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# Criminal Forfeiture in 2014: An Annual Survey of Developments in the Law

Stefan D Cassella



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**Criminal Forfeiture Procedure in 2014:  
An Annual Survey of Developments in the Case Law**

Stefan D. Cassella<sup>1</sup>

*A survey of the developments in the case law  
in the past year relating to the procedure for  
obtaining a forfeiture judgment as part of the  
sentence in a federal criminal case.*

**I. INTRODUCTION**

This is another in a series of articles on developments in the federal case law relating to criminal forfeiture procedure. It covers the cases decided in 2013 and early 2014.

Like the earlier articles in this series, this one does not attempt to address every topic related to criminal forfeiture, nor all of the exceptions and nuances that apply to the topics that are addressed; rather, it covers only those matters on which there was a significant development in the case law in the past year. Thus a basic familiarity with federal criminal forfeiture procedure is assumed.<sup>2</sup>

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<sup>2</sup> For similar summaries of the developments in criminal forfeiture procedure from 2003 through 2013, see Stefan D. Cassella, Criminal Forfeiture Procedure in 2013: An Annual Survey of Developments in the Case Law, 49 Crim. L. Bull. 1228 (2013); Stefan D. Cassella, Criminal Forfeiture Procedure in 2012: An Annual Survey of Developments in the Case Law, 48 Crim. L. Bull. 863 (2012); Stefan D. Cassella, Criminal Forfeiture Procedure in 2011: An Annual Survey of

The Article begins with the cases that illustrate the concept that criminal forfeiture is part of the defendant's sentence in a criminal case. It then takes the reader more or less chronologically through the litigation of a case, beginning with the seizure and restraint of the property and continuing through the trial and sentencing of the defendant and the adjudication of third-party issues in the post-trial ancillary proceeding. Except in instances where it is necessary to refer to the leading case in a given area for purposes of comparison or context, the citations are limited to the cases decided in 2013 and early 2014.<sup>3</sup>

## **II. THE SCOPE AND PURPOSE OF CRIMINAL FORFEITURE**

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Developments in the Case Law, 47 Crim. L. Bull. 593 (2011); Stefan D. Cassella, Criminal Forfeiture Procedure in 2010: An Annual Survey of Developments in the Case Law, 46 Crim. L. Bull. 898 (2010); Stefan D. Cassella, Criminal Forfeiture Procedure in 2009: An Annual Survey of Developments in the Case Law, 45 Crim. L. Bull. 545 (2009); Stefan D. Cassella, Criminal Forfeiture Procedure in 2008: A Survey of Developments in the Case Law, 44 Crim. L. Bull. 3 (2008); Stefan D. Cassella, Criminal Forfeiture Procedure in 2007: A Survey of Developments in the Case Law, 43 Crim. L. Bull. 461 (2007); Stefan D. Cassella, Criminal Forfeiture Procedure in 2006: A Survey of Developments in the Case Law, 42 Crim. L. Bull. 515 (2006); Stefan D. Cassella, Criminal Forfeiture Procedure: An Analysis of Developments in the Law Regarding the Inclusion of a Forfeiture Judgment in the Sentence Imposed in a Criminal Case, 32 Am. J. Crim. L. 155 (2004).

<sup>3</sup> A complete discussion of each of the issues covered in this article, along with the citations to the relevant cases, may be found in chapters 15-24 of Stefan D. Cassella, *Asset Forfeiture Law in the United States* (2d ed. 2013), Juris Publishing: New York (hereinafter "AFLUS").

Criminal forfeiture is part of the defendant's sentence. As will be seen throughout this Article, that simple proposition explains much of criminal forfeiture procedure, from the necessity of a conviction, the way the forfeiture notice is presented in the indictment, the government's burden of proof, the bifurcation of the trial, and the right to have the forfeiture determined by a jury, to the timing of the imposition of a forfeiture order as part of the defendant's sentence.

One of the purposes of criminal forfeiture is to punish the defendant. The Second Circuit focused on that aspect of forfeiture in *United States v. Peters*,<sup>4</sup> when it held that in contrast to restitution, which is designed to put the defendant and his victim back into the positions they were in before the defendant committed his offense, the purpose of forfeiture is to punish the defendant by forcing him to disgorge the gross receipts of his crime, not just his net profit.

But criminal forfeiture actually serves many purposes. Earlier this year in *Kaley v. United States*,<sup>5</sup> the Supreme Court, in an opinion by Justice Kagan, noted that in addition to punishing the wrong-doer, forfeiture deters future illegality, lessens the economic power of criminal enterprises, compensates victims, improves conditions in crime-damaged communities, and supports law enforcement activities such as police training.<sup>6</sup>

It is true that criminal forfeitures are *in personam* and not *in rem*,<sup>7</sup> and it is well-established that because

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<sup>4</sup> *United States v. Peters*, 732 F.3d 93, 98-99,101 (2d Cir. 2013).

<sup>5</sup> *Kaley v. United States*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 1090 (2014).

<sup>6</sup> *Kaley*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 1090.

<sup>7</sup> See *United States v. Louthian*, \_\_\_ F.3d \_\_\_, \_\_\_ n.12, 2014 WL 2809071, at \*10 n.12 (4<sup>th</sup> Cir. June 23, 2014) (criminal and civil forfeiture are "distinct law enforcement tools:" the former is an *in personam* action that requires a conviction, and the latter is an *in rem* action against the property itself).

criminal forfeiture is imposed in a proceeding from which third parties are excluded, property belonging to third parties cannot be forfeited in a criminal case; but it does not follow that the property can be forfeited only if the Government shows that it belongs to the defendant.<sup>8</sup> Given the various purposes of criminal forfeiture, it is often the case that the property is being forfeited because of its nexus to the crime that led to the defendant's conviction, and not because the defendant is the owner of the property. As long as no third party successfully contests the forfeiture in the ancillary proceeding, nexus to the offense is all that is required to include the property in a forfeiture order.

Thus, in *United States v. Dupree*,<sup>9</sup> the district court explained that in the case of the proceeds of the offense, the *in personam* nature of forfeiture is satisfied if the property is the proceeds of the crime the defendant committed. It is not necessary for the Government to show that the defendant was at any time the lawful owner of the forfeited property. Several other cases decided in the past year said the same thing.<sup>10</sup>

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<sup>8</sup> See *De Almeida v. United States*, 459 F.3d 377, 381 (2d Cir. 2006) (criminal forfeiture is not limited to property owned by the defendant; "it reaches any property that is involved in the offense;" but the ancillary proceeding serves to ensure that property belonging to third parties who have been excluded from the criminal proceeding is not inadvertently forfeited).

<sup>9</sup> *United States v. Dupree*, 919 F. Supp. 2d 254, 274-275 (E.D.N.Y. 2013) (criminal forfeiture is not limited to property of the defendant; it reaches any property derived from or used to commit the offense; in the case of proceeds, the *in personam* nature of forfeiture is satisfied if the property is the proceeds of the crime the defendant committed; older cases such as *O'Dell* and *Gilbert* were based on former Rule 31(e) which was replaced by Rule 32.2 and are no longer good law).

<sup>10</sup> See *United States v. Molina-Sanchez*, \_\_\_ F.R.D. \_\_\_, 2014 WL 705330 (W.D.N.C. Jan. 17, 2014) (because the property was derived from the offense for which the defendant was convicted, "the fact that defendant has no legal ownership interest in the . . . property does not bar criminal forfeiture"); *United States v. Zai*, 2013 WL 625762, at \*4 (N.D. Ohio Feb. 20, 2013) (same).

### III. SEIZURE WARRANTS – 21 U.S.C. § 853(f)

Most forfeiture actions begin with the seizure of the property either at the time of the defendant's arrest, or pursuant to a seizure warrant issued under a civil or criminal forfeiture statute.<sup>11</sup> The procedures and requirements for obtaining a seizure warrant under either statute are the same, except that to obtain a criminal warrant, the Government must show that a restraining order would be inadequate to preserve the property for forfeiture at trial.<sup>12</sup>

In most cases, this extra requirement is easily satisfied. In *United States v. Swenson*, for example, the court held that it was entitled to infer from the inherent fungibility and transferability of money in a bank account that a restraining order would be inadequate.<sup>13</sup>

The defendant has the same right to challenge the pre-trial seizure of his property pursuant to Section 853(f) as he does to challenge the pre-trial restraint of his property pursuant to Section 853(e). In general, that means that the defendant must satisfy the *Jones-Farmer* rule.<sup>14</sup> Section 853(e), the *Jones-Farmer* rule, and the other procedures governing pre-trial restraining orders are discussed in the next section.

### IV. PRETRIAL RESTRAINT OF ASSETS

#### *The scope of a pre-trial restraining order*

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<sup>11</sup> See 18 U.S.C. § 981(b) (authorizing the issuance of seizure warrants for civil forfeiture) and 21 U.S.C. § 853(f) (same for criminal forfeiture).

<sup>12</sup> See 21 U.S.C. § 853(f).

<sup>13</sup> *United States v. Swenson*, 2013 WL 3322632 (D. Idaho July 1, 2013), quoting *Asset Forfeiture Law in the United States*, at § 3-2(b). (2d ed. 2013).

<sup>14</sup> *United States v. Dupree*, 781 F. Supp. 2d 115, 141-43 (E.D.N.Y.2011) (applying *Jones-Farmer* to defendant's post-seizure challenge to seizure based on § 853(f)); *United States v. Swenson*, 2013 WL 3322632 (D. Idaho July 1, 2013) (same).

It is common in criminal forfeiture cases for the Government to request an *ex parte* restraining order to preserve the forfeitable assets that have been named in a pending indictment, regardless of where the assets may be located.<sup>15</sup> The statute authorizing such restraints is 21 U.S.C. § 853(e). Except in the Fourth Circuit, courts construe the statute to permit the restraint of directly forfeitable property but to prohibit the restraint of substitute assets.<sup>16</sup>

If the restraining order is issued under a statute other than Section 853(e), however, the pre-trial restraint of substitute assets may be possible. In *United States v. Luis*,<sup>17</sup> the district court issued an order restraining substitute assets in a health care fraud case under 18 U.S.C. § 1345(a)(2), and held that the pre-trial restraint of substitute assets does not violate the Sixth Amendment right to counsel if the Government establishes probable cause and survives a probable cause challenge in a post-restraint hearing. The Eleventh Circuit affirmed.<sup>18</sup>

*Post-restraint hearings: the Jones-Farmer rule*

Under the appellate decisions in *United States v. Jones* and *United States v. Farmer*, a post-restraint, pre-trial hearing is required only if the defendant's Sixth Amendment right to counsel is implicated – i.e., if the defendant shows that he has no other funds with which to retain counsel of his choice to defend him in a criminal case; and only if the defendant makes a prima facie

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<sup>15</sup> See *United States v. Holy Land Foundation for Relief and Development*, 722 F.3d 677, 690 (5th Cir. 2013) (§ 853(l) allows the district court to restrain assets located in another district).

<sup>16</sup> See *United States v. Pagan-Romero*, 2014 WL 2451508 (D.P.R. June 2, 2014) (following all circuits but the Fourth and holding that § 853(e) does not authorize the pre-trial restraint of substitute assets).

<sup>17</sup> *United States v. Luis*, 966 F. Supp. 2d 1321 (S.D. Fla. 2013).

<sup>18</sup> *United States v. Luis*, \_\_ Fed. Appx. \_\_, 2014 WL 1708888 (11<sup>th</sup> Cir. May 1, 2014).

showing that there is no probable cause for the forfeiture of the restrained property.<sup>19</sup>

Many courts have adopted the *Jones-Farmer* rule, while others have adopted some variation of it. In *United States v. Bonventre*,<sup>20</sup> for example, the Second Circuit adopted the first prong of *Jones-Farmer* but not the second, holding that a defendant is not entitled to a probable cause hearing unless he shows that his Sixth Amendment rights are implicated, but that he need not make a formal *prima facie* showing that the initial probable cause finding was erroneous.

In the Ninth Circuit, however, the law is far from clear. In two older cases, the court took an entirely different approach, treating pre-trial restraining orders as subject to Rule 65 of the Federal Rules of Civil Procedure.<sup>21</sup> The court has never expressly overruled

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<sup>19</sup> *United States v. Jones*, 160 F.3d 641, 647 (10th Cir. 1998) (defendant has initial burden of showing that he has no funds other than the restrained assets to hire private counsel or to pay for living expenses, and that there is bona fide reason to believe the restraining order should not have been entered); *United States v. Farmer*, 274 F.3d 800, 804-05 (4th Cir. 2001) (following *Jones*; same two-part test applies where property defendant says he needs to hire counsel in criminal case has been seized or restrained in related civil forfeiture case). Cf. *Kaley v. United States*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 1090 (2014) (Roberts, C.J., dissenting) (“To even be entitled to the hearing, defendants must first show a genuine need to use the assets to retain counsel of choice,” citing *United States v. Bonventre*, 720 F.3d 126, 131 (2d Cir. 2013)).

<sup>20</sup> *United States v. Bonventre*, 720 F.3d 126, 131 (2d Cir. 2013). See also *United States v. Cosme*, 2014 WL 1584026, at \*5 (S.D.N.Y. Apr. 21, 2014) (following *Bonventre*; no right to a *Monsanto* hearing for defendant who fails to show he lacks other funds); *United States v. Fisch*, 2013 WL 5774876, at \*5 (S.D. Tex. Oct. 24, 2013) (noting that the Fifth Circuit has not definitively adopted *Jones-Farmer* but would, at a minimum, require defendant’s to satisfy the first prong regarding his lack of other funds).

<sup>21</sup> See *United States v. Crozier*, 777 F.2d 1376, 1384 (9th Cir. 1985) (Rule 65 governs hearing on pretrial restraining orders); *United States v. Roth*, 912 F.2d 1131, 1133-34 (9th Cir. 1990).



those cases, but in *United States v. Unimex, Inc.*,<sup>22</sup> it held that a defendant is entitled to a post-seizure hearing only if he makes a “substantial claim” supported by specific, detailed and nonconjectural allegations, which the lower courts have interpreted to imply a requirement similar if not identical to the two prongs of *Jones-Farmer*.

In *Swenson*, for example, a district court in Idaho applied *Unimex* and held that the defendant had to satisfy the *Jones-Farmer* rule to be entitled to probable cause hearing following the pre-trial seizure of his property.<sup>23</sup> And in *United States v. Wetselaar*,<sup>24</sup> a district court in Nevada applied *Unimex* and *Jones-Farmer* in denying a request for a probable cause hearing following the issuance of a restraining order. The Government is not required to “reestablish” probable cause that property is traceable to the offense, the court said, until the defendant shows that he lacks other funds.

#### *The two prongs of the Jones-Farmer rule*

Under the first *Jones-Farmer* requirement, the defendant has the burden of showing that he lacks other funds with which to retain counsel. Thus, in *Bonventre*,<sup>25</sup> the Second Circuit held that to qualify for a post-restraint probable cause hearing, the defendant must disclose his net worth, provide a comprehensive list of his assets, or explain how he has been paying his significant living expenses. It is not enough, the court said, to contrast his income stream and bank account balances with his living expenses and legal fees.

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<sup>22</sup> *United States v. Unimex, Inc.*, 991 F.2d 546, 551 (9th Cir. 1993).

<sup>23</sup> *United States v. Swenson*, 2013 WL 3322632 (D. Idaho July 1, 2013).

<sup>24</sup> *United States v. Wetselaar*, 2013 WL 8206582, at \*19-20, \*23 (D. Nev. Dec. 31, 2013).

<sup>25</sup> *United States v. Bonventre*, 720 F.3d 126, 133 (2d Cir. 2013).

