir. 2012) (reciting the requirements in Rule 32.2 and holding that they are "not empty formalities" but are mandatory);

- Yet, courts routinely ignore these rules and wait until sentencing to enter a forfeiture order

- What are the consequences?

The court's failure to comply with the procedures in Rule 32.2(b) *prior to sentencing* does not necessarily require reversal of the forfeiture judgment:

- As long as the defendant had notice of that the Government was seeking forfeiture and had a fair opportunity to oppose the forfeiture order, the court's failure to follow the letter of Rule 32.2(b)(2) is not fatal

- *United States v. Bradley,* 897 F.3d 779 (6th Cir. 2018) (agreeing that there were Rule 32.2 irregularities, but holding that "not all coloring outside the lines produces a constitutional violation," and that defendant's due process rights were not violated);

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

- *United States v. Dahda,* 852 F.3d 1282 (10th Cir. 2017) (failure to enter preliminary order of forfeiture prior to sentencing, while plain error, did not affect defendant's substantial rights where defendant was not deprived of opportunity to be heard and did not show that he would have made additional arguments if the preliminary order had been entered; distinguishing *Shakur*);

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

- *United States v. Mandell,* 752 F.3d 544, 553-54 (2d Cir. 2014) (absent defendant's objection or showing that the outcome would have been different if the court had complied with the rule, the trial judge's failure to issue a preliminary order of forfeiture in advance of sentencing per Rule 32.2(b)(2)(B) is not reversible error);

- *United States v. Moreno*, 618 Fed. Appx. 308 (9th Cir. 2015) (district court's failure to issue preliminary order of forfeiture prior to sentencing, while "obvious error," does not require reversal where defendant had actual notice of the forfeiture);

- *United States v. Cereceres,* ___ Fed. Appx. ___, 2019 WL 2453927 (9th Cir. Jun. 12, 2019) (failure to enter a preliminary order of forfeiture prior to sentencing as required by Rule 32.2 is harmless error if the defendant was aware of the Government's request for forfeiture and was given the opportunity to object);

- *United States v. McIntosh,* 2017 WL 3396429 (S.D.N.Y. Aug. 8, 2017) (distinguishing *Shakur, Westmoreland* and other cases where defendant had no notice and no opportunity to oppose the forfeiture order; where court included forfeiture in oral announcement, belated entry of written order did not deprive defendant of his rights; to rule otherwise would perversely prejudice innocent victims for whose protection the forfeiture statutes were enacted);

Sentencing

Failure to have the court enter the forfeiture order *at sentencing*, however, is a much more serious error

Rule 32.2(b)(4) that the forfeiture order becomes final as to the defendant at sentencing, and that it must be included in both the oral announcement of the sentence and in the judgment

- The point is that forfeiture is part of the defendant's sentence, and the defendant is entitled to have all parts of his sentence made clear to him at one time

- If the court enters a forfeiture order at sentencing but merely forgets to include it in the judgment, that may be corrected as a clerical error under Rule 36.

    - Rule 32.2(b)(4)(B) (providing for the correction of the clerical error)

    - *United States v. Scales,* 735 F.3d 1048, 1053-54 (8th Cir. 2013) (because district court entered a preliminary order of forfeiture before sentencing, its failure to include the order in the judgment could be corrected as a clerical error under Rule 32.2(b)(4)(B); distinguishing *Shakur* where there was no preliminary order);

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

- But the court's failure to enter the forfeiture order at sentencing, or to include it in the oral announcement of the sentence, may be fatal

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

    - *United States v. Petix*, 767 Fed. Appx. 119 (2nd Cir. 2019) (failure to include the forfeiture in the oral announcement of the sentence is fatal; because defendant has the right to be informed of all aspects of his sentence at the sentencing hearing where it is announced, earlier references to the forfeiture in the indictment, preliminary order of forfeiture or earlier sentencing hearing did not comport with Rule 32.2(b)(4) despite the "otherwise ensure" language in the rule);

    - *United States v. Ferguson*, 385 Fed. Appx. 518, 530 (6th Cir. 2010) (if the Government completely ignores Rule 32.2(b) and forgets about the forfeiture until the criminal case is over, it cannot salvage the forfeiture by opposing the

defendant's post-trial Rule 41(g) motion for the return of his property, and have the court enter an order of forfeiture at that time);

