CRIMINAL FORFEITURE PROCEDURE

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I. INTRODUCTION

This outline summarizes the key points in criminal forfeiture procedure

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

— it is intended as a basic overview for those less familiar with criminal forfeiture procedure but with an emphasis on the hot topics and recent cases that will be of interest to prosecutors who have done a few forfeiture cases of their own, and perhaps to any forfeiture experts who may have tuned in

— We have only an hour and we want to leave time for questions, so I will limit myself to criminal forfeiture and not talk about civil forfeitures or doing parallel civil and criminal cases

II. WHAT CAN YOU FORFEIT?

Remember that every crime carries with it a different description of the property subject to forfeiture

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

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

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

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

— And for terrorism, you can forfeit everything the defendant owns

But for some crimes, Congress has not enacted any forfeiture provision at all

— There is no common law of forfeiture, so if Congress has not enacted a forfeiture statute for a given crime, you cannot make forfeiture part of your case, even if the defendant would agree to it

  - § 1028A (aggravated identity theft), is an example

— so, the first thing you need to do when drafting an indictment is to make sure that you have included a charge for which forfeiture is authorized

— And that you have checked the statute to see what property is subject to forfeiture

1. Proceeds

For most crimes, you can forfeit the proceeds of the offense, but it's not always easy to find the forfeiture statute

— sometimes the forfeiture provision is part of the statute that sets forth the substantive offense

— for example:

  - computer fraud: 18 U.S.C. § 1030(i) and (j)

  - drug trafficking: 21 U.S.C. § 853(a) is the forfeiture statute for everything in the Controlled Substances Act

— for other crimes, the forfeiture provision is a separate paragraph of the general criminal forfeiture statute

  - health care fraud: 18 U.S.C. § 982(a)(7)

  - telemarketing fraud: § 982(a)(8)

There is also a catch-all forfeiture provision for offenses that don't have their own forfeiture statute

— 18 U.S.C. § 981(a)(1)(C) says that you can forfeit the proceeds of any offense listed in Section 1956(c)(7)

— Section 1956 is the money laundering statute, but this has nothing to do with proving a money laundering case

— the list of 250 crimes is just used as a convenient cross reference

— because mail and wire fraud are money laundering predicates, § 981(a)(1)(C) is where you find the authority to forfeit the proceeds of a mail or wire fraud offense

— there a number of cases explaining how this works:

- *United States v. Capoccia*, 503 F.3d 103, 115-16 (2d Cir. 2007) (explaining how sections 981(a)(1)(C) authorizes the criminal forfeiture of proceeds of any RICO or money laundering predicate, including interstate transport of stolen property (ITSP));

- *United States v. Parrett*, 530 F.3d 422, 425 n.2 (6th Cir. 2008) (following *Capoccia*; criminal forfeiture may be ordered for any offense referenced by § 981(a)(1)(C), including wire fraud and securities fraud);

- *United States v. Harrell,* 2013 WL 525743, *1 (M.D. Fla. Feb. 11, 2013) (explaining why proceeds of bank robbery are subject to criminal forfeiture under §§ 981(a)(1)(C) and 2461(c));

2. Facilitating Property

For some crimes you can also forfeit "facilitating property"

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

— it is even true for some white collar crimes

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

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

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

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

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

— this is a problem Congress has yet to correct

3. Money Laundering and RICO

Because the forfeiture statutes for white collar crimes are generally limited to the proceeds of the offense, you have to look elsewhere to find authority to forfeit other property

— RICO and money laundering are two examples

If you prove the RICO offense, you can still forfeit the proceeds of the offense and the property used to facilitate it

— Proceeds

- *United States v. McKay*, 506 F. Supp. 2d 1206, 1212 (S.D. Fla. 2007) (salary of union official who gained office through ballot tampering is forfeitable as proceeds of the RICO offense), aff'd 285 Fed. Appx. 637 (11th Cir. 2008);

— Facilitating property:

- *United States v. Rudaj*, 2006 WL 1876664, at *3-4 (S.D.N.Y. 2006) (real property where defendants met to conduct the racketeering activity is forfeitable under section 1963(a)(2)(D) as property affording a source of influence over the RICO enterprise);

— you can also forfeit all of the defendant's interests in the RICO enterprise including interests that had no connection with the offense whatsoever (18 U.S.C. § 1963(a)(2)(A)):

- *United States v. Segal*, 495 F.3d 826, 838-39 (7th Cir. 2007) (defendant's entire interest in the enterprise is forfeitable under section 1963(a)(2); jury should never have been asked what portion of defendant's interest was tainted, and its finding that only 60 percent was tainted was properly ignored by the court);

- *United States v. Hosseini*, 504 F. Supp. 2d 376, 381, 382-83 (N.D. Ill. 2007) (following *Segal*; if defendant uses his car dealership to sell cars to drug dealers in violation of RICO; the dealership is forfeitable in its entirety even though defendant also conducted some legitimate business);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Pacific Bank)*, 956 F. Supp. 5, 12 (D.D.C. 1997) (even untainted property received by the enterprise *after* the racketeering activity had ceased is subject to forfeiture under subsection (a)(2)(A) because "*all* of a RICO defendant's interests in an enterprise, including the enterprise itself, are subject to forfeiture in their entirety, regardless of whether some portion of the enterprise is untainted by racketeering activity");

Likewise, if you prove the money laundering offense, you can forfeit "all property involved" in the offense, which again is broader than the proceeds and the facilitating property

— the term "property involved" 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

— So, if you want to maximize the forfeiture potential in your case, charging money laundering or a money laundering conspiracy is often the way to go

- *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);

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 you do forfeiture

III. OVERVIEW OF FORFEITURE PROCEDURE

A. Administrative and Civil Forfeiture

How do you do forfeiture?