The second *Jones-Farmer* requirement, that there be a prima facie showing that the Government lacked probable cause for the restraint, protects against the defendant's use of the probable cause hearing to gain pretrial access to the witnesses and other evidence that the Government intends to use at trial.<sup>26</sup> In *Swenson*, the district court created its own variation on *Jones-Farmer*, but emphasized that the defendant would have to make a preliminary showing that the seized property was not forfeitable. That requirement, the court said, was needed to prevent the defendant from using the hearing to obtain a preview of the Government's criminal case in the name of seeking the release of his property.<sup>27</sup>

To invoke the *Jones-Farmer* rule, the defendant must affirmatively request a hearing.<sup>28</sup> If he fails to satisfy the two requirements, his motion will be denied. If he qualifies for a hearing, but the Government establishes

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<sup>26</sup> See *United States v. Melrose East Subdivision*, 357 F.3d 493, 507 n.17 (5th Cir. 2004) ("although the government bears the burden at a pretrial hearing of persuading the court that probable cause exists. . . . the district court generally should not permit a [defendant] to examine the government's witnesses without first producing some evidence suggesting that the restrained assets were untainted"), citing *Jones*, 160 F.3d at 647; *United States v. Holy Land Found. for Relief & Dev.*, 493 F.3d 469, 475-76 (5th Cir. 2007) (en banc) (restricting the right to a post-restraint hearing only to certain situations would "spare the Government from frivolous challenges that might impede its ongoing criminal investigations, but does so without jeopardizing the rights of property owners to access their assets in a timely fashion when necessary).

<sup>27</sup> *United States v. Swenson*, 2013 WL 4782134 (D. Idaho Sept. 5, 2013).

<sup>28</sup> See *United States v. Clark*, 717 F.3d 790, 802 (10th Cir. 2013) (defendant who failed to request a post-restraint probable cause hearing cannot complain that the court's failure to afford him a hearing deprived him of due process, or that the restraint deprived him of his Sixth Amendment right to use the restrained property to retain counsel in his criminal case).

probable cause, the property will remain restrained, even if the defendant needs the money to retain counsel.<sup>29</sup>

The district court's refusal to grant a post-restraint hearing is subject to an interlocutory appeal,<sup>30</sup> but it is unclear what consequences, if any, would flow from a district court's erroneously failing to afford the defendant a hearing. In *United States v. Clark*,<sup>31</sup> the Tenth Circuit declined to find reversible error where the property was in fact subject to forfeiture and thus would have remained under restraint even if the defendant had been permitted to challenge the restraining order. In *United States v. Gordon*,<sup>32</sup> the Tenth Circuit also held that a procedural error in entering a restraining order has no effect on the validity of the defendant's conviction unless he can show that the order infringed on his Sixth Amendment rights by

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<sup>29</sup> See *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623-35 (1989) (the defendant has no Sixth Amendment right to use property subject to forfeiture to retain counsel); *United States v. Monsanto*, 491 U.S. 600, 616 (1989) (rejecting Sixth Amendment challenge to pre-trial restraining order restricting defendant's use of forfeitable property); *United States v. Bonventre*, 720 F.3d 126, 130 (2d Cir. 2013) (emphasizing that under *Monsanto*, a defendant has no right to use funds to pay for his defense once the Government establishes probable cause to believe the funds are subject to forfeiture); *United States v. Gordon*, 710 F.3d 1124, 1135 (10th Cir. 2013) ("Assets that are properly forfeitable are not the defendant's rightful property. . . . Indeed these assets may belong to the Government by virtue of the relation-back provision of 21 U.S.C. § 853(c) . . . .", citing *Caplin & Drysdale*); *United States v. Walsh*, 712 F.3d 119, 123 (2d Cir. 2013) (following *Caplin & Drysdale*; "a defendant may not use the proceeds of a fraud to fund his criminal defense").

<sup>30</sup> See *United States v. Walsh*, 712 F.3d 119, 123 (2d Cir. 2013) (when defendant takes interlocutory appeal from denial of probable cause challenge to a restraining order, factual findings are reviewed for clear error, but the probable cause finding is a conclusion of law that is reviewed *de novo*).

<sup>31</sup> *United States v. Clark*, 717 F.3d 790, 804 (10th Cir. 2013).

<sup>32</sup> *United States v. Gordon*, 710 F.3d 1124, 1139 (10th Cir. 2013).

making unavailable the only funds he had to retain counsel.

Conversely, a district court's erroneous finding, at the probable cause hearing, that the property was *not* subject to forfeiture does not preclude the Government from establishing the forfeiture of the property at trial, even though it must do so by preponderance of the evidence.<sup>33</sup>

*Procedure at the probable cause hearing*

If the defendant satisfies both of the *Jones-Farmer* requirements, or whatever variations of those requirements apply in the particular court, he is entitled to challenge the probable cause for the continuation of the restraining order at an evidentiary hearing. This is typically called a *Monsanto* hearing.<sup>34</sup>

Unfortunately, it is not clear who has the burden of establishing probable cause, or lack thereof, at the post-restraint hearing, if such a hearing is required. The two most recent cases placed the burden of proof on the Government.<sup>35</sup>

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<sup>33</sup> See *United States v. Watts*, 477 Fed. Appx. 816, 817 (2d Cir. 2012) (defendant's successful challenge to the probable cause for the restraint of his property at a *Monsanto* hearing did not bar the Government from seeking forfeiture of the same property under the preponderance standard at trial); *United States v. Dupree*, 919 F. Supp. 2d 254, 271-72 (E.D.N.Y. 2013) (same case, following *Watts*; defendant's successful challenge to probable cause for restraining order did not give third party right to argue in the ancillary proceeding that it had no reason to believe property was subject to forfeiture when it acquired its interest).

<sup>34</sup> See *United States v. Monsanto*, 491 U.S. 600 (1989).

<sup>35</sup> *United States v. Bonventre*, 720 F.3d 126, 131 (2d Cir. 2013) (the Government has the burden of re-establishing probable cause in the *Monsanto* hearing); *United States v. Swenson*, 2013 WL 4782134 (D. Idaho Sept. 5, 2013) (if defendant elects a *Unimex* hearing and establishes that he has no other funds to retain counsel, the Government has the burden of proof; but if he elects a Rule 41(g) hearing and does not show that he lacks other funds, he has the burden of proof).

The *scope* of the probable cause hearing, however, is now clear. Prior to the Supreme Court's decision in *Kaley*, the Second and District of Columbia Circuits permitted the defendant to challenge both the probable cause for the restraint of the property, and the grand jury's finding of probable cause as to the underlying crime,<sup>36</sup> while the majority of courts limited the hearing to the first issue. In *Kaley*, the Supreme Court resolved the dispute, holding categorically that the defendant has no right to relitigate the grand jury's finding of probable cause to believe that the defendant committed the underlying crime, but may contest the probable cause to believe the property is forfeitable, even if that finding was also made by the grand jury.<sup>37</sup>

Finally, because a *Monsanto* hearing is a probable cause hearing, hearsay is admissible. Thus, in *United States v. Walsh*, the Second Circuit held that the district court did not err in preventing the defendant from subpoenaing the Government's fact witnesses to testify at the hearing in person and allowing the Government to put on its evidence through a case agent. The Government's need to prevent the premature exposure of its witnesses at a "dress rehearsal" of its case, the court said, outweighs the defendant's need to cross-examine the witnesses with personal knowledge of the facts supporting probable cause.<sup>38</sup>

## V. RETENTION OF PROPERTY SEIZED WITH CIVIL PROCESS

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<sup>36</sup> See *United States v. Monsanto*, 924 F.2d 1186, 1200 (2d Cir. 1991) (grand jury determinations of probable cause – to both the offense and the forfeitability of the property – may be reconsidered by the district courts in ruling upon the continuation of post-indictment restraining orders); *United States v. E-Gold, Ltd.*, 521 F.3d 411, 418 (D.C. Cir. 2008) (following *Monsanto*; defendant is entitled to challenge the probable cause for both the forfeiture and the underlying offense).

<sup>37</sup> *Kaley v. United States*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 1090 (2014).

<sup>38</sup> *United States v. Walsh*, 712 F.3d 119, 124-25 (2d Cir. 2013).

As mentioned earlier, federal forfeiture cases typically begin with the seizure of property under a civil forfeiture statute. Once the property is seized, the Government has 60 days under 18 U.S.C. § 983(a)(1) to commence administrative forfeiture proceedings. Doing so saves judicial resources, as there is no need for the Government to pursue criminal forfeiture as part of the defendant's sentence if no one is contesting the forfeiture of the property and the property can be forfeited administratively by default.

If someone does file a claim to the property, the Government has 90 days under Section 983(a)(3) to commence a judicial forfeiture action against the property. One of the ways in which the Government may comply with the rule is to include the property in an indictment and take the steps necessary to preserve the property with criminal process within the 90-day period.<sup>39</sup>

The statute does not specify what it is that the Government must do to comply with the latter part of the requirement, but courts have held that compliance does not require the Government to seize the property from itself pursuant to Section 853(f), or to restrain itself pursuant to Section 853(e). To the contrary, a “housekeeping order” directing the Government to maintain possession of property already in its possession is generally sufficient.<sup>40</sup>

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<sup>39</sup> 18 U.S.C. § 983(a)(3).

<sup>40</sup> See *United States v. Abrahams*, 2013 WL 285719 (D. Md. Jan. 24, 2013) (if someone contests the administrative forfeiture of property and the Government elects to pursue only criminal forfeiture, it may comply with § 983(a)(3)(C) by including the property in an indictment or bill of particulars within 90 days and obtaining a “housekeeping” order allowing it to maintain custody pending the conclusion of the criminal case). Cf. *United States v. Young*, 2013 WL 1341396, at \*3 (D. Utah Apr. 3, 2013) (granting Government’s motion for § 853(e) restraining order even though the property is already in the Government’s custody and subject to a pending civil forfeiture case; court agrees that issuing the restraining order will give it independent authority to preserve the property regardless of what happens in the civil case before another judge).

## VI. INDICTMENT

### *Rule 32.2(a)*

Criminal forfeiture cases are governed by Rule 32.2 of the Federal Rules of Criminal Procedure. Rule 32.2(a) provides that no forfeiture may be imposed in a criminal case unless the defendant is given notice of the forfeiture in the indictment or information.

The rule, however, is merely a notice provision requiring the Government to state that it intends to seek forfeiture as part of the defendant's sentence; it does not require the property subject to forfeiture to be itemized. Thus, the Sixth Circuit held in *United States v. Hampton*<sup>41</sup> that it was proper for the indictment to say that the Government was seeking forfeiture in the form of a money judgment and not to identify any specific assets subject to forfeiture.

Often seized property will be forfeited administratively, rendering criminal forfeiture unnecessary. In that case the Government may move to dismiss the forfeiture notice from the indictment once the administrative forfeiture is complete. Doing so avoids the possibility that the defendant will attempt to oppose the forfeiture at his sentencing even though the property already belongs to the United States.<sup>42</sup> In *United States v. Williams*, the Eighth Circuit held that the Government's motion to dismiss the forfeiture notice requires leave of the court, but not the consent of the defendant.<sup>43</sup>

## VII. GUILTY PLEAS

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<sup>41</sup> *United States v. Hampton*, 732 F.3d 687, 690 (6<sup>th</sup> Cir. 2013).

<sup>42</sup> See *United States v. Dunn*, 723 F.3d 919, 931 (8<sup>th</sup> Cir. 2013) (defendant may move to vacate an administrative forfeiture under Section 983(e) on the ground that the Government's including a forfeiture notice in his criminal indictment led him to believe he did not have to contest the administrative forfeiture).

<sup>43</sup> *United States v. Williams*, 720 F.3d 674, 703 (8<sup>th</sup> Cir. 2013).

Generally, the Government will negotiate the defendant's consent to forfeit property as part of his written plea agreement. In most cases, the agreement will provide that the property will be forfeited as part of his sentence pursuant to Rule 32.2(b), and the Government will submit a proposed forfeiture order at the time the court accepts the guilty plea. But it is also possible to have the defendant agree not to oppose the administrative or civil forfeiture of the property.<sup>44</sup>

Once the defendant enters into such an agreement, he is bound by it. As the district court said in *United States v. Masilotti*,<sup>45</sup> "A party cannot accept the benefits of an agreement, in whole or in part, and then renege by contesting the forfeiture which was part of the bargain." Thus, in that case the court held that the defendant's waiver of all defenses to the forfeiture was binding even though there was a later change in the law.<sup>46</sup>

Rule 11(b)(1)(J), Federal Rules of Criminal Procedure, requires the court to warn the defendant during the plea colloquy that his property may be forfeited. But in *United States v. Gomez*,<sup>47</sup> the Fifth Circuit held that the district court's failure to comply with the rule was harmless error where the defendant

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<sup>44</sup> See *Wiand v. United States*, 2013 WL 5422964, at \*2 (N.D. Tex. Sept. 27, 2013) (agreement to forfeit computer hard drive is binding on defendant even though Government forfeited it administratively instead of as part of defendant's sentence).

<sup>45</sup> *United States v. Masilotti*, \_\_\_ F. Supp. 2d \_\_\_, 2013 WL 4714216 (S.D. Fla. Aug. 7, 2013), *aff'd*, \_\_\_ Fed. Appx. \_\_\_, 2014 WL 1876283 (11<sup>th</sup> Cir. May 12, 2014).

<sup>46</sup> *Masilotti*, \_\_\_ F. Supp. 2d \_\_\_, 2013 WL 4714216. But see *United States v. Droганes*, 2013 WL 147837, at \*8 (E.D. Ky. Jan. 14, 2013) (waiver of right to appeal sentence without specific reference to forfeiture did not constitute a waiver of right to appeal the forfeiture where there was a dispute as to what was forfeited that was not resolved until after the plea was accepted).

<sup>47</sup> *United States v. Gomez*, \_\_\_ Fed. Appx. \_\_\_, 2013 WL 6439638 (5<sup>th</sup> Cir. Dec. 10, 2013).



acknowledged reading the indictment, which contained notice of forfeiture, and did not object to the entry of a preliminary forfeiture order at his plea hearing.

### VIII. FORFEITURE PHASE OF THE TRIAL

#### *Application of Apprendi*

In *Apprendi v. New Jersey*,<sup>48</sup> the Supreme Court held that facts that increase the maximum sentence for a criminal offence must be charged in the indictment and found by a jury beyond a reasonable doubt. In a series of subsequent decisions, the Court extended *Apprendi* to facts that increase the maximum criminal fine,<sup>49</sup> and facts that increase a mandatory minimum sentence.<sup>50</sup>

Notwithstanding *Apprendi* and its progeny, the lower courts continue to hold that there is no Sixth Amendment right to have forfeiture determined by a jury, and that the Government need only establish the forfeiture by a preponderance of the evidence. All of these decisions rely on the same two arguments: the Supreme Court's earlier decision in *Libretti v. United States*,<sup>51</sup> which held that the Sixth Amendment does not apply to criminal forfeiture, remains binding on the lower courts until the Supreme Court itself reconsiders its holding; and because there is no statutory maximum for forfeiture, there is no danger that the maximum will be exceeded.<sup>52</sup>

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<sup>48</sup> *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

<sup>49</sup> *Southern Union Company v. United States*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2344, 2357 (U.S. June 21, 2012).

<sup>50</sup> *Alleyne v. United States*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2151 (U.S. June 17, 2013).

<sup>51</sup> *Libretti v. United States*, 516 U.S. 29, 49 (1995) ("the nature of criminal forfeiture as an aspect of sentencing compels the conclusion that the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection").

<sup>52</sup> See *United States v. Simpson*, 741 F.3d 539, 560 (5<sup>th</sup> Cir. 2014) (because criminal forfeitures are "indeterminate and open-ended,"

*The right to a jury under Rule 32.2(b)(5)*

Although the Supreme Court made it clear in *Libretti* that there is no constitutional right to a jury in the forfeiture phase of the trial,<sup>53</sup> Rule 32.2(b)(5) gives the defendant a limited statutory right to request that the jury be retained to determine the forfeiture.

On its face, the rule requires that the court ask the defendant whether he intends to exercise that right, but the court's failure to do so does not invalidate a subsequent forfeiture order if the defendant fails to make an affirmative request that the forfeiture be submitted to the jury.<sup>54</sup>

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there is no statutory maximum that would be exceeded by any fact-finding by the judge; hence, *Apprendi* and *Southern Union* do not apply); *United States v. Perkins*, 2014 WL 119326, at \*1 (E.D.N.Y. Jan. 10, 2014) (following appellate cases holding that *Southern Union* doesn't overrule Rule 32.2(b)(5) because *Libretti* is binding on the lower courts, and that forfeiture has no statutory max); *United States v. Carpenter*, 2014 WL 2178020 (D. Mass. May 23, 2014) (rejecting argument that because criminal forfeiture is essentially a mandatory minimum sentence, it must be determined by the jury under *Alleyne*, because *Libretti* is binding on the lower courts); *United States v. Phillips*, 2013 WL 3892923 (W.D. Wash. July 26, 2013) (Supreme Court's decision in *Alleyne v. United States* does not apply to criminal forfeiture).

