Money Laundering and Forfeiture Digest

Summaries and Analyses of Recent Money Laundering and Asset Forfeiture Cases
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Joint and Several Liability - Application of *Honeycutt*

Eighth Circuit reaffirms that Honeycutt *does not apply to forfeitures of fraud proceeds under § 981(a)(1)(C).*

Even if Honeycutt *applied, a defendant "obtains" criminal proceeds when they are deposited into his bank account; whether he later uses the proceeds for his personal benefit or for some other purpose is irrelevant.*

United States v. Asomani, ___ F.4th ___, 2021 WL 3376544 (8th Cir. Aug. 4, 2021).

Eighth Circuit * Defendant was convicted of wire fraud and was ordered -- pursuant to 18 U.S.C. § 981(a)(1)(C) -- to forfeit $381,339 in proceeds that had been deposited into his bank account. He appealed, arguing that the Supreme Court's decision in *Honeycutt* limits forfeiture orders to the amount of money that a defendant personally obtained, and that there was no proof that he had used all of the deposited proceeds for his personal benefit.

The panel began by reaffirming the Eighth Circuit's view that "the reasoning of *Honeycutt* is not applicable to forfeitures under 18 U.S.C. § 981(a)(1)(C)." It then held that even if *Honeycutt* did apply to forfeitures under that statute, it did not apply to the facts of this case.

Honeycutt, the court said, was a case in which the defendant never acquired the criminal proceeds. Here, the proceeds of the wire fraud were deposited into Defendant's bank account. Thus, he "obtained" them. Whether he went on to use part of the money for his personal benefit and part of it for some other purpose "is irrelevant."

So, the forfeiture order was affirmed. *SDC*

Contact: AUSA David Wagner (W.D. Mo.)

Comment: The Eighth Circuit is one of several courts to hold that *Honeycutt* does not apply to forfeitures under 18 U.S.C. § 981(a)(1)(C). *See United States v. Peithman,* 917 F.3d 635, 652 (8th Cir. 2019) (*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). *Accord. United States v. Sexton,* 894 F.3d 787, 798-99 (6th Cir. 2018) (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)).

The court in this case makes a broader point, however. Once the proceeds of a crime are placed within a given defendant's control, he has – for all intents and purposes – "obtained" them. What he does with the money later is irrelevant.

Here, the defendant was arguing that although the proceeds of the crime were deposited into his bank account, he did not use all of the money for his personal benefit; some of it, he said, was used for other things. But the panel's response was, "so what?" All that matters is that when the crime occurred and the proceeds were deposited into the defendant's bank account, he obtained them.

Other *Honeycutt* cases reaching a similar conclusion include the following: *United States v. Mathieu*, ___ Fed. Appx. ___, 2021 WL 1783122 (2nd Cir. May 5, 2021) (doctor who was signatory on bank accounts into which health care fraud proceeds were deposited, and from which they were disbursed, had sufficient "control" over the proceeds to be personally liable for their forfeiture);
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). *SDC*

Joint and Several Liability – Application of *Honeycutt* / Gross vs. Net Proceeds / Substitute Assets

The leader of a criminal enterprise may be held jointly and severally liable with the corporation that he used to commit the scheme for the forfeiture of the proceeds that the corporation obtained.

The employees of a criminal enterprise, however, are only liable to forfeit the portion of the proceeds that they personally obtained.

Accordingly, each employee is liable to forfeit only the fraction of his salary that mirrors the fraction of his employer's revenue that was derived from the criminal activity.

All forfeitures governed by 18 U.S.C. § 982(a)(2) are forfeitures of "gross proceeds" without any deduction for the cost of committing the offense.

A defendant's personal residence may be forfeited as a substitute asset, even though his wife may have an interest in it; because the defendant lacks standing to assert that interest in opposition to the forfeiture, the proper procedure is for the court to forfeit the residence in its entirety, subject to the wife's right to file a claim in the ancillary proceeding if she wishes to assert her interest.

If a criminal and a civil forfeiture statute both apply to the offense of which a defendant is convicted, the court must apply the criminal statute.

United States v. Kim, 2021 WL 3514745 (E.D. Va. Aug. 10, 2021).

E.D. Va. * Defendant, his corporation, and four of his employees were convicted of conspiring to commit mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343, and of conspiring to import merchandise through false statements in violation of 18

U.S.C. §§ 542 and 545. The Government then moved to hold each of the defendants, including the corporation, jointly and severally liable to forfeit the total proceeds of the conspiracy.

The court readily found that Defendant and the corporation were liable to forfeit all $7.5 million in proceeds of the conspiracy to violate Sections 542 and 545. While it was the corporation that obtained the proceeds, Defendant, as the "leader" of the criminal scheme and owner of the corporation, exercised sufficient control over the proceeds to be jointly and severally liable with the corporation for their forfeiture.

Moreover, the court held that because forfeiture for smuggling offenses in violation of Sections 542 and 545 falls within the scope of the criminal forfeiture statute, 18 U.S.C. § 982(a)(2), and because that statute does not authorize any credit against the forfeiture for the costs of committing the offense, Defendant and the corporation were required to forfeit the gross proceeds of the offense, not the net profit.

With respect to the employees, however, the court held that they could not be held jointly and severally liable for the full amount of the forfeiture, but rather could be liable only for the amounts that each personally obtained. As the only benefits that the employees received were their salaries, the court said, each employee would be required to forfeit only the fraction of his salary that was traceable to the scheme.

The court then calculated that because the scheme generated 33.56 percent of the corporation's income, each of the employees would be required to forfeit 33.56 percent of the salary he received during the time he participated in the offense giving rise to the forfeiture.

Next, the court held that Defendant must forfeit a Mercedes automobile that was traceable to the proceeds of the offense, and two parcels of real property as substitute assets. Defendant objected that one of the parcels was his primary residence in which his wife had an interest, but the court held that the proper procedure was to order the forfeiture of the substitute asset as part of Defendant's sentence, subject to the wife's right to file a claim contesting the forfeiture of her interest in the property in the ancillary proceeding.

Finally, the court held that the forfeiture would be based only on the conspiracy to violate Sections 542 and 545, and not on the conspiracy to violate the mail and wire fraud statutes. In the court's view, if a criminal forfeiture statute applies to an offense for which a defendant has been convicted, the forfeiture must be governed by the criminal forfeiture statute and only the criminal forfeiture statute, even if there is a civil forfeiture statute that would apply in the same case through 28 U.S.C. § 2461(c).

Because forfeiture of the proceeds of smuggling violations under Sections 542 and 545 is covered by the criminal forfeiture provisions in Section 982(a)(2), the court said, the forfeiture in this case was governed by Section 982(a)(2) and only Section 982(a)(2), and not by Section 981(a)(1)(C).

The court was aware that Section 981(a)(1)(C) is the *only* forfeiture provision for mail and wire fraud; but it held that because the Government may not rely on that statute when Section 982(a)(2) applies to any part of the defendant's sentence, there could be *no forfeiture* of the proceeds of the mail and wire fraud offenses.

So, the court entered a preliminary order of forfeiture holding Defendant and the corporation liable for the forfeiture of $7.5 million in proceeds, and holding the employees liable for 33.56 percent of their salaries; but it limited the basis for the forfeiture order to Section 982(a)(2) in connection with the

smuggling offense. *SDC*

Contact: AUSA Brian Samuels

Comment: There is a lot going on in this case. First, the court correctly holds that a leader or "mastermind" of a criminal enterprise may be held liable for the proceeds of the entire scheme without limitation to any amounts that he personally retained after parceling out some of the proceeds to underlings. The cases dealing with what I call the "leader-or-mastermind" exception to *Honeycutt* are collected in Section XII.A.10 of the Criminal Forfeiture Case Outline. *See also Asset Forfeiture Law in the United States* (3d ed. 2021) at § 19-5(b).

The court's ruling with respect to the employees is a bit more controversial. To be sure, under *Honeycutt,* employees are liable only for what they personally obtain from the proceeds of a criminal offense. But is the employee's salary – pro-rated to mirror the percentage of his employer's revenue that was generated by the criminal activity – the proper measure of what the employee personally obtained? If, for example, the business that employed the respective defendants could not have existed but for the criminal conduct of the employees, would not the employees' entire salary be subject to forfeiture even if there were a legitimate side to the business?

For other cases on this point, *see United States v. Elbeblawy,* 839 Fed. Appx. 398 (11th Cir. 2021) (defendant who was merely the managing employee of agency that committed Medicare fraud and not the mastermind is liable to forfeit only the salary that he earned); *United States v. Haaris*, 2020 WL 5259927 (S.D.N.Y. Sep. 3, 2020) (doctor-employee of medical clinic to admitted to participating in health care fraud, but who received only a salary, not liable to forfeit any part of the fraud proceeds because he did not personally "acquire" them). *But see United States v. Sanders,* 952 F.3d 263 (5th Cir. 2020) (given the scope of the fraud, the jury could have reasonably found that the business could not have existed but for the fraud, in which case it was proper to order the forfeiture of all of the revenue of the business as proceeds, even if a fraction were derived from legitimate conduct); *United States v. Smith,* 749 F.3d 465, 488-89 (6th Cir. 2014) (if business is so pervaded by fraud that its revenue stream would not have existed but for the fraud, any asset derived from that revenue stream is forfeitable as proceeds).

The court also makes a rather bold ruling in holding that *all forfeitures* under Section 982(a)(2) are forfeitures of gross proceeds without any deduction for the expenses incurred in committing the offense. The deduction for costs, the court reasons, is set forth only in the civil forfeiture statute, 18 U.S.C. § 981(a)(2), and thus only applies to forfeitures governed by Section 981. Some courts, however, that have limited forfeitures to "net proceeds" even in criminal forfeiture cases. *See, e.g., United States v. Genova,* 333 F.3d 750, 761 (7th Cir. 2003) (under Seventh Circuit law, a person paying a kickback to a corrupt public official is entitled to deduct from the forfeiture the amount of the kickback as well as his office overhead expenses).