- *United States v. Bennett*, 423 F.3d 271, 276 (3d Cir. 2005) (the order of forfeiture does not become final as to the defendant and become part of the judgment automatically; the court must comply with Rule 32.2(b)(3); a "final order of forfeiture" that is not entered until after sentencing is a nullity);

- *United States v. Canela*, 2019 WL 2543503 (M.D. Tenn. Jun. 20, 2019) (trial court's failure to include the forfeiture in the oral announcement of the sentence or in the written judgment is fatal and requires that a previously-entered preliminary order of forfeiture be vacated; allowing Government to move to correct the error years after sentencing would be unfair);

- *United States v. Crutcher*, 689 F. Supp. 2d 994, 1003-04 (M.D. Tenn. 2010) (Rule 36 cannot be used to correct the judgment to include a forfeiture order where there was no preliminary order of forfeiture and no jury verdict specifying the property to be forfeited; failure to comply with Rule 32.2(b) at sentencing was fatal);

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

Some courts have been forgiving, allowing a district court to add a forfeiture order to the defendant's sentence days or weeks after sentencing if there was a preliminary order, or if it was apparent to everyone that a forfeiture order was forthcoming

- *United States v. Marquez*, 685 F.3d 501, 509-10 (5th Cir. 2012) (the provisions of Rule 32.2(b) are "not empty formalities;" they are mandatory; but if the defendant does not object, the district court's failure to enter any forfeiture order until three weeks after sentencing or to mention forfeiture in the oral announcement, while "plainly erroneous," does not render the forfeiture void in the absence of showing of prejudice to the defendant);

- *United States v. Martin*, 662 F.3d 301, 307 (4th Cir. 2011) ("missing the deadline set in Rule 32.2 does not deprive a district court of jurisdiction to enter orders of criminal forfeiture so long as the sentencing court makes clear prior to sentencing that it plans to order forfeiture"); *United States v. Chittenden,* 848 F.3d 188 (4th Cir. 2017) (same; following *Martin*);

- *United States v. Marshall*, 872 F.3d 213 (4th Cir. 2017) (applying *Martin* and declining to apply *Shakur*; even if Rule 32.2(b) applied to motion to forfeit substitute asset, Government's failure to comply with the time requirements would not require vacating the forfeiture order were defendant was aware of the Government's intent to forfeit his property);

- *United States v. Arnold,* 2017 WL 187546 (W.D. Okla. Jan. 17, 2017) (court invoked Rule 32.2(b)(2)(C) to delay time for determining amount of money judgment, but even if it had not done so, entering forfeiture order after sentencing would be permissible as long as defendant was on notice; following *Martin*), aff'd *United States v. Arnold,* 878 F.3d 940 (10th Cir. 2017);

- *United States v. Loman,* 2016 WL 1399668, *2 (S.D. Ind. Mar. 18, 2016) (following *Martin*); entering a forfeiture order three years after sentencing was not fatal, where the defendant was on notice of the Government's intent to forfeit his property and did not object until after the forfeiture order was entered);

— Others have forgiven the failure to include the forfeiture in the oral announcement if the record shows that the defendant was "otherwise aware" of the forfeiture

- *United States v. Esquenazi,* 752 F.3d 912, 939 (11th Cir. 2014) (failure to include the forfeiture in the oral announcement of the sentence did not violate Rule 32.2(b)(4) where defense counsel's objection to the amount of the forfeiture indicated that defendant was "otherwise aware" that there would be a forfeiture order);

- *United States v. Cano,* 558 Fed. Appx. 936, 939-40 (11th Cir. 2014) (defendant who signed a consent order of forfeiture was "otherwise aware" of the forfeiture at sentencing, even though the court failed to include it in the oral announcement);

— But as the Sixth Circuit recently held in *Carman,* once the defendant has noticed his appeal, the district court lacks jurisdiction to amend the sentence, even if the defendant was aware that the court was planning to enter a forfeiture order

— That is, if the issue is jurisdictional, it no longer matters whether the error prejudiced the defendant's rights

- *United States v. Carman,* 933 F.3d 614 (6th Cir. 2019) (following *George;* it is not the failure to comply with Rule 32.2 that deprived the court of jurisdiction because those deadlines are not jurisdictional, but once the defendant appealed his conviction and sentence, the court lacked authority to issue the forfeiture order);

- *United States v. George,* 841 F.3d 55 (1st Cir. 2016) (court lacked jurisdiction to enter forfeiture order for the first time after defendant noticed his appeal; that defendant consented to deferring the forfeiture determination did not confer jurisdiction);

In *Carman*, the defendant was convicted by a jury of engaging in a years-long conspiracy to sell untaxed cigarettes "on a massive scale."