<sup>53</sup> See *United States v. Valdez*, 726 F.3d 684, 699 (5th Cir. 2013) ("There is no constitutional right to a jury determination of forfeiture," following *Libretti*).

<sup>54</sup> See *Valdez*, 726 F.3d at 699 (while the trial judge's failure to inquire if the defendant wanted the jury retained was clear error, it did not require reversal of the forfeiture order because there is no constitutional right to have the jury determine the forfeiture, there was sufficient factual support for the forfeiture, and defendant made no affirmative request for the jury); *United States v. Williams*, 720 F.3d 674, 700-01 (8th Cir. 2013) (distinguishing *Mancuso*; Rule 32.2(b)(5) is a "time-related directive," the violation of which does not override the mandatory nature of criminal forfeiture if the defendant is convicted). But see *United States v. Mancuso*, 718 F.3d 780, 799 (9th Cir. 2013) (Rule 32.2(b)(5) places an affirmative duty on the court to ensure that the defendant does not inadvertently waive his right to have the jury determine the forfeiture, but the court's failure to

In all events, Rule 32.2(b)(5) applies only when the Government seeks the forfeiture of specific assets; it does not give either party the right to have the jury determine the forfeiture if the Government is seeking only a money judgment.<sup>55</sup> Nor does the defendant have the right to insist that the Government forfeit specific assets so that he can assert his right to a jury under Rule 32.2(b)(5).<sup>56</sup>

*Conduct of the forfeiture phase of the trial*

To determine the forfeitability of specific property, or to determine the amount of the money judgment, the court may rely on evidence from the “guilt phase” of the trial, supplemented by additional evidence.<sup>57</sup> Because

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comply with the rule was harmless error where the prosecutor stated on the record, before the jury was excused, that defendant had not requested that the jury be retained, and the defendant did not say otherwise).

<sup>55</sup> See *United States v. Curbelo*, 726 F.3d 1260, 1277, 1278 n.10 (11th Cir. 2013) (the right to a jury under Rule 32.2(b)(5) applies only to specific property, not to the amount of a money judgment; the rule does not infringe on defendant’s Sixth Amendment rights because there is no right to a jury under *Libretti*); *United States v. Perkins*, 2014 WL 119326, at \*2 (E.D.N.Y. Jan. 10, 2014) (Rule 32.2(b)(5) makes it clear that the right to a jury applies only when the Government is seeking forfeiture of specific assets); *United States v. Watts*, 2013 WL 1192781 (E.D.N.Y. Mar. 22, 2013) (same); *United States v. Harrell*, 2013 WL 525743, at \*2 (M.D. Fla. Feb. 11, 2013) (same).

<sup>56</sup> *Christie v. United States*, 2014 WL 2158432, at \*9-10 (S.D.N.Y. May 23, 2014) (Government has the discretion to choose between seeking a money judgment and specific assets, and defendant has no right to object on the ground that by seeking a money judgment, the Government deprived him of his right to a jury under Rule 32.2(b)(5)).

<sup>57</sup> See *United States v. Valdez*, 522 Fed. Appx. 25, 32-33 (2d Cir. 2013) (following defendant’s guilty plea, court bases amount of money judgment on agent’s testimony that defendant admitted laundering \$2 billion in drug proceeds, even though defendant later denied it).

forfeiture is part of sentencing, the additional evidence may include hearsay.<sup>58</sup>

As Rule 32.2(b) makes clear, the only issue in the forfeiture phase of the trial is whether the Government has established the required nexus between the property and the offense of conviction – or the amount of the money judgment -- by a preponderance of the evidence. Determining the ownership of the property is deferred to the ancillary proceeding.<sup>59</sup>

Before Rule 32.2 took effect, former Rule 31(e) required a jury to return a special verdict “as to the extent of the interest or property” forfeited; some courts held this meant the jury must determine ownership.<sup>60</sup> But as the district court held in *United States v. Dupree*, those cases are no longer good law.<sup>61</sup>

### *Establishing the nexus*

The Government may rely on direct or circumstantial evidence to establish the forfeitability of the property. For example, in *United States v. Green*,<sup>62</sup> the Third Circuit held that while there was no direct evidence that the defendant acquired a car with his fraud proceeds,

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<sup>58</sup> See *United States v. Brown*, 2013 WL 2473034, at \*2 (D. Md. June 10, 2013) (hearsay is admissible to determine the amount of the money judgment per Rule 32.2(b)(1)(B)).

<sup>59</sup> Rule 32.2(b)(2)(A).

<sup>60</sup> See *United States v. Gilbert*, 244 F.3d 888, 992 (11th Cir. 2001) (forfeiture order is fatally flawed if jury was not asked to determine how much of the property belonged to each defendant and how much belonged to third parties); *United States v. O'Dell*, 247 F.3d 655, 680 (6th Cir. 2001) (if jury is waived, court must determine if defendant is owner of property before entering order of forfeiture).

<sup>61</sup> *United States v. Dupree*, 919 F. Supp. 2d 254, 275 (E.D.N.Y. 2013) (to the extent that Rule 31(e) may have limited criminal forfeiture to the defendant's interest in the property, it was “excised” by Rule 32.2; cases such as *Gilbert* and *O'Dell* are no longer good law).

<sup>62</sup> *United States v. Green*, 516 Fed. Appx. 113, 135 (3d Cir. 2013).

the circumstantial evidence – *e.g.*, that he purchased the car during the time he was committing the offense and had no other income – was sufficient.

One controversial issue concerns the ability of the Government to establish that a given asset is traceable to the offense of conviction when the asset was purchased with commingled funds. The courts are divided with respect to the degree of tracing that is required, and the Government's ability to use accounting principles to meet its burden of proof.

Some courts take a common sense approach that does not require strict tracing. For example, in *United States v. Smith*,<sup>63</sup> the Sixth Circuit held that if the defendant puts criminal proceeds into a commingled bank account, and then uses that account to purchase an asset, the court may infer that the asset is traceable to the criminal offense if the value of the asset is less than the value of the criminal proceeds that were deposited into the account.

Other courts allow the Government to use accounting principles such first-in, first-out, or the "lowest intermediate balance" rule.<sup>64</sup>

On the other hand, some courts require strict tracing and follow the Third Circuit's 1996 decision in *United States v. Voigt*,<sup>65</sup> which held that the Government

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<sup>63</sup> *United States v. Smith*, \_\_\_ F.3d \_\_\_, 2014 WL 1424484 (6<sup>th</sup> Cir. Apr. 15, 2014).

<sup>64</sup> See *United States v. Capoccia*, 2009 WL 2601426, at \*11 (D. Vt. Aug. 19, 2009) (explaining "lowest intermediate balance rule" and how it allows Government to trace proceeds through commingled accounts); *United States v. Haleamau*, 2012 WL 3394952 (D. Haw. Aug. 1, 2012) (same).

<sup>65</sup> *United States v. Voigt*, 89 F.3d 1050 (3d Cir. 1996).

can virtually never trace criminal proceeds through a commingled account.<sup>66</sup>

### IX. MONEY JUDGMENTS

It is well-established that criminal forfeiture is not limited to the criminal proceeds still in the defendant's possession at the time he is sentenced, or by the availability of substitute assets. To the contrary, the defendant is required to forfeit the proceeds of his offense even if he has dissipated the proceeds, and even if he presently lacks other property that could be forfeited in their place. In such cases, the forfeiture order takes the form of a personal money judgment.<sup>67</sup>

All defendants who acted in concert with each other are jointly and severally liable to forfeit the amount subject to forfeiture regardless of how much each defendant may have obtained personally. In *United States v. Akwei*,<sup>68</sup> for example, the Fourth Circuit held that a

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<sup>66</sup> See *United States v. Louthian*, 2013 WL 594232 (W.D. Va. Feb. 15, 2013) (following *Voigt* and refusing to enter forfeiture order against specific assets purchased with commingled funds; accounting principles approved in *Banco Cafetero* do not satisfy the Government's tracing burden of proof by a preponderance of the evidence). Cf. *In re Rothstein, Rosenfeldt, Adler, P.A.*, 717 F.3d 1205, 1213-14 (11th Cir. 2013) (applying *Voigt* in the ancillary proceeding and declining to allow the Government to use the LIBR to rebut claimant's claim that commingled funds belonged to it).

<sup>67</sup> See *United States v. Hampton*, 732 F.3d 687, 691-92 (6th Cir. 2013) (following all other circuits and holding that forfeiture being a mandatory part of the defendant's sentence, the court may enter a money judgment in the amount of the proceeds of the offense even though the defendant has dissipated the traceable property and has no other funds with which to satisfy the judgment); *United States v. Vanosdoll*, 532 Fed. Appx. 647 (8th Cir. 2013) (defendant's ability to pay, now or in the future, is not a factor in determining whether to impose a money judgment); *United States v. Brown*, 2013 WL 2473034, at \*2 (D. Md. June 10, 2013) ("the amount of the money judgment is not limited by the defendant's present ability to pay; nor does it matter that none of the funds directly traceable to the offense remain in his or her possession").

<sup>68</sup> *United States v. Akwei*, 514 Fed. Appx. 291, 298-99 (4th Cir. 2013).

courier for a drug organization was jointly and severally liable for the forfeiture of the value of the drugs he carried, even if he was not paid for his work. In most courts, however, an individual's joint and several liability, while not limited to what the defendant received personally, is limited to the amount obtained by those acting in concert with him that was foreseeable to the defendant.<sup>69</sup>

## **X. PRELIMINARY ORDER OF FORFEITURE**

### *Rule 32.2(b)(2)*

Rule 32.2(b)(1) provides that the court must determine what property is subject to forfeiture, or the amount of the money judgment, as soon as practical after accepting a guilty plea or the return of a guilty verdict.<sup>70</sup> If the forfeiture is contested, and either party requests a hearing, the court must conduct one;<sup>71</sup> but if no one requests a hearing, the hearing is not necessary.<sup>72</sup>

If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture.<sup>73</sup> Unless doing so is impractical, the preliminary order must be entered "sufficiently in advance of sentencing to allow the parties to suggest revision or modifications" before the order becomes final at sentencing.<sup>74</sup> The reason the entry of the forfeiture order

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<sup>69</sup> See *United States v. Brown*, 2013 WL 2473034, at \*3 (D. Md. June 10, 2013) (assuming forfeiture is limited to what was foreseeable to a defendant, a defendant who joins a drug conspiracy late may be liable only for the amount realized by himself and his co-conspirators after he joined the conspiracy).

<sup>70</sup> Rule 32.2(b)(1)(A).

<sup>71</sup> Rule 32.2(b)(1)(B).

<sup>72</sup> See *United States v. Vanosdoll*, 532 Fed. Appx. 647 (8th Cir. 2013).

<sup>73</sup> Rule 32.2(b)(2)(A).

<sup>74</sup> Rule 32.2(b)(2)(B).

cannot be deferred until after sentencing is that the defendant has the right to have all aspects of his sentence – including the forfeiture – imposed at the same time.<sup>75</sup> But Rule 32.2(b)(2)(C) provides that if the court cannot identify all of the specific property subject to forfeiture, or calculate the amount of the money judgment, before sentencing, it may comply with the rule by entering an order that describes the property in general terms.

For example, in *United States v. Brown*,<sup>76</sup> a district court, being unable to determine how much each defendant would be required to forfeit at the time of sentencing, invoked Rule 32.2(b)(2)(C) and ordered the defendants to forfeit “all proceeds” of their offense. Then, after sentencing, the court amended the order to specify the amount of the money judgment for which each defendant was liable.

#### *Forfeiture is mandatory*

If the Government decides to seek a forfeiture order, and the court makes the forfeiture determination, the entry of a forfeiture order is mandatory.<sup>77</sup> In *United States*

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<sup>75</sup> See *United States v. Yeje-Cabrera*, 430 F.3d 1, 15 (1st Cir. 2005) (Rule 32.2(b)’s requirement that the forfeiture be part of the sentence ensures that all aspects of the defendant’s sentence are part of a single package that is imposed at one time).

<sup>76</sup> *United States v. Brown*, 2013 WL 2473034, at \*1 (D. Md. June 10, 2013).

<sup>77</sup> See *United States v. Louthian*, \_\_\_ F.3d \_\_\_, 2014 WL 2809071 (4<sup>th</sup> Cir. June 23, 2014) (if the Government follows the procedures in Rule 32.2 and establishes the forfeitability of the property, the forfeiture is mandatory despite the defendant’s preference for civil forfeiture); *United States v. Smith*, \_\_\_ F.3d \_\_\_, 2014 WL 1424484 (6<sup>th</sup> Cir. Apr. 15, 2014) (“Criminal forfeiture judgments are mandatory for mail fraud convictions”); *United States v. Bulger*, 2013 WL 6017351 (D. Mass. Nov. 13, 2013) (because forfeiture is mandatory in a RICO case, court had no discretion to ignore the Government’s request to forfeit Whitey Bulger’s assets and apply them to restitution). *Cf. In re Stake Center Locating, Inc.*, 731 F.3d 949, 951 (9<sup>th</sup> Cir. 2013) (forfeiture is mandatory only if the Government exercises its discretion and decides to seek it).



*v. Blackman*,<sup>78</sup> the Fourth Circuit reprimanded a district court judge who declined to enter a forfeiture order and said the following: “The word ‘shall’ does not convey discretion . . . The plain text of the statute [28 U.S.C. § 2461(c)] thus indicates that forfeiture is not a discretionary element of sentencing. . . . Insofar as the district court believed that it could withhold forfeiture on the basis of equitable considerations, its reasoning was in error.”

## **XI. ORDER OF FORFEITURE / SENTENCING**

### *Rule 32.2(b)(4)*

Rule 32.2(b)(4) provides that at sentencing, the forfeiture must be included in the oral announcement of the sentence and in the judgment.<sup>79</sup> The latter requirement is accomplished by a simple reference to the previously-entered preliminary order.<sup>80</sup> The district court’s failure to do so may be corrected as a clerical error.<sup>81</sup>

Defendants frequently try to take advantage of the district court’s failure to make an express reference to the forfeiture order in the oral announcement of the sentence by seeking to vacate the forfeiture order on appeal, but such attempts to claim an unintended windfall are seldom successful.

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<sup>78</sup> *United States v. Blackman*, \_\_\_ F.3d \_\_\_, 2014 WL 1099271 (4<sup>th</sup> Cir. Mar. 21, 2014).

<sup>79</sup> Rule 32.2(b)(4)(B).

<sup>80</sup> *United States v. Soreide*, 522 Fed. Appx. 516, 618 (11<sup>th</sup> Cir. 2013) (rejecting defendant’s claim that a previously-issued forfeiture order was invalid because it was merely referenced in the judgment and not set out in a separate document; issuing the order and referencing it in the J&C is all that Rule 32.2(b)(4) requires).

<sup>81</sup> See *United States v. Alvarez*, 710 F.3d 565 (5<sup>th</sup> Cir. 2013) (granting motion under Rule 32.2(b)(4)(B) to correct clerical error by including forfeiture order in the judgment).

In *United States v. Gomez*,<sup>82</sup> the Fifth Circuit noted that Rule 32.2(b)(4)(B) is worded in the alternative: the court must make the forfeiture part of the oral announcement *or otherwise ensure that the defendant is aware of the forfeiture*.<sup>83</sup> The panel then held that the court's asking the defendant if he objected to the entry of a forfeiture order satisfied the second alternative.<sup>84</sup> Similarly, in *United States v. Esquenazi*,<sup>85</sup> the Eleventh Circuit held that the district court's failure to include the forfeiture in the oral announcement of the sentence did not violate Rule 32.2(b)(4) where defense counsel's objection to the amount of the forfeiture indicated that defendant was "otherwise aware" that there would be a forfeiture order.