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

Administrative forfeiture:

Not every criminal forfeiture case starts out as an administrative forfeiture, but most do

- The agency seizes the property and sends out notice;
- if no one claims the property, it is forfeited by default;
- there is no prosecution; no court or prosecutor gets involved
- in 80 percent of the cases that is what happens: no one files a claim to the property and the property is forfeited by default

Administrative forfeiture is great way to save time and effort

- if a case is being handled administratively – i.e., by default – there may be no need to include the forfeiture in the indictment
- the forfeiture may be complete before you even get to the grand jury
- BUT BE SURE TO CHECK THE STATUS OF ANY ADMINISTRATIVE FORFEITURE BEFORE PROCEEDING WITH FORFEITURE IN A CRIMINAL CASE

Why is that?

Here are the 3 things you need to know about administrative forfeiture:

1) if property involved in your case was seized for administrative forfeiture and someone files a claim, you need to include the property in the indictment or commence a civil forfeiture action within 90 days (unless extended); 18 U.S.C. § 983(a)(3)

- *United States v. Martin,* 662 F.3d 301, 304 (4th Cir. 2011) (when someone files a claim, the Government has 90 days to do one of three things: 1) file a civil forfeiture complaint; 2) include the property in an indictment *and* take steps to maintain custody for criminal forfeiture; or 3) return the property);

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

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

- *United States v. Allen*, 2006 WL 1889978, *4 (M.D. Fla. 2006) (by filing a bill of particulars naming the property as subject to forfeiture in the defendant's criminal case, the Government complied with the deadline for commencing a judicial forfeiture within 90 days of receiving defendant's claim in the administrative forfeiture proceeding);

If you haven't yet indicted, you just include the forfeiture in the indictment within the 90 days or ask for an extension of time

If you indicted the case without including a forfeiture notice, and a claim is filed, you have to supersede or learn how to file a civil forfeiture

— the most common mistake criminal AUSAs make is forgetting to ask the case agent if any property was seized and whether it has been forfeited administratively

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

2) if you included it in the indictment because the administrative forfeiture was not complete, but then no one files a claim, you should move to take the forfeiture out of the indictment to avoid confusion

we don't want the defendant saying, "I didn't contest the administrative forfeiture because I thought the Government had decided to do the forfeiture criminally"

- *United States v. Dunn*, 723 F.3d 919, 931 (8th Cir. 2013) (8th Cir. July 22, 2013) (defendant may move to vacate an administrative forfeiture under Section 983(e) on the ground that the Government's including a forfeiture notice in his criminal indictment led him to believe he did not have to contest the administrative forfeiture);

3) if the property has been forfeited administratively, it belongs to the Government; an AUSA has no authority to agree to return the property to defendant as part of a plea agreement

B. Civil judicial forfeiture

The other way of complying with the 90-day deadline is to file a civil forfeiture case

Civil forfeiture is a specialized area, and you all have a civil forfeiture specialist in your offices who knows how to handle that

— We're not going to talk about civil forfeiture today,

— but understand that if the 90-day clock is running because someone contested an administrative forfeiture, and you're not ready to indict your criminal case, one solution is to file a civil forfeiture action and ask the court to stay it until the criminal case is over; 18 U.S.C. § 981(g)

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

— once you understand that forfeiture is part of the sentence, all the rules, and limitations, and procedures you have to follow in criminal forfeiture case make perfect sense

— for example:

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, the forfeiture is limited to the property connected to the particular crime for which the defendant was convicted

— other countries have a concept called "extended confiscation": once you convict the defendant of a crime, the court can order the forfeiture of property involved in other crimes that the defendant committed

— We don't have that

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

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

- *United States v. Capoccia,* 503 F.3d 103, 110, 114 (2nd Cir. 2007) (notwithstanding prefatory language in the indictment stating that the defendant's acts were part of a larger scheme, defendant who was convicted of an ITSP offense under § 2314 may be made to forfeit only the proceeds of the specific acts alleged in the indictment; if the Government wants to forfeit property involved in other acts that

were part of the scheme (but not alleged because of venue issues) it should have charged a conspiracy or another offense of which a scheme is an element);

— 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. Reed,* 908 F.3d 102, 125-26 (5th Cir. 2018) (defendant convicted of fraud is liable for the proceeds of the entire scheme, including conduct occurring outside of the statute of limitations);

- ***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);

3. Because forfeiture is part of the sentence, the forfeiture issues are handled separately in a bifurcated trial

- *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));

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

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

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

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

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

— we'll come back to the procedure in the forfeiture phase of the trial in a few minutes

4. Because forfeiture is part of the sentence, there is no Sixth Amendment right to have the jury determine the forfeiture,

— and the burden of proof in the forfeiture proceeding is preponderance of the evidence

- ***United States v. Grayson Enterprises, Inc.,* 950 F.3d 386 (7th Cir. 2020)** (the Government's burden to establish the forfeiture of facilitating property under § 982(a)(6) is preponderance of the evidence);

