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Criminal Forfeiture Procedure in 2007: A Survey of Developments in the Case Law

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Criminal Forfeiture Procedure: 2007

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

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I. INTRODUCTION

This Article is intended to bring the reader up to date on developments in the federal case law relating to criminal forfeiture procedure. It does not cover every topic related to criminal forfeiture, nor does it address all of the exceptions and nuances that apply to the topics that are discussed; 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.[1]

The Article begins with the law on the scope of criminal forfeiture and the seizure and restraint of property prior to trial. It then continues more or less chronologically through the trial, sentencing, ancillary proceeding and post-trial phases of a criminal forfeiture case. Except in

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[1] For similar summaries of the developments in criminal forfeiture procedure from 2003 through 2006, see 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. 55 (2004).

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 2006 and early 2007.[2]

II. THE SCOPE OF CRIMINAL FORFEITURE

Criminal forfeitures are *in personam* judgments that are part of the defendant's sentence in a criminal case.[3] A number of things flow from this basic proposition.

Criminal forfeiture requires a conviction

Because forfeiture is part of the defendant's sentence, there must be a conviction for a criminal offense before there can be a forfeiture based on that offense.[4] In *United States v. Brown*,[5] two co-defendants were convicted of securities fraud, but only one of the defendants was convicted of money laundering. When the court ordered both defendants to forfeit the proceeds of the fraud, but ordered only the second defendant to forfeit the property involved in the money laundering offense (which included more than just the proceeds of the underlying offense), the latter defendant complained that he was being treated unfairly. Why, he asked, was he subjected to a greater forfeiture than his co-defendant.

The court explained that the disparate treatment was a consequence of the way criminal forfeiture works. Because the first defendant was convicted only of securities fraud, the forfeiture

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[2] A complete discussion of each of the issues covered in this article, along with the citations to the relevant cases, may be found in STEFAN D. CASSELLA, ASSET FORFEITURE LAW IN THE UNITED STATES (Juris Publishing, 2007 (hereinafter AFLUS).

[3] *See* United States v. Vampire Nation, 451 F.3d 189, 202 (3d Cir. 2006) (a criminal forfeiture order is a judgment *in personam* against the defendant; this distinguishes the forfeiture judgment in a criminal case from the *in rem* judgment in a civil forfeiture case); United States v. Lazarenko, 476 F.3d 642, 647 (9th Cir. 2007) (criminal forfeiture operates *in personam* against a defendant; it is part of his punishment following conviction).

[4] *See* AFLUS, *supra* note 2, § 15-3(a), p. 476.

[5] 2006 WL 898043 (E.D.N.Y. Apr. 4, 2006).

in his case had to be limited to the proceeds of the fraud; because he was not convicted of money laundering, he could not be made to forfeit any property based solely on the money laundering offense. The second defendant, on the other hand, was convicted of both securities fraud and money laundering; hence his sentence properly included forfeitures based on both offenses.[6]

The nexus between the property and the offense

It is not enough, however, for the defendant to be convicted of a particular category of offense. A defendant who is convicted of money laundering, for example, does not automatically become liable to forfeit all of the property involved in every money laundering offense he may have committed some time in his career. Rather, before the court can issue an order of forfeiture in a criminal case, it (or the jury) must find that there is a nexus between the property to be forfeited and the specific offense for which the defendant has been convicted.[7]

Thus, in *United States v. Adams,*[8] the Ninth Circuit held that a defendant who pled guilty to a conspiracy that began "no later than 2001," could only be ordered to forfeit the property involved in that offense. Property derived from fraud committed in 1999, the court said, was the proceeds of a different offense and thus could not be ordered forfeited in the instant case.[9]

Similarly, the amount of a money judgment that the defendant may be ordered to pay in a criminal case, or the value of the substitute assets that he may be ordered to forfeit, is limited to the value of the property derived from the offense of conviction. In other words, if the defendant is convicted of particular offense involving $X in proceeds, the money judgment or the forfeiture

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[6] *Brown,* 2006 WL 898043, at *5.
[7] *See* AFLUS, *supra* note 2, § 15-3(b), p. 478.
[8] 189 Fed. Appx. 600 (9th Cir. 2006).
[9] *Adams*, 189 Fed. Appx. at 602-03.

of substitute assets must be limited to $X; it cannot be based on the value of the proceeds derived from other offenses for which the defendant was not convicted.[10]

In cases involving continuing schemes and conspiracies, however, the amount involved in the entire scheme is subject to forfeiture. The classic example is *United States v. Hasson*,[11] where the court held that a defendant convicted of a money laundering conspiracy could be ordered to forfeit all of the money he conspired to launder, including amounts involved in conduct for which he was not charged substantively.[12]

There were two new examples of this principle in the past year. In *United States v. Boesen,*[13] the district court held that in a fraud case the forfeiture is imposed because the defendant has been convicted of perpetrating a *scheme to defraud,* not because he has been convicted of individual *executions* of that scheme.[14] Thus, no matter how many individual counts of fraud may have been alleged in the indictment, the conviction for perpetrating *the scheme* will give rise to the forfeiture of all of the property derived from the scheme. In *Boesen*, this meant that a defendant convicted of eighty-two substantive counts of health care fraud had to forfeit the proceeds of the entire scheme – including the proceeds derived from some 900 false billings not

[10] *Adams*, 189 Fed. Appx. at 602-03 (amount of money defendant could be ordered to forfeit as substitute assets was limited to the value of the proceeds derived from the crimes for which defendant was convicted; he could not be ordered to forfeit property in substitution for the missing proceeds of other offenses not covered by the indictment).

[11] 333 F.3d 1264 (11th Cir. 2003).

[12] *Hasson*, 333 F.3d at 1279.

[13] ___ F. Supp.2d ___, 2007 WL 430782 (S.D. Iowa Feb. 6, 2007) (in a fraud case, forfeiture is imposed because the defendant has been convicted of perpetrating a scheme; it does not matter of how may executions of that scheme were alleged in the indictment; hence a defendant convicted of eighty-two substantive counts of health care fraud must forfeit the proceeds of the entire scheme, not just the proceeds involved in the eighty-two counts on which he was convicted).

[14] *Boesen*, 2007 WL 430782, at *19.

alleged in the indictment – not just the proceeds involved in the eighty-two counts on which he was convicted.

In *United States v. Rodriguez,*[15] the district court extended this principle to a structuring case, where the defendant was convicted of structuring a small amount of money as part of a larger scheme. The forfeiture, the court said, could be based on the total amount involved in the scheme – which was more than $1.2 million – and was not limited to the amount involved in the particular counts on which the defendant was convicted.[16]

Property belonging to third parties cannot be forfeited

It is often said that because criminal forfeiture is part of the defendant's sentence, only the defendant's property can be forfeited in a criminal case; but that is not quite correct.[17] As the Second Circuit noted last year in *De Almeida v. United States,*[18] criminal forfeiture "reaches *any* property that is involved in the offense" whether or not the Government can establish that it belongs to the defendant.[19] Drug proceeds, money stolen from a bank, contraband, and money that the defendant launders for a third party can all be forfeited in a criminal case if the defendant is convicted, even though the defendant has no title to the property. What we really mean to say is that in a criminal case, for reasons having to do with due process, property that belongs to a third party who has been excluded from the criminal proceedings *may not* be forfeited. If the Government wants to forfeit the third party's property, it must commence a civil forfeiture

[15] 430 F. Supp.2d 388 (D.N.J. 2006).
[16] *Rodriquez*, 430 F. Supp.2d at 393.
[17] *See* AFLUS, *supra* note 2, § 15-3(f), p. 481.
[18] De Almeida v. United States, 459 F.3d 377 (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).
[19] *De Almeida*, 459 F.3d at 381.

proceeding in which the third party will have the opportunity to contest the underlying basis for the forfeiture and assert an innocent owner defense.

This may seem like an overly-technical semantic difference; one may reasonably ask, in how many cases would it really matter if we said "only the defendant's property may be forfeited" instead of "property belonging to a third party *may not* be forfeited." But the way the principle is stated has important procedural consequences.

If the Government had to establish that the property belonged to the defendant before it could obtain an order of forfeiture, the ownership of the property would be a critical issue during the forfeiture phase of the trial. As it happens, however, because the defendant's ownership of the property is irrelevant, the only question during the forfeiture phase of a criminal trial, and at the time the preliminary order of forfeiture is entered, is whether there is a nexus between the property and the offense; the question of who owns the property is deferred until the ancillary proceeding, which is designed to ensure that property belonging to third parties is not inadvertently forfeited in a criminal case.[20]

For example, in *United States v. Brown,*[21] the Government was able to obtain an order of forfeiture against certain property based on the nexus between the property and the offense, even though the property was held in the name of a third party. The Government's belief that the third party was a nominee who had no real interest in the property would be tested, the court said, in the ancillary proceeding.[22]

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[20] *De Almeida*, 459 F.3d at 381; *see also* Rule 32.2(b)(2), FED. R. CRIM. P.(providing that ownership issues must be deferred to the ancillary proceeding); United States v. Lazarenko, 476 F.3d 642, 647-48 (9th Cir. 2007.) (summarizing criminal forfeiture procedure under Section 853 and Rule 32.2).

[21] 2006 WL 898043 (E.D.N.Y. Apr. 4, 2006).

[22] *Brown*, 2006 WL 898043, at *5.

Property transferred to non-bona fide purchasers

The same principle allows the Government to seek the forfeiture in a criminal case of property that belonged to the defendant at the time of the offense, but was transferred to a third party by the time of trial. Again, the nexus to the offense establishes the forfeitability of the property, while the ownership of the property – in this case, whether the third party was a bona fide purchaser for value – is determined in the ancillary proceeding.[23]

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

We turn now to the procedural aspects of a criminal forfeiture case, beginning with the rules governing the issuance of seizure warrants for the property subject to forfeiture.

The probable cause standard

In a criminal forfeiture case, a court may issue a warrant for the seizure of property pursuant to 21 U.S.C. § 853(f).[24] To obtain such a warrant, the Government must have probable cause to believe that the property is subject to forfeiture. That means not only probable cause to believe that an offense has been committed, but also probable cause to believe that there is a nexus between the property and the offense.

In *United States v. Harvey,*[25] the Government ran afoul of this fundamental rule when it provided the court with a detailed affidavit describing the drug offense giving rise to the forfeiture, but failed even to mention the thing to be seized or its connection to the offense. Such

[23] *See* United States v. Wahlen, 459 F. Supp.2d 800, 813-14 (E.D. Wis. 2006) (if marital property is acquired with commingled funds, the portion that is directly traceable to criminal proceeds is forfeitable to the Government under the relation back doctrine; the innocent spouse can acquire no interest in that portion of the property; her fifty percent interest under state law only applies to the untainted remainder).

[24] *See AFLUS*, *supra* note 2, § 17-3, p. 505.

[25] 2006 WL 3513940 (D.V.I. Nov. 29, 2006).

an affidavit, the court held, is insufficient to support the issuance of a seizure warrant because it provides no basis on which a judicial officer can find that there is a nexus between the events giving rise to the forfeiture and the thing to be seized.[26]

In *United States v. Lewis,*[27] another district court held that in making the probable cause determination prior to issuing the warrant, it could take into account a grand jury's finding of probable cause to believe that the defendant had committed the underlying offense.[28]

Combined criminal and civil seizure warrants

While Section 853(f) authorizes the seizure of property for criminal forfeiture pursuant to a warrant, there are many cases in which the Government would prefer to seize the property in the first instance with a warrant issued pursuant to the *civil* forfeiture statute, 18 U.S.C. § 981(b). In such cases, the Government will generally begin the forfeiture process by commencing an administrative forfeiture proceeding, and will obtain a warrant under the criminal statute only if it later decides to make the forfeiture part of the criminal prosecution. This two-step process is cumbersome, however, and as we will see shortly, has led to situations in which the lawfulness of the Government's possession of the property was called into question when the Government failed to replace the civil seizure warrant with a criminal one in a timely fashion.

One way for the Government to avoid this procedural pitfall is to seize the property in the first instance with a warrant issued under both the civil and criminal forfeiture statutes at the same time.[29] The *Lewis* court approved the use of such a multi-purpose warrant.[30]

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[26] *Harvey*, 2006 WL 3513940, at *6, 9.
[27] 2006 WL 1579855 (D. Minn. June 1, 2006).
[28] *Lewis*, 2006 WL 1579855, at *8.
[29] *See* AFLUS, *supra* note 2, § 17-2, p. 504.

The inadequacy of a restraining order

The civil and criminal seizure warrant statutes are not identical, however. Unlike a civil seizure warrant, a criminal seizure warrant may be issued only if the court finds that a restraining order would be inadequate to preserve the property for forfeiture at trial.[31] Yet as the cases from the past year illustrate, there are few instances in which the Government is unable to make the necessary additional showing to obtain a seizure warrant under the criminal statute.

In *Lewis*, for example, the court held that vehicles and funds in a bank account are so inherently mobile that the Government was justified in seeking their seizure under Section 853(f) instead of relying on a pre-trial restraining order to preserve its interest in the property.[32] Likewise, in *United States v. Martin*,[33] another court reached the same conclusion with respect to the seizure of cash and funds in a bank account.[34]

A seizure warrant may be issued at any point in the criminal case

The court may issue a Section 853(f) warrant at any stage in the criminal proceedings. In *United States v. Lazarenko*,[35] the warrant was issued after the jury found the defendant guilty at trial. In *Lewis,* it was issued prior to indictment.[36]

Seizure of property claimed by a third party

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[30] *Lewis*, 2006 WL 1579855, at *4 (approving Government's use of a warrant authorizing seizure under both § 981(b) and § 853(f)).

[31] 21 U.S.C. § 853(f). *See* United States v. Kramer, ___ F. Supp.2d ___, 2006 WL 3545026, at *3 (E.D.N.Y. Dec. 8, 2006) (noting that the provision in § 983(a)(3)(B) requiring the Government to obtain a new criminal seizure warrant when it switches from civil to criminal forfeiture is not a simple formality, because the criminal statute contains an additional requirement that the civil statute does not); AFLUS, *supra* note 2, § 17-3, p. 506.

[32] *Lewis*, 2006 WL 1579855, at *5 (vehicles and funds in a bank account may be seized pursuant to § 853(f) because both can easily be moved or transferred; a restraining order would be inadequate).

[33] 460 F. Supp.2d 669 (D. Md. 2006).

[34] *Martin*, 460 F. Supp.2d at 677-78.

[35] 476 F.3d 642 (9th Cir. 2007).

[36] *Lewis*, 2006 WL 1579855, at *4 (there is no requirement in either § 981(b) or § 853(f) that the warrant be issued only after the return of an indictment).

In *Lazarenko*, a third party claimed that the property seized with the Section 853(f) warrant belonged to him, not to the defendant, and argued that he had a right to an immediate hearing to determine if the property should be released to him, but the Ninth Circuit held that a third party has no such right to an immediate hearing. A third party, the court said, must wait until the ancillary proceeding to assert his ownership interest, just as he must do if the property is named in an indictment or in a preliminary order of forfeiture.[37]

The effect of an illegal seizure; prior notice; hardship petitions

What is the effect on the criminal forfeiture case if the seizure under Section 853(f) turns out to have been illegal? In 2005, the Sixth Circuit held that because the pre-trial seizure of the property is not necessary, the fact that such a seizure is illegal does not affect the power of the court to order its forfeiture.[38] But the court did not discuss what the sanction for the illegal seizure might be. In 2006 in *Harvey*, the district court held that the appropriate remedy is a motion to suppress the use of the property as evidence in the criminal case.[39]

In *United States v. James Daniel Good Real Property*,[40] the Supreme Court held that the Government may not seize real property for the purpose of forfeiture without prior notice and a hearing,[41] but the courts are unanimous in holding that *Good* does not apply to the seizure of

[37] *Lazarenko*, 476 F.3d at 648.