The court's ruling regarding the forfeiture of the defendant's residence as a substitute asset even though his wife may have an interest in the property is certainly correct. A defendant lacks standing to object to the forfeiture of a substitute asset on the ground that the property belongs to a third party; rather, the court must include the asset in its forfeiture order, and wait until the ancillary proceeding to determine if any third party's interest must be exempted from the forfeiture order – assuming a third party files a claim. *See United States v. Manlapaz,* 825 Fed. Appx. 109 (4th Cir. 2020) (defendant may not object to the forfeiture of substitute assets on the ground that they belong to his

wife).

Finally, there is one part of the opinion that I believe is incorrect. In *United States v. Chittenden,* 896 F.3d 633, 635 n.2 (4th Cir. 2018), the Fourth Circuit held that if two forfeiture statutes – one criminal and one civil – apply to the same offense, the court in a criminal case must apply the criminal statute and not the civil one in determining what property is subject to forfeiture. Thus, in *Chittenden*, the court held that the forfeiture in a bank fraud case was governed by Section 982(a)(2) even though Section 981(a)(1)(C) also authorizes the forfeiture of proceeds of bank fraud. (This mattered because the limitation on joint and several liability in *Honeycutt* clearly applies to forfeitures under § 982(a)(2) but may not apply to forfeitures under § 981(a)(1)(C)).

The court in this case correctly applies *Chittenden* in holding that because Section 982(a)(2) and Section 981(a)(1)(C) both authorize forfeiture in smuggling cases under Sections 542 and 545, it is Section 982(a)(2) and not Section 981(a)(1)(C) that applies *to the forfeiture of the proceeds of the smuggling offenses.* But the Fourth Circuit did not hold – and it would make no sense to hold – that as long as the defendant is convicted of *an offense* to which a criminal forfeiture statute applies, there can be *no forfeiture* of the proceeds of *other offenses* for which the defendant is also convicted, even though the forfeiture for *those* offenses is available only under a civil forfeiture statute.

Here, the court says that because forfeiture for the violations of Sections 542 and 545 is governed by a criminal forfeiture statute, it is the criminal forfeiture statute and only the criminal forfeiture statute that applies to *all aspects* of the defendant's sentence; which means that there can be *no forfeiture* based on the mail and wire fraud violations even though the civil forfeiture statute is the *only forfeiture statute* that applies to the defendants' mail and wire fraud offenses. That is not what *Chittenden* – or any other case – holds. *SDC*

Substitute Assets / Parallel Proceedings

Nothing prevents the Government from pursuing the forfeiture of an asset as directly-forfeitable property in a civil forfeiture case, and then forfeiting the same property as a substitute asset in a criminal case.

Because "any property of the defendant" is forfeitable as a substitute asset, it makes no difference that the property could have been forfeited as directly forfeitable property.

The defendant is responsible for the diminution in value of a forfeitable asset that is due to his neglect; thus, a defendant who has been ordered to forfeit a mansion as property involved in a money laundering offense must forfeit a substitute asset equal to the loss in value of the mansion due to the defendant's neglect.

A defendant who entrusts the criminal proceeds in an investment account to third-party managers is responsible for the disbursement of those funds as an "act or omission of the defendant" as if he had disbursed them himself.

United States v. Lazarenko, 2021 WL 3471172 (N.D. Cal. Aug. 6, 2021).

N.D. Cal. * Defendant, the former Prime Minister of Ukraine, was convicted of laundering millions of dollars in criminal proceeds through investment accounts and other assets in the United States. His sentence included a $22.8 million forfeiture money judgment, most of which remains outstanding.

The Government moved pursuant to Rule 32.2(e) to amend the forfeiture order to

include funds on deposit in Defendant's bank accounts in Guernsey and Liechtenstein ("the foreign accounts") as substitute assets. The total value of the foreign accounts was a little more than $2 million. Therefore, pursuant to 21 U.S.C. § 853(p), the court had to determine whether more than $2 million in directly forfeitable property was unavailable due to an "act or omission of the defendant."

One of the bases for Defendant's money laundering conviction was his deposit of $2.3 million in criminal proceeds into an investment account in Boston. When it was seized by the Government, that account contained less than $300,000. The court reviewed the records of the investment account and found that the "missing" $2.0 million had been commingled with other funds, transferred to third parties, and used for legal fees and other personal expenses. Thus, the court found that at least $2.0 million in directly forfeitable property was unavailable.

Defendant argued that because he had given control over the Boston account to third parties who were the ones who actually disbursed the "missing" funds, the unavailability of those funds was not due to an act *of the defendant* within the meaning of Section 853(p). But the court held that Defendant was responsible for the disbursement of the funds by persons to whom he had given control over them.

Another basis for the money laundering conviction was Defendant's use of criminal proceeds to purchase a $7.9 million mansion in California. Because of Defendant's failure to maintain the property, however, it was in poor condition when seized by the Government, and despite the Marshals Service investment of substantial sums to prepare it for sale, it sold for only $5 million.

One of the grounds for forfeiting substitute assets is that the defendant has caused the directly forfeitable property to be diminished in value. The Government was entitled to recover $7.9 million from the sale of the mansion, the court said, because that was the amount involved in Defendant's money laundering offense. To the extent that the diminution in value of the property was due to Defendant's neglect, he remained responsible for the difference.

It was unnecessary, the court said, to determine the full extent of Defendant's liability for the diminished value of the property because it was only necessary for the Government to show that the value of the unavailable property was greater than the value of the foreign accounts being forfeited as substitute assets. Combined with the $2 million missing from the Boston account, the diminution in the value of the California mansion attributable to Defendant's negligence was more than enough, no matter how it was calculated, to justify the forfeiture of the foreign accounts.

Defendant then raised a series of other objections to the forfeiture of the foreign accounts as substitute assets.

First, he argued that there were other assets – in Antigua and Lithuania – that the Government could have chosen to forfeit instead of the foreign accounts. But the court held that the Government has the right to choose "any property of the defendant" as a substitute asset.

Next, he argued that the Government was judicially estopped from forfeiting the foreign accounts as substitute assets because for 17 years the Government has tried to forfeit those same accounts as directly forfeitable property in a still-pending civil forfeiture case. But the court held that even if the foreign accounts are directly traceable to Defendant's criminal offense (as the Government alleged in the civil case), Section 853(p) "does not preclude courts from ordering the forfeiture of other

tainted property as substitute property." To the contrary, *any* property of the defendant may be forfeited as a substitute asset, including property that could have been forfeited as directly forfeitable property. Thus, the Government's contention in the civil case that the foreign accounts were tainted assets was not inconsistent with the Government's motion to forfeit those accounts as substitute assets. So, the doctrine of judicial estoppel did not apply.

Finally, Defendant argued that it was unfair for the Government to have litigated for 17 years in the civil forfeiture case – and used that case to restrain the foreign accounts – only to abandon the civil case in favor of forfeiting the foreign accounts as substitute assets in the criminal case. In Defendant's view, the Government had "elected its remedy" and was bound to pursue that remedy to the exclusion of all others.

But the court held that the Government is entitled to commence parallel civil and criminal forfeiture actions and to abandon one in favor of the other at any time. The only constraint, the court said, is that the Government may not seek to recover the same property twice.

Because the Government has advised the court that it would dismiss the civil forfeiture action if the foreign accounts are forfeited in the criminal case, the court said, there would be no double recovery.

So, the Government's motion to forfeit the foreign accounts as substitute assets was granted. *SDC*

Contact: Acting U.S. Attorney Stephanie Hinds

Comment: There are many interesting parts to this decision but three stand out. First, the court holds that one of the bases for forfeiting substitute assets is that the defendant, through his act or omission, has caused the directly forfeitable property be "substantially diminished in value." This is not a matter of judicial interpretation; Section 853(p)(1)(D) says exactly that. But almost all cases involving the forfeiture of substitute assets have involved the defendant's dissipation of the proceeds of his offense. This is the rare case where the directly forfeitable property was a tangible asset – a mansion in California – that lost value due to the defendant's neglect. The defendant was responsible for that loss in value, the court says, in the same way that he would be responsible for the unavailability of the proceeds of his offense if he has spent them on wine, women and song.

Second, the court holds unequivocally that property that could have been forfeited directly as tainted assets may be forfeited as substitute assets. Or stated differently, it is no defense to the forfeiture of a substitute asset that the property was in fact directly traceable to the offense.

Other courts have said the same thing, but the view is not unanimous. *See, e.g., United States v. Smith,* 770 F.3d 628, 642 (7th Cir. 2014) (Government may argue that property is directly forfeitable or, in the alternative, that it is a substitute asset, and the court may enter an order forfeiting the property under both theories); *United States v. Saccoccia*, 564 F.3d 502, 506-07 (1st Cir. 2009) (if the Government moves to amend an order of forfeiture to include substitute assets, it does not matter that the property could have been forfeited directly but was not). *But see United States v. Gregoire,* 638 F.3d 962, 972 (8th Cir. 2011) (Government not allowed to forfeit stolen merchandise as substitute assets when the merchandise was recovered and available for forfeiture directly).