- ***United States v. Tolliver,* 949 F.3d 244 (6th Cir. 2020)** (in a money laundering case, the Government must prove that the property was involved in or traceable to a money laundering offense by a preponderance of the evidence);

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

- ***United States v. Bradley,* 969 F.3d 585 (6th Cir. 2020)** (joining all other courts in holding that *Apprendi* and *Southern Union* do not create a Sixth Amendment right to have the jury determine the amount of a money judgment; they apply only when there is a statutory maximum, which is not the case for criminal forfeiture; collecting cases);

— and hearsay is admissible

- *United States v. Leyva,* 916 F.3d 14 (D.C. Cir. 2019) (affirming district court's reliance on hearsay testimony of cooperating witness to estimate quantity of cocaine defendant conspired to distribute);

- *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);

5. Because forfeiture is part of sentencing, it's an *in personam* punishment

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

-- which means you are not limited, as you are in civil forfeiture cases, to the traceable property

-- to the contrary, you can get a forfeiture order in the form of a money judgment, and you can satisfy the judgment by forfeiting substitute assets

— This is the great advantage of criminal forfeiture

- ***United States v. Channon,* 973 F.3d 1105 (10th Cir. 2020)** ("criminal forfeiture is a sanction against the individual rather than a judgment against the property itself;" so, if the defendant disposes of the proceeds of his crime for less than its market value, he remains liable to forfeit the value of the property when he obtained it);

- ***United States v. Bradley,* 969 F.3d 585 (6th Cir. 2020)** (the *in personam* nature of criminal forfeiture is what makes it possible to hold a defendant liable for a personal money judgment; the "traditional view" that forfeiture "proceeded directly against property" was modified by statutes such as § 853);

- ***United States v. Waked,* 969 F.3d 1156 (11th Cir. 2020)** (applying *Elbeblawy* to forfeiture under the money laundering statute: criminal forfeiture is *in personam*, but the defendant is personally liable for the money he launders because he "clearly has a personal interest in the corpus of funds he laundered" even if the money belongs to a third party);

6. 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

— You don't have to prove the property belonged to the defendant; you only have to prove the nexus to the offense

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

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

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

— So, 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. Grayson Enterprises, Inc.,* 950 F.3d 386 (7th Cir. 2020)** (the court may order the forfeiture of facilitating property based on a showing of a nexus to the criminal offense notwithstanding evidence that the property has been sold to a third party; whether the third party is a bona fide purchaser for value will we sorted in the ancillary proceeding);

- *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. Ramunno,* 599 F.3d 1269, 1273 (11th Cir. 2010) (the court does not consider third party issues in entering the forfeiture order; the purpose of the ancillary proceeding is to exempt the interests of qualifying third parties);

— 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));

— 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. Nolasco*, 354 Fed. Appx. 676, 680 (3d Cir. 2009) (explaining the purpose of the ancillary proceeding: third parties are excluded from the criminal case by § 853(k); thus § 853(n) is their only means of asserting an interest in the forfeited property; if they prevail, the court must exclude the property from the order of forfeiture; proof of ownership "is a complete defense");

- *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);

- ***United States v. Lindberg*, 2020 WL 4518881 (W.D.N.C. Aug. 4, 2020)** (agreeing with defendant that because criminal forfeiture is *in personam* only the interest of the defendant may be forfeited, and that accordingly a bribe payer who did not retain control of the bribe money after the bribe was paid could not be liable for the forfeiture, but finding that defendant did maintain control of the bribe money and therefore was ordered to forfeit it);

— 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

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

— you must get the forfeiture order at sentencing

— This is a major source of errors in criminal forfeiture cases that I will return to later

There are many other consequences of forfeiture's being part of sentencing

— because it is part of sentencing, an order of forfeiture doesn't violate the dual criminality rule for extradition, it doesn't constitute double jeopardy, it cannot be amended more than 7 days after sentencing, it has to be appealed along with the rest of the sentence, and so forth

-- but that's enough to give you the idea.

IV. CRIMINAL PROCEDURE

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

— Criminal AUSAs are always saying the process is too complicated

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

1. Include Forfeiture in the Indictment.

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

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

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

— But be careful to cite and track the language of the right statute

A common mistake is to pick up someone else's indictment and track the forfeiture language in, say, a mail fraud case when you're charging money laundering

— Different statutes have different language, authorizing the forfeiture of different categories of property

— The mistake may not be fatal, but it causes a lot of unnecessary trouble when the defendant argues that he was misled and didn't have notice of what the Government was seeking to forfeit

- ***United States v. Lacerda,* 958 F.3d 196 (3rd Cir. 2020)** (Rule 32.2(a) requires only "a conclusory forfeiture allegation in the indictment that recognizably tracks the language of the applicable criminal forfeiture statute"; incorrect citation to § 982(a)(2) instead of § 982(a)(8) in a telemarketing fraud case did not deprive defendant of his right to notice under Rule 32.2(a)));

- *United States v. Soto,* 915 F.3d 675 (9th Cir. 2019) (incorrect citation to § 981(a)(1)(C) instead of § 924(d) to forfeit ammunition involved in smuggling offense under § 554 did not preclude entry of forfeiture order; following *Silvious*);

If you will be seeking forfeiture in connection with several different crimes in your indictment, you probably want to have separate forfeiture allegations for each one

— In a drug and money laundering case, for example, you'll want one paragraph saying you're seeking the forfeiture of the proceeds and facilitating property in connection with the drug offense

— And another saying you're seeking the forfeiture of all property involved in the money laundering offense