[38] *See* Baranski v. Fifteen Unknown Agents, 401 F.3d 419, 435-36 (6th Cir. 2005) (it is not necessary for the Government to have seized the property prior to obtaining a criminal forfeiture order; therefore, an illegal seizure has no effect on a criminal forfeiture).

[39] United States v. Harvey, 2006 WL 3513940, at *9 (D.V.I. Nov. 29, 2006) (if § 853(f) seizure warrant is invalid, stop of vehicle based on the warrant is invalid, and fruits of search of vehicle must be suppressed).

[40] 510 U.S. 43 (1993).

[41] *James Daniel Good Real Property*, 510 U.S. at 498-505.

personal property. Accordingly, the district court in *Lewis* held that a Section 853(f) warrant for the seizure of vehicles and bank accounts could be issued without prior notice and a hearing.[42]

There is one other difference between a seizure in a civil forfeiture case and a seizure pursuant to Section 853(f) in a criminal case. In civil cases, the person aggrieved by the seizure may apply to the court for the release of his property pending trial under the "hardship" provision that was enacted as part of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA).[43] But the civil forfeiture hardship provision does not apply in criminal cases, and thus does not apply when the property is seized pursuant to Section 853(f).[44]

IV. PRETRIAL RESTRAINT OF ASSETS

Issuing a post-indictment restraining order

Instead of seizing the property that is subject to forfeiture, the Government may ask the court to preserve its interest in the property by issuing a post-indictment, pre-trial restraining order.[45] The nearly unanimous rule is that the restraining order may be issued *ex parte*; there is no right to a pre-restraint hearing.[46] In a bit of a surprise, the Fifth Circuit held last year that Rule 65 of the Federal Rules of Civil Procedure applies to restraining orders issued in criminal cases,

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[42] United States v. Lewis, 2006 WL 1579855, at *5 (D. Minn. June 1, 2006).

[43] 18 U.S.C. § 983(f).

[44] *See* United States v. Kramer, ___ F. Supp.2d ___, 2006 WL 3545026, at *2 n.1 (E.D.N.Y. Dec. 8, 2006) (noting that defendant attempted to gain release of his property pending trial pursuant to § 983(f), but then conceded that the hardship provision in that statute does not apply to criminal forfeiture cases).

[45] *See* 21 U.S.C. § 853(e); AFLUS, *supra* note 2, § 17-5, p. 512.

[46] *See*, *e.g.*, United States v. Jamieson, 427 F.3d 394, 405-06 (6th Cir. 2005) (restraining order may be entered upon the filing of the indictment; post-restraint hearing under the Jones-Farmer rule is sufficient to protect defendant's right to due process); United States v. Monsanto, 924 F.2d 1186, 1193 (2d Cir. 1991); (notice and a hearing need not occur before an ex parte restraining order is entered pursuant to section 853(e)(1)(A)); *Lewis*, 2006 WL 1579855, at *10 (the grand jury's finding of probable cause is sufficient to support the issuance of an ex parte restraining order).

and that *a third party* affected by the restraining order therefore had a right to prior notice and a hearing.[47] But that decision was quickly vacated when the full court granted the Government's petition for a rehearing *en banc*.[48] The case was reargued in January 2007; as of this writing, no new decision has been rendered.

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

While defendants and third parties are not entitled to notice and a hearing prior to the issuance of a pre-trial restraining order, most courts will grant a request for a *post-restraint* hearing prior to trial in certain circumstances.[49] In most jurisdictions, if the request is made by the defendant, the court will grant such a hearing only if the defendant shows that he has no other funds with which to retain counsel to defend him in the criminal case, and he makes a prima facie showing that there is no probable cause for the forfeiture of the restrained property. This is commonly known as the *Jones-Farmer* rule, which balances the right of a defendant to seek the release of his property with the right of the Government to avoid the premature disclosure of its evidence and the exposure of its witnesses.[50]

In 2006, the Third Circuit and a number of district courts joined the list of courts that have adopted the *Jones-Farmer* rule.[51]

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[47] United States v. Holy Land Foundation for Relief and Development, 445 F.3d 771, 792 (5th Cir. 2006) (the Fifth Circuit continues to apply Rule 65 to restraining orders issued pursuant to § 853(e); therefore, until the issue is revisited by the en banc court, a pre-restraint hearing is required).

[48] *Holy Land Foundation for Relief and Development*, 445 F.3d 771.

[49] *See* AFLUS, *supra* note 2, § 17-6, p. 514.

[50] *See* 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) (defendant entitled to pretrial hearing if property is seized for civil forfeiture if he demonstrates that he has no other assets available; following Jones).

[51] *See* United States v. Yusuf, 199 Fed. Appx. 127, 132-33 (3d Cir. 2006) (following *Jones*, *Farmer* and *Jamieson*; district court must require defendants to show that they can satisfy the two *Jones* requirements, and then

It is important to understand that the *Jones-Farmer* rule is only the first step in a two-step process. As the Third Circuit explained in *United States v. Yusuf,*[52] a defendant who satisfies the *Jones-Farmer* requirements has demonstrated only that he has the right to a post-restraint probable cause hearing.[53] If the Government establishes probable cause at such a hearing, the property remains under restraint, notwithstanding the defendant's need to use the money to retain counsel.[54]

Lis pendens

If the property subject to forfeiture is real property, the Government may choose to file a *lis pendens* on the property pursuant to state law.[55] The courts are divided, however, as to whether a *lis pendens* may be filed on substitute assets.

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may release funds for attorneys fees only if the Government fails to establish probable cause); United States v. Morrison, ___ F. Supp.2d ___, 2006 WL 2990481, at *6-7 (E.D.N.Y. Oct. 19, 2006) (a hearing on the continued pre-trial restraint of assets is warranted only when the defendant shows that he needs the money to hire counsel or for living expenses; that the restraint may cause defendant the loss of investment income is not sufficient); United States v. Kramer, ___ F. Supp.2d ___, 2006 WL 3545026, at *4 n.4 (E.D.N.Y. Dec. 8, 2006) (finding it unnecessary to reach *Jones-Farmer* issue, but noting that because probable cause hearings might be used only to gain a sneak peak of the Government's case and witnesses, thereby wasting prosecutorial resources, a majority of courts have held that such hearing are necessary only where the criminal defendant makes a least an initial showing that he has no other assets with which to retain private counsel; citing *Jamieson*, *Jones*, *Farmer* and *Morrison*); *Lewis*, 2006 WL 1579855, at *8-10 (applying *Jones-Farmer* and denying defendant's right to a hearing because she could satisfy neither of the two requirements; that defendant was represented by three attorneys at the *Jones* hearing is strong evidence that she was not without funds with which to retain counsel); United States v. Galante, 2006 WL 3826701, at *3 (D. Conn. Nov. 28, 2006) (defendants will be entitled to a probable cause hearing if they can show that access to the restrained funds is necessary to retain counsel).

[52] *Yusuf*, 199 Fed. Appx. 127.

[53] *Yusuf*, 199 Fed. Appx. at 133 n.5 (if the claimant qualifies for a probable cause hearing, he is entitled to challenge the grand jury's finding of probable cause as to the forfeitability of the property).

[54] *Yusuf*, 199 Fed. Appx. at 132 n.3 (following *Jamieson*; if the Government establishes probable cause, the property must remain under restraint; the defendant's Sixth Amendment right to obtain counsel of his choice applies only to the use of his own legitimate, nonforfeitable funds); *id.* at *4 (the Government has the burden of establishing probable cause as to the forfeitability of the property; it need not re-establish probable cause as to the underlying offense). *See also* United States v. Jamieson, 427 F.3d 393, 405 (6th Cir. 2005) (Government established probable cause at Monsanto hearing, so property remained restrained and court appointed Criminal Justice Act counsel to represent defendant at trial and authorized $100,000 for investigative expenses and expert witnesses).

[55] *See* AFLUS, *supra* note 2, § 17-8, p. 526.

The majority rule, reflected in 2006 in the district court's opinion in *United States v. Woods*,[56] is that the United States can file a *lis pendens* on any property named in an indictment or bill of particulars, even if it is only a substitute asset.[57] Two other courts, however, have taken a contrary view.

In *United States v. Kramer*,[58] a district court held that, under New York law, a *lis pendens* may only be filed on property in which the plaintiff has a pre-existing interest that he or she is attempting to vindicate. Substitute assets, the court said, do not qualify.[59] And in *United States v. Parrett*,[60] another district court assumed, without analysis, that a *lis pendens* is the same as a restraining order, and that the cases prohibiting the pre-trial restraint of substitute assets therefore prohibit filing a *lis pendens* on substitute real property.[61]

The latter decision appears to be clearly wrong and has been appealed. A *lis pendens* is not a restraining order, and even if it were regarded as the functional equivalent of one, it is certainly not a restraining order issued by a federal court pursuant to Section 853(e). It is only to that narrow category of restraining orders that the proscription against the pre-trial restraint of substitute assets applies.[62]

Restraint of foreign asset

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[56] 436 F. Supp.2d 753 (E.D.N.C. 2006).
[57] *Woods*, 436 F. Supp.2d at 755.
[58] ___ F. Supp.2d ___, 2006 WL 3545026 (E.D.N.Y. Dec. 8, 2006).
[59] *Kramer*, 2006 WL 3545026, at *10-11.
[60] **Error! Main Document Only.**469 F. Supp.2d 489 (S.D. Ohio 2007).
[61] *Parrett*, **Error! Main Document Only.**469 F. Supp.2d at 493-94.
[62] *See*, e.*g.*, United States v. Gotti, 155 F.3d 144, 149 (2d Cir. 1998) (Section 853(e) does not permit the pre-trial restraint of substitute assets because the statute, by its terms, applies only to property subject to forfeiture under subsection (a) whereas substitute assets may be forfeited only pursuant to subsection (p)).

Section 853(e)(4) allows the court to order the defendant to repatriate forfeitable assets from overseas.[63] Sometimes this raises Fifth Amendment concerns, but in *United States v. Morrison*,[64] the district court held that there is no testimonial self-incrimination involved when the defendant is compelled to repatriate assets from an account of which the Government is already aware.[65]

Interlocutory appeals from pre-trial restraining orders

In *Yusuf,* the Third Circuit held that if the district court releases funds from a restraining order so that they may be used to pay attorneys fees, the Government has the right to take an interlocutory appeal.[66]

Restraint of property in which a third party has an interest

The defendant has no standing to object to a restraining order on the ground that the property belongs to a third party. In *Morrison*, the defendant objected that the property being restrained belonged to his wife, not to him, but the district court held that this was not an objection that the defendant was entitled to raise. If there was a genuine dispute as to the ownership of the property, the court said, the proper procedure would be to wait to see if the property was forfeited, and then let the wife file a claim on her own behalf in the ancillary proceeding.[67]

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[63] 21 U.S.C. § 853(e)(4); *see also* AFLUS, *supra* note 2, § 17-9, p. 527.

[64] ___ F. Supp.2d ___, 2006 WL 2990481 (E.D.N.Y. Oct. 19, 2006).

[65] *Morrison*, 2006 WL 2990481, at *4.

[66] United States v. Yusuf, 199 Fed. Appx. 127, 133 (3d Cir. 2006) (court of appeals has jurisdiction under § 1292 over Government's interlocutory appeal from district court's release of restrained funds to pay attorneys fees). *See also* AFLUS, *supra* note 2, § 17-15, p. 538.

[67] *Morrison*, 2006 WL 2990481, at *6 (defendant cannot object to pre-trial restraining order on the ground that the property belongs to his wife; if the property is forfeited, the wife can make a claim in the ancillary proceeding). *Cf.* United States v. Woods, 436 F. Supp.2d 753, 755 (E.D.N.C. 2006) (because the relation back doctrine applies to substitute assets, the Government may file a *lis pendens* on real property forfeitable from the

Interlocutory sale

When an asset subject to forfeiture is wasting, or the defendant has stopped making mortgage payments, the Government will often ask the court to invoke its plenary power under Section 853(e) to allow the Government to preserve the value of the property by conducting an interlocutory sale.[68] Such requests are generally granted, but in *United States v. Benbow*[69] a district court held that it had no authority to order the sale over the objections of the defendant.[70] In light of the broad statutory language, that ruling seems to be incorrect.

Pretrial restraint of substitute assets

As already mentioned, the majority rule is that a district court lacks the power under Section 853(e) to order the pretrial restraint of property subject to forfeiture only as a substitute asset.[71] The most significant exception is the Fourth Circuit, which permits the pretrial restraint of any property subject to forfeiture, regardless of the theory on which the forfeiture will be based.[72] There were no new developments in this debate in 2006, except that a district court in the Fourth Circuit held that if a substitute asset may be restrained pursuant to Section 853(e), it may also be seized pursuant to Section 853(f).[73]

V. APPLICATION OF THE CAFRA DEADLINES TO CRIMINAL FORFEITURE

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defendant as a substitute asset even though the defendant has transferred the property to a third party; the third party must wait for the ancillary proceeding to contest the forfeiture).

[68] *See* 21 U.S.C. § 853(e) (authorizing the court to take any action to preserve the Government's interest in the property).

[69] 2006 WL 2850100 (M.D. Fla. Oct. 3, 2006).

[70] *Benbow*, 2006 WL 2850100, at *4-5.

[71] *See* AFLUS, *supra* note 2, § 17-14, p. 534.

[72] *See* In Re Billman, 915 F.2d 916, 919 (4th Cir. 1990); United States v. Bollin, 264 F.3d 391, 421 (4th Cir. 2001).

[73] *See* United States v. Martin, 460 F. Supp.2d 669, 677-78 (D. Md. 2006).

Retention of property seized with civil process

When a claimant files a claim to seized property in an administrative forfeiture proceeding, the Government has ninety days to commence a judicial forfeiture action, either by filing a civil forfeiture complaint against the property *in rem*, or by including the property in the forfeiture allegation in a criminal indictment.[74] If the Government fails to take either step before the expiration of the deadline, it must return the property to the person from whom it was seized, and it forever barred by seeking the civil forfeiture of the property.[75] The latter sanction is commonly known as the "death penalty" provision, which was enacted as part of CAFRA in 2000.[76]

In the past year, two district courts noted that if the Government elects to pursue criminal forfeiture option, it is not enough for the Government simply to include the property in an indictment; it must also "take the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute."[77] Such steps may include applying for a restraining order under Section 853(e) for a seizure warrant under Section 853(f), or for an order from the court directing the Government to maintain custody of property already in its possession.[78] But the Government cannot simply hold on to the property based solely on process issued for the purpose of civil forfeiture.