I cannot help but note that the defendant in this case criticizes the Government – and

attempts to invoke the doctrine of judicial estoppel – for arguing for 17 years in the parallel civil forfeiture case that the accounts in Guernsey and Liechtenstein were directly forfeitable, while disdaining to point out that for the same 17 years the defendant was arguing that they were *not* directly forfeitable. *See, e.g., United States v. All Assets Held at Bank Julius Baer & Co.,* 2020 WL 1615870 (D.D.C. Apr. 2, 2020)*;* United States v. All Assets Held at Bank Julius, Baer & Co., *2017 WL 65554 (D.D.C. Jan. 6, 2017)*.

Third, the court makes clear that the Government's right to pursue the forfeiture of the same property in parallel civil and forfeiture cases includes the right to base the forfeiture action in each case on a different theory, and to abandon one in favor of the other at any time. *See* Section XXVII of the Criminal Forfeiture Case Outline. *SDC*

Ancillary Proceeding / Substitute Assets

If the value of a substitute asset exceeds the defendant's forfeiture liability, the defendant is entitled to the return of the excess.

But whether the substitute asset will be sufficient to satisfy the forfeiture judgment – and hence whether there will be any excess – depends on whether the asset belongs to the defendant or to a third party.

Thus, before the court can determine whether any portion of the substitute asset can be released, it must first resolve any third-party claims in the ancillary proceeding.

United States v. Vilar, 2021 WL 3193231 (S.D.N.Y. July 28, 2021).

S.D.N.Y. * A court issued a preliminary order of forfeiture forfeiting the funds in a brokerage account as substitute assets. The order specified that the funds would be forfeited only to the extent necessary to satisfy Defendants' outstanding forfeiture money judgment, and that any excess funds would be released. It also specified, however, that the amount of the excess funds would be determined only after any third party claims to the funds in the brokerage account were resolved.

Several third parties did file claims to the forfeited funds and at least one moved for summary judgment. In response, the Government moved to dismiss some or all of the claims. Meanwhile, the trustees managing the brokerage account moved for the release of $2 million as an advance on the excess funds that would were due to be released.

The question before the court was in what order these various motions would be resolved.

Whether there would be any excess funds in the brokerage account beyond what would be needed to satisfy Defendants' forfeiture judgment depended on the extent to which the funds in the account belonged to Defendants or to the third parties who had filed claims in the ancillary proceeding. If, for example, it turned out that the funds belonged mostly to the third parties, there might be insufficient funds belonging to Defendants to satisfy the money judgments, leaving nothing to be released as "excess" funds. Accordingly, the court held that the motion for the release of $2 million in excess funds was premature and would be denied without prejudice.

Regarding the third party claims, the court held that it must first address the Government's motions to dismiss. If the third parties' claims survived those motions, the next step would be to allow the parties to conduct discovery. Only after some discovery had taken place would it be appropri-

ate to address Claimants' motions for summary judgment.

Accordingly, the court denied the motion for summary judgment without prejudice as well. *SDC*

Contact: AUSA Joshua Naftalis

Comment: Substitute assets are subject to forfeiture only to the extent that they are needed to satisfy the defendant's forfeiture liability. In this case, the court recognized that the assets in question likely had a value greater than what was needed to satisfy the defendants' forfeiture judgment, but that would be so only if it turned out that the forfeited funds actually belonged to the defendants.

Ownership issues, of course, are deferred to the ancillary proceeding. *See* Rule 32.2(b). Thus, there was no way to know if the funds being forfeited as substitute assets belonged to the defendants – and thus could be used to satisfy the forfeiture judgment – until any third party claims that were filed in the ancillary proceeding were resolved.

Accordingly, the court correctly held that the first order of business was to address the third party claims – starting with the Government's motions to dismiss those claims, and proceeding through discovery and summary judgment. Only after all of that was resolved could the court or the Government determine whether the substitute assets would be sufficient to satisfy the forfeiture judgment, and if so, to what extent there was any excess to be released. *SDC*

Ancillary Proceeding / Division of Marital Property

When a defendant's interest in property held as tenants by the entireties is forfeited, the tenancy by the entireties is converted to a tenancy in common with the Government and the spouse each holding a one-half interest with reciprocal rights of survivorship.

United States v. Stern, 2021 WL 3474040 (S.D.N.Y. Aug. 5, 2021).

S.D.N.Y. * Defendant was convicted of a money laundering offense and was ordered to forfeit $1.9 million. The court subsequently entered a preliminary order of forfeiture forfeiting Defendant's marital home as a substitute asset.

In the ancillary proceeding, Defendant's wife filed a claim asserting that she retained her interest in the forfeited property, which was a tenancy by the entireties with a right of survivorship. The Government did not dispute that the wife retained an interest, but it argued that going forward, the Government and the wife would hold the property as tenants in common without any right of survivorship.

The court held that when the Government succeeded to Defendant's interest, the tenancy by the entireties – which can only exist between married persons – could not continue, but was converted to a tenancy in common. It also held, however, that the wife's right of survivorship was a property interest held by the wife that could not be forfeited.

Therefore, the court held that the effect of the forfeiture of Defendant's interest was to convert the tenancy by the entireties to a tenancy in common with the Government holding a one-half interest with a right of survivorship tied to the wife's life, and the wife holding a one-half interest tied to Defendant's life. *SDC*

Contact: AUSA Noah Falk

Comment: The effect of the court's ruling is to leave the defendant's wife in possession

of the property with the prospect of obtaining a 100 percent interest at the defendant's death, and leaving the Government with no opportunity to obtain a 100 percent interest unless the wife dies while the defendant is still living. This is obviously not an optimal situation.

Congress addressed this problem in CAFRA by enacting 18 U.S.C. § 983(d)(5), which sets forth three alternative ways in which a court may divide marital property when one spouse is ordered to forfeit his interest and the other spouse is not: The court may sever the property, transfer the property to the Government with a provision that the Government compensate the spouse for her interest, or permit the spouse to retain the property "subject to a lien in favor of the Government to the extent of the forfeitable interest."

Although it does not mention rights of survivorship, the third alternative is arguably what the court chose in this case. Indeed, courts have done something similar pursuant to § 983(d)(5) in civil forfeiture cases. *See United States v. $16,920.00 in U.S. Currency,* 2008 WL 1787072 (W.D.N.C. 2008) (terminating tenancy by the entireties held by convicted drug dealer and his innocent spouse and pursuant to the third alternative in § 983(d)(5), converting the property to a joint tenancy with right of survivorship and giving the Government a lien to that effect); *United States v. 8 Curtis Ave.*, 2003 WL 470579, *1 (D. Mass. 2003) (§ 983(d)(5) evinces Congress's intent to make wrongdoer's interest in jointly held property subject to forfeiture, irrespective of state law; to give effect to the forfeiture, court chooses option C, forfeiting husband's right of survivorship in a tenancy by the entireties and giving the Government a lien to that effect).

The court, however, appears not to have considered the other two alternatives. Whether they are available in criminal forfeiture cases is not entirely clear, but there is some authority suggesting that they are. *See United States v. Alquzah,* 91 F. Supp.3d 818 (W.D.N.C. 2015) (to divide jointly-held property, the court may use § 853(g) to choose from the alternatives in § 983(d)(5); court orders property sold with wife to be paid from proceeds), citing *Asset Forfeiture Law in the United States,* § 24-10). *But see United States v. Coffman,* 2014 WL 6750603, *5 (E.D. Ky. Dec. 1, 2014) (§ 983(d)(5) does not apply in criminal forfeiture cases, and the authority in § 853(g) does not allow the court to encroach on the spouse's undivided interest under state law).

For other criminal cases illustrating how courts have addressed the division of jointly-held property *see* Section XXXIII of the Criminal Forfeiture Case Outline. *SDC*

Jones-Farmer **Rule / Guilty Plea**

District court erred in refusing to grant a defendant a probable cause hearing at which he could have challenged the Government's right to retain possession of funds he needed to retain counsel of his choice in a criminal case.

But when defendant entered a guilty plea, he waived any procedural defects in his case; thus, the district court's error in refusing to grant the probable cause hearing is not a ground on which the defendant could move to withdraw his guilty plea.

United States v. Glover, ___ F.4th ___, 2021 WL 3483282 (4th Cir. Aug. 9, 2021).

Fourth Circuit * Defendant attempted to retain counsel to represent him in a criminal case and had relatives pay the attorney's fee. The attorney, however, believing the money to be drug proceeds, turned the fee

over to the DEA, which seized it for forfeiture. Defendant was given appointed counsel, but he nevertheless asked the court to hold a probable cause hearing to determine if the DEA's seizure of the money he wanted to use to retain his counsel-of-choice was tainted.

The district court refused to hold the hearing and Defendant, still represented by appointed counsel, entered a guilty plea. He subsequently filed a *pro se* motion, however, to withdraw his plea on the ground that in denying him the probable cause hearing, the court denied him his right to use his money to hire an attorney of his own choosing. The district court denied the motion to withdraw and Defendant appealed.

On appeal, the panel held that Defendant was entitled to a pre-trial probable cause hearing regarding the forfeitability of the funds he wanted to use to retain counsel, and that the district court erred in refusing to grant him one. It also held, however, that Defendant's guilty plea – which was freely and voluntarily entered – rendered the issue moot. When a defendant enters a guilty plea, the court said, "he waives all non-jurisdictional defects in the proceeding conducted prior to the entry of the plea."

Accordingly, the court held that the district court's error in refusing to grant Defendant a probable cause hearing was not a proper basis for vacating his guilty plea. *SDC*

Contact: AUSA Ezra Gantt (D.S.C.)