Again, you don't have to itemize the property subject to forfeiture in the indictment

— You can do that later in a bill of particulars

- ***United States v. Carr,* 2020 WL 3964999 (D. Me. Jul. 13, 2020)** (Rule 32.2(a) does not require either that the property subject to forfeiture be itemized or that the defendant's interest in the property be described in the indictment; case law based on pre-2000 version of Rule 7(c) is no longer operative);

- ***United States v. Teyf*, 2020 WL 598660 (E.D.N.C. Feb. 6, 2020)** (rejecting defendant's argument that superseding the indictment to add property to the forfeiture notice is an abuse of the grand jury process);

— The advantage of listing it in the indictment itself, however, is that the grand jury's finding of probable cause can serve as the probable cause for a restraining order

- *Kaley v. United States,* 571 U.S. 320 (2014) (just as it is sufficient to support the issuance of a warrant for the defendant's arrest, the grand jury's finding of probable cause is sufficient to support the restraint of his property);

It is also unnecessary to specify the amount of the money judgment that you're seeking, or even to say that you're seeking a money judgment at all

— It is enough to say that the defendant, upon conviction, will forfeit the proceeds of his offense

- *United States v. Lo*, 839 F.3d 777 (9th Cir. 2016)(Rule 32.2(a) does not require Government to give defendant notice that it will be seeking forfeiture in the form of a money judgment);

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

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

2. Preserve the Property Pending Trial.

Often the property will already be in the Government's possession when the indictment is returned because the case started out as an administrative forfeiture,

— but if not, ask for a pre-trial restraining order under 21 U.S.C. § 853(e) or a seizure warrant under § 853(f)

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

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

The standard for issuing a restraining order is probable cause

- *Kaley v. United States,* 571 U.S. 320, 323-24 (2014) (property may be restrained pre-trial based on a showing of probable cause; there are two parts to the probable cause determination: probable cause to believe the defendant committed the underlying crime, and probable cause to believe the property has the requisite connection to that crime);

— Again, if the property is itemized in the indictment, the grand jury's finding supplies the probable cause

— Otherwise, you will need to attach an agent's probable cause affidavit

Post-restraint hearings

There is no right to a post-restraint probable cause hearing unless the defendant is able to show that he needs the restrained property to hire an attorney

— That is, he has to show that his Sixth Amendment rights are implicated

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

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

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

— but check the law in your circuit, as other circuits have their own variations on the *Jones-Farmer* Rule

- *United States v. Bonventre,* 720 F.3d 126, 131 (2nd Cir. 2013) (adopting the first prong of *Jones-Farmer* but not the second; a defendant is not entitled to a probable cause hearing unless he shows that his Sixth Amendment rights are implicated, but he need not make a formal *prima facie* showing that the initial probable cause finding was erroneous);

Satisfying the *Jones-Farmer* rule only means that the defendant is entitled to a probable cause hearing

— It doesn't mean that the property will be released

— To the contrary, if the Government establishes probable cause at the hearing, the property remains under restraint until the end of the trial

- *Kaley v. United States,* 571 U.S. 320 (2014) (reaffirming *Caplin & Drysdale* and *Monsanto* on this point);
- *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623-35 (1989) (the defendant has no Sixth Amendment right to use property subject to forfeiture to retain counsel);
- *United States v. Monsanto*, 491 U.S. 600, 616 (1989) (rejecting Sixth Amendment challenge to pre-trial restraining order restricting defendant's use of forfeitable property);

Only property traceable to the offense may be restrained

— Substitute assets may not

- *United States v. Chamberlain,* 868 F.3d 290 (4th Cir. 2017) (*en banc*) (joining all other circuits and reversing *In Re Billman*, 915 F.2d 916, 919 (4th Cir. 1990) and all other precedents);

— But you may employ accounting principles such as last in / first out to satisfy the tracing requirement

- *Luis v. United States*, 578 U.S. ___, 136 S. Ct. 1083, 1095 (2016) (Government may rely on accounting rules to establish probable cause for the pre-trial restraint of property, and thereby avoid the Sixth Amendment exception to the pre-trial restraint of substitute assets);

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

Check with your agent about the status of any administrative forfeiture proceeding.

— Remember, if the property has already been forfeited administratively, there is no need to include it in the indictment.

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

- *United States v. Scarmazzo*, 2007 WL 587183, *3 (E.D. Cal. 2007) (neither a seizure warrant nor a restraining order is appropriate when the property is already in

the Government's possession; rather, all that is required is an order issued pursuant to section 853(e) directing the Government to continue to maintain its custody of the property);

- ***United States v. Zazueta-Hernandez,* 2020 WL 5016940 (S.D. Ohio Aug. 25, 2020)** (following *Scarmazzo*; to comply with § 983(a)(3)(B)(ii)(II), the Government need only request a "housekeeping" order; such an order is not a restraining order, as the property is already in the Government's custody; therefore it does not require a finding of probable cause, and the defendant may not use the Government's motion as an opportunity to challenge the initial seizure of the property on that ground);

3. Plea Agreements

The defendant should agree to the forfeiture in the plea agreement, which should be as specific as possible in naming the property.