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[74] *See* 18 U.S.C. § 983(a)(3)(B).
[75] *See* 18 U.S.C. § 983(a)(3)(B).
[76] *See* AFLUS, *supra* note 2, § 7-5, pp. 227-30.
[77] 18 U.S.C. § 983(a)(3)(B) .
[78] *See* In Re: 2000 White Mercedes ML320, 220 F. Supp.2d 1322, 1325-26 (M.D. Fla. 2001) (if property is already in Government custody, order allowing Government to maintain custody issued under § 853(e) would be adequate to preserve it).

In *United States v. Martin*,[79] agents of the Bureau of Immigration and Customs Enforcement (ICE) seized the claimant's property, and legal counsel for Customs and Border Protection (CBP) sent the claimant notice of administrative forfeiture. The claimant filed a claim and the U.S. Attorney's Office responded by including the property in an indictment before the ninety days expired, but it did not take any steps to preserve its right to hold the property with criminal process. When the claimant filed a Rule 41(g) motion for the return of his property,[80] the court held that failure to take the necessary steps meant two things: 1) the Government's possession of the property ceased to be lawful when the ninety days expired, and 2) civil forfeiture of the property was forever barred by the "death penalty" provision in Section 983(a)(3).[81] In that case, the Government avoided having to return the property by belatedly seizing it with a Section 853(f) warrant, but that action came too late to preserve the Government's option of proceeding with the forfeiture civilly if the criminal forfeiture was for some reason unsuccessful.

A similar situation developed in *United States v. Kramer.*[82] In that case, when the Government obtained an indictment within the ninety-day period following the receipt of the claimant's claim, it assumed that it the civil seizure warrant with which it had initially seized the property would be sufficient to allow it to maintain custody of the property throughout the criminal trial, but the court held that this was not so. A civil seizure warrant, the court said, is not automatically transformed into a criminal warrant when the Government switches from civil to criminal forfeiture. Thus, the Government's possession became unlawful when it failed to take

[79] 469 F. Supp.2d 669 (D. Md. 2006).
[80] *See* Rule 41(g), FED. R. CRIM. P.
[81] *Martin*, 469 F. Supp.2d at 676.
[82] ___ F. Supp.2d ___, 2006 WL 3545026 (E.D.N.Y. Dec. 8, 2006).

the necessary steps to maintain possession of the property with criminal process. But the court nevertheless gave the Government seven days to comply with the statute by obtaining a criminal seizure warrant, and did not order it to return the property.[83]

No effect on criminal forfeiture

While the failure to comply with the requirements of 983(a)(3)(B) means that the Government will likely lose the option of falling back on civil forfeiture if something goes wrong in the criminal case, and that it runs the risk of having to return the property pursuant to Rule 41(g), missing the ninety-day deadline has no impact on the Government's ability to pursue criminal forfeiture. As the district court held in *Martin*, even if the Government were forced to return the property because of the CAFRA violation, it would retain the right to re-seize it for criminal forfeiture at any time.[84]

VI. INDICTMENT

The property subject to forfeiture need not be itemized

Rule 32.2(a) of the Federal Rules of Criminal Procedure provides that the defendant must be given notice in the indictment that the Government will be seeking the forfeiture of his property in the event that he is convicted. But the courts are nearly unanimous in holding that the notice can be in generic terms; it is not necessary for the Government to list each and every asset

[83] *Kramer*, 2006 WL 3545026, at *3-4.
[84] *Martin*, 460 F. Supp.2d at 675-77.

subject to forfeiture in the indictment itself, but can provide more detailed notice of the forfeiture to the defendant later in a bill of particulars or some other document.[85]

In *United States v. Brown*,[86] the defendant moved to vacate a forfeiture verdict because the forfeited real property was not named in the indictment, but the court followed the rule that an indictment is sufficient if it merely tracks the language of the applicable forfeiture statute.[87]

Bill of particulars

A bill of particulars will generally be considered sufficient if it simply identifies the assets subject to forfeiture. In *United States v. Columbo*,[88] the court denied a request that the Government provide the defendant with a bill of particulars providing "a full accounting of how the Government arrived at the $10,000,000 forfeiture allegation" in the indictment.[89] Such detailed information, the court said, is relevant only at sentencing.[90]

Motion to dismiss

The defendant cannot move to dismiss the forfeiture allegation from the indictment based on a lack of evidence.[91] The forfeiture notice is simply a notice provision; whether the Government is able to meet its burden of proof with respect to the forfeiture is a matter for trial, not a pre-trial motion.[92]

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[85] *See* AFLUS, *supra* note 2, § 16-2, p. 491.

[86] 2006 WL 898043 (E.D.N.Y. Apr. 4, 2006).

[87] *Brown*, 2006 WL 898043, at *6.

[88] 2006 WL 2012511 (S.D.N.Y. July 18, 2006) (denying motion for bill of particulars describing how the Government calculated the amount subject to forfeiture that was alleged in the indictment; such information is not necessary for trial preparation and is relevant only at sentencing; Government's alternative of sending defendant a letter describing its calculation is reasonable).

[89] *Columbo*, 2006 WL 2012511, at *5 & n.13.

[90] *Columbo*, 2006 WL 2012511, at *5 & n.13.

[91] *See* AFLUS, *supra* note 2, § 16-4, p. 497.

[92] *See* United States v. Chan, 2006 WL 224389, *3 & n.3 (E.D. Cal. Jan. 27, 2006) (defendant may not use Rule 12(b) to challenge a forfeiture allegation based on the sufficiency of the evidence or a third party's interest in

Statute of limitations

Generally, the statute of limitations in a criminal case is tolled by the filing of an indictment,[93] even if the indictment is filed under seal, but the sealing of the indictment must be for a proper purpose. In *United States v. Gigante,*[94] the Government obtained an indictment four weeks before the statute of limitations expired, but had the indictment placed under seal so that it could continue its investigation to determine what assets were subject to forfeiture. Ten weeks later (six weeks after the statute of limitations expired), the grand jury returned a superseding indictment (also sealed) listing the forfeitable property. On the next day, the defendant was arrested and the indictment was unsealed.

The defendant ultimately filed a motion to dismiss the indictment based on statute of limitations grounds. In granting the motion, the court held that sealing an indictment to allow the Government to conduct a forfeiture investigation is not a "proper purpose."[95] The statute of limitations gives the Government a fixed period of time in which to conduct a criminal investigation, the court said, not a fixed period of time "and a few extra weeks in which to conduct a forfeiture investigation."[96]

Rule 32.2(a) has no application to civil forfeiture proceedings

Rule 32.2(a) says that the Government is required to give a criminal defendant notice that the Government will be seeking criminal forfeiture as part of his sentence. In *United States v.*

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the property; following *Dote*); United States v. Dote, 150 F. Supp.2d 935, 943 (N.D. Ill. 2001) (the amount of money subject to forfeiture is a matter for the Government to prove and the jury to determine at trial—not an issue the court can resolve on a motion to dismiss the forfeiture allegation in the indictment).

[93] *See* AFLUS, *supra* note 2, § 16-5, p. 499.

[94] 436 F. Supp.2d 647 (S.D.N.Y. 2006).

[95] *Gigante*, 436 F. Supp.2d at 650.

[96] *Gigante*, 436 F. Supp.2d at 650.

Ivory,[97] the defendant argued that it also meant that the Government must give him notice that it will be seeking civil forfeiture in a parallel proceeding. The court said that it does not. Civil forfeitures are separate matters that the Government may pursue, at its option, without regard to the notice provision in the Criminal Rules.[98]

In *Hairston v. United States,*[99] another district court reached the same conclusion on the same point.[100]

VII. BIFURCATED PROCEEDING

Rule 32.2(b)(1) requires that the forfeiture determination take place as soon as practicable after the jury's return of a guilty verdict or the court's acceptance of the defendant guilty plea.[101] In *United States v. Arthur*,[102] however, the court held that the defendant suffered no prejudice when the Government waited six months after the verdict to submit a motion for a preliminary order of forfeiture.[103]

VIII. BURDEN OF PROOF / JURY INSTRUCTIONS

Application of Apprendi, Blakely, *and* Booker *to criminal forfeiture*

[97] 172 Fed. Appx. 934 (11th Cir. 2006) (rejecting view that Rule 32.2(a) required the Government to put defendant on notice in his criminal forfeiture case that the Government would be seeking civil forfeiture of his property in a parallel proceeding).

[98] *Ivory*, 172 Fed. Appx. at 936 n.1. *See also* AFLUS, *supra* note 2, § 16-6, p. 500.

[99] 2006 WL 839202 (E.D. Mo. Mar. 27, 2006).

[100] *Hairston*, 2006 WL 839202, at *1 n.2 (rejecting view that civil forfeiture judgment was invalid because Government had not listed the property as subject to forfeiture in a related criminal indictment).

[101] *See* AFLUS, *supra* note 2, § 18-2, p. 540.

[102] 2006 WL 2992865 (E.D. Wis. Oct. 18, 2006).

[103] *Arthur*, 2006 WL 2992865, at *4 (rejecting claim that forfeiture violated Rule 32.2(b)(1) because Government did not file motion for preliminary order until 6 months after the verdict; parties agreed to delay addressing the forfeiture, and defendant could not show prejudice).

The courts uniformly hold that the Supreme Court's decisions in *Apprendi,*[104] *Blakely*[105] and *Booker*[106] do not apply to criminal forfeiture, and that accordingly, any factual findings necessary to support the entry of a forfeiture order may be made by the court under the preponderance of the evidence standard.[107]

The preponderance standard has been the rule in criminal forfeiture cases since 1995 when the Supreme Court held in *Libretti v. United States*[108] that the Sixth Amendment does not apply to criminal forfeiture.[109] Noting that nothing in *Apprendi, Blakely* and *Booker* suggests that *Libretti* has been overruled, some courts have held simply that the lower courts remain bound by *Libretti* until the Supreme Court itself says otherwise.[110] Accordingly, those courts have found it unnecessary to determine how they would apply *Booker* in the criminal forfeiture context if they were free to do so.

In *United States v. Alamoudi,*[111] however, the Fourth Circuit undertook a *Booker* analysis of criminal forfeiture, and held that *Booker* does not require any change in the way criminal forfeitures are currently handled.[112] The court reasoned as follows: 1) there can be a *Booker*

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[104] Apprendi v. New Jersey, 530 U.S. 466 (2000).
[105] Blakely v. Washington, 542 U.S. 296 (2004).
[106] United States v. Booker, 543 U.S. 220 (2005).
[107] *See* AFLUS, *supra* note 2, § 18-5(d), p. 552.
[108] 516 U.S. 29 (1995).
[109] *Libretti*, 516 U.S. at 48-52.
[110] *See* United States v. Ortiz-Cintron, 461 F.3d 78, 82 (1st Cir. 2006) (until and unless *Libretti* is overturned, a court is constrained to hold that the Sixth Amendment does not apply to criminal forfeiture; therefore a defendant cannot complain that he was denied the right to have the forfeiture determined by a jury); United States v. Leahy, 438 F.3d 328, 331-33 (3d Cir. 2006) (en banc) (*Libretti* holds that the Sixth Amendment does not apply to criminal forfeiture; whatever the tension between *Libretti* and *Booker* may be, until the Supreme Court holds otherwise, a Court of Appeals is not free to decide that the Supreme Court has implicitly overruled its prior decision; thus *Libretti* remains good law); United States v. Mertens, 166 Fed. Appx. 955, 958 (9th Cir. 2006) (same; lower courts are bound to follow the decisions of the Supreme Court even if the rationale has been undermined by another line of cases).
[111] 452 F.3d 310 (4th Cir. 2006).
[112] *Alamoudi*, 452 F.3d at 314.

violation only if the law imposes a maximum above which a sentence may not rise; 2) there is no statutory (or guidelines) maximum for criminal forfeiture; rather, such forfeitures are indeterminate and open-ended; 3) therefore a forfeiture order can never violate *Booker*.[113]

Jury instructions

Most jury instruction cases deal with substantive issues, such as what does term "proceeds" mean, or what constitutes "facilitating property,"[114] but there was one case on a procedural issue in 2006.

In *United States v. Wittig*,[115] the court explained to the jury that it was not to concern itself with the ownership of the property. The jury's only role, the court said, is "to determine whether the government has adequately proven the nexus between the offenses and the property."[116]

IX. GUILTY PLEAS

The defendant can agree to the forfeiture of his property

When a defendant enters a guilty plea, he may agree to the forfeiture of his property as part of his sentence.[117] Several cases in 2006 dealt with the procedure for carrying out such an agreement.

In a Section 2255 petition filed years after the forfeiture, the defendant in *Pease v. United States*[118] complained that the forfeited property had not been listed in the plea agreement. Instead,

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[113] *See* United States v. Hively, 437 F.3d 752, 763 (8th Cir. 2006) (*Booker* does not apply to a RICO forfeiture; the *Booker* Court specifically held that forfeitures under § 3554 remain perfectly valid).
[114] *See* AFLUS, *supra* note 2, § 18-5(e), p. 558.
[115] 2006 WL 13158 (D. Kan. Jan. 3, 2006).
[116] *Wittig*, 2006 WL 13158, at *3.
[117] *See* AFLUS, *supra* note 2, § 18-3, p. 541.

the plea agreement simply said that the defendant agreed to the forfeiture of "any and all assets subject to forfeiture."[119] Prior to sentencing, however, the Government had supplied the defendant and the court with a list of the property to be forfeited, and the court had given the defendant an opportunity to object to the forfeiture of the listed items before it entered its order of forfeiture. Rejecting the Section 2255 petition, the court held that the procedure followed by the Government and the district court was the proper way of implementing the defendant's plea agreement.[120]

Another approach is for the parties to agree to have the court determine the property subject to forfeiture. In *United States v. Campbell*,[121] for example, the parties agreed that the defendant would pay a money judgment in an amount to be determined by the court. The court determined that the Government was entitled to a judgment in the amount of $326,346.56, and entered a forfeiture judgment in that amount.[122]

A third way to implement a plea agreement is for the defendant to agree to the forfeiture of a specific sum of money, with the Government retaining the right to enforce the agreement by forfeiting substitute assets if the defendant does not fulfill his agreement to pay. In *Alamoudi*, for example, the defendant agreed to forfeit $910,000 paid to him by the Libyan Government to assassinate the Saudi Crown Prince. When defendant failed to come up with more than half of the money, the district court granted the Government's motion to forfeit substitute assets.

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[118] 2006 WL 2175271 (M.D. Fla. July 31, 2006).
[119] *Pease*, 2006 WL 2175271, at *10.
[120] *Pease*, 2006 WL 2175271, at *16.
[121] 2006 WL 3050800 (D. Kan. Oct. 24, 2006).
[122] *Campbell*, 2006 WL 3050800, at *4.

On appeal, the defendant complained that because the plea agreement said nothing about substitute assets, the Government had waived its right to pursue them, but the Fourth Circuit held that because the forfeiture of substitute assets is mandatory, a defendant's agreement to forfeit the proceeds of his offense implicitly includes an agreement to forfeit substitute assets if the proceeds cannot be found. Accordingly, the Government always has the right to enforce an agreement to pay a specific sum of money by forfeiting substitute assets, unless the plea agreement expressly provides to the contrary.[123]

A plea agreement can also include an agreement *not* to pursue forfeiture of one asset if the defendant agrees to the forfeiture of another. In *United States v. Ellis*,[124] the parties agreed that if defendant paid a $200,000 money judgment the Government would not seek forfeiture of his farm. When the defendant failed to pay the judgment, the Government brought a civil forfeiture action against the farm. The defendant complained that the plea agreement said nothing about the Government's being able to do this if he didn't keep his end of the bargain and moved to withdraw his guilty plea, but the district court held that the Government's right to bring a civil forfeiture action against the farm was implicit in the plea agreement and denied the motion to withdraw.[125]

Agreement not to appeal the forfeiture

[123] United States v. Alamoudi, 452 F.3d 310, 314 (4th Cir. 2006) (defendant's agreement to forfeit the proceeds of his offense, allows the Government to seek the forfeiture of substitute assets pursuant to Rule 32.2(e) and section 853(p), unless the right to do so is expressly waived).