Comment: Under *United States v. Farmer,* 274 F.3d 800 (4th Cir. 2001) – the Fourth Circuit's contribution to the *Jones-Farmer* rule – a defendant who shows that he has no other funds with which to retain counsel of his choice is entitled to a pre-trial hearing at which the Government must demonstrate probable cause to believe that the property it has seized from him is subject to forfeiture. If the Government makes the probable cause showing, the property may remain under the Government's control; but if it cannot make that showing, the defendant is entitled to use the money to retain counsel. *Luis v. United States,* 578 U.S. ___, 136 S. Ct. 1083 (2016) (if the court determines that there is no probable cause to believe the property is directly forfeitable, it must exempt funds needed for reasonable attorney's fees).

Here, it appears that the defendant was able to make the threshold showing – that he had no other funds with which to retain counsel – and that accordingly, he was entitled to a pre-trial probable cause hearing. In this opinion, the Fourth Circuit expressly agrees with the defendant on that point.

The problem for the defendant was that in pleading guilty, he waived the right to object to any procedural defects in his case – including the right to object that in denying him a probable cause hearing under *Farmer*, the court had infringed upon his Sixth Amendment right to counsel of his choice. *SDC*

Forfeiture of Attorney's Fees / Guilty Plea / Conflict of Interest

A plea offer that requires a defendant to stipulate that the funds used to pay his attorney's fees were criminal proceeds, creates a conflict of interest between the defendant and his attorney.

An attorney is unable to advise a defendant to accept a plea offer that is otherwise to his advantage if it requires him to admit that the funds used to pay his legal fee are subject to forfeiture, because the attorney has a pecuniary interest in avoiding the forfeiture of his fee.

The Government cannot eliminate the conflict by agreeing that the attorney is a bona fide purchaser for value, or by offering to strike the stipulation regarding the source of the attorney's fee from the plea offer once it has been made.

United States v. Kim, 2021 WL 3662073 (E.D.N.C. Aug. 10, 2021).

E.D.N.C. * The Government extended a plea offer to Defendant that required him to stipulate that $30,000 withdrawn from his bank account on a particular date constituted the proceeds of his offense. Defense counsel, noting that the $30,000 had been used to pay their legal fees, advised the Government that the proposed plea agreement required Defendant to stipulate that he paid his legal fee with criminal proceeds, subjecting the fee to forfeiture.

In defense counsel's view, this created a conflict of interest because their pecuniary interest in opposing the forfeiture of their legal fees limited their ability to advise Defendant whether to accept a plea offer that might otherwise be favorable to him. Accordingly, counsel moved to be allowed to withdraw from the case.

The Government opposed the motion, arguing that there were multiple reasons why it should be denied.

First, the Government argued that counsel's motion was untimely because counsel had known for months that the Government was seeking the forfeiture of the $30,000 in question. But the court agreed with counsel that the conflict "did not materialize fully" until the Government extended the plea offer, creating a situation where "Defendant's interest became adverse to defense counsel's interest."

The Government also argued that defense counsel could oppose the forfeiture of the $30,000 by asserting the bona fide purchaser defense under 21 U.S.C. § 853(n)(6)(B) in the ancillary proceeding. Counsel, the Government argued, could say that they were unaware at the time they received the fee that it represented criminal proceeds because at that time the Government had not yet named the $30,000 as property subject to forfeiture in the indictment.

The court held, however, that the "possibility that counsel may qualify as bona fide purchasers for value . . . does not eliminate the present conflict of interest," because it is uncertain that counsel would meet their burden of proof in the ancillary proceeding. After all, the court said, there are other ways besides reading the indictment that counsel might have learned that the $30,000 represented criminal proceeds.

Next, the Government offered to stipulate that defense counsel were bona fide purchasers for value, thus eliminating any uncertainty regarding their ability to avoid the forfeiture of their fee. But the court held that this would not be in Defendant's interest: if Defendant stipulated in his guilty plea that the $30,000 was criminal proceeds, and defense counsel prevailed in the ancillary proceeding, the Government would have the right to seek another $30,000 from Defendant as substitute assets, thus increasing Defendant's financial liability beyond what it would be if the fee were forfeited.

The Government then offered to strike the requirement that Defendant agree that the $30,000 was criminal proceeds from the plea agreement, but the court held that this would not eliminate the conflict either. Removing that requirement, the court said, "weakens Defendant's bargaining power because it requires the Government to relinquish one of its desired objectives," reducing his ability to argue for favorable treatment with respect to other aspects of his sentence.

Moreover, the court added, "any request by defense counsel to strike the stipulation from the proposed plea agreement could be perceived as defense counsel advocating on behalf of themselves, rather than their client."

Finally, the Government argued that Defendant could waive the conflict of interest, but the court agreed with counsel that it was doubtful that the conflict was waivable.

So, the court granted counsel's motion to withdraw. *SDC*

Contact: AUSA Murphy Averitt

Comment: When I was an AUSA, a prosecutor would have needed approval from Main Justice to agree not to seek the forfeiture of an attorney's fee that was paid with criminal proceeds. I do not know if that is still a requirement, but if it is, I assume that it would apply to the various offers that were made in an attempt to avoid the conflict of interest in this case. *SDC*

Final Order of Forfeiture / Stay Pending Appeal

Because a forfeiture order is final as to the defendant at sentencing, he has no right to notice of the Government's motion for a final order of forfeiture at the end of the ancillary proceeding, or to challenge the court's jurisdiction to enter it.

Rule 32.2(d), which authorizes the stay of a forfeiture order pending appeal, only applies to the defendant's direct appeal, not to the appeal of the denial of a § 2255 motion.

United States v. Rafiq, 2021 WL 3434989 (N.D. Tex. July 13, 2021).

N.D. Tex. * Defendant appealed the forfeiture order in his criminal case but his appeal was dismissed. He then moved to vacate his sentence under 28 U.S.C. § 2255 and appealed the denial of that motion.

While the latter appeal was pending, the Government moved for and obtained a final order of forfeiture. Defendant, however, challenged the entry of that order on the grounds that he was not given notice of the Government's motion, and that, in any event, the court lacked jurisdiction to enter the final order while Defendant appeal from the Section 2255 motion was pending. He also asked that the forfeiture order be stayed pending that appeal pursuant to Rule 32.2(d).

The court held that because a forfeiture order is final *as to the defendant* at sentencing, the entry of a final order of forfeiture (which typically occurs at the conclusion of the ancillary proceeding when all third party claims have been resolved) has no effect on him. By the time the final order is entered, the defendant's rights in the forfeited property have already been extinguished, and his only his right to challenge the forfeiture order was his direct appeal. Thus, Defendant had no right to receive notice of the Government's motion for a final order, and has no right to question the court's jurisdiction to enter it.

The court also held that Defendant had no right to seek a stay of the final order while his Section 2255 appeal was pending. Rule 32.2(d), the court said, only applies when the forfeiture order is on direct appeal; it does not provide for a stay where a defendant appeals from an order denying a Section 2255 motion.

Finally, the court held that even if Rule 32.2(d) applied, Defendant had not shown a likelihood of success on the merits.

Accordingly, Defendant's challenge to the final order of forfeiture and his request for a stay pending appeal were denied. *SDC*

Contact: AUSA Travis Elder

Comment: For another case discussing the defendant's right to notice of the entry of a final order of forfeiture *see Dillon v. United States,* 2018 WL 3820228 (N.D. Tex. Aug. 9, 2018) (because defendant's interest was extinguished when the preliminary order of forfeiture became final as to him at sentencing, he was not entitled to notice when Government settled third party claim and moved for final order pursuant to Rule 32.2(c)(2)). *SDC*

Money Laundering Conspiracy – Proof of Agreement / Excessive Fines Clause / Forfeiture of Co-Defendant's Interest

Evidence that co-defendants discussed how to distribute the proceeds of their offense is sufficient to support the jury's finding that there was a conspiracy to commit money laundering, even if all of the ensuing financial transactions were conducted by one person.

A co-defendant who is convicted of the offense giving rise to the forfeiture cannot object to the forfeiture of her interest in property derived from the proceeds of the offense on the ground that she acquired the property from her co-defendant as a bona fide purchaser for value without knowing that it was subject to forfeiture.

Forfeiture of property with a value of less than the maximum fine for the offense giving rise to the forfeiture is presumptively constitutional; because the maximum fine for money laundering is twice the value of the property laundered, a money judgment for the amount of money laundered is not excessive.

United States v. Masino, ___ Fed. Appx. ___, 2021 WL 3235301 (11th Cir. July 30, 2021).

Eleventh Circuit * Defendant was convicted of conspiring with her husband to run an illegal gambling operation in violation of 18 U.S.C. § 1955, and of conspiring to launder the proceeds of that offense in violation of 18 U.S.C. §§ 1957 and 1956(h). She was ordered to forfeit her interest in parcels of real property traceable to the offense and to pay a $5.8 million forfeiture money judgment. On appeal, she contested both the money laundering conspiracy conviction and the forfeiture order.

With respect to the money laundering conspiracy, the Government's theory was that Defendant and her husband conspired to violate Section 1957 when they agreed to deposit checks derived from their gambling business into accounts at banks and other financial institutions. Defendant responded that a conspiracy requires an agreement between two people, and because her husband handled all transactions involving the proceeds of the gambling business, there was no conspiracy to launder the money.

The court held, however, that Defendant was "not a passive bystander." Rather, emails between Defendant and her husband showed that they discussed how the proceeds from the gambling business would be distributed. Accordingly, the court held that there was sufficient evidence of an agreement to support the jury's verdict on the conspiracy count.

With respect to the forfeiture, Defendant objected to the forfeiture of her interest in several parcels of real property on the ground that she acquired that interest – presumably from her husband – before she became involved in the gambling business, and that accordingly she should be viewed as a bona fide purchaser for value who was unaware that the property was subject to forfeiture at the time she acquired it. *See* 21 U.S.C. § 853(n)(6)(B).