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

It is good practice to have a Consent Order of Forfeiture with you at the change-of-plea hearing so that the defendant can say on the record that he agrees to it, and the court can enter it right then and there

- *United States v. Lail*, 2012 WL 483827, *2 n.2 (W.D.N.C. Feb. 14, 2012) (characterizing the Government's failure to submit a consent order at the Rule 11 hearing as "an omission and oversight" that caused the court to have to delay the entry of a forfeiture order when a dispute between the Government and the defendant arose at sentencing);

CAUTION: There are several ways to get into trouble with plea agreements

— The plea agreement should set forth the factual basis for the forfeiture

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

- *But see* ***United States v. Cook,* 2020 WL 6797353, *2 (W.D. Va. Nov. 19, 2020)** (under Rule 32.2, the entry of a money judgment may be based on any evidence in the record including defendant's plea agreement; so, defendant's agreement to a forfeiture order stating that he must forfeit $2 million in proceeds from his drug offense was the only factual support the court needed to enter the judgment);

Rule 11 also requires that the defendant be apprized that forfeiture will be part of his sentence when the court is listing the rights that he is waiving and ensuring that the defendant understands his plea

- ***United States v. Gleaton,* 789 Fed. Appx. 376 (4th Cir. 2020)** (court's failure to advise defendant of the possibility of forfeiture during the Rule 11 hearing does not require reversal of conviction absent showing that "but for this minor omission, [Defendant] would not have pleaded guilty");

- ***United States v. Morgovsky,* ___ Fed. Appx. ___, 2020 WL 5640809 (9th Cir. Sep. 22, 2020)** (when court asked defendant if he understood that a consequence of his plea was that his property would be forfeiture, it was merely following Rule 11(b)(1)(J) and not conditioning acceptance of the plea on defendant's agreement to the forfeiture);

Ethical issues:

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

— this creates the appearance of buying a guilty plea, undermines the purpose of forfeiture (to punish the defendant), and is devastating to the morale of the agents who worked hard to locate the property

— moreover, the agreement not to seek forfeiture is *Giglio* material, if the defendant is a cooperator

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

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

— and remember, you *may not* agree to return property that has already been administratively forfeited.

Finally, remember that the defendant must plead to an offense that supports the forfeiture

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

- *United States v. Pollard,* 850 F.3d 1038 (9th Cir. 2017) (defendant's waiver of his right to appeal an illegal sentence is not binding on either the defendant or the

appellate court; thus, a defendant may appeal a forfeiture based on an offense for which there is no statutory forfeiture authority, notwithstanding his agreement to the forfeiture);

- *United States v. Venturella*, 585 F.3d 1013, 1016, 1017 (7th Cir. 2009) (noting that in the Seventh Circuit, a defendant's agreement to a sentence not authorized by law is not binding on the defendant);

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

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

Prosecutors sometimes say, "I don't want the forfeiture to screw up my ability to get a plea"

— I have never had a defendant refuse to plead because I insisted on the forfeiture

— if they resist for a time, it just proves that it's the forfeiture that really hurts

4. Form of the Forfeiture Order / Money Judgments

If you're asking the court to forfeit specific assets, they should be listed in the forfeiture order

— often, however, the defendant no longer has the proceeds of his offense, or any property traceable to it, at the time his is convicted

— he has spent the proceeds of his crime on wine, women and song

— as we mentioned earlier, criminal forfeiture's claim to fame is that when that happens, you can still get an order of forfeiture in the form of a money judgment

- *United States v. Blackman,* 746 F.3d 137, 143 (4th Cir. 2014) (forfeiture is mandatory even if the defendant lacks the present ability to satisfy the judgment; "To conclude otherwise would enable wrongdoers to avoid forfeiture merely by spending their illegitimate gains prior to sentencing"*);*

- ***United States v. Channon,* 973 F.3d 1105 (10th Cir. 2020)** (reaffirming *McGinty*, and holding that money judgments are not limited to cases where the proceeds

consisted solely of money; money judgments may also be imposed where the defendant obtained personal property);

- *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. Waked,* 969 F.3d 1156 (11th Cir. 2020)** (defendant convicted of money laundering is liable for a money judgment equal to the value of the property involved in the money laundering offense; that he did not own the money or retain any for himself is irrelevant except where the "intermediary exception" in § 982(b)(2) applies);

— 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. Waked,* 969 F.3d 1156 (11th Cir. 2020)** (criminal forfeiture is mandatory in a money laundering case under § 982(a)(1); thus, the district court had no discretion to decline to impose a forfeiture order based on equitable considerations, such as the lack of any loss by the victim of the underlying SUA; applying *Monsanto* to money laundering forfeitures and citing *Blackman*);

- *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);

— Typically, the forfeiture order will include a list of specific assets traceable to the crime, and a money judgment for the portion of the proceeds that cannot be located

- ***United States v. Bradley,* 969 F.3d 585 (5th Cir. 2020)** (when forfeiture order contains both money judgment and specific assets, value of the assets is credited against the money judgment);

- ***United States v. Johnson*, 956 F.3d 510, 518 n.5 (8th Cir. 2020)** (ordering forfeiture of $2.1 million as a money judgment with credit for the value of specific assets traceable to the offense to avoid double counting);

- ***United States v. Boutros,* 2020 WL 6683064, *1 (D.D.C. Nov. 12, 2020)** (forfeiture order comprises $500,000 in fraud proceeds seized from defendant at the time of her arrest and $1.6 million money judgment);

— moreover, pursuant to 21 U.S.C. § 853(p), you can satisfy the money judgment by forfeiting substitute assets