[124] 470 F.3d 275 (6th Cir. 2006).

[125] *Ellis*, 470 F.3d at 284.

A plea agreement may also contain an agreement not to appeal the forfeiture judgment, but the agreement must be specific. In *United States v. Adams*,[126] the defendant agreed not to appeal his conviction and sentence. When he nevertheless appealed from the order of forfeiture, the Government argued that because forfeiture is part of the sentence, the defendant's agreement not to appeal the sentence constituted an agreement not to appeal the forfeiture as well. But the Ninth Circuit disagreed, holding that the defendant may have believed he had retained the right to appeal the forfeiture and allowed the appeal.[127]

X. FORFEITURE PHASE OF THE TRIAL

The right to a jury under Rule 32.2(b)(4)

While the Sixth Amendment right to a jury trial does not apply to the forfeiture phase of a criminal proceeding, Rule 32.2(b)(4) gives either party a statutory right to request that the jury be retained to determine if there is a nexus between the property and the offense of conviction.[128] But the Rule requires a specific request that the jury be retained. If neither party makes such a request, the right to the jury is waived.[129] Thus, in *United States v. Hively,*[130] the Eighth Circuit

[126] 189 Fed. Appx. 600 (9th Cir. 2006).
[127] *Adams*, 189 Fed. Appx. at 602.
[128] *See* United States v. Gaskin, 2002 WL 459005, at *9 n.3 (W.D.N.Y. Jan. 8, 2002) (notwithstanding *Libretti*, which appears to make trial by jury on the forfeiture issue inappropriate, Rule 32.2(b)(4) gives the defendant the right to have the jury determine the forfeiture, if the case was tried before a jury), *aff'd*, 364 F.3d 438 (2d Cir. 2004); United States v. Prejean, 2006 WL 2414256, at *1 (E.D. La. Aug. 18, 2006) (noting that the Government requested that the jury be retained pursuant to Rule 32.2(b)(4)); AFLUS, *supra* note 2, § 18-4(a), p. 544.
[129] *See* AFLUS, *supra* note 2, § 18-4(b), p. 549.
[130] 437 F.3d 752 (8th Cir. 2006).

held that a defendant waived his right to a jury determination of the forfeiture by failing to make an affirmative request that the jury be retained for that purpose.[131]

Three courts have now held that the right to request a jury trial on the forfeiture does not apply when the Government is seeking only a judgment for a sum of money. In the most recent case, *United States v. Delgado*,[132] a district court explained that the statutory right embodied in Rule 32.2(b)(4) is the right to have a jury determine if there is a nexus between specific property and the offense. If the Government is seeking only a money judgment, the court said, there is no nexus determination to be made; therefore a defendant's request to have the jury determine the amount of a money judgment must be denied.[133] There are no published opinions to the contrary, but it is clear from the case law that some courts nevertheless do allow the jury to determine the amount of the money judgment.

If the jury is asked to determine the amount of a money judgment, it is not limited to the amount requested by the Government. In *United States v. Brown*,[134] the Government asked the jury for a special verdict of $2.6 million. When the jury came back with a verdict for only $1.2 million, the defendant objected that neither he nor the Government could divine how the jury came up with that number, and that accordingly it could not be the basis for a forfeiture order.

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[131] *Hively*, 437 F.3d at 763. *See also* United States v. Greenwood, No. 1:05cr294, slip op. at 3 (E.D. Va. Mar. 14, 2006) (Rule 32.2(b) reflects Congress' manifest intent that jury determinations forfeiture should not be automatic and should not occur in every case, but rather should result only from a specific and deliberate election by one or both parties.).

[132] 2006 WL 2460656 (M.D. Fla. Aug. 23, 2006).

[133] *Delgado*, 2006 WL 2460656, at *1. *See also* United States v. Tedder, 403 F.3d 836, 841 (7th Cir. 2005) (the defendant's right under Rule 32.2(b)(4) is to have the jury determine if the Government has established the required nexus between the property and his crime; the rule does not give the defendant the right to have the jury determine the amount of a money judgment); United States v. Reiner, 393 F. Supp.2d 52, 54-57 (D. Me. 2005) (same, following *Tedder*; Rule 32.2(b)(4) applies only when the Government is required to establish a nexus between the property and the offense; when the Government is seeking only a money judgment, there is no nexus requirement and thus no nexus for the jury to find).

[134] 2006 WL 898043 (E.D.N.Y. Apr. 4, 2006).

But the court held that submitting a special verdict form to the jury with respect to the forfeiture of a sum of money is not an all-or-nothing proposition.[135] Whether defense counsel or the prosecutor is able to explain the jury's reasoning or not, if the jury does not like the number of dollars the Government is seeking, it is free to come up with its own number, and the court is bound to enter a judgment of forfeiture accordingly.

Conduct of the forfeiture phase of the trial

If the forfeiture is being tried to a jury, the defendant has the right to put on evidence and argue against the forfeiture before the jury retires to consider its verdict. In *United States v. Arbolaez*,[136] when the jury returned a guilty verdict, the defense attorney asked for the opportunity to present evidence and argue to the jury with respect to the forfeiture, but the judge denied the request and immediately instructed the jury on the forfeiture and sent them back out to deliberate. On appeal, the Eleventh Circuit reversed the forfeiture judgment, declining to accept the Government's argument that the error was harmless in light of the overwhelming evidence supporting the forfeiture.[137]

Once the jury returns a forfeiture verdict, there is no right to a second hearing before the judge. In *United States v. Prejean*,[138] the Government asked that the jury determine the forfeiture, and when it returned a forfeiture verdict, the court entered a preliminary order of forfeiture without giving the defendants an opportunity to be heard in opposition. The defendants objected that this violated their right to due process, but the court held that all of the facts necessary to determine whether the property should be forfeited had already been determined. The nexus

[135] *Brown*, 2006 WL 898043, at *4.
[136] 450 F.3d 1283 (11th Cir. 2006).
[137] *Arbolaez*, 450 F.3d at 1294-95.
[138] 2006 WL 2414256 (E.D. La. Aug. 18, 2006).

inquiry is the same whether the judge or the jury is the factfinder, the court said, therefore once the jury finds that the required nexus between the property and the offenses of conviction has been established, there are no facts left to find. At that point, the court concluded, "it was the duty of this Court to issue the preliminary order as the Court has no discretion to second guess the jury's verdict."[139] Accordingly, therefore, there was no reason to grant the defendants a hearing before the order was entered.

On the other hand, the defendant always has the right to point out an error in the preliminary order of forfeiture so that the court may correct it before the order becomes final at sentencing.[140] This is the reason why it is important for a court to enter a preliminary order of forfeiture "as soon as practicable after entering a guilty verdict," as Rule 32.2(b)(1) provides, instead of waiting until the day of sentencing.

Determining the ownership of the property is deferred to the ancillary proceeding

As mentioned earlier, Rule 32.2(b)(2) says that determining the extent of the defendant's ownership interest vis à vis third parties must be deferred to the ancillary proceeding.[141] Accordingly, *any property* involved in the offense may be included in the order of forfeiture; the

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[139] *Prejean*, 2006 WL 2414256, at *2 (following United States v. Neal, 2003 WL 24307070, at *2 (E.D. Va. Sept. 29, 2003), the inquiry into the nexus between the property and the offense is the same regardless of whether the judge or the jury is the factfinder; citing Advisory Committee's Notes to Rule 32.2).

[140] *Prejean*, 2006 WL 2414256, at *2.

[141] United States v. Lazarenko, 476 F.3d 642, 648 (9th Cir. 2007) (Upon a finding that the property involved is subject to forfeiture, a court must promptly enter a preliminary order of forfeiture without regard to a third party's interests in the property); De Almeida v. United States, 459 F.3d 377, 381 (2d Cir. 2006) (criminal forfeiture is not limited to the property of the defendant; any property involved in the offense of conviction may be forfeited; it is only to protect the due process rights of third parties that there must be a post-trial ancillary proceeding; thus, the Government does not have to establish the defendant's ownership of the property to seize it pending trial or to obtain a preliminary order of forfeiture, and the third party cannot complain that he was forced to wait for the ancillary proceeding to assert his rights). *See* AFLUS, *supra* note 2, § 18-6, pp. 562-66.

ancillary proceeding, not the forfeiture phase of the trial, is the forum for ensuring that the interests of third parties in the property are not forfeited inadvertently.[142]

It follows that the defendant cannot object to the forfeiture on the ground that the property belongs to a third party. In *United States v. Brown*,[143] the defendant wanted to object to the forfeiture on the ground that the property belonged to his wife, but the court explained that the proper procedure is for the court to enter a preliminary order which the wife could contest in the ancillary proceeding.[144]

Similarly, in *United States v. Wittig*,[145] the court said that the defendant's argument that the forfeited property did not belong to him "is premature and not his to make."[146] "A defendant," the court said, "does not have standing to object to forfeiture on the grounds that a third party owns the property."[147]

Tracing analysis

Proving that the property was derived from or used to commit the criminal offense is part of the Government's burden of proof in the forfeiture phase of the trial. In *United States v. Salvagno*,[148] the court noted that the Government may have difficulty doing this in cases involving commingled funds. In such cases, the court said, the Government may have no choice but to resort to forfeiting substitute assets.[149]

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[142] *De Almeida*, 459 F.3d at 381.
[143] 2006 WL 898043 (E.D.N.Y. Apr. 4, 2006) (ancillary proceeding).
[144] *Brown*, 2006 WL 898043, at *5.
[145] 2006 WL 13158 (D. Kan. Jan. 3, 2006).
[146] *Wittig*, 2006 WL 13158, at *3.
[147] *Wittig*, 2006 WL 13158, at *3. *See also* United States v. German, 2006 WL 3826674, at *2 (11th Cir. Dec. 29, 2006) (defendant lacks standing to contest the forfeiture on the ground that the Government made an oral promise to recognize his wife's interest in the property).
[148] 2006 WL 2546477 (N.D.N.Y. Aug. 28, 2006).
[149] *Salvagno*, 2006 WL 2546477, at *10.

Inconsistent verdicts

In *Wittig*, the court also held that the jury's verdict regarding the forfeitability of certain assets was not undermined by its apparently inconsistent finding that certain other assets were not subject to forfeiture. The jury's refusal to forfeit some of the assets, the court said, might indicate nothing more than the jury's preference that the defrauded victim recover those assets from the defendants directly, rather than through the process of forfeiting them to the Government. Accordingly, the court denied the defendant's motion to set aside the special verdicts of forfeiture.[150]

XI. MONEY JUDGMENTS

Court may order the forfeiture of an amount of money

For several decades it was seemingly well-established that a court could enter an order of forfeiture in the form of a judgment to pay a sum of money, such as the amount of money derived from the offense, or the amount of money laundered by a money launderer.[151] Then, in 2004, in *United States v. Croce*,[152] a district court in Philadelphia held that there was no statutory authority for entering an order of forfeiture in that form; the forfeiture order, the court said, could only compel a defendant to forfeit property in his possession at the time of sentencing; it could not take the form of an *in personam* order to pay a sum of money that the defendant did not have.[153]

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[150] *Wittig*, 2006 WL 13158, at *4.
[151] *See* AFLUS, *supra* note 2, § 19-4(c), p. 579.
[152] 334 F. Supp.2d 781 (E.D. Pa. 2004) (*Croce I*).
[153] *Croce I*, 334 F. Supp.2d at 794-95.

This surprising ruling set off a round of litigation over the authority of a district court to enter an order of forfeiture in a criminal case in the form of a money judgment when the defendant did not have the funds available to satisfy the judgment at the time he was sentenced. There were six appellate decisions on this point in 2006, all holding that entering a forfeiture order in the form of a money judgment is perfectly appropriate, whether the defendant has the present ability to satisfy the judgment or not.

The leading decision is *United States v. Vampire Nation*,[154] in which the Third Circuit expressly rejected the argument that a forfeiture order must be limited to specific property in the defendant's possession at the time he is sentenced. The forfeiture of the proceeds of a criminal offense is mandatory, the court said, and such mandatory forfeiture "is concerned not with how much an individual has but with how much he received in connection with the commission of the crime."[155] Moreover, nothing in the forfeiture statute limits the amount of money that may be included in a forfeiture order to the value of the assets the defendant possesses at the time the order is issued. To the contrary, Section 853(o) says that the statute should be "liberally construed to effectuate its remedial purposes," which include combating fraud schemes and deterring those who would commit them.

"We observe," the panel said, "that adopting [Defendant's] position would permit defendants who unlawfully obtain proceeds to dissipate those proceeds and avoid liability for their ill-gotten gains."[156] Such a result would be inconsistent with purpose of the forfeiture statute. Thus, the court held that a forfeiture order in a criminal case may take the form of an *in*

[154] 451 F.3d 189 (3d Cir. 2006).
[155] *Vampire Nation*, 451 F.3d at 201-02.
[156] *Vampire Nation*, 451 F.3d at 202.

personam money judgment, "even where the amount of the judgment exceeds the defendant's available assets at the time of conviction."[157]

The Third Circuit subsequently said essentially the same thing in reversing the holding of the district court in *Croce* itself.[158]

The Ninth Circuit reached the same conclusion in *United States v. Casey.*[159] The overriding purpose of the forfeiture statute, the court said, is to eliminate the gain that a defendant realizes from committing a criminal act. Every defendant who sells drugs in exchange for money realizes a gain whether he retains the money or spends it. Forfeiture is the tool Congress has devised to eliminate that gain. If the defendant still has the actual proceeds, he must forfeit them; if he does not have the actual proceeds but has something of equal value, he must forfeit that as a substitute asset; and if he has nothing to forfeit because he is insolvent he must be ordered to pay a money judgment. Otherwise a defendant who has spent the proceeds of his crime would be able to retain the benefit of those proceeds while other defendants may not.