The court held, however, that the bona fide purchaser defense in Section 853(n)(6)(B) applies to *third parties* who acquire an interest in the property from the defendant, not to co-defendants who are also convicted of the same offense. Because Defendant herself was convicted of the offenses giving rise to the forfeiture, the court said, and because the district court found that the property was traceable to the illegal gambling business, Defendant had no right to contest the forfeiture of her interest in the property regardless of what she knew about the gambling business at the time she acquired it.

Finally, Defendant objected to the forfeiture of the real property and the $5.8 money judgment on the ground that the forfeiture would be grossly disproportionate to the gravity of her offense, in violation of the Excessive Fines Clause of the Eighth Amendment. But the court reiterated the Eleventh Circuit's rule that "if the value of the forfeited property is within the range of fines authorized by Congress and the U.S. Sentencing Commission, a strong presumption arises that the forfeiture is constitutional." It then held that given that the maximum fine for money laundering is twice the value of the property laundered, and that Defendant had laundered over $8 million in gambling proceeds, the forfeitures imposed by the district court were not outside the bounds of what would constitute an appropriate forfeiture order.

So, the money laundering convictions and forfeiture order were all affirmed. *SDC*

Contact: AUSAs Alicia Forbes and Robert Davies (N.D. Fla.)

Comment: There are three interesting issues in this case. The first, dealing with when there is sufficient evidence of a conspiracy to commit money laundering, comes up again in the next case summary and in the Comment that follows. *See also* the cases collected in Section XX.D of the Money Laundering Case Outline on this issue.

The second concerns whether a co-defendant who is convicted of the offense giving rise to the forfeiture of a particular asset can nevertheless oppose the forfeiture on the ground that the asset belongs to her, not to a co-defendant who was convicted of the same offense. At one time, this was a recurring issue in criminal forfeiture cases. But following the amendments to Rule 32.2 that were made more than a decade ago, the Government no longer has to prove which co-defendant was the owner of the property, and conversely, it is not a defense for one co-defendant to argue that the property "belonged to me, not to him." Stated simply, if the property is forfeited because it was derived from or used to commit an offense on which two defendants were convicted, it is subject to forfeiture regardless of which defendant owns the property.

This issue and its history are discussed in detail in Section 23-13(c) of *Asset Forfeiture Law in the United States,* the third edition of which will be published later this summer.

The defendant's argument in this case was a little different – and a bit more creative – then the argument that is usually made in such cases. In the typical case, Defendant A is convicted of a drug offense and of using a car as facilitating property, and is ordered to forfeit the car. Then Defendant B, who has been convicted of the same offense, says, "the car belongs to me, and I therefore can file a claim contesting its forfeiture in the ancillary proceeding."

Here the co-defendant was not trying to file a claim in the ancillary proceeding, but she was attempting to use Section 853(n)(6)(B) – the BFP defense that is available to third parties in the ancillary proceeding – as a reason why her interest in the asset derived

from the gambling offense should not be forfeited in the first place. Even if the asset was acquired by her husband with criminal proceeds, she argued, she had acquired it *from him* as a bona fide purchaser for value before she knew that it was criminally derived. But the court held correctly that once she was convicted of the offense giving rise to the forfeiture, it no longer mattered who owned the property or how she acquired it. As a convicted defendant, she simply had no right to oppose the forfeiture of the property once the district court found that it was derived from her offense.

Finally, the decision on the Eighth Amendment issue is one of many holding that the forfeiture of the amount of money laundered in a money laundering case cannot be constitutionally excessive because the maximum fine for money laundering is twice the value of the property laundered. *See* Section VII of the Excessive Fines Case Outline. *SDC*

Money Laundering Conspiracy / Promotion Money Laundering

Participants in a money laundering conspiracy do not need to have actual knowledge of the details of the conspiracy.

Shoplifters who sold stolen goods to their fence could reasonably infer that he used the proceeds of selling those goods on eBay to buy more stolen goods from them, and thus could be participants in the conspiracy to commit promotional money laundering, even though they did not know the details of Defendant's financial transactions.

United States v. Vladimirov, 2021 WL 3130875 (S.D.W.Va. July 23, 2021).

S.D.W.Va. * Defendant purchased stolen goods from professional shoplifters, sold the items on eBay for less than their wholesale value, and used the money to buy more stolen goods. He was convicted by a jury of conspiring with the shoplifters to commit promotional money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and (h), but moved for a judgment of acquittal.

The Government's theory was that Defendant's use of the proceeds of the sale of the stolen goods to buy more stolen goods from the shoplifters constituted promotional money laundering, and that Defendant and the shoplifters conspired to commit that offense. Defendant argued, however, that because the shoplifters were unaware of his financial transactions after he purchased the stolen goods from them, they could not have known that he was using criminal proceeds to pay them for the stolen goods, and thus could not have been part of a conspiracy to commit promotional money laundering.

The court held that for purposes of a money laundering conspiracy, it is not necessary to show that each of the conspirators was aware of the details of the conspiracy. Rather, in this case it was sufficient to show that the shoplifters knew that Defendant was buying stolen goods from them for approximately 30 – 40 percent of their resale value on eBay, and that Defendant then sold the goods on eBay before buying more stolen goods from them.

From this, a reasonable jury could infer that Defendant used the money that he obtained by selling the stolen goods to purchase the additional stolen goods from the shoplifters, and that the shoplifters "understood that their stolen goods were purchased, at least in part, with the proceeds derived from the previous sale of stolen

goods" – which would constitute a promotional money laundering offense.

Thus, the court held that there was sufficient evidence to find that Defendant and the shoplifters conspired to commit promotional money laundering and denied Defendant's request for a judgment of acquittal. *SDC*

Contact: AUSA Andrew Tessman

Comment: Using the proceeds of selling stolen goods to buy more stolen goods is a promotional money laundering offense. The defendant's argument in this case was that there was no *conspiracy* to commit that offense because the shoplifters with whom he allegedly conspired did not know where the money that the defendant used to buy the stolen goods from them came from. If they did not know he was using the proceeds of the sale of the stolen goods on eBay to pay them, the defendant reasoned, they could not have conspired to commit promotional money laundering. Or stated differently, if the defendant was the only one who knew that he was using criminal proceeds to pay for the additional stolen goods, there could be no conspiracy to commit promotional money laundering.

The court held, however, that the shoplifters and the defendant played "defined roles" in the scheme, and that as long as it was reasonable for the shoplifters to infer that the defendant was using the proceeds of selling the stolen goods to pay them for the additional stolen goods, a jury could find that there was a conspiracy between defendant and the shoplifters to commit promotional money laundering. *SDC*

Promotional Money Laundering / Proof on Intent to Promote

Defendant's offer to put undercover agents in touch with international drug traffickers was sufficient to show that when he accepted "sting" money from them, he did so with the intent to promote drug trafficking.

United States v. Yang, ___ Fed. Appx. ___, 2021 WL 3177691 (2nd Cir. July 29, 2021).

Second Circuit * Defendant pled guilty to laundering "sting" money with the intent to promote a drug trafficking offense, in violation of 18 U.S.C. § 1956(a)(3)(A). He appealed, arguing that notwithstanding his guilty plea, there was insufficient evidence that he intended to commit promotional money laundering. All he intended to do, he said, was to conceal what he thought was drug money.

The panel acknowledged that the offense to which Defendant pled guilty requires proof of an intent to promote a specified unlawful activity. Concealment – as Defendant argued – is not an element of the offense. Nevertheless, the record contained sufficient evidence of Defendant's intent.

Specifically, according to the Government's proffer at the change-of-plea hearing, Defendant "held himself out as someone who had contact to international narcotics . . . traffickers," and offered to put the undercover agents in touch with them "if they needed assistance having drugs moved."

So, the court held that there was a sufficient factual basis for the guilty plea and affirmed the conviction. *SDC*

Contact: AUSA Jon Rebold (S.D.N.Y.)

Transactional Money Laundering / Section 1957 / Motion to Dismiss

Section 1957 does not require proof of the defendant's motive for conducting a financial transaction; it is sufficient to show that the defendant conducted the transaction knowing that it involved more than $10,000 in criminal proceeds.

United States v. Sterling, 2021 WL 3271596 (M.D. La. July 29, 2021).

M.D. La. * One of the counts in a multi-count indictment alleged that Defendant violated 18 U.S.C. § 1957 when he withdrew $256,000 in fraud proceeds from his checking account. Defendant moved to strike that count, arguing that he withdrew the money only because he received a letter from his bank informing him that he account was being closed, and that he needed to withdraw the money. He supported his motion with a letter from the bank to that effect.

The court agreed with the Government that a defendant's motive for conducting a financial transaction has no bearing on his culpability under Section 1957: the statute only requires proof that the defendant conducted a transaction knowing that it involved more than $10,000 in criminal proceeds. Thus, it agreed that there was no defect in the indictment that would warrant dismissing the Section 1957 count from the indictment.

It held, however, that Defendant was free to raise his reason for conducting the transaction as a defense at trial. *SDC*

Contact: AUSA Brady Casey

Comment: The court is correct that a conviction under Section 1957 does not require proof that the defendant acted with any particular motive or intent: it is sufficient to show that he conducted a transaction knowing that it involved more than $10,000 in criminal proceeds. So, what is it that the court is suggesting that the defendant could raise as a defense at trial? Presumably, he will argue that his withdrawal of the money from his checking account was involuntary, as in "the bank made me do it."

Whether that is a valid legal defense or, more likely, an appeal to jury nullification, remains to be seen. *SDC*

Money Laundering / Expert Testimony / Knowledge

Defendant's belief that he was laundering the proceeds of some form of criminal activity was all that was required to establish the mens rea *element of the money laundering offense.*

That defendant was ignorant or mistaken as to the actual criminal source of the money was irrelevant.