In *United States v. Joseph*, the defendant argued that under the rule that the oral announcement of the sentence controls, the district court's failure to include the forfeiture in the oral announcement of the sentence was fatal. But the Eleventh Circuit held that the rule does not apply when the oral announcement is contrary to law.<sup>86</sup>

*Property located in another district*

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<sup>82</sup> *United States v. Gomez*, \_\_\_ Fed. Appx. \_\_\_, 2013 WL 6439638 (5<sup>th</sup> Cir. Dec. 10, 2013).

<sup>83</sup> Rule 32.2(b)(4)(B).

<sup>84</sup> See also *United States v. Cano*, \_\_\_ Fed. Appx. \_\_\_, 2014 WL 929053 (11<sup>th</sup> Cir. Mar. 11, 2014) (defendant who signed a consent order of forfeiture was "otherwise aware" of the forfeiture at sentencing, even though the court failed to include it in the oral announcement).

<sup>85</sup> *United States v. Esquenazi*, \_\_\_ F.3d \_\_\_, 2014 WL 1978613 (11<sup>th</sup> Cir. May 16, 2014).

<sup>86</sup> *United States v. Joseph*, \_\_\_ F.3d \_\_\_, 2014 WL 658057 (11<sup>th</sup> Cir. Feb. 21, 2014) (where judge's oral announcement gave defendant offset against restitution order to reflect amount forfeited, and written judgment did not, oral announcement was contrary to law and did not control).

The jurisdiction of the district court to order the forfeiture of property in a criminal case is based not on its *in rem* jurisdiction over the property, but on its *in personam* jurisdiction over the defendant. Thus, the court may order the forfeiture of property wherever it may be located.<sup>87</sup>

#### *Corrections to the Final Order of Forfeiture*

If the district court needs to make other corrections to the order of forfeiture, such as correcting the serial number on a forfeited firearm, it may do so pursuant to Rule 32.2(e).<sup>88</sup>

#### *Effect of parallel state criminal proceedings*

The defendant is not entitled to any offset against the forfeiture based on forfeiture imposed in a related state case.<sup>89</sup> Nor does a state court's failure to surrender *in rem* jurisdiction over the property prevent the federal court from ordering the forfeiture of the property in a criminal case.<sup>90</sup>

#### *Application of the U.S. Sentencing Guidelines*

Defendants often argue that any stipulation the Government makes in a plea agreement or at sentencing

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<sup>87</sup> See *United States v. Holy Land Foundation for Relief and Development*, 722 F.3d 677, 690 (5th Cir. 2013).

<sup>88</sup> See *United States v. Cloward*, 2013 WL 2550044 (D. Utah June 10, 2013).

<sup>89</sup> See *United States v. Williams*, 519 Fed. Appx. 303, 304 (5th Cir. 2013) (the doctrine of dual sovereignty allows a federal court to impose a money judgment without any offset for any forfeiture ordered by a state court based on the same conduct).

<sup>90</sup> See *United States v. Caruthers*, 967 F. Supp. 2d 1286 (E.D. Mo. 2013) (the concurrent jurisdiction doctrine has no effect on a federal court's ability to exercise *in personam* jurisdiction; the lack of a state turnover over thus did not bar the court from entering the forfeiture order).

regarding the facts governing the application of the advisory sentencing guidelines is binding on the Government with respect to the property that may be forfeited, or the amount of any forfeiture money judgment. But in *United States v. Gartland*,<sup>91</sup> the Third Circuit held otherwise: because the offense level for sentencing purposes is based on net proceeds, and forfeiture is based on gross proceeds, the court said, the Government's stipulation in the plea agreement that, for sentencing purposes, the defendant realized not more than \$7 million in proceeds did not preclude the entry of a forfeiture judgment for \$11.8 million in gross proceeds.

## **XII. SUBSTITUTE ASSETS**

### *Ownership*

When the court forfeits a substitute asset, ownership issues are deferred to the ancillary proceeding just as they are in cases involving directly forfeitable property.<sup>92</sup> Thus, the defendant cannot object to the motion to forfeit substitute assets on the ground that the property does not belong to him.<sup>93</sup> Property owned by a corporation that the

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<sup>91</sup> *United States v. Gartland*, 540 Fed. Appx. 136, 139 (3d Cir. 2013).

<sup>92</sup> See *United States v. Gordon*, 710 F.3d 1124, 1167-68 (10th Cir. 2013) ("The court does not determine that a substitute asset belongs to the defendant when it includes it in the preliminary order of forfeiture; rather, the requirement in § 853(p)(2) that the substitute asset be 'property of the defendant' is satisfied by allowing third parties to contest the forfeiture of the property in the ancillary proceeding. . . ."; citing *Asset Forfeiture Law in the United States* at § 22-3); *United States v. Frey*, 517 Fed. Appx. 512, 513 (6th Cir. 2013) (holding that the district court did not err in refusing to consider ownership issues before forfeiting substitute assets, citing Rule 32.2(b)(2)(A)).

<sup>93</sup> See *United States v. Weitzman*, 936 F. Supp. 2d 218, 221 (S.D.N.Y. 2013) (defendant lacks standing to object to forfeiture of substitute asset on the ground that a third party has an interest in it; third party must file a claim in the ancillary proceeding).

defendant controls is deemed property of the defendant for this purpose.<sup>94</sup>

*The criteria set forth in § 853(p) must be satisfied*

The forfeiture of substitute assets is governed by 21 U.S.C. § 853(p). One of the criteria the Government must satisfy under the statute is that it exercised due diligence in attempting to locate the directly forfeitable property and was not able to do so because of an act or omission of the defendant.<sup>95</sup>

The Government's burden in that regard is not high, and it generally has little difficulty in making the necessary showing. In *United States v. Gordon*,<sup>96</sup> the Tenth Circuit held that a financial analyst's affidavit stating that he reviewed the defendant's records and could not find the proceeds of his offense was sufficient to satisfy the due diligence requirement, and that it was reasonable to assume that the defendant was the one responsible for the absence of his assets.<sup>97</sup>

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<sup>94</sup> See *United States v. Jaynes*, 2013 WL 4009650, at \*3 (W.D.N.C. Aug 5, 2013) (defendant objects to forfeiture of property held by his corporation as substitute asset on the ground that it does not belong to him; instead of holding that defendant lacks standing to contest the forfeiture on that basis, court holds that property of defendant's corporation is defendant's property for purposes of § 853(p)).

<sup>95</sup> 21 U.S.C. § 853(p)(1)(A).

<sup>96</sup> *United States v. Gordon*, 710 F.3d 1124 (10th Cir. 2013).

<sup>97</sup> 710 F.3d at 1166 (collecting cases and citing *Asset Forfeiture Law in the United States*, supra note 3, § 2-3). See *United States v. Martin*, 2014 WL 221956, at \*6 (D. Idaho Jan. 21, 2014) (to obtain the forfeiture of substitute assets, it was sufficient for the Government to have its agent testify that he could not locate or trace the criminal proceeds due to unreliable records, intervening transactions, and commingling); *United States v. Lane*, 2014 WL 231988 (D. Ariz. Jan. 22, 2014) (agent's affidavit, based on reliable hearsay, established that least \$600,000 in proceeds deposited into defendant's bank account had been dissipated due to defendant's act or omission because defendant was the sole owner of the bank account).

*Any asset may be forfeited as a substitute asset*

A substitute asset may be forfeited without showing any connection between the property and the defendant's offense. As the district court explained in *United States v. Weitzman*,<sup>98</sup> the whole point of Section 853(p) is to allow the Government to use untainted property to satisfy a forfeiture when the tainted property is unavailable.<sup>99</sup>

Nor are there exceptions to the type of property that may be forfeited as a substitute asset. In *Weitzman*, for example, the court ordered the forfeiture of the defendant's IRA account.<sup>100</sup>

*Switching theories of forfeiture*

Most courts hold that the Government has the option of forfeiting property as a substitute asset even though it may be directly forfeitable, and that it may change its theory of forfeiture as the criminal case progresses. This might happen, for example, if the Government initially alleged that each of more than 100 items was traceable to the defendant's offense, but then decided that it would be easier to obtain a money judgment and forfeit those items as substitute assets rather go through the exercise of tracing each of them to the offense in the forfeiture phase of the trial.<sup>101</sup>

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<sup>98</sup> *United States v. Weitzman*, 936 F. Supp. 2d 218, 221 (S.D.N.Y. 2013).

<sup>99</sup> See *United States v. Louthian*, 2013 WL 3007174, at \*2 (W.D. Va. June 14, 2013) (because substitute property is forfeitable when the directly forfeitable property is unavailable, the Government need not show a nexus between the substitute asset and the defendant's offense).

<sup>100</sup> *Weitzman*, 936 F. Supp. 2d at 221.

<sup>101</sup> See *United States v. Hailey*, 887 F. Supp. 2d 649 (D. Md. 2012) (rather than require the Government to trace each of 119 items to the fraud proceeds, the court may order the forfeiture of the same items as substitute assets). See *United States v. Candelaria-Silva*, 166 F.3d 19, 43 (1st Cir. 1999) (there was nothing improper in prosecutor's

In such cases, despite the language in Section 853(p) requiring a showing that the directly forfeitable property is unavailable, courts generally hold that it is not a defense for the defendant to say that the property was directly traceable to the offense and therefore could not be forfeited as a substitute asset.<sup>102</sup>

When this issue arose in *United States v. Zorrilla-Echevarria*,<sup>103</sup> however, the First Circuit rebuked the district court and the Government for creating an unnecessary appellate issue instead of forfeiting the property directly when it would have been easy to do so.

In *Zorrilla*, the defendant was convicted of bulk cash smuggling in violation of 31 U.S.C. § 5332, but instead of ordering the forfeiture of the \$541,801 that was seized from the defendant as property involved in the smuggling offense, the district court entered a money judgment in that amount and allowed the Government to enforce the judgment by attaching the seized currency under state law.

A third party who wanted to contest the forfeiture on the ground that the property belonged to him complained that this end-run around the forfeiture procedures in Rule 32.2(b) deprived him of his right to make a claim in the ancillary proceeding.

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decision to move to strike property from the forfeiture allegation before it was submitted to the jury and later to seek forfeiture of the same property as a substitute asset).

<sup>102</sup> See *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 could not forfeit stolen merchandise as substitute assets when the merchandise was recovered and available for forfeiture directly).

<sup>103</sup> *United States v. Zorrilla-Echevarria*, 723 F.3d 298 (1st Cir. 2013).

The First Circuit agreed with him, and remanded the case to the district court.<sup>104</sup>

On remand, the court conducted a hearing and found that the third party had no interest in the property, but instead of ordering the forfeiture of the money as property directly involved in the bulk cash smuggling offense, it ordered it forfeited as a substitute asset in satisfaction of the money judgment.<sup>105</sup> This time the defendant appealed, arguing that because the \$541,081 was directly involved in the offense and could have been forfeited in the first instance, it was not eligible to be forfeited as a substitute asset.

In its opinion, the First Circuit blasted the district court and the Government for creating this procedural quandary by mishandling the case from the outset. Once the defendant was convicted, the panel said, all the trial court had to do was to enter an order forfeiting the seized cash as property involved in the bulk cash smuggling offense pursuant to 31 U.S.C. § 5332. Instead, the district court charted its own course, ignoring all of the procedures that apply in criminal forfeiture cases. “When parties lead a court down a path that ignores proper procedure,” the panel said, “bad things often happen.”<sup>106</sup>

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<sup>104</sup> *United States v. Zorrilla-Echevarria*, 671 F.3d 1 (1st Cir. 2011).

<sup>105</sup> *United States v. Zorrilla-Echevarria*, 2012 WL 359745 (D.P.R. Feb. 2, 2012).

<sup>106</sup> *Zorrilla-Echevarria*, 723 F.3d at 299.



This case illustrated that point. Because of its odd procedural history, the court said, the case arrived in the court of appeals “like a train passenger disembarking at the wrong station and finding that none of the standard directions for going forward seemed to fit.”<sup>107</sup> Thus, instead of having a simple order of forfeiture, the court continued, “we have . . . a money judgment and, now, a misapplication of 853(p) to the actual property used in the crime.”<sup>108</sup>

In all events, the panel was unwilling to hand the defendant a windfall by holding that the directly forfeitable property was ineligible for forfeiture as a substitute asset. Instead, it simply affirmed the forfeiture on the ground that directly-forfeitable property may always be forfeited to satisfy a money judgment.<sup>109</sup>

### **XIII. RIGHT OF THIRD PARTIES TO OBJECT TO THE FORFEITURE**

*Third parties may not intervene in a criminal case*

Under 21 U.S.C. § 853(k), third parties are barred from commencing any action against the United States asserting an interest in property subject to criminal forfeiture once an indictment has been returned. Instead, third parties are required to wait until the criminal case is concluded and the court has entered a preliminary order of forfeiture. At that point, the third parties may assert their interest in the forfeited property by filing claims in

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<sup>107</sup> *Zorrilla-Echevarria*, 723 F.3d at 299.

<sup>108</sup> *Zorrilla-Echevarria*, 723 F.3d at 299.

<sup>109</sup> *Zorrilla-Echevarria*, 723 F.3d at 300.

the post-trial ancillary proceeding pursuant to Section 853(n).<sup>110</sup>

Section 853(k) does not apply to actions for the release of seized property that were pending when the indictment was returned,<sup>111</sup> but the Government may nevertheless seek to dispose of such pre-existing actions on another ground. In *United States v. Huggins*,<sup>112</sup> for example, a third party had filed a pre-indictment motion for the release of the property under Rule 41(g) of the Federal Rules of Criminal Procedure, alleging that its seizure was illegal. But the court granted the Government's motion to dismiss the action on the ground that the return of the indictment gave the third party an adequate remedy at law.<sup>113</sup>

Among other things, Section 853(k) means that a third party cannot object to the entry of an order of forfeiture or its amendment;<sup>114</sup> and cannot file any action in another court to circumvent the forfeiture procedure.<sup>115</sup>

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<sup>110</sup> 21 U.S.C. 853(k).

<sup>111</sup> See *Chaim v. United States*, 692 F. Supp. 2d 461, 471-73 (D.N.J. 2010) (§ 853(k) would have barred the third party from filing a Rule 41(g) motion after the property was included in a criminal indictment, but it does not render moot a pre-existing Rule 41(g) motion that was filed prior to indictment; however, the Rule 41(g) motion may be denied on other grounds); *United States v. Huggins*, 2013 WL 1728269 (S.D.N.Y. Mar. 18, 2013) (same; following *Chaim*).

<sup>112</sup> *United States v. Huggins*, 2013 WL 1728269 (S.D.N.Y. Mar. 18, 2013)

<sup>113</sup> *Huggins*, 2013 WL 1728269, following *Chaim v. United States*, 692 F. Supp. 2d 461, 475 (D.N.J. 2010) (absent a showing that the third party will suffer "great and certain irreparable harm" if not afforded an immediate hearing, or that the seizure was in "callous disregard" of the third party's rights, the right to file a claim in the post-trial ancillary proceeding provides a third party with an adequate remedy at law; Rule 41(g) motion dismissed).

<sup>114</sup> See *United States v. Gamez*, 2013 WL 2145590 (N.D. Tex. May 16, 2013) (§ 853(k) bars third party from filing motion for return of seized property after defendant enters guilty plea but before the court enters

#### **XIV. ANCILLARY HEARING – PROCEDURAL ISSUES**

##### *Purpose of the ancillary proceeding*

The purpose of the ancillary proceeding is to give third parties the opportunity to object to the forfeiture on the ground that the property belongs to them and therefore should not be forfeited.<sup>116</sup> Per Rule 32.2(c)(1), however, no ancillary proceeding is necessary if the Government is seeking only a money judgment; because the money judgment is personal to the defendant, the entry of the judgment does not implicate any third party's interest.

For the same reason, the Government does not have to commence an ancillary proceeding if the defendant satisfies the money judgment by making a payment to the

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an order of forfeiture; he must wait until there is a forfeiture order and an ancillary proceeding); *United States v. Louthian*, 2013 WL 594232 (W.D. Va. Feb. 15, 2013) (acquitted co-defendant cannot oppose entry of forfeiture order but must wait until the ancillary proceeding to file a claim).