The money that a defendant receives in exchange for drugs is money that "should never have been available for him to spend," the court continued.[160] "Imposing a money judgment despite his lack of assets at sentencing negates any benefit he may have received from the money, ensuring that, in the end, he does not profit from his criminal activity."[161]

This conclusion, the panel concluded, is dictated by the mandatory nature of the criminal forfeiture statute and the Congressional directive to construe the statute liberally to achieve its

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[157] *Vampire Nation*, 451 F.3d at 203.
[158] United States v. Croce, 2006 WL 3779752 (3rd Cir. Dec. 22, 2006).
[159] 444 F.3d 1071 (9th Cir. 2006).
[160] *Casey*, 444 F.3d at 1074.
[161] *Casey*, 444 F.3d at 1074.

remedial purpose. "Requiring imposition of a money judgment on a defendant who currently possesses no assets furthers the remedial purposes of the forfeiture statute by ensuring that all eligible criminal defendants received the mandatory forfeiture sanction Congress intended and disgorge their ill-gotten gains, even those already spent."[162]

The First Circuit said the same thing in *United States v. Hall*.[163] "A money judgment permits the Government to collect on the forfeiture order in the same way that a successful plaintiff collects a money judgment from a civil defendant," the court said. "Thus, even if a defendant does not have sufficient funds to cover the forfeiture at the time of the conviction, the Government *may seize future assets to satisfy the order."*[164]

"There are two primary reasons for permitting money judgments as part of criminal forfeiture orders," the court continued. "First, criminal forfeiture is a sanction against the individual defendant rather than a judgment against the property itself. Because the sanction follows the defendant as part of the penalty, the Government need not prove that the defendant actually has the forfeited proceeds in his possession at the time of conviction."[165] "Second," the court said, "permitting a money judgment, as part of a forfeiture order, prevents a drug dealer from ridding himself of his ill-gotten gains to avoid the forfeiture sanction."[166]

Following the Seventh Circuit's seminal opinion in *United States v. Ginsburg,*[167] the panel explained that a defendant who has spent his criminal proceeds "on wine, women, and song has profited from organized crime to the same extent as if he had put the money in his bank

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[162] *Casey*, 444 F.3d at 1074.
[163] United States v. Hall, 434 F.3d 42 (1st Cir. 2006).
[164] *Hall*, 434 F.3d at 59 (emphasis added).
[165] *Hall*, 434 F.3d at 59.
[166] *Hall*, 434 F.3d at 59.
[167] 773 F.2d 798 (7th Cir. 1985).

account."[168] In order to truly separate the defendant from his dishonest gains, therefore, the court must have the authority to order him to forfeit the total value of those proceeds "regardless of whether the specific dollars received from that activity are still in his possession."[169]

There were two decisions to the same effect in 2006 from the Eleventh Circuit as well.[170]

Orders combining a money judgment with the forfeiture of specific assets

If the Government has located some of the defendant's forfeitable assets but not others, the forfeiture order may comprise both a money judgment and an order forfeiting specific assets. For example, in *Hall,* the First Circuit held that the order of forfeiture could include a money judgment for $511,321 and the forfeiture of specific items of real and personal property.[171]

Enforcement of the money judgment

As the First, Third and Ninth Circuits held in *Hall, Vampire Nation* and *Casey,* the money judgment places the Government in the same position as any other judgment creditor and remains in effect until satisfied.[172]

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[168] *Ginsburg*, 773 F.2d at 802.

[169] *Hall*, 434 F.3d at 59.

[170] *See* United States v. Noorani, 188 Fed. Appx. 833, 838 (11th Cir. 2006) (rejecting the argument that the district court lacked the statutory authority to enter a forfeiture order in the form of a money judgment for the proceeds of a cigarette trafficking offense); United States v. Weiss, 467 F.3d 1300, 1307 n.8 (11th Cir. 2006) (affirming forfeiture of substitute asset to satisfy $3.1 million money judgment).

[171] *Hall*, 434 F.3d at 60 n.8 (rejecting defendant's argument that district court could not enter a money judgment and order forfeiture of specific assets as part of the same order, order that included a money judgment for $511,321 and ordered the forfeiture of specific items of personal and real property in accordance with the jury's special verdict was proper). *See also* United States v. Capoccia, 2006 WL 3779752 , at *1, 6 (D. Vt. Dec. 22, 2006) (court orders defendant to forfeiture sum of money in addition to the directly traceable property).

[172] *See Hall*, 434 F.3d at 59 (a money judgment permits the Government to collect on the forfeiture order in the same way that a successful plaintiff collects a money judgment from a civil defendant; even if a defendant does not have sufficient funds to cover the forfeiture at the time of the conviction, the Government may seize future assets to satisfy the order; rejecting *Croce*); United States v. Vampire Nation, 451 F.3d 189, 202-03 (3d Cir. 2006) (following *Casey*, *Hall* and *Baker*; a defendant's lack of assets at the time he is convicted does not allow him to sidestep a forfeiture judgment for the amount of his proceeds; if it did, defendants would have an incentive to dissipate their proceeds and avoid liability for their ill-gotten gains); United States v. Casey, 444 F.3d 1071, 1074-77

Concurrent money judgments

In *United States v. Brown*,[173] the defendant was found liable to pay a money judgment under two different theories – securities fraud and money laundering. The court held that when that happens, the judgments are concurrent.[174]

XII. ORDER OF FORFEITURE / SENTENCING

The order of forfeiture must be part of the sentence

Rule 32.2(b)(3) provides that the order of forfeiture "shall be made part of the sentence and included in the judgment."[175] This strongly implies that the order must be entered no later than the time of sentencing, and may not be entered long after the sentence has become final.[176] Indeed, several courts have held in the last few years that the failure to issue the forfeiture order at or before the time of sentencing can be a fatal error.[177]

Several cases decided in 2006, however, suggest that the rule may not be quite so absolute. *United States v. Soreide*[178] was a strange case in which a third party claimed an interest in property that was *not* included in the order of forfeiture. Rather than simply holding that it

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(9th Cir. 2006) (if the defendant is insolvent at the time of sentencing, the court must impose a money judgment that remains in effect until it is satisfied when the defendant acquires future assets).

[173] 2006 WL 898043 (E.D.N.Y. Apr. 4, 2006).

[174] *Brown*, 2006 WL 898043, at *4 (E.D.N.Y. Apr. 4, 2006).

[175] FED. R. CRIM P. 32.2(b)(3). *See also* AFLUS, *supra* note 2, § 20-3, p. 598.

[176] *See* United States v. Yeje-Cabrera, 430 F.3d 1, 15 (1st Cir. 2005) (Rule 32.2(b)(3)'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).

[177] *See* United States v. Bennett, 423 F.3d 271, 275-76 (3d Cir. 2005) (the order of forfeiture does not become final as to the defendant and become part of the judgment automatically; the court must comply with Rule 32.2(b)(3); a final order of forfeiture that is not entered until after sentencing is a nullity); United States v. Petrie, 302 F.3d 1280, 1284 (11th Cir. 2002) (district court lacked jurisdiction to enter a preliminary order of forfeiture six months after defendant was sentenced even though the judgment and commitment order said defendant was subject to forfeiture as cited in count two; the scheme set forth in Rule 32.2 is detailed and comprehensive).

[178] 461 F.3d 1351 (11th Cir. 2006).

lacked subject matter jurisdiction over a claim to property that was not part of the forfeiture case before it,[179] the district court found that the third party's claim lacked merit, and proceeded to include the property in the final order of forfeiture even though the defendant's sentence had long since become final.[180]

United States v. McCormick[181] was a much more typical case in which the court treated the failure to issue a preliminary order of forfeiture until more than a year after sentencing to be a clerical error. As long as the forfeiture was included in the oral announcement of the defendant's sentence, the court said, the oral sentence controls, and the failure to enter a written order may be corrected pursuant to Rule 36 of the Federal Rules of Criminal Procedure.[182]

Finally, in *United States v. Machado,*[183] the Eleventh Circuit held that an order of forfeiture that was not entered until nearly a year after the defendant was sentenced remained valid because the defendant did not file a direct appeal when the forfeiture order was entered.[184]

The forfeiture order must be included in the judgment

In addition to entering the order of forfeiture at or before the time of sentencing, the court must include the forfeiture in the judgment and commitment order (J&C).[185] Most courts hold that the failure to comply with this "housekeeping" rule is a clerical error that may be corrected

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[179] See the discussion of the ancillary proceeding, *infra*.

[180] *Soreide*, 461 F.3d at 1356. Rule 32.2(e) provides that the order of forfeiture may be amended at any time to include newly discovered property, but the *Soreide* court did not purport to rely on that Rule but instead appeared to order the forfeiture of the property solely on the ground that a third party had filed a meritless claim.

[181] 2006 WL 1722197 (E.D. Mich. June 22, 2006).

[182] *McCormick*, 2006 WL 1722197, at *3.

[183] 465 F.3d 1301 (11th Cir. 2006) (where court did not issue order of forfeiture until nearly a year after sentencing, but defendant waited more than six years to file Rule 41(g) motion, the motion was properly denied as out of time, and inequitable; the court is not required to return the fruits of a crime to a convicted felon who agreed to the forfeiture in a valid plea agreement; the proper remedy for the Rule 32.2 violation – even if it is jurisdictional – is direct appeal from the entry of the order of forfeiture).

[184] *Machado*, 465 F.3d at 1307.

[185] *See* Rule 32.2(b)(3); AFLUS, *supra* note 2, § 20-3(c), p. 600.

pursuant to Rule 36,[186] but unfortunately, the courts are not unanimous even on this seemingly non-controversial point.

In 2003, the Eleventh Circuit held in *United States v. Pease*[187] that if the written order of forfeiture is not included in the judgment, and the Government does not appeal, the forfeiture order is void.[188]

In two more recent cases, however, the same court held that it is not the Government that must appeal to avoid having the forfeiture declared void; rather it is the defendant who must appeal if he wants to avoid having the forfeiture order enforced. In *United States v. Watkins,*[189] the court issued a preliminary order of forfeiture prior to sentencing but failed to include the order in the J&C as Rule 32.2(b)(3) requires. Under *Pease,* the defendant had a viable argument that the forfeiture order (as amended to include substitute assets) was invalid, but following *Machado*, the court held that the defendant's remedy was to file a direct appeal. Because the defendant did not file any appeal from the order of forfeiture, the panel held that it did not have jurisdiction to consider his challenge to the order.[190]

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[186] *See* United States v. Yeje-Cabrera, 430 F.3d 1, 15 (1st Cir. 2005) (the portion of Rule 32.2(b)(3) requiring the court to make the forfeiture part of the judgment is largely a housekeeping rule and does not itself go to any fundamental rights of defendants; the error may be corrected pursuant to Rule 36, but only if there was a preliminary order of forfeiture and the forfeiture was included in the oral announcement); United States v. Bennett, 423 F.3d 271, 279-81 (3d Cir. 2005) (if there was a preliminary order of forfeiture to which defendant did not object, the failure to include the forfeiture in both the oral announcement and the judgment and commitment order is a clerical error that may be corrected pursuant to Rule 36) (collecting cases); United States v. Lamb, 182 Fed. Appx. 97, 99 (3d Cir. 2006) (same, following *Bennett*); United States v. Hatcher, 323 F.3d 666, 673 (8th Cir. 2003) (if there was a preliminary order of forfeiture, the failure to include the forfeiture in the judgment or in the oral pronouncement at sentencing is a clerical error that may be corrected at any time pursuant to Rule 36); United States v. Edelmann, 458 F.3d 791, 814 (8th Cir. 2006) (same).

[187] 331 F.3d 809 (11th Cir. 2003).

[188] *Pease*, 331 F.3d at 816-17 (the omission of the order of forfeiture from the judgment in a criminal case is not a clerical error that can be corrected pursuant to Rule 36; if the district court does not make the order of forfeiture part of the judgment at sentencing, and the Government does not appeal, the forfeiture is void).

[189] ___ Fed. Appx. ___, 2006 WL 3635400 (11th Cir. Dec. 13, 2006).

[190] *Watkins*, 2006 WL 3635400, at *3-4.

In *United States v. German,*[191] the district court again entered an order of forfeiture and included the forfeiture in the oral announcement of the defendant's sentence, but failed to include the order in the J&C. This time the defendant did file a direct appeal, but he still lost on the ground that the oral announcement of the sentence controls.[192]

Forfeiture cannot be used to offset the defendant's fine

It is well-established that the defendant cannot use the forfeiture to offset his criminal fine.[193] The court in *McCormick* followed that rule, explaining that once the property is forfeited it no longer belongs to the defendant, and so may not be used to pay his fine.[194]

Forfeiture and sentencing

The calculations the court makes for sentencing guidelines purposes are entirely independent of the jury's findings regarding the amount of money subject to forfeiture.[195] In *United States v. Hamaker,*[196] the Government determined that the defendant had obtained nearly $2 million in proceeds from the victims, but the jury found that only $178,000 was subject to forfeiture. The Government argued that the larger figure should be used to calculate the sentencing range, but the district court used the smaller one. On appeal, the Eleventh Circuit reversed, holding that the court should not have used the forfeiture verdict to determine the gravity of the offense.[197]

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[191] ___ Fed. Appx. ___, 2006 WL 3826674 (11th Cir. Dec. 29, 2006).

[192] *German*, 2006 WL 3826674, at *2.

[193] *See* United States v. Trotter, 912 F.2d 964, 965-66 (8th Cir. 1990) (defendant cannot use forfeited funds to offset or satisfy his fine).

[194] United States v. McCormick, 2006 WL 1722197, at *3 (E.D. Mich. June 22, 2006) (forfeiture, fine and restitution are three separate matters; once defendant's property is forfeited, it is no longer his, and may not be used to pay his fine). *See also AFLUS*, *supra* note 2, § 20-5, p. 607.

[195] *See AFLUS*, *supra* note 2, § 20-6, p. 607.

[196] 455 F.3d 1316 (11th Cir. 2006).

[197] *Hamaker*, 455 F.3d at 1337-38.

XIII. JOINT AND SEVERAL LIABILITY

It is well-established that each of the defendants convicted of a given offense are jointly and severally liable for the forfeiture of the proceeds of that offense that were foreseeable to him.[198] For example, in 2005 the Second Circuit held in *United States v. Fruchter*[199] that a RICO defendant was liable for forfeiture of all foreseeable proceeds of the offense, including proceeds traceable to conduct committed by others and on which he was personally acquitted.[200]

In *United States v. Gotti*,[201] the Second Circuit reaffirmed that rule. The evidence was sufficient, the panel said, to allow the trial judge to find that it was foreseeable to the defendant that the racketeering enterprise would engage in activities generating $3,749,250 in criminal proceeds.[202]

The Eighth Circuit said the same thing in *United States v. Hively*,[203] holding that the RICO defendant was liable for the proceeds of the entire racketeering scheme, not just the proceeds of the two predicate acts on which he was convicted.[204]

One unusual case was *United States v. Huber*.[205] In that case, instead of pointing out that the question of joint and several liability is a question of law that is solely a matter for the court to decide, the Government did not object when the court put the question to the jury. When the jury

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[198] *See AFLUS*, *supra* note 2, § 19-5, p. 590.
[199] 411 F.3d 377 (2d Cir. 2005).
[200] *Fruchter*, 411 F.3d at 384.
[201] 459 F.3d 296 (2d Cir. 2006).
[202] *Gotti*, 459 F.3d at 347.
[203] 437 F.3d 752 (8th Cir. 2006).
[204] *Hively*, 437 F.3d at 763.
[205] 462 F.3d 945 (8th Cir. 2006).

decided that the defendants should *not* be jointly and severally liable, the district court declined to disturb that result, and the Eighth Circuit affirmed.[206]

XIV. SUBSTITUTE ASSETS

Procedure for obtaining substitute assets

Just as the jury generally has no role in determining whether a given defendant should be held jointly and severally liable for a forfeiture, it has no role in deciding whether a defendant should be ordered to forfeit substitute assets.[207] The latter point has been well-established for years, but was challenged in 2006 in the Fourth Circuit in *United States v. Alamoudi*[208] on the ground that the Supreme Court's decision in *Booker* gave the defendant a Sixth Amendment right to have any matter that increased his sentence above the statutory maximum determined by a jury. But the panel rejected the defendant's argument. The forfeiture of substitute assets does not increase the amount of the forfeiture, the panel said, but simply allows the Government to recover property of equal value when the directly forfeitable property cannot be found.[209]

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

To forfeit substitute assets, the Government must show that the requirements in 21 U.S.C. § 853(p) have been satisfied — i.e., it must show that due to some act or omission of the defendant, the directly forfeitable property cannot be found, has been transferred to a third party, has been moved beyond the jurisdiction of the court, has been diminished in value, or has been

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[206] *Huber*, 462 F.3d at 953.