— the forfeiture of substitute assets is also 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. Manlapaz,* ___ Fed. Appx. ___, 2020 WL 4815837 (4th Cir. Aug. 19, 2020)** (following *Fleet*; "there are no limits on what property may be substituted for the proceeds" of the defendant's crime);

- *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");

Too often, AUSAs omit forfeiture from the indictment and plea agreement, and fail to get an order of forfeiture, because they think "the defendant doesn't have anything"

— but the ability to get a money judgment and substitute assets means that you can continue to look for forfeitable property long after the case is over

— and the money judgment remains in effect until satisfied

- *United States v. Navarrete,* 667 F.3d 886, 887-88 (7th Cir. 2012) (like a restitution order, a forfeiture order is an *in personam* judgment that remains in effect until satisfied; if defendant earns money after his release from prison, he may be able to pay both debts);

- *United States v. Fogg,* 666 F.3d 13, 19 (1st Cir. 2011) ("a money judgment allows the Government to collect on the forfeiture order 'in the same way that a successful plaintiff collects a money judgment from a civil defendant[,] . . . even if a defendant does not have sufficient funds to cover the forfeiture at the time of conviction, the Government may seize future assets to satisfy the order'" (quoting *United States v. Levesque*, 546 F.3d 78, 85 (1st Cir. 2008)));

- *United States v. Casey*, 444 F.3d 1071, 1074 (9th Cir. 2006) (if the defendant is insolvent at the time of sentencing, the court must impose a money judgment that remains in effect until it is satisfied when the defendant acquires future assets);

— and you can move to amend it at any time to include newly-discovered property or substitute assets

- *see* Rule 32.2(e)

- *United States v. Duboc,* 694 F.3d 1223, 1227-29 (11th Cir. 2012) (Rule 32.2(e) permits the Government to move at any time to amend an order of forfeiture to include additional property; an amendment made 12 years after the entry of the forfeiture order was not barred by the statute of limitations in 19 U.S.C. 1621, which does not apply in criminal cases, by laches, or by any due process argument under *$8850*);

- *United States v. Kilbride*, 2007 WL 2528087, *1 (D. Ariz. 2007) *(*answers the defendant gives in response to questions regarding his finances during a pre-sentence investigation may be used to amend the order of forfeiture to include additional property pursuant to Rule 32.2(e));

So, my advice is to calculate (or estimate) the amount of proceeds, and get the money judgment even if the defendant has no present ability to satisfy it

Joint and Several Liability

The hot issue right now is whether, in multi-defendant cases, the defendants are jointly and severally liable for the amount of the money judgment

— In *Honeycutt,* the Supreme Court said that there is no joint and several liability in for the forfeiture of the proceeds in drug cases

- *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);

— That decision was based, however, on the language of § 853(a)(1), which limits forfeiture to property "obtained by the defendant"

— The circuits are split as to whether *Honeycutt* applies to other forfeiture statutes that are not so limited

- ***United States v. Waked,* 969 F.3d 1156 (11th Cir. 2020)** (forfeitures in money laundering cases are not limited to the property "obtained" by the defendant; therefore, *Honeycutt* does not apply to forfeitures under § 982(a)(1));

- *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), *cert.* denied, 140 S. Ct. 340 (2019);

- *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*, 784 Fed. Appx. 312 (9th Cir. 2019) (same; following *Sexton);*

- ***United States v. Stein,* 964 F.3d 1313 (11th Cir. 2020)** (because of the difference in statutory language, *Honeycutt* does not apply to forfeitures under § 981(a)(1)(C) or 982(a)(1));

- ***United States v. Brown,* 947 F.3d 655 (11th Cir. 2020)** (the difference in language between § 981(a)(1)(C) and § 853 "is fatal" to defendant's argument that *Honeycutt* applies in fraud cases, but holding that "even if we were inclined to apply *Honeycutt* to forfeiture orders authorized by 18 U.S.C. § 981, [Defendant's] argument would still fail" because the district court found that she personally obtained all the proceeds);

- *United States v. Tanner,* 942 F.3d 60 (2nd Cir. 2019) (notwithstanding *Honeycutt,* defendant convicted of money laundering remains liable to forfeit all property involved even though he did not retain it for himself, unless the intermediary exception applies);

- ***United States v. Tartaglione*, 815 Fed. Appx. 648 (3rd Cir. 2020)** (*Honeycutt* does not apply to forfeiture under § 981(a)(1)(C) because, unlike § 853, it contains no language limiting the forfeiture to property the defendant personally obtained);

- *But see 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));

— Most courts, however, avoid having to decide this issue by holding that even if *Honeycutt* applies, a person "obtains" the criminal proceeds if –

1) he was the ringleader of the criminal organization; or

- ***United States v. Cingari*, 952 F.3d 1301 (11th Cir. 2020)** (husband and wife who act jointly in committing an offense and obtain joint ownership of the proceeds may be held jointly and severally liable under *Honeycutt*);

- ***United States v. Channon,* 973 F.3d 1105 (10th Cir. 2020)** (even if *Honeycutt* applies to forfeitures under § 981(a)(1)(C), husband and wife who acted in concert in committing the crime and in enjoying its fruits are jointly and severally liable because each "obtained" all of the proceeds; following *Tanner*);

- *United States v. Tanner,* 942 F.3d 60 (2nd Cir. 2019) (co-conspirators acting in concert remain jointly and severally liable after *Honeycutt* because both "acquired" the money; therefore, bribe payer and bribe recipient are both liable for the amount of the bribe);