<sup>115</sup> See *In re: Rothstein Rosenfeldt Adler, P.A.*, 2012 WL 4320479 (S.D. Fla. Aug. 30, 2012) (bankruptcy trustee who believes defendant's loan to third party was fraudulent and is seeking to recover the amount loaned, should have filed a claim in the ancillary proceeding when the mortgage note that the borrower gave defendant was forfeited to the Government; he is barred by § 853(k) from bypassing the ancillary proceeding in favor of filing a private lawsuit against the borrower to recover the value of the note), *aff'd*, *Stettin v. United States*, 2013 WL 4028150 (S.D. Fla. Aug. 7, 2013) (because trustee had standing to file a claim making his fraudulent transfer argument in the ancillary proceeding under § 853(n)(2), he should have made his claim there, not in the bankruptcy court; that he would likely have failed to prevail under § 853(n)(6)(A) because the property was proceeds was not a reason to bypass the ancillary proceeding).

<sup>116</sup> For an excellent summary of the purpose and procedures governing the ancillary proceeding, See *United States v. Sigillito*, 938 F. Supp. 2d 877, 884-85 (E.D. Mo. 2013) (to prevail in the ancillary proceeding, the claimant must file a claim that comports with the pleading requirements in § 853(n)(3), have a "legal interest" in the property to satisfy the standing requirement in § 853(n)(2), and show that she satisfies one of the grounds for recovery in § 853(n)(6)).

court. As the Tenth Circuit explained in *United States v. Tolliver*,<sup>117</sup> no third party could have an interest in either the judgment or the defendant's payment.

*Notice requirement to potential claimants*

Since December 1, 2009, when Rule 32.2(b)(6) was enacted, the Government has been required to publish notice of the forfeiture order in accordance with Rule G(4)(a) of the Federal Rules of Civil Procedure, and to send direct written notice in accordance with Rule G(4)(b) to all potential third party claimants.<sup>118</sup> Just as in civil forfeiture cases, the notice must comply with the requirements of constitutional due process as set forth by the Supreme Court in *Mullane*<sup>119</sup> and *Dusenbery*.<sup>120</sup>

In general, the Government must send notice to persons of whose interest it is aware, or whose interest is recorded in public records. On the other hand, in *United States v. Lyons*,<sup>121</sup> the district court held that the Government was not to be faulted for failing to send notice to a third party of whom it was not aware and who had no

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<sup>117</sup> *United States v. Tolliver*, 730 F.3d 1216, 1233 (10th Cir. 2013).

<sup>118</sup> See *United States v. Devlin*, 2013 WL 275968, at \*9 (M.D. Fla. Jan. 22, 2013) (the burden is on the Government to prove that it complied with the notice requirements in Rule 32.2(b)(6)).

<sup>119</sup> *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

<sup>120</sup> *Dusenbery v. United States*, 534 U.S. 161, 167 (2002). See also *United States v. Alvarez*, 710 F.3d 565, 567 (5th Cir. 2013) (the notice provisions in § 853(n)(1) and Rule 32.2(b)(6) mirror the due process requirements in *Mullane*; “the Government need not exert heroic efforts or ensure actual notice”; following *Dusenbery*); *United States v. Gallion*, 534 Fed. Appx. 303, 313 (6th Cir. 2013) (the “second attempt” rule in *Jones v. Flowers* applies in the ancillary proceeding, but the Government satisfied the requirement by sending the second notice to an attorney who represented claimant’s father and who, as a family friend, could be expected to pass it on to claimant).

<sup>121</sup> *United States v. Lyons*, 2013 WL 1694865 (D. Mass. Apr. 12, 2013).

recorded interest in the forfeited property in any public record. Once it determined the owner of record, the court said, Government had no burden “to go searching through records to see if others might have an interest.”<sup>122</sup>

There are also situations in which it is appropriate for the Government to send notice to someone other than the potential claimant himself. For example, in *United States v. Alvarez*,<sup>123</sup> the Fifth Circuit held that if the titled owner of the forfeited property is a minor child, notice served on the child’s parent is sufficient; and in *United States v. Gallion*,<sup>124</sup> the Sixth Circuit held that under Rule G(4)(b)(v), notice may be sent to an attorney representing the claimant with respect to the forfeiture. Finally, notice to a corporation may be sent in accordance with state law, which in *United States v. Devlin* meant that it was sufficient to send notice by regular mail to the corporation’s registered agent.<sup>125</sup>

In *Gallion*, the Sixth Circuit also held that a person who has actual notice of the forfeiture order cannot complain that the Government’s effort to provide him with notice was inadequate.<sup>126</sup>

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<sup>122</sup> *Lyons*, 2013 WL 1694865, at \*3.

<sup>123</sup> *United States v. Alvarez*, 710 F.3d 565, 567 (5th Cir. 2013).

<sup>124</sup> *United States v. Gallion*, 534 Fed. Appx. 303, 313 (6th Cir. 2013).

<sup>125</sup> *United States v. Devlin*, 2013 WL 275968, at \*9 (M.D. Fla. Jan. 22, 2013).

<sup>126</sup> *Gallion*, 534 Fed. Appx. at 313-14 (applying Rule G(4)(b)(v); person with actual notice cannot complain that Government’s efforts to provide him direct notice were insufficient; district court’s finding, based on circumstantial evidence, that a third party had passed notice of the forfeiture on to claimant was not clearly erroneous). See also *United States v. Lyons*, 2013 WL 1694865 (D. Mass. Apr. 12, 2013) (admission by its counsel that he had seen notice of the forfeiture order on the Government’s forfeiture website meant that claimant had actual notice, and thus could not complain of lack of actual notice).

### *Subject matter jurisdiction*

The court's jurisdiction in the ancillary proceeding is limited to adjudicating claims to property included in the order of forfeiture. Thus, in *United States v. Fabian*,<sup>127</sup> the district court declined to consider claims to property in which the third party petitioner asserted an interest but which had not been forfeited in the criminal case.

### *Pleading requirements under § 853(n)(3)*

The requirements for filing a claim in the ancillary proceeding are set forth in 21 U.S.C. § 853(n)(3). First, the claim must be filed under penalty of perjury.

In *Fabian*, the court held that when a claim is filed by a corporation or trust, the claim must be signed under penalty of perjury by a representative of the entity filing the claim. Because of the danger of false claims in forfeiture proceedings, the court said, that requirement is not a mere technical one that can be easily excused. Thus, when the claimant failed to amend its claim to include the required signature before the filing deadline expired, the claim was untimely.<sup>128</sup>

Second, the claim must state the "nature and extent" of the claimant's legal interest in the forfeited property.

In *United States v. Hailey*,<sup>129</sup> the defendant's wife filed a claim in the ancillary proceeding stating only that she had an interest in the forfeited property. The court held that it is not enough for the claimant merely to state that she has an interest in the property or even that she is its owner. To the contrary, the claim must state the statutory and factual basis for the claim in sufficient detail

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<sup>127</sup> *United States v. Fabian*, 2013 WL 150361, at \*5 (W.D. Mich. Jan. 14, 2013).

<sup>128</sup> *Fabian*, 2013 WL 150361, at \*7.

<sup>129</sup> *United States v. Hailey*, 924 F. Supp. 2d 648 (D. Md. 2013).

to allow the court to determine if a motion to dismiss for failure to state a claim should be granted, and to provide guidance as to what discovery is needed to test the validity of the claim.

In particular, the claim must state if it is made under Section 853(n)(6)(A) or Section 853(n)(6)(B): the former being the provision that applies to pre-existing interests that third parties may hold in the forfeited property, and the latter providing protection for bona fide purchasers for value who acquired their interest after it became subject to forfeiture. Because the factual and legal issues likely to arise in the litigation of the claim are very different depending on which statute the claimant is asserting as her basis for recovery, the court in *Hailey* concluded, the claimant must make her theory known at the outset of the proceeding.<sup>130</sup>

Third, the claim must describe the property being claimed. This may seem obvious, but in *United States v. Phillips*,<sup>131</sup> the court held that a claim contesting the forfeiture of “various motorcycle parts and accessories” was “too vague to state a plausible legal interest in any particular part” of the forfeited property and thus did not satisfy Section 853(n)(3). Similarly, in *United States v. Sigillito*,<sup>132</sup> the court held that a claimant contesting the forfeiture of a bank account must state what portion of the commingled funds she is claiming.

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<sup>130</sup> *Hailey*, 924 F. Supp. 2d at 658; *United States v. Ceballos-Lepe*, 977 F. Supp. 2d 1085 (D. Utah 2013) (following *Hailey*; granting motion to dismiss in part because claimant failed to specify if the claim was made under § 853(n)(6)(A) or (B)); *United States v. Caruthers*, 967 F. Supp. 2d 1286 (E.D. Mo. 2013) (claim that stated only that claimant was in possession of currency when it was seized does not satisfy Section 853(n)(3)'s requirement that the claim state the nature and extent of the claimant's interest).

<sup>131</sup> *United States v. Phillips*, 2013 WL 428557, at \*3-4 (E.D. Va. Feb. 1, 2013).

<sup>132</sup> *United States v. Sigillito*, 938 F. Supp. 2d 877, 892 (E.D. Mo. 2013).

Finally, the claim must state the “time and circumstances” of the claimant’s acquisition of an interest in the property, and “any additional facts supporting the petitioner’s claim and the relief sought.”

Some courts have likened the “time and circumstances” requirement in Section 853(n)(3) to the requirement imposed by the Supreme Court on plaintiffs in civil proceedings in its decisions in *Iqbal* and *Twombly*.<sup>133</sup> That is, the claim must contain sufficient facts to state a claim that is plausible on its face.<sup>134</sup> In all events, the courts agree that it not sufficient for the claimant merely to assert that she obtained the property “as a gift,” “through her employment,” or under other vague, unspecified circumstances.<sup>135</sup> To the contrary,

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<sup>133</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

<sup>134</sup> *United States v. Church & Dwight Company*, 510 Fed. Appx. 55 (2d Cir. 2013) (third-party petition must provide “enough facts to state a claim to relief that is plausible on its face,” quoting *Bell Atlantic Corp. v. Twombly*); *United States v. Phillips*, 2013 WL 428557, at \*3 (E.D. Va. Feb. 1, 2013) (applying *Twombly* and *Iqbal* to claims filed in the ancillary proceeding; “as with a civil complaint facing a Rule 12(b)(6) motion to dismiss,... the petition must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face”); in the ancillary proceeding is sufficient if it satisfies the pleading standard in *Iqbal* and *Twombly*).

<sup>135</sup> See *United States v. Vithidkul*, 2014 WL 979206, at \*2-3 (D. Md. Mar. 12, 2014) (to comply with § 853(n)(3), claim must set forth the “time and circumstances” of the claimant’s acquisition of a legal interest in the forfeited property; simply stating that the property was acquired “through previous employment” is not sufficient; rather, claimants must state how they obtained possession, from whom, and the place and time); *United States v. Fabian*, 2013 WL 150361, at \*5 (W.D. Mich. Jan. 14, 2013) (claim stating only that defendant’s family members acquired the forfeited property by gift or transfer did not comply with § 853(n)(3); such claims do not adequately set forth the nature and extent of the claimant’s interest or the time and circumstances of the acquisition of that interest).



claimants must state how they obtained possession of the property, from whom, and at what place and time.<sup>136</sup>

*Time for filing claim*

Section 853(n)(2) provides that third party claims must be filed within 30 days of the final publication of notice, or the receipt of actual notice, whichever is

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<sup>136</sup> *Vithidkul*, 2014 WL 979206 at \*2-3; *United States v. Sigillito*, 938 F. Supp. 2d 877, 887-88 (E.D. Mo. 2013) (bare legal assertion of a marital interest in defendant's property, or that property was received as gifts, is insufficient; claim must state time and circumstances of her acquisition of her interest); *United States v. McDonald*, 2014 WL 1911554 (D. Me. May 13, 2014) (claim asserting only that forfeited firearm was missing from claimant's firearms collection was insufficient; the claim must state the time and circumstances of claimant's acquisition of the firearm; that he cannot recall how or when he acquired it is no excuse); *United States v. Phillips*, 2013 WL 428557, at \*3-4 (E.D. Va. Feb. 1, 2013) (to state a claim under § 853(n)(6)(A), claim must plead both the date when the interest was acquired and the date when the act giving rise to the forfeiture took place); *United States v. Molina-Sanchez*, 2013 WL 4083271 (W.D.N.C. Aug. 13, 2013) (claim by defendant's wife asserting only that she was "owner" of property forfeited because it was purchased with drug money did not comply with § 853(n)(3) because it failed to assert a source for the money used to purchase the property); *United States v. Emor*, 2013 WL 3005366, at \*9 (D.D.C. June 18, 2013) (legal conclusions, unsupported by facts, are insufficient to satisfy § 853(n)(3); nor may claimant promise to provide documentary support later); *United States v. Brown*, 2013 WL 2103630, at \*7 (N.D. W. Va. May 14, 2013) (bald assertion of ownership of forfeited jewelry does not satisfy the "time and circumstances" requirement in § 853(n)(3)).

earlier.<sup>137</sup> The requirement is strictly enforced, and third party claims are frequently dismissed as untimely.<sup>138</sup>

If there are multiple forfeiture orders in the same case, each set of assets has its own deadline for filing a claim. Thus, in *Fabian* the district court dismissed a claim as untimely when the claimant waited until the court issued a second amended order of forfeiture to claim property named in the first amended order.<sup>139</sup>

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<sup>137</sup> See *United States v. Dupree*, 919 F. Supp. 2d 254, 283 (E.D.N.Y. 2013) (claimant's deadline for filing a claim did not expire until 32 days after final publication, counting the weekend on which the 30th day fell); *United States v. Phillips*, 2013 WL 428557, at \*2 (E.D. Va. Feb. 1, 2013) (if Government sends direct notice informing claimant he has 30 days to submit claim, even though the time to file a claim based on last date of publication already expired, court will toll the deadline); *United States v. Devlin*, 2013 WL 275968, at \*10 (M.D. Fla. Jan. 22, 2013) (for purposes of computing the start date for the 30-day deadline, court presumes that notice sent by regular mail was received within 5 days of the mailing).

<sup>138</sup> See *United States v. Alvarez*, 710 F.3d 565, 567-68 nn.10-11 (5th Cir. 2013) (declining to establish more flexible rule where claimant is a minor child; claim filed by child's guardian on 74th day dismissed as untimely; claimant could have moved for an extension of time under Fed. R. Civ. P. 6(b)(1) but did not do so); *United States v. Sharma*, 509 Fed. Appx. 381 (5th Cir. 2013) (affirming dismissal of claim filed 10 months after receiving notice and rejecting claimant's contention that he did not initially appreciate the scope of the order); *United States v. Nunez*, 2013 WL 157303, at \*3 (N.D. Ill. Jan. 14, 2013) (assuming arguendo court may equitably toll the filing deadline, it declines to do so where defendant's mother received actual notice of the forfeiture and failed to file a timely claim on the ground that she did not speak English and thought her claim in the administrative forfeiture was sufficient); *United States v. Eckenberg*, 918 F. Supp. 2d 1089, 1090-91 (D. Or. 2013) (defense attorney was required to file his claim within 30 days of publication like everyone else, even though he was not sent direct notice of the forfeiture); *United States v. Titus*, 2013 WL 6540164, at \*4 (E.D. La. Dec. 12, 2013) (declining to equitably toll the filing deadline to allow an LLC to file a claim on its own behalf; equitable tolling is only appropriate where the party has been diligent in asserting its rights, not where it was merely ignorant of the law).

<sup>139</sup> *United States v. Fabian*, 2013 WL 150361, at \*6 (W.D. Mich. Jan. 14, 2013).