[207] *See AFLUS*, *supra* note 2, § 22-2, pp. 638-39.

[208] 452 F.3d 310 (4th Cir. 2006).

[209] *Alamoudi,* 452 F.3d at 314. *See also* United States v. Weiss, 2005 WL 1126663, at *12 (M.D. Fla. May 6, 2005) (same), *aff'd*, 467 F.3d 1300 (11th Cir. 2006).

commingled with other property.[210] In *Alamoudi*, the court held that these requirements were satisfied when a law enforcement agent submitted that she had searched for the missing assets and that despite the exercise of due diligence, was unable to find them.[211]

In *United States v. Friend,*[212] the defendant made an unusual challenge to the Government's right to forfeit substitute assets. In that case, the defendant was convicted of a drug offense and was ordered to forfeit $400,000 in drug proceeds. Because the defendant no longer had the actual drug proceeds, the forfeiture order was in the form of a money judgment, but rather than moving immediately to forfeit the defendant's real property as a substitute asset to satisfy the judgment, the Government agreed to allow the defendant to pay the judgment in installments according to an agreed-upon schedule. To ensure his compliance with the payment schedule, however, the defendant gave the Government a lien on his real property.

When the defendant defaulted on his agreement, the Government did not bother to foreclose on the lien that secured the payments but instead moved pursuant to Rule 32.2(e) to forfeit the real property as a substitute asset. In opposition, the defendant argued that instead of allowing the Government to forfeit his property as a substitute asset, the court should require the Government to foreclose on the lien that secured the money judgment, but the district court disagreed.

There was no reason, the court said, why the Government had to foreclose on its lien on the real property instead of forfeiting the property as a substitute asset. Substitute assets may be forfeited to satisfy a money judgment at any time, as long as the requirements of Section 853(p)

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[210] *See AFLUS*, *supra* note 2, § 22-3, p. 642.
[211] United States v. Alamoudi, 452 F.3d 310, 315 (4th Cir. 2006).
[212] 2006 WL 1966594 (D. Or. Apr. 27, 2006).

are satisfied. The defendant argued that none of the requirements of the statute were satisfied because the *real property* that secured the money judgment could certainly be located, had not been transferred to anyone nor diminished in value, was still within the jurisdiction of the court, and had not been commingled with any other property. But the court held that the defendant had missed the point: the requirements of Section 853(p) apply not to the substitute asset that the Government wishes to forfeit but to the *originally forfeitable property*.[213] In this case, the original asset Defendant forfeited was not the real property, but the $400,000 in drug proceeds. That property was still missing; therefore the Government was entitled to forfeit any other property of the defendant to satisfy the remaining balance on the money judgment.

Any property of the defendant may be forfeited as a substitute asset

Nothing in the substitute asset statute limits the Government to forfeiting only certain types of property; it can forfeit anything the defendant owns in substitution for the missing property.[214]

In *United States v. Shepherd*,[215] the defendant – who was convicted of Medicare fraud – argued that his family home should be exempted from forfeiture as a substitute asset because of its intangible value, but the Ninth Circuit said no; nothing in Section 853(p) or the Due Process Clause exempts the family home or any other property from forfeiture as a substitute asset as long as the Government has a rational basis for the forfeiture. The substitute assets statute, the court said, counteracts "the tendency of criminals to hide their assets from the state" and "allows the

[213] *Friend*, 2006 WL 1966594, at *2.
[214] *See AFLUS*, *supra* note 2, § 22-3, p. 644.
[215] 171 Fed. Appx. 611 (9th Cir. 2006).

Government to remit funds to victims of crimes, making them whole again;" thus it has a rational basis.[216]

Substitute assets may be forfeited to satisfy a money judgment

Perhaps the most common use of the substitute assets provision occurs when the Government moves to forfeit a substitute asset to satisfy a money judgment.[217] There is nothing new in this proposition, but the district court's decision in *United States v. Wahlen*[218] provides an interesting illustration of the interplay of the forfeiture of directly traceable property, a money judgment, substitute assets and the rights of a third party.

In that case, the defendant was convicted of bank fraud and had to pay a $1.1 million money judgment and forfeit two parcels of real property purchased, in part, with the proceeds of the offense. The defendant's wife asserted a marital interest in both parcels, but the court held that the portion of the real property traceable to the fraud proceeds was forfeitable as directly traceable property in which the wife could have no interest.[219] Of the remainder, the wife was entitled to recover her half, while the defendant's half could be forfeited as substitute asset to satisfy the money judgment.[220]

The prosecutor can switch theories of forfeiture

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[216] *Shepherd*, 171 Fed. Appx. at 616.

[217] *See* United States v. Weiss, 2005 WL 1126663, at *6-8 (M.D. Fla. May 6, 2005) (any asset of the defendant may be forfeited as a substitute asset to satisfy a money judgment), *aff'd,* 467 F.3d 1300 (11th Cir. 2006); *Friend*, 2006 WL 1966594, at *2 (when defendant failed to pay the money judgment according to his agreed-upon payment schedule, the Government was entitled to satisfy the judgment by forfeiting his real property as a substitute asset).

[218] 459 F. Supp.2d 800 (E.D. Wis. 2006).

[219] *See infra*, Part XX (discussing the inability of third parties to recover the proceeds of crime under Section 853(n)(6)).

[220] *Wahlen*, 459 F. Supp.2d at 813-14.

In *United States v. Weiss*,[221] the court held that if the jury fails to find that a given asset is directly forfeitable, the Government may seek forfeiture of the same asset as a substitute asset. That the prosecutor initially attempted to establish that the asset was directly traceable to the offense does not, in other words, immunize the property from forfeiture as a substitute asset, but rather places it in the pool of untainted assets that are available for forfeiture if the requirements of Section 853(p) are satisfied.[222]

Post-conviction restraint of substitute assets

As discussed earlier, most circuits hold that the district courts lack statutory authority to order the restraint of substitute assets prior to trial, but even in those circuits, there is no reason why such assets may not be restrained after the defendant is convicted.[223]

Forfeiture of substitute assets is mandatory

If the Government satisfies the requirements of Section 853(p), the forfeiture of substitute assets is mandatory. This was the key point in the Fourth Circuit's decision in *Alamoudi*, where the court said that the defendant's property could be forfeited as a substitute asset even though there was no mention of this in the plea agreement. "Section 853(p) is not discretionary," the court said.[224] "[W]hen the Government cannot reach the property initially subject to forfeiture, federal law requires a court to substitute assets for the unavailable tainted property."[225]

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[221] 2005 WL 1126663 (M.D. Fla. May 6, 2005), *aff'd*, 467 F.3d 1300 (11th Cir. 2006).

[222] *Weiss*, 2005 WL 1126663, at *6-7.

[223] *See* United States v. Salvagno, 2006 WL 2546477, at *16 (N.D.N.Y. Aug. 28, 2006) (if the Government wants to prevent a defendant from transferring property, post-conviction, to third parties, so that it can forfeit the property as substitute assets, it may obtain a post-conviction restraining order); United States v. Wahlen, 459 F. Supp.2d 800, 802 (E.D. Wis. 2006) (noting that the court issued a post-conviction order restraining property forfeitable as substitute assets); AFLUS, *supra* note 2, § 22-4, p. 647.

[224] United States v. Alamoudi, 452 F.3d 310, 314 (4th Cir. 2006).

[225] *Alamoudi*, 452 F.3d at 314.

Third parties may contest forfeiture of substitute assets in the ancillary proceeding

If the defendant is ordered to forfeit substitute assets, third parties claiming an interest in the property may contest the forfeiture in the ancillary proceeding, just as they may contest the forfeiture of any other property.[226] But just as third parties may not object to the forfeiture of directly forfeitable property *until* the ancillary proceeding, they may not object to the forfeiture of substitute assets until then either.[227]

In *United States v. Wahlen,*[228] the defendant's wife tried to object to the Government's motion to amend the order of forfeiture to include substitute assets, but the court held that the motion could be granted without regard to her objections. If the defendant's wife had an interest in the substitute asset, the court said, her remedy would be to file a claim in the ancillary proceeding.[229]

XV. PROPERTY TRANSFERRED TO THIRD PARTIES

Relation back doctrine

Under the relation back doctrine, the Government's interest in the forfeitable property vests at the time of the offense giving rise to the forfeiture.[230] As the Ninth Circuit said in *Lazarenko*, if the law were otherwise, "a defendant could attempt to avoid criminal forfeiture by transferring his property to another party before conviction."[231]

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[226] *See* United States v. Soreide, 461 F.3d 1351, 1353 n.1 (11th Cir. 2006).
[227] *See* AFLUS, *supra* note 2, § 21-6, p. 631; Part XVI, *infra*.
[228] 459 F. Supp.2d 800 (E.D. Wis. 2006).
[229] *Wahlen*, 459 F. Supp.2d at 814.
[230] *See* 21 U.S.C. § 853(c); AFLUS, *supra* note 2, § 21-2, p. 619.
[231] United States v. Lazarenko, 476 F.3d 642 (9th Cir. 2007).

In *United States v. Zaccagnino,*[232] the court applied the relation back doctrine to resolve a conflict between the forfeiture laws and a bankruptcy proceeding. Because, under the relation back doctrine, the property already belonged to the Government before the defendant declared bankruptcy, the court said, it did not become part of the bankruptcy estate that was created when the defendant subsequently declared bankruptcy.[233]

In the same case, the court rejected the suggestion that the Government has to wait for the final order of forfeiture for the relation back doctrine to apply. The Government's interest vested when the money laundering offense giving rise to the forfeiture took place, the court said, not when the ancillary proceeding was concluded and the court issued a final order of forfeiture.[234]

While it is fairly clear how the relation back doctrine applies to the proceeds of the crime or property used to facilitate it, it is not immediately obvious how the doctrine should apply to traceable property – i.e., property that the defendant acquired after the crime in exchange for the forfeitable property. If the defendant uses his criminal proceeds to buy a car, for example, when does the Government's interest vest in the car?

In *United States v. Carrie*,[235] the defendant used his criminal proceeds to acquire a liquor license. When a third party attempted to contest the forfeiture of the license, the court held that the Government's interest in the license had vested as soon as the defendant acquired it. The reason was simple: under the relation back doctrine, the Government had title to the criminal proceeds before the purchase was made; thus, when the defendant purchased the liquor license, he was using the Government's money to do so, which meant that the Government's title transferred

[232] 2006 WL 1005042 (C.D. Ill. Apr. 18, 2006).
[233] *Zaccagnino*, 2006 WL 1005042, at *4.
[234] *Zaccagnino*, 2006 WL 1005042, at *4.
[235] ___ Fed. Appx. ___, 2006 WL 3326754 (11th Cir. Nov. 16, 2006).

directly from the purchase money to the thing being purchased as soon as the purchase was made.[236]

Application of relation back doctrine to substitute assets

Applying the relation back doctrine to substitute assets has proven much more difficult.[237] The Fourth Circuit and some district courts hold that the Government's interest in the substitute asset vests at the time of the offense – i.e., at the time the Government's interest vested in the property for which the asset is being substituted.[238] For example, in *United States v. Loren-Maltese,*[239] a district court in Chicago held that the money used by a corrupt public official to pay her appellate lawyer was subject to forfeiture as a substitute asset, and that the Government's title to the money vested before it was paid to the attorney. As a practical matter, this meant that the attorney had to file a claim contesting the forfeiture of his fee in the ancillary proceeding, asserting that he was a bona fide purchaser for value.[240]

Other courts are not so sure about this, however. In *United States v. Salvagno*,[241] the court declined to follow the Fourth Circuit rule, holding instead that the relation back doctrine does not

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[236] *Carrie*, 2006 WL 3326754, at *2.

[237] *See AFLUS*, *supra* note 2, § 21-3, p. 622.

[238] *See* United States v. McHan, 345 F.3d 262, 271 (4th Cir. 2003) (relation back doctrine applies to substitute assets and vests title in the Government as of the date of the offense); United States v. Woods, 436 F. Supp.2d 753, 755 (E.D.N.C. 2006) (following *McHan*; because the relation back doctrine applies to substitute assets, the Government was entitled to file a *lis pendens* on real property named as a substitute asset even though the property was titled in a third party's name; the third party may contest the forfeiture in the ancillary proceeding); United States v. Loren-Maltese, 2006 WL 752958, at *1 (N.D. Ill. Mar. 21, 2006) (the relation back doctrine applies equally to tainted assets and to substitute property; following *McHan*).

[239] *Loren-Maltese*, 2006 WL 752958.

[240] *Loren-Maltese*, 2006 WL 752958, at *1.

[241] 2006 WL 2546477 (N.D.N.Y. Aug. 28, 2006).

apply to substitute assets until the court finds that the statutory requirements are satisfied and includes the property in an order of forfeiture.[242]

XVI. THE RIGHT OF A THIRD PARTY TO OBJECT TO THE FORFEITURE

Section 853(n) is the exclusive procedure for determining third party rights

Section 853(n) establishes the exclusive procedure for determining third party rights in a criminal forfeiture case; and Section 853(k) expressly bars third parties from contesting the forfeiture in any other forum.[243] As the Second Circuit said in *De Almeida v. United States,*[244] until the ancillary proceeding, the ownership of the property subject to forfeiture is irrelevant; any property involved in the offense of conviction may be forfeited;[245] thus, the Government does not have to establish the defendant's ownership of the property to seize it pending trial or to obtain a preliminary order of forfeiture, and Section 853(k) makes it clear that the third party must wait until the ancillary proceeding to assert his rights.[246]

Third parties cannot seek return of property seized for criminal forfeiture

In *Lazarenko,* the Ninth Circuit held that one consequence of this rule is that a third party could not challenge the forfeiture by moving to vacate a seizure warrant issued pursuant to

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[242] *Salvagno*, 2006 WL 2546477, at *19. *See also* United States v. Kramer, ___ F. Supp.2d ___, 2006 WL 3545026, at *7 (E.D.N.Y. Dec. 8, 2006) (in the Second Circuit, the relation back doctrine does not apply to substitute assets for the same reason substitute assets cannot be restrained pre-trial: the statute, § 853(c), like § 853(e), refers only to subsection (a) property).

[243] *See* United States v. Lazarenko, 476 F.3d 642, 648 (9th Cir. 2007) (Section 853(n) provides the process for vindicating a third party's interest in forfeited property. The law appears settled that an ancillary proceeding constitutes the only avenue for a third party claiming an interest in seized property.) (citing § 853(k) and the Advisory Committee Note to Rule 32.2(b)).

[244] 459 F.3d 377 (2d Cir. 2006).

[245] *De Almeida*, 459 F.3d at 381.

[246] *See AFLUS*, *supra* note 2, § 21-6, p. 631.