— The day after the jury returned its verdict, the district court held a forfeiture hearing and ordered the parties to brief the forfeiture issue.

- They did so, and the issue was fully briefed at the time the defendant was sentenced.

- The court, however, failed to mention the forfeiture at sentencing and failed to enter a forfeiture judgment until four months later when it ordered Defendant to forfeit $17 million and two vehicles.

- By that time, however, Defendant had appealed her conviction and sentence.

The defendant separately appealed the forfeiture order and argued that the forfeiture judgment should be vacated because the district court failed to comply with Rule 32.2(b) in two respects:

- it failed to enter a preliminary order of forfeiture prior to sentencing, and it failed to include the forfeiture in the oral announcement of the sentence.

The panel held that the district court's error in failing to comply with Rule 32.2 was not jurisdictional and thus did not, by itself, deprive the court of jurisdiction to enter the forfeiture order.

- But it held that once Defendant noticed her appeal, the court was deprived of jurisdiction to amend her sentence.

- Thus, the court held that the district court had no authority to enter the forfeiture order and granted Defendant's request to vacate it.

Entering forfeiture order in general terms

How do you comply with the rule if the court is not ready to determine what property is subject to forfeiture (or the amount of the money judgment) at sentencing?

Rule 32.2(b)(2)(C) provides that the court can enter a forfeiture order "in general terms"

- e.g., by ordering the defendant to forfeit "all proceeds" of his offense

- and providing that the order will be amended at a later time pursuant to Rule 32.2(e) once the property has been identified or the amount of the money judgment has been calculated

- having the court do that at sentencing will avoid all problems

- *United States v. Papas,* 715 Fed. Appx. 88 (9th Cir. 2018) (court's entry of forfeiture order in general terms at sentencing, followed by hearing and amendment to include a specific amount was fully in accord with Rule 32.2(b)(2)(C));

- *United States v. George,* 841 F.3d 55 (1st Cir. 2016) (to avoid the fatal error, the court could have included a forfeiture order in general terms in the judgment, and amended it later when it determined the amount of the forfeiture; or it could have asked the court of appeals to stay and remand the appeal so that the court could amend the judgment);

- *United States v. Yutronic,* 544 Fed. Appx. 18, 20 (2nd Cir. 2013) (agreeing that a forfeiture order may be issued in general terms under Rule 32.2(b)(2)(C), but holding that the order must state that it will be amended pursuant to Rule 32.2(e)(1) when the court is able to determine the amount of the money judgment; vacating and remanding to comply with the rule);

- *United States v. Percoco*, 2019 WL 1593882, *2 (S.D.N.Y. Apr. 15, 2019) (noting that the court issued a forfeiture order in general terms under Rule 32.2(b)(2)(C) and delayed determination of the amount of the forfeiture pending briefing on the gross v. net issue);

But you cannot simply ignore the forfeiture until after sentencing and expect to avoid a disaster

Criminal forfeiture is limited to the offense of conviction

The Government may restrain property based on probable cause to believe that the defendant will be convicted of all of the counts in the indictment

— But if he is found guilty on some counts and not guilty on others, the forfeiture will be limited to the counts on which he is found guilty

  - *United States v. Kumar*, 2019 WL 4862969 (E.D.N.C. Oct. 1, 2019) (despite his conviction on several substantive drug and money laundering counts, the defendant's acquittal on the over-arching conspiracy count that would have been the basis for the forfeiture of the lion's share of his property meant that he was entitled to the immediate return of that property unless it was subject to a separate civil forfeiture action);

— The way to avoid this problem is to file a separate civil forfeiture action and stay it pending resolution of the criminal case

— You could also wait until after the criminal case to institute the civil forfeiture, but you would run the risk that the statute of limitations would have run by that time

  - *United States v. $96,100.00 in U.S. Currency*, 2007 WL 701249, *3 (W.D. Tenn. 2007) (that Government diligently pursued criminal forfeiture is not a reason to toll the statute of limitations and allow the Government to file a civil forfeiture

action when defendant dies before his criminal case is final; the Government could have protected itself by filing a parallel civil forfeiture and requesting a stay before the statute of limitations expired, but it chose to gamble that defendant would live long enough for criminal forfeiture to become final, and lost);