Similarly, if there are multiple claimants to the forfeited property, all of the claimants must file timely claims. As the district court held in *United States v. Knoll*, a late-filing claimant cannot assert that he is merely amending someone else's timely claim in a way that allows his claim to relate back to the filing period.<sup>140</sup>

#### *Motion to dismiss the claim*

No hearing on the merits of the third party's claim is necessary if the court can dismiss the claim on the pleadings for lack of standing, for failure to state a claim, or for some other lawful reason.<sup>141</sup>

Motions to dismiss for lack of standing are granted when the claimant is unable to establish a legal interest in the forfeited property in terms of 21 U.S.C. § 853(n)(2).<sup>142</sup> A motion to dismiss for failure to state a claim is granted if, assuming all of the factual allegations in the third party's claim are true, the claimant has failed to state a basis on which he could prevail under Section 853(n)(6)(A)

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<sup>140</sup> See *United States v. Knoll*, 2014 WL 1515896, at \*2 (S.D. Ind. Apr. 18, 2014) (where original claim was amended outside the 30-day claims period to add two additional claimants, claim was out of time and did not relate back to the original filing date with respect to the two additional claimants).

<sup>141</sup> See *United States v. Sigillito*, 938 F. Supp. 2d 877, 883 (E.D. Mo. 2013) (Government may move under Rule 32.2(c)(1)(A) to dismiss for failure to comply with the pleading requirements, lack of standing, or failure to state a claim on which claimant could prevail even if all factual allegation are true); *United States v. Fabian*, 2013 WL 150361, at \*6 (W.D. Mich. Jan. 14, 2013) (claimant cannot object to Rule 32.2(c)(1)(A) motion on the ground that she has not yet conducted discovery or had a hearing on the merits).

<sup>142</sup> See *United States v. Ceballos-Lepe*, 977 F. Supp. 2d 1085 (D. Utah 2013) (granting motion to dismiss under Rule 32.2(c)(1)(A) for failure to allege sufficient facts to establish standing under § 853(n)(2)); *United States v. Dupree*, 919 F. Supp. 2d 254 (E.D.N.Y. Jan. 28, 2013) (denying motion to dismiss for lack of standing where assuming all facts alleged in the claim to be true, claimant has "barely" alleged a valid assignment under state law).

or (B).<sup>143</sup> For example, in *Hailey* the court dismissed the claim filed by the defendant's wife because she conceded that the forfeited assets, which were purchased with fraud proceeds, were given to her as gift – which is not a basis for recovery under either prong of the statute.<sup>144</sup>

#### *Motion for summary judgment*

Rule 56 of the Federal Rules of Civil Procedure applies in the ancillary proceeding, so either party may seek to resolve the case on a motion for summary judgment.<sup>145</sup>

#### *Final order of forfeiture*

Rule 32.2(c)(2) contains language suggesting that the court must enter a final order of forfeiture at the end of the ancillary proceeding in all cases. But in *United States v. Gallion*, the Sixth Circuit held that such a final order is required only if a third party files a claim.<sup>146</sup>

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<sup>143</sup> See *United States v. Emor*, 2013 WL 3005366 (D.D.C. June 18, 2013) (explaining why each of claimant's theories of recovery would be dismissed on the pleadings, either because they lacked factual allegations supporting claimant's legal conclusions, or because the facts, even if true, did not entitle claimant to relief as a matter of law).

<sup>144</sup> *United States v. Hailey*, 924 F. Supp. 2d 648, 657 (D. Md. 2013) (purpose of Rule 32.2(c)(1)(A) is to allow courts to dismiss claims without a hearing if, assuming all facts alleged in the claim are true, claimant is not entitled to relief as a matter of law; dismissing claim where claim did not dispute that assets were purchased with fraud proceeds but asserted they were given to claimant as gifts).

<sup>145</sup> See *United States v. Washington*, 2013 WL 3762906, at \*2 (D.S.C. July 16, 2013) (granting Government's Rule 56 motion for summary judgment where claimant could not establish standing under § 853(n)(2)); *United States v. Brown*, 2013 WL 2103630, at \*6 (N.D. W. Va. May 14, 2013) (the Government may move for summary judgment under Rule 56 in the ancillary proceeding).

<sup>146</sup> *United States v. Gallion*, 534 Fed. Appx. 303, 310 (6th Cir. 2013) (a final order of forfeiture is necessary under Rule 32.2(c)(2) only if a third party files a claim). See also *United States v. de la Mata*, 535 F.3d 1267 (11th Cir. 2008) (if there are no third party claims, or all

## **XV. CHOICE OF LAW**

### *The role of state law*

When a claim is filed in the ancillary proceeding, the court must look first to the law of the jurisdiction that created the property right to determine the nature of the claimant's interest in the property.<sup>147</sup> For example, state law determines whether the claimant was a bona fide purchaser,<sup>148</sup> whether the claimant is entitled to the imposition of a constructive trust,<sup>149</sup> and whether the claimant was the recipient of a valid assignment of the legal interest or the recipient of a fraudulent conveyance.<sup>150</sup>

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claims are settled, there is no need for a final order of forfeiture; if defendant's property has been forfeited, he lacks standing to object to the final order of forfeiture regarding third party claims).

<sup>147</sup> See *United States v. Djeredjian*, 532 Fed. Appx. 734, 735 (9th Cir. 2013) (oral promise of a life estate may be sufficient to create a legal interest under state law regarding oral trusts); *United States v. Basurto*, 2013 WL 1331983 (D. Minn. Mar. 29, 2013) (dismissing claim to forfeited real property where claimant, although possibly the true owner, lacked a legal interest under state law because the property was not titled in her own name).

<sup>148</sup> See *United States v. Dreier*, 952 F. Supp. 2d 582, 590 (S.D.N.Y. 2013) (the meaning of "bona fide purchaser" is determined by reference to state law, citing *Pacheco v. Serendensky*, 393 F.3d 348, 353 (2d Cir. 2004)).

<sup>149</sup> See *United States v. Emor*, 2013 WL 3005366, at \*14 (D.D.C. June 18, 2013) (state law determines if claimant has a constructive trust, but finding such a trust would be to no avail in a circuit holding that a constructive trust is trumped by the relation back doctrine); *United States v. Bailey*, 2013 WL 681826, at \*3 (W.D.N.C. Feb. 25, 2013) (applying North Carolina law to determine if claimant was entitled to a constructive trust).

<sup>150</sup> See *United States v. Dupree*, 919 F. Supp. 2d 254, 266 (E.D.N.Y. 2013) (whether assignment of legal interest to claimant was a fraudulent conveyance is a matter of state law).

If the claimant has no interest under state law, the inquiry ends and the claim fails.<sup>151</sup>

On the other hand, federal law is used to determine the meaning of terms in federal forfeiture statute. As the Second Circuit held in *United States v. Peters*,<sup>152</sup> because interpreting a federal statute “demands national uniformity,” the terms in a federal statute must be defined by federal common law, not law of the state where the case happens to arise. Accordingly, the court interpreted the term “property obtained directly or indirectly” – which appears in many federal forfeiture statutes --- to include property obtained by a corporation that the defendant controlled, without regard to whether state law would have regarded the corporation as defendant’s alter ego or as a separate entity.

#### **XVI. STANDING UNDER SECTION 853(N)(2)**

##### *Section 853(n)(2)*

The standing requirement is set forth in Section 853(n)(2), which provides that any person, other than the defendant, asserting a “legal interest in the property which has been ordered forfeited to the United States,” may petition the court for a hearing to adjudicate the validity of the alleged interest.<sup>153</sup>

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<sup>151</sup> See *United States v. Emor*, 2013 WL 3005366, at \*7 (D.D.C. June 18, 2013) (claimant’s assertion that he had a secured interest fails because there is no such thing as a common law secured interest under the applicable state law).

<sup>152</sup> *United States v. Peters*, 732 F.3d 93, 103 n.4 (2d Cir. 2013).

<sup>153</sup> See *Stettin v. United States*, 2013 WL 4028150 (S.D. Fla. Aug. 7, 2013) (“the standing requirements for third party petitioners are . . . found in § 853(n)(2)”; under the “forgiving” standard, a third party need not have title or ownership; other “legal interests” will suffice); *United States v. Emor*, 2013 WL 3005366, at \*5 (D.D.C. June 18, 2013)(standing is a threshold issue in the ancillary proceeding; under both § 853 and Rule 32.2, the claimant must demonstrate a legal interest in the forfeited property).

As the Eleventh Circuit pointed out in *United States v. Masilotti*, the interest being asserted must be a *present* legal interest; if the third party has relinquished all interests in the forfeited property, he no longer has standing to file a claim in the ancillary proceeding.<sup>154</sup> For that reason, it makes no difference that the claimant is able to trace the forfeited property back to property that he once owned. A former interest is not a present interest, so the ability to trace is irrelevant. For example, in *United States v. Ceballos-Lepe*,<sup>155</sup> the court held that because a lender transferred title to the loaned currency when the loan was made, he has no interest to assert in the ancillary proceeding when the currency was forfeited.<sup>156</sup>

By the same token, persons with an inchoate or contingent interest also lack standing because they have no present interest in the forfeited property. In *United States v. Church & Dwight Company*,<sup>157</sup> the Second Circuit held that a claimant with a contingent interest in the forfeited property based on the settlement of a private lawsuit lacked standing because the contingency was not satisfied.

### *State and federal law*

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<sup>154</sup> *United States v. Masilotti*, 510 Fed. Appx. 809 (11th Cir. 2013) (because a third party who relinquished all interest in the forfeited property did not have standing to contest the forfeiture, the court did not need to address any of the substantive challenges he raised). See also *United States v. Brown*, 2013 WL 2103630, at \*8 (N.D. W. Va. May 14, 2013) (granting summary judgment where claimant failed to demonstrate she retained a legal interest in the forfeited property under state law and had not made a gift).

<sup>155</sup> *United States v. Ceballos-Lepe*, 977 F. Supp. 2d 1085 (D. Utah Oct. 10, 2013).

<sup>156</sup> See also *United States v. Emor*, 2013 WL 3005366, at \*6 (D.D.C. June 18, 2013) (an unsecured creditor lacks standing “even where a creditor or depositor unquestionably provided the specific funds seized by the Government from its debtor”).

<sup>157</sup> *United States v. Church & Dwight Company*, 510 Fed. Appx. 55, 57-58 (2d Cir. 2013).

While reference to state law is the first step in determining whether the claimant has an interest in the forfeited property, having an interest in terms of state law is not dispositive; a person may have such an interest yet fail to satisfy the standings requirements in Section 853(n)(2).

For example, in *United States v. Washington*,<sup>158</sup> the defendant's mother filed a claim in the ancillary proceeding contesting the forfeiture of the vehicle that the defendant used to commit a drug offense. She alleged ownership based on having title to the vehicle, but at her deposition she admitted that she had given nothing of value for the vehicle, had never driven it, and that it was merely titled in her name. In the end, the court granted summary judgment for the Government, finding that the claimant's bare legal title under state law was insufficient. To have a legal interest under Section 853(n)(2), the court said, the claimant must exercise dominion and control over the forfeited property.<sup>159</sup>

It is worth noting that the "legal interest" in the forfeited property that the claimant must have to establish standing under Section 853(n)(2) is the same "legal interest in the property" needed to prevail on the merits under Section 853(n)(6)(A). As discussed below, however, to prevail on the merits under Section 853(n)(6)(A), the claimant must show that this legal interest was in existence prior to the time the property became subject to forfeiture because of its nexus to the criminal offense.<sup>160</sup>

### *Claims filed by defendants and co-defendants*

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<sup>158</sup> *United States v. Washington*, 2013 WL 3762906 (D.S.C. July 16, 2013).

<sup>159</sup> *Washington*, 2013 WL 3762906 at \*3, citing *Asset Forfeiture Law in the United States*, § 23-13(a).

<sup>160</sup> See *United States v. Church & Dwight Company*, 510 Fed. Appx. 55, 57 (2d Cir. 2013) (§ 853(n)(2)'s requirement of a legal interest "must be read as identical to § 853(n)(6)'s reference to a right, title or interest in the property").



The defendant whose conviction gave rise to the issuance of the forfeiture order is expressly barred by the statute from filing a claim in the ancillary proceeding. In *United States v. Thomas*,<sup>161</sup> the district court explained that the defendant must make her objections to the forfeiture order before it becomes final at sentencing and that only third parties can file claims in the ancillary proceeding. Thus, the defendant had no basis for making a post-sentencing request that the forfeited funds be released to pay her attorney's fees.

On the other hand, a co-defendant who has not been convicted of the offense giving rise to the forfeiture has the same right to contest the forfeiture as any other third party.<sup>162</sup> Thus, in *United States v. Watts*,<sup>163</sup> a co-defendant who had yet to be tried was allowed to contest the forfeiture of the property forfeited at the conclusion of the first defendant's trial. When that claim was unsuccessful, however, the co-defendant found that he could not contest the forfeiture a second time in his own trial because it had already been determined that he had no interest in the property.<sup>164</sup>

### *Alter egos*

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<sup>161</sup> *United States v. Thomas*, 961 F. Supp. 2d 814, 818 (S.D. Miss. 2013).

<sup>162</sup> See *United States v. Davenport*, 668 F.3d 1316, 1320-21 (11th Cir. 2012) (a former co-defendant who pled guilty to an offense other than the one giving rise to the forfeiture, is a third party with respect to the forfeiture order whose only right to contest the forfeiture is to file a claim in the ancillary proceeding).

<sup>163</sup> *United States v. Watts*, 934 F. Supp. 2d 451, 493 (E.D.N.Y. 2013).

<sup>164</sup> See also *United States v. Winkelman*, 527 Fed. Appx. 127, 129 (3d Cir. 2013) (once defendant is convicted and his property forfeited, he no longer has an interest, so he is not entitled to notice when co-defendant is later convicted and ordered to forfeit the same property); *United States v. Ford*, 2014 WL 1334223 (D. Me. Apr. 2, 2014) (co-defendants tried separately; second defendant's claim in the ancillary proceeding held until she is convicted in her trial, then dismissed).

Just as a claim filed by the defendant will be dismissed for lack of standing, so will a claim filed by the defendant's *alter ego*.<sup>165</sup> In *United States v. Parenteau*,<sup>166</sup> the district court held that a corporation's failure to observe corporate formalities, and the defendant's use of the corporation to commit a fraud offense for his personal gain, were among the reasons to regard the corporation as defendant's *alter ego* and to dismiss the claim it attempted to file in the ancillary proceeding.

#### *General creditors / shareholders*

It is well-established that the defendant's general unsecured creditors have no legal interest in any of the defendant's assets, and thus lack standing to contest the forfeiture of those assets in the ancillary proceeding.<sup>167</sup>

It is also well-established that shareholders do not have standing to challenge the forfeiture of corporate assets.<sup>168</sup> Recently, the courts have held that the same rule applies to members of an LLC.<sup>169</sup>

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<sup>165</sup> See *United States v. Emor*, 2013 WL 3005366, at \*12 (D.D.C. June 18, 2013) (neither defendant's *alter ego* nor the assignee of the *alter ego* has standing; but *alter ego* can file a claim contesting the court's initial finding that it is in fact an *alter ego*).

<sup>166</sup> *United States v. Parenteau*, 976 F. Supp. 2d 978 (S.D. Ohio 2013).

<sup>167</sup> See *United States v. Dupree*, 919 F. Supp. 2d 254, 283-84 (E.D.N.Y. 2013) (dismissing claim for back wages for lack of standing because claimant was only a general creditor); *United States v. Portillo*, 2013 WL 3466854 (N.D. Tex. July 9, 2013) (person who makes improvements to forfeited real property with personal funds without obtaining a lien is an unsecured creditor; claim dismissed for lack of standing); *United States v. Madoff*, 2012 WL 1142292, at \*4 (S.D.N.Y. Apr. 3, 2012) (explaining why unsecured creditors lack standing to file claims in the ancillary proceeding; following *Ribadeneira* and declining to follow *Reckmeyer*); *United States v. Ceballos-Lepe*, 977 F. Supp. 2d 1085 (D. Utah 2013) (same).

<sup>168</sup> See *United States v. Boscarino*, 2013 WL 1833018, at \*2 (D. Ariz. Apr. 30, 2013) (where defendant's wife claimed assets held by a corporation of which she was merely a shareholder, claim dismissed for lack of standing).