Section 853(f) to preserve the property for forfeiture. The third party's remedy, the court said, was to wait for the ancillary proceeding.[247]

Similarly, in *De Almeida*, the Second Circuit held that a third party could not seek the return of seized property pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure.[248]

Third parties may not object to a motion to forfeit substitute assets

For the same reasons, a third party cannot object to the entry of an order forfeiting substitute assets before the order is entered;[249] but the district court in *Salvagno* ignored that rule and allowed a defense attorney to object to the forfeiture of his client's property on the ground that it belonged to him as his fee.[250] That was plainly incorrect as a matter of procedure; a defense attorney has every right to object to the forfeiture of money that has been paid him as his fee, but he must do so by filing a claim in the ancillary proceeding like any other third party seeking to overcome the effects of the relation back doctrine.[251]

Another consequence of Section 853(k) is that a third party cannot file any action in another court to circumvent the forfeiture procedure. The Government frequently invokes this rule to prevent a mortgage foreclosure by a lienholder asserting an interest in real property that is

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[247] *Lazarenko*, 476 F.3d at 648 (it is well-settled that the ancillary proceeding is the exclusive forum for adjudicating third party claims; forcing a third party to wait until the ancillary proceeding to contest a forfeiture, rather than granting an immediate hearing on a motion to vacate a seizure pursuant to § 853(f), does not violate the third party's right to due process).

[248] *De Almeida*, 459 F.3d at 381 (§ 853(k) bars a third party from using Rule 41(g) to seek the return of seized property pre-trial; the ancillary proceeding gives the third party an adequate remedy at law).

[249] *See* United States v. McHan, 345 F.3d 262, 269-70 (4th Cir. 2003) (it does not violate third party's due process rights to require that she wait to contest the forfeitability of property as a substitute asset until the ancillary proceeding).

[250] United States v. Salvagno, 2006 WL 2546477, at *18-19 (N.D.N.Y. Aug. 28, 2006) (permitting defense attorney to object to forfeiture of substitute asset on the ground that it was paid to him as a fee before the Government's interest vested).

[251] *See* United States v. Ivanchukov, 405 F. Supp.2d 708, 713 n.12 (E.D. Va. 2005) (pursuant to Rule 32.2(b)(2), defense attorney cannot contest forfeiture of attorneys fee in the forfeiture phase of the case, but may do so in the ancillary proceeding).

subject to forfeiture in a criminal case.[252] For example, in *United States v. MacInnes*,[253] the Ninth Circuit held that a third party lienholder's attempt to foreclose on a mortgage after the property was forfeited to the United States in a criminal case was "an action against the United States" that was barred by Section 853(k).[254]

Similarly, the Government may invoke Section 853(k) to stop third parties from going to state court and filing private lawsuits to establish their property interest.[255]

XVII. ANCILLARY HEARING—PROCEDURAL ISSUES

Notice requirement under Section 853(n)(1)

As this discussion makes clear, the ancillary proceeding is a critical stage in a criminal forfeiture proceeding where all ownership issues are litigated.[256] For that reason, it is important

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[252] *See* United States v. Phillips, 185 F.3d 183, 188 (4th Cir. 1999) (third party cannot commence foreclosure action to recover lienholder's interest in forfeited real property even though defendant has stopped paying mortgage; once the property is forfeited, it belongs to the Government under the relation back doctrine, and any attempt at foreclosure is barred by section 853(k)); JP Morgan Chase Bank N.A. v. Khalil, 2006 WL 87599, at *1-2 (N.D. Ill Jan. 9, 2006) (§ 853(k) bars a third party from attempting to litigate his interest in property or the forfeitability of the property in a foreclosure action in another forum; granting Rule 12(b)(1) motion to dismiss the foreclosure action for lack of subject matter jurisdiction); United States v. Cheng, 2006 WL 1133295, at *1 (N.D.N.Y. Apr. 26, 2006) (denying bank's motion for permission to foreclose on forfeited property; bank's only avenue of relief is the ancillary proceeding).

[253] United States v. MacInnes, ___ Fed. Appx. ___, 2007 WL 295451 (9th Cir. Jan. 26, 2007).

[254] *MacInnes*, 2007 WL 295451, at *4 (following *Phillips*). *See also* United States v. West, **Error! Main Document Only.**2007 WL 1100437 (E.D. Tenn. Mar. 2, 2007) (following *MacInnes*; lienholder's right under state law to foreclosure on the property is not a property interest that trumps the Government's right to forfeit the property under federal law; the only rights exempted from forfeiture are those protected by Section 853(n); § 853(k) bars the lienholder from commencing a state foreclosure).

[255] *See* United States v. Compean, 2006 WL 1737536, at *2 (S.D. Tex. June 23, 2006) (claimant was barred by § 853(k) from filing an action in state court to have the defendant's interest in the property declared void as the subject of a fraudulent transfer); 37 Associates v. REO Construction Consultants, 409 F. Supp.2d 10, 14-15 (D.D.C. 2006) (party who could have filed a claim in the ancillary proceeding cannot file a private lawsuit asserting superior title against the person who acquired the property from the Government following forfeiture).

[256] *See AFLUS*, *supra* note 2, §§ 23-1 and 23-2, pp. 653-60.

that the Government provide adequate notice of the forfeiture proceeding to third parties who may have an interest in the property.[257]

What form that notice must take is not always clear, however. In *United States v. Miller*,[258] a third party objected to the forfeiture, long after it was final, on the ground that the Government had not given him adequate notice of the forfeiture. In that case, the Government had published notice of the forfeiture in the newspaper, but had not sent direct written notice to the third party. The court held that providing notice by publication alone is insufficient as to persons whose names and addresses are known to the Government or are easily ascertainable, if the Government has reason to believe the person has an interest in the forfeited property; but it held that where there is no evidence that the Government knew of the third party or his interest in the property, notice by publication alone is sufficient.[259]

In *United States v. Carmichael,*[260] the court said the Government is not required to send notice to the defendant's unsecured creditors, because such persons do not have an identifiable interest in the forfeited property.[261]

Generally, publication is required in all cases, but in *United States v. Austin,*[262] the court held that it is not required when the property being forfeited was "front money" supplied to the defendant by the FBI during an investigation, and the defendant has already agreed to its forfeiture.[263] Presumably, the court took the view that, in the circumstances of this case, there

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[257] *See AFLUS*, *supra* note 2, § 23-3, p. 660.
[258] 448 F. Supp.2d 860 (N.D. Ohio 2006).
[259] *Miller*, 448 F. Supp.2d at 870-71.
[260] 440 F. Supp.2d 1280 (M.D. Ala. 2006).
[261] *Carmichae*l, 440 F. Supp.2d at 1282-83.
[262] 2006 WL 2850134 (E.D. Tenn. Oct. 3, 2006).
[263] *Austin*, 2006 WL 2850134, at *2.

was no third party who could have any interest in the property. Other courts have dealt with situation somewhat differently, holding that it is not necessary for the Government to bring formal forfeiture proceedings to recover its own property.[264]

Subject matter jurisdiction

The district court will have jurisdiction to consider a third party's claim only if the claim relates to the property that was forfeited in the criminal case and included in the preliminary order of forfeiture. If the claim relates to *other property* that is not part of the forfeiture order, the claim should be dismissed for lack of subject matter jurisdiction.[265]

There were two cases decided in 2006 in which the third party could not make the required showing. In *United States v. Nektalov,*[266] the Government obtained an order forfeiting a quantity of diamonds involved in a money laundering scheme. A third party filed a claim asserting that he had given the diamonds to the defendant on consignment and was therefore their rightful owner, but the court held that the claimant was unable to prove that the diamonds he gave to the defendant were the same ones that were forfeited in the criminal case.[267]

In *United States v. Johnson*,[268] the defendant pled guilty to a drug offense and acknowledged that the $12,000 found along with his supply of cocaine was drug proceeds, but his mother filed a claim in the ancillary proceeding, asserting that the $12,000 was money she had

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[264] *See* United States v. Howell, 425 F.3d 971, 975 (11th Cir. 2005) (Government was not required to bring forfeiture action to recover sting money that never left Government's possession and in which drug dealer never acquired any property interest); Johnson v. West, 2004 WL 4986628, at *2 (D. Md. Apr. 12, 2004) (dismissing action filed by plaintiff for return of sting money; plaintiff could not establish an ownership interest in money given to him by undercover officer in exchange for heroin).

[265] *See AFLUS*, *supra* note 2, § 23-5, p. 666.

[266] 440 F. Supp.2d 287 (S.D.N.Y. 2006).

[267] *Nektalov*, 440 F. Supp.2d at 296.

[268] 2006 WL 1285404 (E.D. Ky. May 9, 2006).

given her son on an earlier occasion, and that it still belonged to her. The court rejected the claim, holding that the claimant was unable to prove that the forfeited currency was the same money she had allegedly given to her son.[269]

Pleading requirements under Section 853(n)(3)

A third party wishing to contest the forfeiture in the ancillary proceeding much file a claim in the form described by Section 853(n)(3).[270] Among other things, the claim must be signed personally by the claimant, not by his attorney or another third party. In *United States v. Speed Joyeros, S.A.*,[271] a group of the defendant's former employees attempted to contest the forfeiture of the defendant's property by filing a claim that was signed by their attorney and verified by a CPA, but not by the petitioners themselves. The court held that the claim did not comply with Section 853(n)(3). The "substantial danger of false claims in forfeiture proceedings," the court said, requires strict compliance with the requirement that the claimant sign the petition personally under penalty of perjury.[272]

The claim must also state the claimant's basis for asserting a legal interest in the forfeited property.[273] In *United States v. German,*[274] the claim said only that the claimants acquired the property "through lawfully acquired funds."[275] This was not sufficient. The statement that the claimants acquired the forfeited property "through lawfully acquired funds," the court said, was

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[269] *Johnson*, 2006 WL 1285404, at *3.
[270] *See AFLUS*, *supra* note 2, § 23-5, p. 664.
[271] 410 F. Supp.2d 121 (E.D.N.Y. 2006).
[272] *Speed Joyeros, S.A.,* 410 F. Supp.2d at 125.
[273] *See* United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement), 69 F. Supp.2d 36, 55 (D.D.C. 1999) (collecting cases in which a claim was dismissed for failure to describe the nature of the claimant's interest as required by the statute).
[274] 2006 WL 1098896 (W.D. La. Apr. 21, 2006).
[275] *German*, 2006 WL 1098896, at *1.

an inadequate conclusory assertion that failed to set forth the "time and circumstances of the petitioner's acquisition" of their interest in the property as Section 853(n)(3) requires.[276]

Time for filing a claim

Section 853(n)(2) provides that third-party petitions must be filed within thirty days of the final publication of notice, or the receipt of actual notice, whichever is earlier.[277] In *Carmichael,* the court dismissed a late claim as time barred.[278]

In *United States v. Soreide*,[279] the Eleventh Circuit took this requirement a step further, holding that a third party must state all of her grounds for recovery within the initial thirty-day period, and may not amend her claim to assert additional grounds once thirty-day period has expired. In that case, the claimant filed a timely claim asserting an interest in the forfeited property as a bona fide purchaser for value in terms of Section 853(n)(6)(B); sometime later, she tried to amend her claim to include a "superior ownership" claim under Section 853(n)(6)(A). But the court held that the claim was filed out of time to the extent that it relied on the latter basis for recovery.[280]

Interlocutory sale during ancillary proceeding

If the forfeited property is losing value or causing the serious problems for the Government in terms of storage costs or maintenance, it may make sense for the Government to sell the property and allow the third-party claimants to make their claims to the proceeds of the

[276] *German*, 2006 WL 1098896, at *2-3
[277] *See AFLUS*, *supra* note 2, § 23-4, p. 663.
[278] United States v. Carmichael, 440 F. Supp.2d 1280, 1281 (M.D. Ala. 2006).
[279] United States v. Soreide, 461 F.3d 1351, 1355 (11th Cir. 2006).
[280] *Soreide*, 461 F.3d at 1355.

sale.[281] The claimants, who usually have an equal interest in avoiding the diminution in the value of the property, will often agree to this procedure, but sometimes they do not. In *United States v. Close,*[282] the Government moved for permission to sell the forfeited property in an interlocutory sale, but the claimant opposed the motion. After setting forth the various factors the court should consider in that situation, the court denied the Government's motion on the ground that the irreparable harm to the claimant outweighed Government's and other claimants' interest in avoiding further depreciation in the value of the property.[283]

Motion for summary judgment

As most recently illustrated in *United States v. Hayes*,[284] it is well-established that the district court can grant summary judgment for the Government in the ancillary proceeding if the third party's claim could not satisfy the requirements of Section 853(n)(6), even if all of the allegations set forth in the claim were true.

Constitutional challenges to the ancillary proceeding

The most important case involving the ancillary proceeding in the past year was the Ninth Circuit's decision in *Lazarenko*, where the claimants made a frontal assault on the constitutionality of the entire process for resolving third party claims. Forcing a third party to wait until the ancillary proceeding to contest the forfeiture, they said, violated their rights to due process. But the Ninth Circuit disagreed, holding not only that the statute satisfied due process, but that the claimants lacked prudential standing to make a generalized attack on a scheme

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[281] *See AFLUS*, *supra* note 2, § 23-11, p. 674.
[282] 2006 WL 83509 (D. Idaho Jan. 12, 2006).
[283] *Close*, 2006 WL 83509, at *3.
[284] United States v. Hayes, 2006 WL 1228972, at *2 (W.D. La. May 4, 2006) (pursuant to Rule 32.2(c)(1)(B), court enters summary judgment for the Government where, accepting the facts alleged by the claimant to be true, claimant could not satisfy the requirements of § 853(n)(6)).

Congress had deliberately enacted to address the due process rights of third parties in criminal cases.[285]

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.[286] Usually that means the court must look to state law to see what rights a person has in the property.[287] In *Speed Joyeros,* however, the court held that if the claimants' interest in the property arose under foreign law, the court must look to the law of the foreign sovereign to determine what the claimants' property interests might be.[288]

If the claimant has no interest under state (or foreign) law, the inquiry ends and the claim fails. In *United States v. Cochenour*,[289] the defendant's wife claimed a marital interest in the forfeited property, but when the court found that she had no such interest in the property under state law, the case was over.[290]

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[285] United States v. Lazarenko, 476 F.3d 642, 648 (9th Cir. 2007).

[286] *See* United States v. Totaro, 345 F.3d 989, 998-99 (8th Cir. 2003) (court looks to state law to determine what interest a third party has in the forfeited property, so long as doing so does not frustrate a federal interest; thus, court must apply state divorce law to determine what interest wife had in marital property before husband began using criminal proceeds to pay the mortgage and make improvements); AFLUS, *supra* note 2, § 23-12, pp. 674-82.

[287] *See* United States v. Hayes, 2006 WL 1228972, at *3 (W.D. La. May 4, 2006) (state law determines whether claimants have a property interest, but federal law determines whether claimants can recover that interest in the ancillary proceeding); United States v. McCollum, 443 F. Supp.2d 1154, 1165-66 (D. Neb. 2006) (following Totaro; court looks to state law to determine if defendant's mother was still the owner of firearms defendant was ordered to forfeit, or if she had gifted them to defendant before they became subject to forfeiture); United States v. Butera, 2006 WL 2632384, at *3 (S.D. Miss. Sept. 13, 2006) (using state law to determine what interest a woman owed child support payments has in the defendant's property); United States v. Nektalov, 440 F. Supp.2d 287, 298-99 (S.D.N.Y. 2006) (using state law to determine if claimant was a consignor who retained title to the property given to defendant on consignment).