United States v. Conkright, ___ Fed. Appx. ___, 2021 WL 3520604 (11th Cir. Aug. 11, 2021).

Eleventh Circuit * A school district contracted with a construction company to build a new elementary school. A group of co-conspirators impersonated an employee of the construction company, and induced the school district to send them $2 million, ostensibly in payment for the construction work.

When the school district sent the money, it was deposited into Defendant's bank account, where he used it to purchase luxury items and to make disbursements to the co-conspirators. He was convicted of money laundering and appealed.

Defendant's argument on appeal was that he lacked the *mens rea* to commit a money laundering offense. He testified at

trial that he was in an online relationship with a woman named Lola, who told him that she was an heiress and was expecting a large inheritance. He explained that he thought that the money coming into his account was Lola's inheritance, and agreed to move the money for her so that they might be married. He also acknowledged, however, that he had sent text messages to Lola telling her that he thought he was committing money laundering, and would "do jail time."

In the course of the trial, the district court declined to allow Defendant to call an expert witness who would have told the jury that Defendant's "mental health challenges" made him "more susceptible to being manipulated into participating in conspiracies." He argued on appeal that the district court's refusal to permit the expert testimony deprived him of his Sixth Amendment right to present evidence in support of his defense.

The court held that even if the district court erred in not admitting the expert testimony, the error did not affect Defendant's substantial rights. Defendant, the court said, admitted at trial that he believed he was engaged in money laundering, and the jury was entitled to infer the *mens rea* elements of his offense from that testimony. Thus, the expert testimony regarding Defendant's susceptibility to believing the story about Lola's inheritance would not have changed the outcome of the case.

So, the money laundering conviction was affirmed. *SDC*

Contact: AUSA Shannon Darsch (S.D. Fla.)

Comment: The panel in this case did not explain its reasoning in detail, but the most likely explanation for its conclusion is this: Defendant admitted that he thought he was committing money laundering; thus, the jury was entitled to infer that he thought he was conducting transactions involving the proceeds of some form of unlawful activity. That he thought the money was part of a scam involving Lola and her false claim of being an heiress, and did not know that the money came from the theft of funds from the school district, was irrelevant.

As Section 1956(c)(1) provides, it is only necessary for the Government to prove that the defendant knew that the money involved in the money laundering offense was the proceeds of "some form of unlawful activity;" it is not necessary to show that he knew precisely what form of unlawful activity generated the money; and indeed, a defendant's mistake in that regard is not a defense. *See, e.g., United States v. Marzano,* 160 F.3d 399, 400 (7th Cir. 1998) (if defendant thought he was laundering drug money, the fact that he actually laundered embezzlement proceeds would not be a defense).

Accordingly, because the defendant's admissions at trial were sufficient to establish the elements of money laundering, the exclusion of the expert testimony explaining the defendant's vulnerability to participating in conspiracies did not affect the outcome of the case. *SDC*

Money Laundering / Revocation of Citizenship

Court orders the revocation of the naturalized citizenship of a pharmacist convicted of laundering the proceeds of federal health care fraud.

United States v. Lopez, 2021 WL 3552347 (S.D. Fla. Aug. 5, 2021).

S.D. Fla. * Defendant, a pharmacist and naturalized U.S. citizen, submitted millions of dollars in false claims for durable medical equipment to the Medicare program, and pled guilty to conspiring to launder the proceeds.

The Government subsequently filed a complaint under 8 U.S.C. § 1451(a) to revoke Defendant's citizenship on the ground that she had been convicted of a crime of moral turpitude, *viz.,* the money laundering offense.

Defendant did not dispute the conviction, but argued that her money laundering offense did not occur within the statutory period in which the requirement of "good moral character" applies. The court held, however, that the statutory period – which runs from 5 years before the date of a person's naturalization application through the date she became a naturalized citizen – included at least one money laundering offense in furtherance of the money laundering conspiracy, to wit: the purchase of a Mercedes-Benz automobile with fraud proceeds in violation of 18 U.S.C. § 1957.

Accordingly, the court held that the Government had met its burden under the denaturalization statute and entered judgment for the Government. *SDC*

Contact: AUSA Alicia Welch

Claim and Answer / Excusable Neglect / Contents of the Claim

Court declines to dismiss a claim filed six days after the filing deadline, finding that the covid pandemic's effect on claimant's counsel's staff constituted excusable neglect.

But the court holds that a claim containing only a bald assertion of ownership does not comply with the pleading requirement in Rule G(5)(a), and gives claimant 14 days to file an amended claim.

United States v. $153,115.00 U.S. Currency, 2021 WL 3507894 (W.D.N.Y. Aug. 10, 2021).

W.D.N.Y. * The Government filed a civil forfeiture complaint under 21 U.S.C. § 881(a)(6) alleging that $153,115 found in a vehicle during the execution of a search warrant was drug proceeds. Claimant, who was represented by counsel, filed a claim six days after the filing deadline. The claim stated only that Claimant was the owner of the currency, and that as such he had a right to make a claim.

The Government moved to strike the claim as untimely and for failure to comply with the pleading requirements in Rule G(5)(a).

The court agreed that the claim was untimely but held that the delay was due to excusable neglect – counsel asserted that the covid pandemic had "adversely impacted" his office staff – was not the result of any bad faith, and was short enough not to have prejudiced the Government. So, the court declined to strike the claim on that ground.

The court held, however, that the bald assertion of ownership set forth in the claim was insufficient to comply with the pleading requirements in Rule G(5)(a). A claimant, the court said, must expound on the nature of his interest in the defendant property and cannot merely assert that, "it is mine."

So, the court granted the motion to dismiss but gave Claimant 14 days to file an amended claim. *SDC*

Contact: AUSA Mary Clare Kane

Comment: There is a division among the courts as the amount of detail that a claimant must set forth in a claim to satisfy Rule G(5)(a). Unlike its criminal forfeiture counterpart, 21 U.S.C. § 853(n)(3), which requires claimants to state the "nature and extent" of their interest in the property subject to forfeiture and the "time and circumstances" of their acquisition of that interest,

Rule G(5)(a) requires only that the claim identify the claimant and state his interest in the property. Exactly what that means is unclear.

Many courts, like this one, hold that a bald assertion of ownership is insufficient to state a claim under Rule G(5)(a), and that the claimant must include some detail regarding the nature of his interest in the property and how he acquired it in his claim. *See, e.g., United States v. $140,200.00 in U.S. Currency*, 2016 WL 2986232, *2 (N.D. Ala. May 18, 2016) (applying *Iqbal* and *Twombly* to Rule G(5)(a): claimant "must expound on the nature of his or her interest in the subject property with some specificity rather than summarily declaring 'It's mine'"); *United States v. $39,557.00, More or Less, in U.S. Currency,* 683 F. Supp.2d 335, 339 40 (D.N.J. 2010) (bald assertion of ownership is not sufficient to comply with Rule G(5); claimant who was passenger in vehicle where currency was found under the seats, and who initially denied any knowledge of it, must explain how he obtained the currency and what it was doing there).

Other courts hold that a bald assertion of ownership is all that the rule requires. *See, e.g., United States v. $579,475.00 in U.S. Currency,* 917 F.3d 1047 (8th Cir. 2019) (*en banc*) (Rule G(5)(a) establishes "only a bare-bones pleading requirement; a claim that the claimant is the owner of the property is sufficient; to weed out unsubstantiated claims, the Government must use special interrogatories); *United States v. $31,000 in U.S Currency,* 872 F.3d 342 (6th Cir. 2017) (following *$196,969.00*; if Congress wants to create a heighten pleading requirement it may do so, but the current text of "Rule G(5) "requires claimants to do no more than identify themselves and state their interest in the property subject to forfeiture"). The next case summary is an example of this opposing view.

The cases going both ways are collected in Section VIII.M.5 of the Civil Forfeiture Case Outline. *See also Asset Forfeiture Law in the United States* (3rd ed. 2021), § 7-13(d).
SDC

Claim and Answer / Excusable Neglect / Contents of the Claim

A bald assertion of ownership is all that Rule G(5)(a) requires; if the Government wants more detail regarding the origin of the defendant property, it must serve the claimant with special interrogatories.

United States v. $60,028.00, More or Less, in U.S. Currency, 2021 WL 3179301 (S.D. Ala. Jul. 26, 2021).

S.D. Ala. * The Government filed a civil forfeiture complaint against a sum of money and sent Claimant notice of the procedure for filing a claim and answer. Claimant responded by filing an answer, but failed to file a verified claim. When the Government reminded Claimant's counsel of the need to file such a claim and set a deadline for doing so, counsel missed the deadline and then filed a claim stating only that Claimant was the owner of the money and that it was "derived from [Claimant's] lawful business interests."

The Government moved to dismiss the claim both because it was untimely and because Claimant's bald assertion of ownership did not comply with the pleading requirements in Rule G(5)(a). In the Government's view, Claimant was required to support his claim of ownership with additional details, including the name of the legitimate business from which the funds were derived, an explanation of how the business obtained those funds, and the dates when they were obtained.

The court held that the Government offered no authority to support its argument

that Rule G(5)(a) requires anything more than a bald assertion of ownership. If the Government wanted Claimant to provide the details that it found lacking in the claim, the court said, its remedy was to serve Claimant with special interrogatories pursuant to Rule G(6). But the Government did not do so.

Accordingly, the court held that only ground the Government had for moving to dismiss the claim was that it was untimely.

On that issue, the court held that while counsel's failure to follow the "clearly established, two-step procedure for asserting a claim" in a civil forfeiture case was not "commendable," the Government could show no prejudice resulting from the delay in filing a verified claim. To the contrary, Claimant's answer, which was filed within the filing deadline, put the Government on notice of Claimant's interest in the property.