- *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);

2) he and his co-defendant(s) acted "in concert" with each other, in committing the crime, receiving the proceeds, and dividing it among themselves

- ***United States v. Bradley,* 969 F.3d 585 (6th Cir. 2020)** (because the ringleader of a drug organization "obtains" all of the proceeds of the conspiracy, the court may hold him liable for the forfeiture of all that the conspiracy obtained without relying on joint and several liability; that he chose to reinvest some of the money in the conspiracy's overhead costs or to spend it "on wine, women, and song" is irrelevant because his is liable to forfeit the gross proceeds not the net profits of the offense; collecting cases);

- ***United States v. Saccoccia,* 955 F.3d 171 (1st Cir. 2020)** (collecting cases and joining all other circuits in holding that *Honeycutt* does not bar holding the person who controlled the proceeds of a criminal enterprise from being held liable for the full proceeds);

- ***United States v. Bane,* 948 F.3d 1290 (11th Cir. 2020)** (mastermind of health care fraud scheme cannot show prejudice from being held jointly and severally liable in violation of *Honeycutt* because he was responsible for the entire proceeds of the fraud);

- *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. Bergstein*, 788 Fed. Appx. 742 (2nd Cir. 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);

- *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);

5. Forfeiture Phase of the Trial

Special Verdict / Jury Instructions

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

— As mentioned earlier, there is no constitutional right to a jury in the forfeiture phase of the trial:

- *Libretti v. United States*, 516 U.S. 29, 49 (1995) ("the nature of criminal forfeiture as an aspect of sentencing compels the conclusion that the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection");

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

- ***United States v. Kumar,* ___ F. Supp.3d ___, 2020 WL 6063930 (E.D.N.C. Oct. 14, 2020)**(Government's agreement that jury could be discharged after it acquitted the defendant of the count on which forfeiture could have been based, only to move for forfeiture under a different theory on the eve of sentencing, deprived defendant of his right to a jury under Rule 32.2(b)(5));

Per Rule 32.2(b)(5), the court must ask the parties, before the jury begins to deliberate, if they will waive the jury or ask that the jury be retained to determine the forfeiture.

— the court's failure to follow Rule 32.2(b)(5) probably does not constitute grounds to vacate the forfeiture judgment:

- *United States v. Fisher*, 943 F.3d 809 (7th Cir. 2019) (if defendant does not object to the entry of the forfeiture order, failure to follow Rule 32.2(b)(5) will be grounds to vacate forfeiture order only if it affected his substantial rights; because the jury that convicted the defendant of being a felon-in-possession could not have failed to find a nexus between the firearm that he possessed and his offense, the violation did not affect his substantial rights);

- *United States v. Valdez,* 726 F.3d 684, 699 (5th Cir. 2013) (while the trial judge's failure to inquire if the defendant wanted the jury retained was clear error, it did not require reversal of the forfeiture order because there is no constitutional right to have the jury determine the forfeiture, there was sufficient factual support for the forfeiture, and defendant made no affirmative request for the jury);

— but some courts are not sure

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

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

If the jury is waived, the court may postpone the forfeiture hearing to a later date, as long as the forfeiture is determined before sentencing.

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

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

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

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

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

- ***United States v. Grayson Enterprises, Inc.*, 950 F.3d 386 (7th Cir. 2020)** (if the guilty verdict at trial necessarily included a finding that the defendant's property was used to facilitate his offense, due process does not require a further hearing; rather, the court may enter a forfeiture order based on the evidence already in the record)

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

- *United States v. Leyva,* 916 F.3d 14 (D.C. Cir. 2019) (affirming district court's reliance on hearsay testimony of cooperating witness to estimate quantity of cocaine defendant conspired to distribute);

— No live hearing on the forfeiture issues is required if neither party requests one

- ***United States v. Morgovsky,* ___ Fed. Appx. ___, 2020 WL 5640809 (9th Cir. Sep. 22, 2020)** (no hearing is required if neither party requests one);

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

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

- ***United States v. Sanders,* 952 F.3d 263, 284 n.28 (5th Cir. 2020)** (noting that the jury was retained to determine the forfeitability of specific assets but had no role in the determination of the amount of the money judgment);

- ***United States v. Williamson,* 2020 WL 6136844, *5 (D. Nev. Oct. 19, 2020)** (there is neither a constitutional nor statutory right to have the jury determine the amount of a money judgment);

6. Including the forfeiture order in the sentence

Rule 32.2 governs what must happen after the return of a guilty verdict to make sure that a forfeiture order is made part of the defendant's sentence

— The majority of errors in the imposition of criminal forfeiture orders arise out of the court's failure to comply with the rule – and the prosecutor's failure to remind the court to do so

The Rule says that forfeiture must be determined as soon as practical after a guilty plea or verdict; the court must enter a preliminary order prior to sentencing; and the forfeiture must be included in the oral announcement of defendant's sentence and in the judgment; Rules 32.2(b)(1), (2) and (4).