*Persons in possession of the property / bailees / assignees*

Finally, persons holding the property pursuant to a valid bailment or the valid assignment of a legal interest do have standing to contest its forfeiture,<sup>170</sup> but persons in “naked possession” – that is, persons who have possession of the property but cannot or will not offer an explanation for how they came to be in possession – do not have standing.<sup>171</sup>

*Equitable interests*

The courts appear divided as to whether an equitable interest in property as opposed to a legal interest is sufficient to confer standing on a third party to contest a forfeiture in the ancillary proceeding. In *United States v. Basurto*,<sup>172</sup> a district court held that an equitable interest in real property is not sufficient under Section 853(n)(2), and that the claimant must have a legal interest under state law. But in *United States v. Nelson*,<sup>173</sup> another district court denied a motion to dismiss for lack of standing where all of the property was titled in defendant’s name, not his wife’s, but the wife asserted facts sufficient,

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<sup>169</sup> See *United States v. Emor*, 2013 WL 3005366, at \*8 (D.D.C. June 18, 2013) (even if claimant did have an ownership interest in the LLC, it would not have standing to contest the forfeiture of the LLC’s assets).

<sup>170</sup> See *United States v. Dupree*, 919 F. Supp. 2d 254, 266 (E.D.N.Y. 2013) (assignee of legal interest has standing, but he must show that the assignment was valid, and was not a fraudulent conveyance under state law).

<sup>171</sup> See *United States v. Caruthers*, 967 F. Supp. 2d 1286 (E.D. Mo. 2013) (naked possession without an explanation is insufficient to establish standing; claim asserting only possession may be dismissed on the pleadings).

<sup>172</sup> *United States v. Basurto*, 2013 WL 1331983 (D. Minn. Mar. 29, 2013).

<sup>173</sup> *United States v. Nelson*, 2013 WL 4212002, at \*3 (W.D.N.C. Aug. 14, 2013).

if true, to establish an equitable lien and/or a resulting trust.

#### **XVII. GROUNDS FOR RECOVERY IN THE ANCILLARY PROCEEDING**

Establishing a legal interest in the forfeited property in terms of Section 853(n)(2) is only the first hurdle the third-party claimant must overcome in the ancillary proceeding. To prevail, he must show that the legal interest falls within one of the two categories described in Section 853(n)(6)(A) and (B).<sup>174</sup>

Section 853(n)(6)(A) applies to persons who had an ownership or other legal interest in the property *before* the Government's interest vested, and Section 853(n)(6)(B) applies to persons who acquired the property thereafter as bona fide purchasers for value. These are the only grounds on which a third party can prevail in the ancillary proceeding. Hence, as the Fifth Circuit held in *United States v. Holy Land Foundation for Relief and Development*,<sup>175</sup> the only issue in the ancillary proceeding is the claimant's ownership of the property: if he had an ownership interest that fits into one of the two categories in Section 853(n)(6) he will prevail; if he did not he will lose.<sup>176</sup>

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<sup>174</sup> See *Stettin v. United States*, 2013 WL 4028150, at \*5 (S.D. Fla. Aug. 7, 2013) (rejecting third party's argument that because he could not have prevailed on the merits under § 853(n)(6)(A), he did not have standing to file a claim under § 853(n)(2); the standing determination and determination on the merits "are separate inquiries"; claimant may have had standing to contest the forfeiture of proceeds yet been unable to prevail on the merits).

<sup>175</sup> *United States v. Holy Land Foundation for Relief and Development*, 722 F.3d 677 (5th Cir. 2013).

<sup>176</sup> *Holy Land Foundation*, 722 F.3d at 689-90. See also *United States v. Smith*, 953 F. Supp. 2d 1260, 1266 (M.D. Fla. 2013) ("The only issue in an ancillary proceeding is ownership of the property ordered forfeited in the criminal case").

Accordingly, as a general matter, third parties cannot relitigate the determination that the property was derived from or used to commit the offense for which the defendant was convicted, that the court committed a procedural error in issuing the forfeiture order, or that the forfeiture was barred by another provision of law.<sup>177</sup> As the First Circuit said in *Zorrilla*, once the court determined that the third party had no interest in the forfeited property, he had no standing to contest the procedural irregularities that led to the entry of the forfeiture order because “defects in the finding of forfeitability are no concern of his.”<sup>178</sup>

#### **XVIII. SUPERIOR LEGAL INTEREST UNDER SECTION 853(N)(6)(A)**

To prevail under Section 853(n)(6)(A), the third party must show that his legal interest in the forfeited property existed at the time of the crime giving rise to forfeiture. This is merely a restatement of the relation back doctrine: the Government’s interest vests at the time of the offense, so to trump the relation back doctrine, the claimant must show that his interest existed prior to that time.<sup>179</sup>

For that reason, a third party can never assert an interest under Section 853(n)(6)(A) in the proceeds of the crime: the proceeds do not exist until the crime occurs,

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<sup>177</sup> *Holy Land Foundation*, 722 F.3d at 689-90 (third party could not contest the forfeiture order on the ground that the district court lacked jurisdiction to order the restraint or forfeiture of property located in another district).

<sup>178</sup> *United States v. Zorrilla-Echevarria*, 723 F.3d 298, 299 (1st Cir. 2013).

<sup>179</sup> See *United States v. Dupree*, 919 F. Supp. 2d 254, 268-69 (E.D.N.Y. 2013) (claimant could not recover under § 853(n)(6)(A) because it acquired its interest after the onset of the conspiracy, which is when the Government’s interest vested).

and as soon as the crime occurs, title to the proceeds vests in the Government.<sup>180</sup>

The same rule applies to property traceable to the proceeds of the crime. So in *United States v. Hailey*, the defendant's wife could not assert a claim to luxury items purchased with fraud proceeds because the Government's interest in those items vested before she acquired any interest of her own.<sup>181</sup>

### *Nominal interests*

To prevail under Section 853(n)(6)(A), the claimant's pre-existing interest in the forfeited property must have been an actual legal interest; nominal ownership and possessory interests are not sufficient. Thus, in *United States v. Gamez*,<sup>182</sup> the court held that the defendant's father, who paid for the forfeited vehicle and titled it in his name, but who allowed the defendant to have sole possession of the vehicle, and to exercise dominion and control over it, was a nominal owner who could not prevail under Section 853(n)(6)(A).

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<sup>180</sup> See *United States v. Hooper*, 229 F.3d 818, 821-22 (9th Cir. 2000) (to prevail under § 853(n)(6)(A), the claimant must have a preexisting interest in the forfeited property; because proceeds do not exist before the commission of the underlying offense, § 853(n)(6)(A) can never be used to challenge the forfeiture of proceeds); *United States v. Smith*, 953 F. Supp. 2d 1260, 1268 (M.D. Fla. 2013) (entity defendant used as recipient of the fraud proceeds taken from victims could not have a claim under § 853(n)(6)(A) because its interest arose at the same time as the Government, and thus was not a pre-existing interest); *United States v. Dupree*, 919 F. Supp. 2d 254, 269 (E.D.N.Y. 2013) (following *Hooper*; jury having found the forfeited property was the proceeds of the offense, claimant could not possibly have a claim under § 853(n)(6)(A)); *United States v. Boscarino*, 2013 WL 1833018, at \*2 (D. Ariz. Apr. 30, 2013) (following *Hooper*; community property interest in proceeds of defendant's crime is not a pre-existing interest under § 853(n)(6)(A); motion to dismiss for failure to state a claim granted).

<sup>181</sup> *United States v. Hailey*, 924 F. Supp. 2d 648, 657 n. 14 (D. Md. 2013) (applying *Hooper*).

<sup>182</sup> *United States v. Gamez*, 2013 WL 5779629 (N.D. Tex. Aug. 16, 2013).

*Traceable ownership interest*

As mentioned earlier, because the only issue in the ancillary proceeding is ownership, the third party generally may not use the ancillary proceeding to relitigate the district court's finding that the property was subject to forfeiture. One exception to that rule, however, is that the third party does have the right to show that the forfeited property simply is not traceable to the offense but instead is traceable to property that the third party obtained from a legitimate source. In that case, the claimant will prevail under Section 853(n)(6)(A) because if the property is not traceable to the offense, no interest in the property ever vested in the Government, and if it is traceable to the property that the third party obtained from a legitimate source, he will be able to establish the superior ownership interest that Section 853(n)(6)(A) requires.

Stated simply, by showing that the property was derived from his own legitimate assets and not from the criminal offense, the third party will have established his superior ownership, which is what Section 853(n)(6)(A) allows him to do.

The issue in such cases is whether the claimant is allowed to use the accounting rules approved by the Second Circuit in *United States v. Banco Cafetero Panama*,<sup>183</sup> such as "first in / first out" or the "lowest intermediate balance rule," to meet his burden of proof, and whether the Government may use those rules to rebut the claimant's showing. In the past, district courts have allowed the Government to use those rules to rebut the claim,<sup>184</sup> but in *In re Rothstein, Rosenfeldt, Adler, P.A.*,<sup>185</sup>

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<sup>183</sup> *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1160 (2d Cir. 1986).

<sup>184</sup> See *United States v. Corey*, 2006 WL 1281824, at \*8-9 (D. Conn. May 9, 2006) (Government may rely on the *Banco Cafetero* tracing analysis to rebut Claimant's assertion in the ancillary proceeding that the forfeited property was acquired with legitimate funds in a commingled bank account, not the criminal proceeds); *United States v. Sokolow*, 1996 WL 32113, at \*18-20 (E.D. Pa. Jan. 26, 1996) (to the extent any portion of the property is traceable to the investment of

the Eleventh Circuit erroneously held that the Government had the burden of tracing the forfeited property to the offense in the ancillary proceeding and refused to allow it to use the lowest intermediate balance rule to do so.

### *Constructive trusts*

The rule that general creditors lack standing to contest the forfeiture of the debtor's property has prompted many crime victims and other creditors to assert claims in the ancillary proceeding under a constructive trust theory. The argument is that if the victim or other creditor is regarded as the beneficiary of a constructive trust, he will be able not only to establish standing to file a claim in the ancillary proceeding under Section 853(n)(2), but also to prevail on the merits as a person with a pre-existing legal interest under Section 853(n)(6)(A).

Some courts hold that a constructive trust can never give a third party the right to recover under Section 853(n)(6)(A) because the trust does not arise until imposed by a court, and thus is not a pre-existing interest within the meaning of Section 853(n)(6)(A) and the relation back doctrine.<sup>186</sup>

Other courts hold or assume that the temporal requirement is satisfied, but also hold that the beneficiary of a constructive trust can recover under Section 853(n)(6)(A) only if all of the elements of a constructive

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legitimate funds by a third party, the interest may be recovered under § 853(n)(6)(A); but the Government may apply *Banco Cafetero* analysis to rebut tracing), vacated on denial of reh'g, 91 F.3d 396 (3d Cir. 1996).

<sup>185</sup> *In re Rothstein, Rosenfeldt, Adler, P.A.*, 717 F.3d 1205, 1214 (11th Cir. 2013).

<sup>186</sup> See *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Chawla)*, 46 F.3d 1185, 1190-91 (D.C. Cir. 1995) (constructive trusts are "legal interests," but they do not exist until they are imposed by the court, and so cannot support a claim under § 1963(l)(6)(A)); *United States v. Emor*, 2013 WL 3005366, at \*9 (D.D.C. June 18, 2013) (same, following *BCCI*).



trust are satisfied.<sup>187</sup> Among other things, those elements include the ability to trace,<sup>188</sup> the absence of an adequate remedy at law, clean hands,<sup>189</sup> a confidential relationship between the wrongdoer and the beneficiary, and an assurance that imposing the trust on behalf of one party will not cause unfairness to others who are similarly situated.<sup>190</sup>

### **XIX. BONA FIDE PURCHASERS UNDER SECTION 853(N)(6)(B)**

A third party who cannot establish that he had a legal interest in the forfeited property prior to the time the Government's interest in the property vested under the relation back doctrine cannot recover under Section 853(n)(6)(A). Instead, his only remedy is to establish that he acquired his interest in the property as a bona fide purchaser for value who was without reason to know, when he acquired the interest, that the property was

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<sup>187</sup> For a full discussion of the elements of a constructive trust as applied in asset forfeiture cases, See AFLUS, *supra* note 3, § 23-15(e).

<sup>188</sup> See *United States v. Schwimmer*, 968 F.2d 1570, 1583-84 (2d Cir. 1992) (constructive trust is a legal interest, but tracing is required to show property held in constructive trust is the property being forfeited); *United States v. Bailey*, 2013 WL 681826, at \*4 (W.D.N.C. Feb. 25, 2013) (rejecting constructive trust claim of claimant who could not trace her loss to the forfeited property; following *Schwimmer*). But See *United States v. Wilson*, 659 F.3d 947, 956 (9th Cir. 2011) (holding that once a given victim is able to trace, and the constructive trust is created, the court is entitled to ignore the tracing requirement and administer the trust as in a liquidation proceeding for the benefit of all victims); *United States v. Wilson*, 2013 WL 322583 (E.D. Cal. Jan. 28, 2013) (same case on remand; *Wilson* permits a court to suspend the tracing requirement and impose a constructive trust on behalf of all victims so that the forfeited property may be distributed on a pro rata basis).

<sup>189</sup> See *United States v. Emor*, 2013 WL 3005366, at \*14 (D.D.C. June 18, 2013) (where claimant was controlled by the defendant, the "clean hands" doctrine bars the imposition of a constructive trust).

<sup>190</sup> See *United States v. Bailey*, 2013 WL at \*4, (W.D.N.C. Feb. 25, 2013) (collecting cases and holding that even if claimant could trace, court would not impose a constructive trust because doing so would be unfair to similarly situated victims).

subject to forfeiture. That remedy – which is an exception to the relation back doctrine – is codified in Section 853(n)(6)(B).

*There must be a “purchase”*

The first element that the third party must establish under Section 853(n)(6)(B) is that he is a “purchaser” in the sense of an arm’s length commercial transaction.<sup>191</sup> Donees and family members of the defendant who obtain an interest in the forfeited property by gift, inheritance or operation of law are not bona fide purchasers.<sup>192</sup> Nor are general creditors and crime victims, even though they may have reduced the defendant’s debt to a judgment.<sup>193</sup> In all of those cases, the problem for the third party is that he did not give anything of value in exchange for the interest in the forfeited property.<sup>194</sup>

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<sup>191</sup> See *United States v. Smith*, 953 F. Supp. 2d 1260, 1268 (M.D. Fla. 2013) (entity that defendant used to receive the money he fraudulently obtained from victims had no claim under § 853(n)(6)(B) because it did not receive the money in an arm’s length commercial transaction).

<sup>192</sup> See *United States v. Phillips*, 2013 WL 2156377, at \*4 (E.D. Va. May 2, 2013) (the burden is on the claimant to show that her “purchase” of forfeited property from a family member was an arms-length transaction).

<sup>193</sup> *United States v. Holy Land Foundation for Relief and Development*, 2013 WL 3197161 (5th Cir. June 25, 2013) (victims of terrorism who have obtained judgments against the defendant terrorist organization are not entitled to use the forfeited funds to satisfy their judgments; claimants must satisfy the requirements of § 853(n) because the Terrorism Risk Insurance Act (TRIA) does not trump forfeiture law); *United States v. Emor*, 2013 WL 3005366, at \*11 (D.D.C. June 18, 2013) (“being the recipient of a an unsecured loan that one promises to repay is not the same thing as being a ‘purchaser for value’”).

<sup>194</sup> See *United States v. Dreier*, 952 F. Supp. 2d 582, 590-91 (S.D.N.Y. 2013) (to be a “purchaser” the claimant must give something of value; it need not be of proportional value, but must be sufficient to constitute consideration under contract law); (the value of a secured interest in an asset is not the value of the asset itself, but the value of the asset discounted to recognize the contingency that would result in realization of the secured interest).