Given the absence of any prejudice, the court concluded, the Government "could have accepted the late filing of the claim as just one of those imperfect things that happen in litigation and moved on." As it was, the court held that it was appropriate to exercise its discretion in favor of extending the deadline, and denied the Government's motion to dismiss. *SDC*

Contact: AUSA Gina Vann

Comment: As noted in the previous case summary, there is a split of authority as to whether Rule G(5)(a) requires more than a bald assertion of ownership in the defendant property in a civil forfeiture case, with a substantial body of case law on both sides. In this case, the court criticizes the Government for not citing any of the case law on its side of the issue. "It is not the responsibility of the court to discover authority supporting a party's *ipse dixit,"* the court said, "and the plaintiff's failure to offer such authority thus requires rejection of its position." As mentioned, the cases going both ways on this issue are collected in Section VIII.M.5 of the Civil Forfeiture Case Outline and in *Asset Forfeiture Law in the United States* (3rd ed. 2021), §7-13(d). *SDC*

Search and Seizure / Currency Seized During Highway Stop

A passenger in a rental vehicle cannot object to a search of the vehicle on expectation of privacy grounds, but he does have standing to object to a seizure that results from the unreasonable extension of a traffic stop, because in that case, the passenger's own Fourth Amendment rights are affected.

United States v. $110,000.00 in U.S. Currency, 2021 WL 3516716 (D. Neb. July 26, 2021).

D. Neb. * A police officer stopped a rental vehicle traveling westbound on I-80 in Nebraska for a traffic violation. After engaging the driver and his passenger (Claimant) in conversation and doing a record check, the officer called for a drug dog and detained the occupants for 29 minutes until the dog arrived. When the dog alerted to the vehicle, the officer conducted a search and found $100,000 in currency in a concealed compartment and another $10,000 bundled in rubber bands in Claimant's backpack.

Claimant filed a claim contesting the forfeiture of the currency and moved to suppress the evidence pursuant to Rule G(8)(a). Among other things, he argued that the officer had impermissibly extended the traffic stop to await the arrival of the drug dog, and lacked probable cause to search the vehicle even after the dog alerted. The Government countered that Claimant, as the passenger in a rental vehicle that he was not authorized to drive, lacked standing to contest the legality of the seizure.

It is true, the court said, that a mere passenger generally does not have standing to contest the legality of the search of a vehicle because he does not have an expectation of privacy in the vehicle's contents. That is particularly true in the case of a rental vehicle where there is no indication that the passenger was permitted to drive the vehicle or exercised any possessory control over it.

Thus, the court said, Claimant did not have standing to contest the seizure on expectation of privacy grounds.

On the other hand, a passenger does have standing to contest a seizure that was the result of an unreasonable extension of a traffic stop because in that event it was the passenger himself who was unreasonably detained. Thus, the case turned on whether the police officer had "reasonable suspicion" – the standard from *Terry v. Ohio* – that the driver and Claimant were engaged in criminal activity that was sufficient to justify the 29-minute delay in awaiting the arrival of the drug dog.

The court held that the following factors *inter alia* justified the delay: Claimant and the driver gave inconsistent versions of their travel plans; traveling 1700 miles from Chicago to Las Vegas in a car rented for only 4 days made little economic sense; the driver did not know Claimant's last name; and Claimant had 24 prior arrests for drug and weapons violations.

So, the court held that the police officer had acted reasonably in extending the traffic stop and denied the motion to suppress. *SDC*

Contact: AUSA Amy Blackburn

Comment: It is now well-established that a police officer may extend a traffic stop long enough to accommodate the arrival of a drug dog only if he has reasonable suspicion that the occupants of the vehicle are engaged in criminal activity. *See Rodriguez v. United States,* 575 U.S. 348 (2015) (absent reasonable suspicion, police may not extend a traffic stop even for seven or eight minutes to conduct a dog sniff; there is no *de minimis* exception to *Terry v. Ohio*), and cases collected in Section II.D.2 of the Civil Forfeiture Case Outline. In this case, the court found that the circumstances were sufficient to satisfy the reasonable suspicion standard.

The more interesting question concerned the passenger's standing to object to the search of the rental car.

In *Byrd v. United States*, ___ U.S. ___, 138 S. Ct. 1518 (2018), the Supreme Court held that a person in lawful possession and control of a rental car has an expectation of privacy even if he is not listed as an authorized driver. But the court in this case makes a distinction between the person in "lawful possession" and a mere passenger who was not in control of the vehicle when it was stopped. Accordingly, the court held that the passenger could not object to the search of the vehicle on "expectation of privacy" grounds.

Nevertheless, the court found that the passenger did have the right to object to the search on the ground that an unreasonable extension of a traffic stop violates the Fourth Amendment rights of all occupants of a vehicle, and that accordingly any of the occupants would have standing to object to a seizure that resulted from the extension of the stop. *SDC*

Discovery / **Foreign Claimants**

Court dismisses claim filed by foreign claimants who refused to appear for their deposi-

tions even after the court granted their request to allow the depositions to be taken in their country.

United States v. The Proceeds from the Sale of a Condominium, 2021 WL 3573057 (C.D. Cal. Jul. 27, 2021).

C.D. Cal. * The Government filed a civil forfeiture action against funds that were collected by a Philippines citizen through bribes, kickbacks, and embezzlement, and that were then laundered by him in the United States. Several individual and corporate Claimants – all Philippines citizens – filed claims contesting the forfeiture.

The Government noticed Claimants' depositions in California, but the court granted Claimants' motion for a protective order allowing the depositions to take place in the Philippines. Thereafter, the Government made an MLAT request to the Philippines Government to allow the depositions to be taken at the U.S. Embassy in the Philippines. Claimants opposed the request, but the Philippines Government granted it.

Claimants nevertheless refused to appear for the depositions, noting that a Philippines court had issued an injunction barring them from doing so. The injunction was requested by a relative of Claimants, and they did not oppose it.

Ultimately, the Government moved to dismiss Claimants' claim for failing to participate in discovery. Noting that Claimants' refusal to appear for their depositions had made it impossible for the Government to proceed with the case, and that Claimants' excuse – the Philippines injunction – appeared to have been Claimants' own doing, the court held that it would grant the motion to dismiss unless Claimants appeared for their depositions within 30 days. *SDC*

Contact: MLARS Attorney Michael Khoo

Comment: Other cases involving foreign claimants who declined to enter the United States for purposes of a deposition are collected in Section X.B.6 of the Civil Forfeiture Case Outline. *SDC*

Motion for Summary Judgment / Innocent Owner Defense

A mere nominee who has title to a vehicle but did not exercise dominion and control over it cannot satisfy the ownership prong of the innocent owner defense.

A claimant's assertion that he had no personal knowledge of the illegal use of his property is not sufficient to create a triable issue of fact in opposition to a motion for summary judgment where the claim is not credible.

United States v. 2009 Acura TL, 2021 WL 3415180 (E.D. Va. July 19, 2021).

E.D. Va. * The Government filed a civil forfeiture action against a vehicle that was used by a leader of the MS-13 gang – a drug trafficking organization – to distribute illegal drugs in Virginia. Claimant, the drug dealer's brother-in-law who lived in New York, was the titled owner of the vehicle and filed a claim asserting the innocent owner defense under 18 U.S.C. § 983(d)(2).

After some initial skirmishing in which the court denied the Government's motion to dismiss for lack of standing (because the assertion of being the titled owner of the vehicle was sufficient to establish standing at the pleading stage), and granted the Government's motion to compel Claimant to respond to special interrogatories, the Government moved for summary judgment.

The court held that the Government was clearly entitled to summary judgment with respect to the forfeitability of the vehicle, as its use in the distribution of illegal

drugs was undisputed. It then turned to Claimant's innocent owner defense.

The innocent owner defense, the court said, is not available to a mere nominee who has legal title to a vehicle but fails to exercise dominion and control over it. Here, Claimant, who lived in New York and who drove a different vehicle, exercised no control over the drug dealer's exclusive use of the vehicle in Virginia. His statement in response to the special interrogatories that he "would advise [the drug dealer] to be careful driving," the court said, "hardly establishes that [Claimant] retained dominion or control over his vehicle."

Moreover, even if Claimant could satisfy the ownership prong of the innocent owner defense, his claim would still fail. "It strains credulity," the court said, "to believe that [Claimant], married to [the drug dealer's] sister, did not know that the 2009 Acura TL was used to distribute illegal narcotics. After all, [the drug dealer] has an MS-13 tattoo on his forehead."

Thus, the court concluded, Claimant's assertion that he had no personal knowledge of the illegal use of his vehicle was insufficient to create a triable issue of fact on the innocent owner defense "as it is not credible."

So, the Government's motion for summary judgment was granted. *SDC*

Contact: AUSAs Annie Zanobini and Kevin Hudson

Comment: The innocent owner defense has two prongs – innocence and ownership – and the claimant but put forward enough evidence to create a triable issue of fact on both prongs to avoid summary judgment.

Here, Claimant could not do either: he had no evidence beyond bare legal title that he was the owner of the vehicle (because he could not show that he exercised dominion and control), and his denial of having personal knowledge of the illegal use of the vehicle was insufficient to create a triable issue of fact on the innocence prong because it was not credible.