- *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);

— The idea is for the court to enter a preliminary order – preliminary as to the defendant – in advance of sentencing so that the defendant is given notice of the forfeiture order and an opportunity to oppose it or suggest changes

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

— This means that the forfeiture hearing and the imposition of the forfeiture order must be imposed no later than when the defendant is sentenced

— The court cannot say, let's put the forfeiture issue off for a few weeks

— Courts do that all the time – with the acquiescence of the AUSA – but it leads to an appeal where the Government survives only if it can show that the defendant's "substantial rights" were not affected because he was aware of the forfeiture at sentencing

— Usually the Government is able to do that, and the forfeiture order survives

- ***United States v. Omigie,* ___ F.3d ___, 2020 WL 5937382 (5th Cir. Oct. 7, 2020)** (applying "plain error:" where the defendant was aware that the Government was seeking forfeiture, and the evidence supporting the forfeiture order was uncontroverted, the district court's failure to enter a preliminary order of forfeiture, to mention forfeiture at sentencing, and to enter the forfeiture under until a week after sentencing, did not affect the defendant's substantial rights);

- ***United States v. Graham,* 820 Fed. Appx. 207 (4th Cir. 2020)** (failure to include the forfeiture in the oral announcement of sentence was plain error but it did not affect defendant's substantial rights where he had notice of the forfeiture before sentencing, and so did not require reversal);

- *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. 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*);

— but there have been some real horror stories where the Government did everything it needed to do to obtain a forfeiture order but the court's failure to follow Rule 32.2 resulted in the forfeiture order being vacated on appeal

- ***United States v. Brooks*, 804 Fed. Appx. 219 (5th Cir. 2020)** (following *Marquez;* district court's failure to include forfeiture in the oral announcement was a legal error requiring that the forfeiture order be vacated; but on remand, the district court may resentence the defendant and include a forfeiture order in compliance with Rule 32.2(b)(4)(B));

- *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. 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. 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);

One way to deal with the requirement that forfeiture determined *at sentencing* if no one is ready to deal with the forfeiture issues at that point is to have the court enter a forfeiture order in general terms -- *e.g.,* "the defendant shall forfeit all proceeds of his offense – and leave the details to a later hearing

— Doing that is expressly authorized by Rule 32.2(b)(2)(C)

- *United States v. Carpenter,* 941 F.3d 1 (1st Cir. 2019) (there is no jurisdictional problem caused by the defendant's noting his appeal if the court enters a forfeiture order in general terms at sentencing, and later, after the defendant has appealed, amends the order to specify the amount of the forfeiture judgment; distinguishing *George*);

- *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. Mincey,* 800 Fed. Appx. 714 (11th Cir. 2020)** (same);

7. Restitution and Forfeiture

Forfeiture and restitution are different concepts:

— forfeiture is based on the gain to the defendant; restitution is based on loss to the victim

- ***United States v. Channon,* 973 F.3d 1105 (10th Cir. 2020) (**forfeiture is a punishment measured by the defendant's gain; restitution is a remedy measured by

the victim's loss; that the amount subject to forfeiture and restitution may be the same in a case involving theft of property from a victim does not mean that there is an improper double recovery when the defendant is ordered to pay both).

— these will not always be the same

- *United States v. Navarrete*, 667 F.3d 886, 889-90 (7th Cir. 2012) (explaining how, in a commercial bribery case, the defendant must forfeit the proceeds of the sales obtained via the bribe, but the victim's loss may be much less, because the victim may have paid the same amount to a competitor but for the bribe, or only slightly more to the defendant).

Restitution and forfeiture are both mandatory:

— as a general rule, the defendant is not entitled to an offset against a restitution order to reflect the amount forfeited, or vice versa

— if a wealthy defendant has enough resources to pay restitution to his victims with his own money, he should do so, and forfeit the proceeds to the Government

— otherwise, if he only paid once, he would suffer no pecuniary penalty for having committed the crime

- ***United States v. Bane,* 948 F.3d 1290 (11th Cir. 2020)** (holding that it is well-established "that the Government may 'double dip' by obtaining the same amount in forfeiture and restitution;" thus, a defendant cannot show he was prejudiced by an invalid forfeiture order if the Government could have taken the same property for restitution);

- *United States v. Blackman,* 746 F.3d 137, 143 (4th Cir. 2014) ("Forfeiture is mandatory even when restitution is also imposed"; a defendant with sufficient resources may be required to satisfy both orders, and the defendant is not entitled to a reduction in the forfeiture to reflect restitution payments to the victims);

If the defendant *does not* have sufficient resources, and there are victims in the case, the victims come first.

— the "restoration policy" allows us to apply forfeited funds to the victims in that case

— to apply the policy, you need to get both a forfeiture order and a restitution order so that you can ask Main Justice to apply the forfeited money to satisfy the restitution order

— this cannot be done without both orders:

— if you have only a forfeiture order, the victims have to petition for the remission of the property, which is a time-consuming process;

— if you have only a restitution order, you cannot use the tools of forfeiture (e.g., seizure and forfeiture of substitute assets) to recover property for restitution.

8. Third Parties

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

— Dealing with third parties in the ancillary proceeding is an entirely separate topic that we could spend another hour on at least, so we will have to leave that to another time.

— The short version of my advice on dealing with third party rights is to give a copy of your order of forfeiture to the paralegals in the Forfeiture Unit to publish and send to potential third party claimants.

— If a claim is filed, they will assist you in responding to the claim in the ancillary proceeding.

CRIMINAL FORFEITURE CHECK LIST

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

1. Include Forfeiture in the Indictment.

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

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

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

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

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

2. Preserve the Property Pending Trial.

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

3. Plea Agreements

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

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

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

4. Consent Order of Forfeiture

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

5. Special Verdict / Jury Instructions

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

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

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

6. Sentencing

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

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

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

7. Third Parties

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

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