*Without cause to believe*

Second, the third party must establish that at the time he acquired his interest in the property, he was reasonably without cause to believe that the property was subject to forfeiture. For this reason, a claimant who is aware that the property has been named in an indictment, or that the Government has filed a *lis pendens* on it, cannot be a bona fide purchaser under section 853(n)(6)(B).<sup>195</sup>

This makes it particularly difficult for defense attorneys to contest the forfeiture as bona fide purchasers.<sup>196</sup> Accordingly, as the district court held in *United States v. Thomas*,<sup>197</sup> any attempt by a defendant's attorney to file a claim in the ancillary proceeding to recover his fee would be futile if he was fully aware that the property was subject to forfeiture when he earned his fee.<sup>198</sup>

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<sup>195</sup> See *United States v. Cazares*, 2013 WL 3894976, at \*4 (D. Ariz. July 29, 2013) (because even a "rudimentary search" of the land records would have revealed the *lis pendens*, claimants could not assert a BFP defense under § 853(n)(6)(B)); *United States v. Dupree*, 919 F. Supp. 2d 254, 273 (E.D.N.Y. 2013) (third party could not claim it was without reason to believe property was subject to forfeiture just because court granted motion to vacate pre-trial restraining order for lack of probable cause; third party was on notice that Government might still establish forfeitability by preponderance of the evidence at trial).

<sup>196</sup> See *Caplin & Drysdale v. United States*, 491 U.S. 617, 633 n.10 (1989) ("given the requirement that any assets which the Government wishes to have forfeited must be specified in the indictment, the only way a lawyer could be a beneficiary of section 853(n)(6)(B) would be to fail to read the indictment of his client").

<sup>197</sup> *United States v. Thomas*, 961 F. Supp. 2d 814, 818 (S.D. Miss. 2013).

<sup>198</sup> See *United States v. Dupree*, 919 F. Supp. 2d 254 (E.D.N.Y. 2013) (law firm that acquired interest after learning defendant's assets were seized and defendant was indicted was on notice; quoting *Caplin & Drysdale*: only an attorney who did not read his client's indictment could be a BFP under § 853(n)(6)(B)).

Likewise, a person who was aware of the defendant's criminal conduct in connection with the property cannot be a bona fide purchaser for value. Some courts have held that stories in the media regarding the defendant's wrongdoing may be sufficient to put a third party on notice and negate the possibility of that person's filing a successful claim under Section 853(n)(6)(B).<sup>199</sup> But in *United States v. Petters*,<sup>200</sup> a district court held that stories in the media are unreliable and may not be sufficient to put a third party on notice if the defendant has not been charged and nothing in the stories links the particular assets in question to any alleged wrongdoing.

Finally, entities controlled by the defendant cannot be bona fide purchasers because the defendant's knowledge is imputed to them.<sup>201</sup>

#### *Duty to inquire*

It is not yet clear whether and to what extent a claimant has an affirmative duty to conduct a reasonable inquiry regarding the defendant's criminal conduct and the forfeitability of his property to qualify as a bona fide purchaser for value. In *United States v. Dreier*,<sup>202</sup> the district court agreed with the Government that in appropriate circumstances the claimant would have a duty to inquire before acquiring an interest in the defendant's property, but found that the facts in that case were insufficient to trigger such a duty. On the other

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<sup>199</sup> See *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Am. Express Bank II)*, 961 F. Supp. 287, 296 (D.D.C. 1997) (given extensive public record of defendant's misconduct, claimant knew or should have known that defendant's assets were subject to forfeiture; standard is objective reasonableness).

<sup>200</sup> *United States v. Petters*, 2013 WL 269028 (D. Minn. Jan. 24, 2013).

<sup>201</sup> *United States v. Emor*, 2013 WL 3005366, at \*12 (D.D.C. June 18, 2013) (entitled defendant controlled could not satisfy the "without cause to believe requirement" because defendant's knowledge of the underlying fraud is imputed).

<sup>202</sup> *United States v. Dreier*, 952 F. Supp. 2d 582, 589 (S.D.N.Y. 2013).

hand, in *Petters*,<sup>203</sup> the court held that a bank had no affirmative duty to inquire as to the forfeitability of property in which it was acquiring a lien, despite media reports that the defendant was under investigation.

*Clear title to forfeited property*

As the Fifth Circuit held in *Holy Land Foundation*,<sup>204</sup> “the United States acquires clear title to the property” pursuant to Section 853(n)(7) if no one files a successful claim in the ancillary proceeding.

## **XX. APPEALS**

*Standard of review*

Direct appeal from his sentence is the only vehicle by which the defendant may challenge a forfeiture order.<sup>205</sup> Factual findings on which a forfeiture order are based are reviewed for clear error; whether those facts render an asset subject to forfeiture is reviewed *de novo*.<sup>206</sup> If the defendant appeals the forfeiture order but made no objection to it when it was imposed, however, the plain error standard applies, whether the appeal is from the district court’s factual findings, its failure to comply with one of the procedural requirements in Rule 32.2(b), or the

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<sup>203</sup> *United States v. Petters*, 2013 WL 269028 (D. Minn. Jan. 24, 2013).

<sup>204</sup> *United States v. Holy Land Foundation for Relief and Development*, 722 F.3d 677 (5th Cir. 2013).

<sup>205</sup> See *United States v. Bernard*, \_\_\_ Fed. Appx. \_\_\_, 2013 WL 5452640 (3d Cir. Oct. 2, 2013) (district court has no jurisdiction to consider Rule 41(g) motion for the return of property once it has been forfeited in a criminal case; because forfeiture is part of the defendant’s sentence, his only remedy is direct appeal); *United States v. Rodriguez*, 2013 WL 594467 (N.D. Okla. Feb. 15, 2013) (only remedy for criminal forfeiture is direct appeal; defendant cannot file a Rule 41(g) motion; § 983(e) has no application to criminal forfeiture either).

<sup>206</sup> See *United States v. Adetiloye*, 716 F.3d 1030, 1037 (8th Cir. 2013); *United States v. Alexander*, 714 F.3d 1085, 1092-93 (8th Cir. 2013); *United States v. Gordon*, 710 F.3d 1124, 1156 (10th Cir. 2013).

application of the Excessive Fines Clause of the Eighth Amendment.<sup>207</sup>

On an interlocutory appeal from the district court's refusal to grant a pre-trial probable cause hearing on a challenge to a restraining order, the district court's application of the law is reviewed *de novo*.<sup>208</sup>

Appeals from rulings in the ancillary proceeding follow a similar standard: facts found by the court in the ancillary proceeding are reviewed for clear error, and the application of those facts to the law is reviewed *de novo*.<sup>209</sup> The district court's factual findings relating to the adequacy of notice in the ancillary proceeding are reviewed under the clearly erroneous standard.<sup>210</sup>

#### *Stay pending appeal*

Courts generally deny defendants' motions to stay the forfeiture pending appeal. In *United States v. Phillips*,<sup>211</sup> the district court listed the reasons for denying a drug dealer's motion to stay the forfeiture of substitute asset pending appeal, including the potential depreciation in value of the forfeited property, and the need to avoid sending the "wrong message" to society that a drug dealer

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<sup>207</sup> See *United States v. Valdez*, 726 F.3d 684, 699 (5th Cir. 2013) (applying plain error standard to appeal based on court's failure to comply with Rule 32.2(b)(5)(A)); *United States v. Gomez*, \_\_\_ Fed. Appx. \_\_\_, 2013 WL 6439638 (5th Cir. Dec. 10, 2013) (absence of factual support for the amount of the money judgment, and violation of the Eighth Amendment, subject to "plain error" review if defendant did not object to the forfeiture order).

<sup>208</sup> See *United States v. Bonventre*, 720 F.3d 126, 128 (2d Cir. 2013).

<sup>209</sup> See *United States v. Holy Land Foundation for Relief and Development*, 722 F.3d 677, 683 (5th Cir. 2013).

<sup>210</sup> See *United States v. Gallion*, 534 Fed. Appx. 303, 307 (6th Cir. 2013).

<sup>211</sup> *United States v. Phillips*, 2013 WL 3833240, at \*5 (E.D. Pa. July 25, 2013).

was being allowed to retain “mementos and product” of his illegal behavior.

*Jurisdiction pending appeal*

The district court retains jurisdiction to conduct the ancillary proceeding while the defendant’s appeal is pending.<sup>212</sup> But in *United States v. Robinson*,<sup>213</sup> the district court held that while Rule 32.2(c)(1) allows the court to conduct the ancillary proceeding while defendant’s appeal is pending, it does not require it to do so. Thus, the court granted a stay of the ancillary proceeding at the Government’s request to conserve judicial resources. The ancillary proceeding would be unnecessary, the court noted, should the defendant win his appeal.

The district court also retains jurisdiction pending appeal to amend the forfeiture order to including substitute assets.<sup>214</sup>

## **XXI. POST-CONVICTION ISSUES**

*Investigation to locate forfeited assets*

Under Section 853(m) and Rule 32.2(b)(3), the Court may issue orders to third parties, including defendant’s spouse, to discover the location and value of forfeited assets. In *United States v. Hailey*,<sup>215</sup> the defendant’s wife

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<sup>212</sup> See *United States v. Gallion*, 534 Fed. Appx. 303, 310 (6th Cir. 2013) (just as the district court retains jurisdiction to conduct the ancillary proceeding while the defendant’s appeal is pending, it also has jurisdiction to issue a final order of forfeiture under Rule 32.2(c)(2) when the third party claims are resolved).

<sup>213</sup> *United States v. Robinson*, 2013 WL 3778787 (S.D. Ohio July 18, 2013).

<sup>214</sup> See *United States v. Louthian*, 2013 WL 3007174, at \*1 (W.D. Va. June 14, 2013) (citing the Advisory Committee Note to Rule 32.2(e)).

<sup>215</sup> *United States v. Hailey*, 924 F. Supp. 2d 648, 654-55 (D. Md. 2013).

objected that the taking of her deposition for that purpose violated the spousal privilege. But the court disagreed. The privilege would apply, the court said, only if the taking of the wife's deposition could lead to a future criminal prosecution of the defendant; but the Government had already presented the court with a declaration stating that it would not use her testimony in any such prosecution.

#### *Enforcement of the forfeiture judgment*

The court may appoint a receiver under 21 U.S.C. § 853(e) or (g) to monitor a business to preserve its assets for forfeiture. In a case with the odd caption *In re Monthly Payments International Regional Center, LLC Is Obligated to Make*,<sup>216</sup> the Government agreed to release forfeitable funds to allow a business to remain afloat in the hope of maximizing the value of assets ultimately subject to forfeiture, and the court used Section 853(e) to appoint Special Master to monitor the business.

#### *Effective assistance of counsel*

In *United States v. Johnson*,<sup>217</sup> the district court held that because there is no Sixth Amendment right to a jury determination of forfeiture, defense counsel's election to have the court determine the forfeiture under Rule 32.2(b)(5) instead of having the forfeiture submitted to the jury did not render his representation ineffective.

## **XXII. FORFEITURE AND RESTITUTION**

It is well-established that forfeiture and restitution serve different purposes: the purpose of criminal forfeiture is punishment; the purpose of restitution is to reimburse the victim.<sup>218</sup> Accordingly, as the Eighth Circuit held in

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<sup>216</sup> *In re Monthly Payments International Regional Center, LLC Is Obligated to Make*, 2013 WL 183866 (N.D. Ohio Jan. 17, 2013).

<sup>217</sup> *United States v. Johnson*, 2013 WL 4501055 (E.D. Pa. Aug. 23, 2013).

<sup>218</sup> See *United States v. Peters*, 732 F.3d 93, 98-99, 101 (2d Cir. 2013) (the purpose of forfeiture is punishment; that is what distinguishes



*United States v. Adetiloye*, the amount of forfeiture and the amount of restitution will often be different.<sup>219</sup>

While they serve different purposes, restitution and forfeiture are both mandatory. Thus, as a general rule, the defendant is not entitled to an offset against a restitution order to reflect the amount forfeited, or *vice versa*.<sup>220</sup>

In *United States v. Davis*,<sup>221</sup> a defendant convicted of laundering sting money for an FBI undercover agent was required to forfeit the amount laundered to the Government and to pay restitution to the FBI for the commissions he had received. He argued that in a case where the Government itself is the victim of an offense, ordering both forfeiture and restitution amounts to double recovery, but the Ninth Circuit disagreed. That the FBI is part of the Government, the panel said, does not entitle the defendant to an offset on double-recovery grounds. He is still required to satisfy both orders.<sup>222</sup>

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forfeiture from restitution and other remedial tools; restitution puts the defendant and the victim back in the position they were in before the crime occurred; forfeiture punishes the defendant by forcing him to pay the gross receipts of the crime, not just his net profit).

<sup>219</sup> *United States v. Adetiloye*, 716 F.3d 1030, 1041 (8th Cir. 2013) (forfeiture and restitution are different concepts; one is based on defendant's gain and the other on the victim's loss; district court erred in assuming forfeiture in a fraud case is limited to the amount of measurable loss to the victims).

<sup>220</sup> See *United States v. McGinty*, 610 F.3d 1242, 1247-48 (10th Cir. 2010) (forfeiture and restitution serve different purposes and both are mandatory; ordering a defendant to pay a money judgment equal to the proceeds of his offense and to pay restitution to his victim is not unfair) (collecting cases); *United States v. Tolliver*, 730 F.3d 1216, 1232-33 (10th Cir. 2013) (same, following *McGinty*).

<sup>221</sup> *United States v. Davis*, 706 F.3d 1081, 1084 (9th Cir. 2013).

<sup>222</sup> But See *United States v. Perry*, 714 F.3d 570, 578-79 (8th Cir. 2013) (not reaching the double recovery issue because the district court properly denied defendant's request for offset against restitution

The Government is not required to apply forfeited funds to satisfy a restitution order, but generally, as a matter of policy, the Government will agree to do so if it appears that the defendant does not have sufficient assets to satisfy both orders. Indeed, as Justin Kagan noted in the Supreme Court's decision in *Kaley*, the Government frequently seeks forfeiture specifically with the intent to use its forfeiture tools to preserve property so that it is available for victim restitution when the case is completed.<sup>223</sup> But as the district court held in *United States v. Duran*,<sup>224</sup> the Government's ability to pursue this "victims first" policy does not confer any rights on the victim.

In *Duran*, the court held that a victim who recovered his money was not entitled to attorney's fees or interest. That the victim prompted the Government to act by filing a Rule 41(g) motion to recover his property, the court said, made no difference.

In all events, the court will not second guess the Government's decision to pursue forfeiture versus restitution or *vice versa*. In *In re Stake Center Locating, Inc.*,<sup>225</sup> the Ninth Circuit held that forfeiture is mandatory only if the Government decides to seek it, and that a crime victim has no right to force the Government to seek

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to IRS in a tax case on the ground that the forfeiture action remained pending and might or might not result in a forfeiture).

<sup>223</sup> *Kaley v. United States*, \_\_\_ U.S. \_\_\_, \_\_\_ n.1, 134 S. Ct. 1090 (2014) (citing statistics on the Government's use of forfeited funds to compensate victims). See *United States v. Blackman*, \_\_\_ F.3d \_\_\_, 2014 WL 1099271 (4<sup>th</sup> Cir. Mar. 21, 2014) ("The Government's ability to collect on a [forfeiture] judgment often far surpasses that of an untutored or impecunious victim of crime . . . Realistically, a victim's hope of getting paid may rest on the Government's superior ability to collect and liquidate a defendant's assets" under the forfeiture laws).

<sup>224</sup> *United States v. Duran*, 2013 WL 5434613 (S.D.N.Y. Sept. 30, 2013).

<sup>225</sup> *In re Stake Center Locating, Inc.*, 731 F.3d 949, 951 (9<sup>th</sup> Cir. 2013).

forfeiture so that the money, if recovered, may be used for restitution.

### **XXIII. CONCLUSION**

As prosecutors and judges become more familiar with the forfeiture laws, and as the scope and procedures that govern criminal forfeiture become more settled, it is likely that we will see forfeiture orders entered in an even greater number of criminal cases, with the result that more money will be preserved for the benefit of victims, and criminals will perceive that the economic consequences of a criminal conviction rival the other aspects of their sentence under federal law. At a time when sentences of incarceration are being reduced as a matter of affirmative Justice Department policy, the latter point takes on all the more significance. Hence, the flood of case law interpreting the criminal forfeiture laws is likely to continue unabated for some time to come.