Other cases holding that an assertion of innocence must be credible to avoid summary judgment include the following: *United States v. Dollar Bank Money Market Account*, 980 F.2d 233, 240 (3d Cir. 1992) (claimant cannot avoid summary judgment "merely by offering any unlikely but legitimate excuse"); *United States v. Real Property in Santa Paula,* 763 F. Supp. 2d 1175, 1189 (C.D. Cal. 2011) (claimant, who bears the burden of proof on the innocent owner defense, cannot withstand summary judgment in the face of overwhelming circumstantial evidence of his knowledge of the illegal use of his property by making a bare denial); *United States v. $864,000 in U.S. Currency,* 2009 WL 2171249, *4 (M.D.N.C. July 20, 2009) (claimant cannot create a genuine issue of fact in opposition to a motion for summary judgment on his innocent owner defense by telling an implausible story unsupported by any documentary evidence; claimant's assertion that a friend gave him $864,000 to buy a restaurant that claimant had never seen and could not name was insufficient).

Administrative Forfeiture

Court says that nothing in the statutes, regulations, or rules requires the claimant in an administrative forfeiture proceeding to give his real name.

Does 1 et al. v. United States, 2021 WL 3206808 (C.D. Cal. June 7, 2021).

C.D. Cal. * The FBI seized cash from numerous safe deposit boxes and sent Claimants notice of the agency's intent to forfeit

the cash administratively. Claimants, proceeding under the pseudonyms Doe 1 through Doe 6, moved for a temporary restraining order (TRO), enjoining the Government from rejecting administrative forfeiture claims filed under a pseudonym. Proceeding anonymously, they argued, was necessary to protect themselves "from the risk of criminal prosecution, and from injury, harassment, retaliation, and embarrassment."

The Government responded that Claimants should not be allowed to proceed anonymously in the administrative forfeiture proceeding, but the court held that there is "no statute, regulation, or procedural rule that requires claimants in an administrative forfeiture proceeding to identify themselves by their legal names." To the contrary, the court said, 18 U.S.C. § 983(a)(1) says only that the claimant must identify the property being claimed, state the claimant's interest in the property, and be made under oath under penalty of perjury.

Nevertheless, the court denied the TRO, holding that because Claimants had not yet filed their anonymous claims, and because the FBI had not yet rejected them, Claimants had not shown that they were about to suffer any irreparable harm. There will be plenty of time, the court suggested, to sort out the issues raised by Claimants if and when they filed their claims anonymously and the FBI rejected them. *SDC*

Contact: AUSA Victor Rodgers

Comment: It is true that Section 983 does not say that the claimant in an administrative forfeiture proceeding must identify himself or that he must file his claim using his true name. Of course, he must file the claim under oath and under penalty of perjury. How he can do that without giving his name is something of a mystery. Nevertheless, the solution to this artificially-created conundrum seems straightforward. If the claimants proceed with their plan to file anonymous claims, all the FBI has to do is refer the case to the U.S. Attorney to file a civil forfeiture complaint. If the U.S. Attorney does so, the claimants will have 30 days to contest the forfeiture action by filing claims pursuant to Rule G(5)(a), which requires, *inter alia,* that the claim "identify the claimant and state the claimant's interest in the property."

If the claimants want to raise some Fifth Amendment objection to having to identify themselves at that point, they may do so, but there will be no question that the "procedural rule" that the court found wanting in the case of an administrative forfeiture proceeding will clearly require the claimants to state their names. *SDC*

Rule 41(g) Motion / Administrative Forfeiture

Court grants injunction telling the Government to return seized property to the owner unless it informs him of the legal basis for the pending administrative forfeiture proceeding.

Snitko v. United States, 2021 WL 3139706 (C.D. Cal. July 23, 2021).

C.D. Cal. * The Government obtained an indictment against the provider of safe deposit boxes for conspiring with its customers to commit money laundering offenses, and obtained a warrant to seize the contents of hundreds of safe deposit boxes. (See previous case summary.) The boxes contained firearms, illegal drugs, and large quantities of cash.

Within days of the seizure of his safe deposit box, Claimant filed a claim with the

FBI seeking the return of $57,000 in cash. The agency responded that it would send Claimant notice of his right to contest the administrative forfeiture of his money within 60 days and did so. The notice, however, stated only that the money was subject to forfeiture pursuant to 18 U.S.C. § 981(a)(1)(C); it did not specify the underlying criminal violation giving rise to the forfeiture.

Claimant responded by filing an action against the Government demanding to be told the factual basis for the Government's continued possession of his property, and seeking an injunction against the Government's forfeiture of his property until the Government did so. The Government responded that giving Claimant notice that his property was subject to forfeiture under § 981(a)(1)(C) was all that it was required to do.

The court held that Claimant had a Fourth Amendment right to know the reason for the Government's retention of his property and granted the injunction, ordering the Government to release the seized currency to Claimant within seven days unless the Government provides written notice to Claimant of the legal basis for the pending forfeiture. *SDC*

Contact: AUSA Victor Rodgers

Comment: There is obviously something missing from the recitation of the procedural history in this case. If the Government initiated administrative forfeiture proceedings – as it clearly did – and the claimant filed a claim – which he apparently did – the Government had 90 days from when it received the claim to commence a civil forfeiture action, providing the claimant with the factual basis for the forfeiture action. *See* 18 U.S.C. § 983(a)(3). At this point, however, more than 90 days has passed, yet the Government continues to justify its possession of the claimant's property on the ground that an administrative forfeiture action is pending. Why? Did the Government obtain an extension of time?

In any event, the remedy for the Government's failure to commence a judicial forfeiture action within 90 days of receiving a claim is a Rule 41(g) motion. (It is well-established that a court lacks jurisdiction to grant a Rule 41(g) motion once a forfeiture action is pending, but that it the appropriate remedy once the Government misses the 90-day deadline in § 983(a)(3). *See* Section VIII.C.13 of the Civil Forfeiture Case Outline.)

In this case, however, the claimant sought, and the court granted, an injunction against the Government's proceeding with any forfeiture action unless it provides the claimant with an explanation for its continued possession of his property. Why the normal procedure – telling the Government to file its action as Section 983(a)(3) requires or return the property – was not the obvious way to handle this matter is unclear. *SDC*

Notes

Claim and Answer

United States v. $579,410.00 in U.S. Currency, 2021 WL 3172908 (C.D. Ill. July 27, 2021).

C.D. Ill. * The Government filed a 35-paragraph civil forfeiture complaint alleging that $579,410 was drug proceeds. Claimant filed an answer responding only to the first two paragraphs of the complaint, which he said stated "legal conclusions" that did not

require a response. The court, however, granted the Government's motion to strike the answer for failure to comply with Rule 8, F.R.Civ.P., and directed Claimant to file an amended answer responding to each of the allegations in the complaint.

Contact: AUSA Richard Kim

Comment: As discussed in the Comment following the summary of *United States v. 2017 Lexus ES 350*, 2021 WL 2647008 (E.D. La. June 28, 2021) in the August *Digest*, courts enforce Rule 8 in civil forfeiture cases by requiring the claimant to respond to each of the numbered paragraphs in the Government's complaint. *SDC*

Forfeiture and Restitution

United States v. Fuentes-Quinones, 2021 WL 3353851 (N.D.W.Va. Aug. 2, 2021).

N.D.W.Va. * Defendant filed a *pro se* motion asking the court to "correct" the forfeiture and restitution orders in her criminal case pursuant to Rule 36. She asked that the court make clear that the $15,000 forfeiture judgment would be credited toward her $61,844 restitution order. But the court held 1) that Defendant's argument was a legal argument, not a request to correct a clerical error; and 2) that in any event, forfeiture and restitution serve different purposes, and Defendant had no right to ask that her restitution obligation be reduced by the amount she was required to forfeit.

Contact: AUSA Danae DeMasi-Lemon

Foreign Bank Account Report / Maximum Penalty

United States v. Kahn, ___ F.4th ___, 2021 WL 2931305 (2nd Cir. July 13, 2021).

Second Circuit * Defendant appealed the district court's judgment finding him liable to pay a fine of $4.26 million for failing to file a Foreign Bank Account Report (FBAR) with the IRS as required by 31 U.S.C. § 5314. But the panel agreed with the Government that the maximum penalty under Section 5321 was 50% of the balance in the account at the time of the offense, which was $8.53 million, and accordingly affirmed the judgment.

Contact: Tax Division Attorney Julie Avetta

Money Laundering / Sentencing / Compassionate Release

United States v. Saccoccia, ___ F.4th ___, 2021 WL 3660814 (1st Cir. Aug. 18, 2021).

First Circuit * Defendant was convicted in 1991 of laundering $136 million in drug proceeds for a Colombian drug cartel and was sentenced to 660 years in prison – the functional equivalent of a life sentence. He appealed the district court's denial of his motion for "compassionate release," citing various health concerns and the "sheer length of his prison term." But the panel held that Defendant had no extraordinary health concerns, and that even if the length of his sentence were a factor in considering a motion for compassionate release, Defendant "holds a special place in the pantheon of money launderers," for whom a life sentence was appropriate when imposed and remains appropriate now. So, the appeal was denied.

Contact: AUSA Lauren Zurier (D.R.I.)

Pre-Indictment Restraining Order / Civil Forfeiture Restraining Order

In the Matter of the Restraint of Approximately 400 Roosters, 2021 WL 3572664 (M.D. Ala. Aug. 11, 2021).

M.D. Ala. * The Government moved under 21 U.S.C. § 853(e)(1)(B) and 18 U.S.C. § 983(j)(1)(B) to restrain thousands of roosters, hens, and young chickens prior to obtaining any criminal indictment, and prior to filing any civil forfeiture complaint. The court found that there was a "substantial probability" that the Government would prevail in either a criminal or civil forfeiture action against the restrained property, and a "substantial probability" that failure to enter the restraining order would result in the property's being made unavailable for forfeiture. So, the court entered the order.

Contact: AUSA Gregory Griffin

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