[288] United States v. Speed Joyeros, S.A., 410 F. Supp.2d 121, 125 (E.D.N.Y. 2006) (the court properly looks to the law of the jurisdiction that created the property right to determine what interest the claimant has in the property; court looks to Panamanian law to see what interest claimants have to back wages).

[289] 441 F.3d 599 (8th Cir. 2006).

[290] *Cochenour*, 441 F.3d at 601.

The role of federal law

Once the court determines what interest the claimant has under state law, it must look to federal law (the forfeiture statute) to see if the claimant can prevail.[291] Therefore, federal law determines whether the claimant's property interest is sufficient to satisfy the standing requirement in section 853(n)(2) or to prevail on the merits under section 853(n)(6)(A) or (B).[292] This two-step analysis means that a person who has an interest in the property under state law may nevertheless fail to satisfy the requirements of the federal statute.

In *Speed Joyeros,* the claimants acquired an interest in the forfeited property by filing an attachment against the property to satisfy a debt, but that did not constitute an interest federal law would recognize under § 853(n)(6)(A). The problem for the claimants was that their interest, however valid it might be in another jurisdiction, did not exist at the time of the offense, which as we will see in a moment, is a key requirement of the federal statute.[293]

Similarly, in *United States v. Hayes,*[294] the Government conceded that a creditor who acquired a judgment lien against the defendant's property by virtue of state law, had standing to contest the forfeiture in the ancillary proceeding, but the claimant failed to show that his interest vested before the offense giving rise to the forfeiture, as required by § 853(n)(6)(A)).[295]

Effect of ruling by another court

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[291] *See AFLUS*, *supra* note 2, § 23-12(c), p. 683.
[292] *Speed Joyeros*, *S.A.*, 410 F. Supp.2d at 125.
[293] *Speed Joyeros*, *S.A.*, 410 F. Supp.2d at 125-26.
[294] United States v. Hayes, 2006 WL 1228972, at *3-5 (W.D. La. May 6, 2006).
[295] *See* United States v. Soreide, No. 03-60235-CR-COHN/SNOW, slip op. at 17-18 (S.D. Fla. Mar. 22, 2005) (claimant may have had a valid legal interest in the property under state law but was not be able to satisfy the purchaser for value element in the federal statute), *aff'd*, 461 F.3d 1351 (11th Cir. 2006).

Whether the district court is bound by the ruling of a state or foreign court as to the third party's interest in the forfeited property is a complicated issue. Depending on the facts of the case, the court may recognize the state or foreign court's ruling, or it may say the third party was barred from seeking the ruling by Section 853(k).

In *United States v. Dejanu*,[296] the Ninth Circuit held that the doctrine of claim preclusion bars a third party from relitigating issues in the ancillary proceeding that he raised or should have raised in a related bankruptcy proceeding. [297] In *Speed Joyeros,* the district court accepted, as a matter of comity, the ruling of a foreign court confirming the existence of a debt owed by the defendant to the claimant.[298] And in *United States v. Compean,*[299] the court held that because the third party was barred by Section 853(k) from commencing an action in another court to obtain an interest in property subject to forfeiture, a state court judgment entered after the property was named in a federal criminal indictment was void.[300]

XVIII. STANDING UNDER SECTION 853(N)(2)

Standing in the ancillary proceeding is the same as standing in civil forfeiture cases

The standing requirement for persons filing claims in the ancillary proceeding is set forth in Section 853(n)(2), which provides that any person, other than the defendant, asserting a "legal

[296] 163 Fed. Appx. 493 (9th Cir. 2006).
[297] *Dejanu*, 163 Fed. Appx. at 498.
[298] *Speed Joyeros*, 410 F. Supp.2d at 125.
[299] 2006 WL 1737536 (S.D. Tex. June 23, 2006).
[300] *Compean*, 2006 WL 1737536, at *2.

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.[301]

In *United States v. Weiss*,[302] the Eleventh Circuit held that standing is a threshold issue in the ancillary proceeding just as it is in civil forfeiture cases, and that the claimant has the burden of proving standing by a preponderance of the evidence. If the claimant lacks standing, the court said, the court lacks jurisdiction to consider his claim.[303]

All of the usual constitutional principles governing Article III standing apply. Thus, as the Ninth Circuit held in *Lazarenko*, to establish Article III standing, a third party claimant in a criminal forfeiture case must show an "actual or imminent injury – not a hypothetical, conjectural, or abstract injury" resulting from the forfeiture of the property.[304]

Nominees lack standing to file a claim

The issue in *Weiss* was whether a nominee had standing to file a claim; the court held that he did not. A mere nominee, the court said, lacks the legal interest in the forfeited property necessary to establish Article III standing.[305]

General creditors do not have a legal interest in the forfeited property

Similarly, it is now well-established that general, unsecured creditors lack standing to contest the forfeiture in the ancillary proceeding.[306] The problem for unsecured creditors is that

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[301] *AFLUS*, *supra* note 2, § 23-13, p. 684.
[302] United States v. Weiss, 467 F.3d 1300 (11th Cir. 2006).
[303] *Weiss*, 467 F.3d at 1307-08.
[304] United States v. Lazarenko, 476 F.3d 642, 649-50 (9th Cir. 2007) (citing Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004)).
[305] United States v. Weiss, 467 F.3d 1300, 1309 (11th Cir. 2006).
[306] *See AFLUS*, *supra* note 2, § 23-13(c), p. 688.

they "lack a particularized interest in specific assets," and thus cannot demonstrate any interest in the particular assets named in the preliminary order of forfeiture.[307]

Judgment creditors

A judgment creditor is just another unsecured creditor unless he has perfected a judgment lien against the particular property that is subject to forfeiture. In *United States v. Butera*,[308] the court held that even if state law created a judgment by operation of law in favor of the person to whom the defendant owed child support payments, it did not attach to any of the defendant's specific property until execution; thus until the judgment was executed, the third party remained an unsecured creditor without standing to contest the forfeiture of the defendant's property under Section 853(n)(2).[309]

In contrast, in *United States v. Hayes*[310] the Government conceded that once a third party has obtained a judgment lien against particular property he may have standing under Section 853(n)(2), but as noted earlier, a person with standing based on his state law interest in the property may still lose on the merits if he cannot establish either of the grounds for recovery set forth in the federal statute.[311]

XIX. GROUNDS FOR RECOVERY IN ANCILLARY PROCEEDING

[307] *See* United States v. Speed Joyeros, S.A., 410 F. Supp.2d 121, 125 (E.D.N.Y. 2006) (unsecured creditors – employees seeking payment of back wages – lack a particularized interest in specific assets); United States v. Johnson, 2006 WL 1285404, at *3 (E.D. Ky. May 9, 2006) (mother who loaned son money to buy a car had no legal interest in the car or the proceeds of an insurance claim on the car); United States v. Alamoudi, Cr. No. 1:03cr513, slip op. at 23-27 (E.D. Va. Nov. 3, 2006) (defendant's ex-wife has no legal interest in the property forfeited as a substitute asset, even though defendant is in arrears on his child support payments).

[308] 2006 WL 2632384 (S.D. Miss. Sept. 13, 2006).

[309] *Butera*, 2006 WL 2632384, at *4.

[310] 2006 WL 1228972 (W.D. La. May 4, 2006).

[311] *Hayes*, 2006 WL 1228972, at *3. *See also AFLUS*, *supra* note 2, § 23-14(b), p. 697.

The only grounds on which a third party can prevail in the ancillary proceeding

Hayes is just the latest case to emphasize that the third party's claim has to fall within one of the "two narrow categories" in Section 853(n)(6).[312] The only claimants who will prevail in the ancillary proceeding are "those whose legal interests in the property were superior to the defendant at the time the interest of the United States vested through the commission of an act giving rise to forfeiture and bona fide purchasers for value without knowledge of the forfeitability of the defendant's assets."[313]

Among other things, this means that a claimant cannot relitigate the forfeitability of the property in the ancillary proceeding; nor can he argue that the court committed a procedural error in issuing the forfeiture order, or that the forfeiture was barred by another provision of law. The Ninth Circuit stated the rule succinctly in 2006 in *United States v. Dejanu.*[314] "Whether the criminal forfeiture of the property was proper," the court said, "is not an issue subject to litigation by third parties in the ancillary proceeding."[315]

A good illustration of this principle is the Eleventh Circuit's holding in *United States v. Carrie.*[316] In that case, the Government obtained an order forfeiting the defendant's liquor license. In the ancillary proceeding, the third party – who had later acquired the license – argued that the forfeiture of the license violated the right of the State of Florida to regulate alcohol under the Twenty-First Amendment. But the panel held that procedural or constitutional defects in the

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[312] *See AFLUS*, *supra* note 2, § 23-14(c), p. 698.

[313] *Hayes*, 2006 WL 1228972, at *3.

[314] 163 Fed. Appx. 493 (9th Cir. 2006).

[315] *Dejanu*, 163 Fed. Appx. at 498. *See also* Advisory Committee Note to Rule 32.2 ([The ancillary proceeding] does not involve relitigation of the forfeitability of the property; its only purpose is to determine whether any third party has a legal interest in the forfeited property.).

[316] 206 Fed. Appx. 920 (11th Cir. 2006).

criminal trial (including the entry of the forfeiture order) are not the third party's concern. He has no standing to assert the defendant's rights, and even if he had such standing, he would lose on the merits because he can only recover by satisfying the requirements of Sections 853(n)(6)(A) or (B).[317]

While as a general matter a third party may not contest the forfeitability of the property, there are times when establishing the source of the property may be intertwined with the claimant's assertion that the property was vested in him or her, not the defendant. Thus, if the third party is saying "the forfeited money is really my money from a legitimate source, not the defendant's criminal proceeds," he may sound like he's challenging forfeitability, but he's really just making a legitimate claim that he is the superior owner of the money – a claim he is entitled to make under Section 853(n)(6)(A).

For example, in *United States v. Corey*,[318] the court held that if the claimant had been able to show that he acquired the forfeited property with legitimate funds from a commingled bank account, not with the defendant's criminal proceeds, he would have prevailed under Section 853(n)(6)(A) because he had a superior ownership interest in the untainted funds. In such cases, of course, tracing often becomes an issue. In *Corey*, the court held that the Government may use accounting rules – like first in, last out – to satisfy the tracing requirements.[319]

XX. SUPERIOR LEGAL INTEREST UNDER SECTION 853(N)(6)(A)

Section 853(n)(6)(A) embodies the relation back doctrine

[317] *Carrie*, 206 Fed. Appx. at 923-24.
[318] 2006 WL 1281824 (D. Conn. May 9, 2006).
[319] *Corey*, 2006 WL 1281824, at *8-9.

Section 853(n)(6)(A) says that the third party can prevail if he establishes that he had an interest in the property at the time of the offense; this is just the flip side of the relation back doctrine.[320] If the third party did *not* have a pre-existing interest, he could not successfully contest the forfeiture because the Government's interest under the relation back doctrine vests at the time of the offense.[321]

Legal interest must exist at the time of the crime giving rise to forfeiture

For this reason, a person who acquired an interest in the property after it became subject to forfeiture (i.e., after Government's interest vested) can never recover under Section 853(n)(6)(A). In *Carmichael,* the claimant acquired an interest in the property – a mechanic's lien – while the crime was in progress. The court held that because the government's interest vested *when the crime began*, the claimant's interest arose too late to trump the relation back doctrine.[322]

For the same reasons, a third party can *never* assert an interest under Section 853(n)(6)(A) in the proceeds of the crime.[323] The Government's interest in the proceeds vests as soon as the crime is committed; the proceeds do not exist before that time, so no third party can have a pre-

[320] *See AFLUS*, *supra* note 2, § 23-15(a), p. 702.

[321] *See* United States v. Hooper, 229 F.3d 818, 820 (9th Cir. 2000) (the temporal requirement in section 853(n)(6)(A) requiring the claimant to show that the property interest was vested at the time the acts giving rise to the forfeiture were committed is the complement to sections 853(c) and (n)(6)(B), which prevent the defendant from transferring the forfeitable property to anyone other than a bona fide purchaser); *Carrie*, 206 Fed. Appx. at 922-23 (same; because Government's interest vested under the relation back doctrine when defendant acquired the property with criminal proceeds, claimant could recover under § 853(n)(6)(A) only if he had an interest before that time); United States v. Hayes, 2006 WL 1228972, at *4 (W.D. La. May 4, 2006) (Section 853(n)(6)(A) embodies the relation back doctrine; the Claimant must show that he had an interest in the property at the time the crime occurred because otherwise he will not be able to show that his interest vested before the Government's).

[322] United States v. Carmichael, 440 F. Supp.2d 1280, 1282 (M.D. Ala. 2006) (Government's interest vests when the crime giving rise to the forfeiture begins, not when it ends; third party who acquired lien on the property while the crime was in progress cannot prevail under § 853(n)(6)(A)).

[323] *See AFLUS*, *supra* note 2, § 23-15(a), pp. 705-06.

existing interest in them.[324] For example, in *United States v. Timley*,[325] the defendant's attorney tried to assert an interest under Section 853(n)(6)(A) in the defendant's drug proceeds, but the court said that could not be. Because the Government's interest in the money vested when the drug conspiracy began, it trumped the attorney's interest, even though he had already earned his fee and expected that the drug proceeds would be used to pay it.[326]

In *Carrie*, the Eleventh Circuit said that the same rule applies when the forfeited property was not derived directly from the crime, but constituted property that the defendant acquired with the proceeds of his crime. As mentioned earlier, because the Government's interest in the proceeds vested as soon as the crime occurred, any purchase that is made with those proceeds is a purchase made with the Government's money. The Government's interest in the property accordingly vests as soon as the purchase is made, and a third party who later attempts to assert an interest in the property under Section 853(n)(6)(A) will find that the property already belongs to the Government and his claim must fail.[327]

For example, in *United States v. Wahlen,*[328] the court held that the defendant's wife could not assert a pre-existing interest under Section 853(n)(6)(A) in the portion of the marital property that was acquired with her husband's criminal proceeds.[329] The Government's interest in the

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[324] *See Hooper*, 229 F.3d at 821-22 (to prevail under section 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, section 853(n)(6)(A) can never be used to challenge the forfeiture of proceeds).

[325] 443 F.3d 615(8th Cir. 2006).

[326] *Timley*, 443 F.3d at 628-29.

[327] United States v. Carrie, 206 Fed. Appx. 920, 922-23 (11th Cir. 2006).

[328] 459 F. Supp.2d 800 (E.D. Wis. 2006).

[329] *Wahlen*, 459 F. Supp.2d at 813-14.

proceeds themselves vested as soon as the crime occurred, and so the Government's interest in the marital property vested as soon as the purchase was made.[330]

We saw earlier that judgment creditors who acquire liens on the forfeited property have standing to contest the forfeiture, but they cannot assert a pre-existing interest under Section 853(n)(6)(A) because the Government's interest in the property has already vested before they acquired their lien.[331]

Innocence is not required

A person with a pre-existing interest under Section 853(n)(6)(A) will prevail in the ancillary proceeding even if he or she is not "innocent."[332] The statute protects the due process rights of third party owners who were barred from participating in the criminal trial; it is not at all like the innocent owner defense for civil forfeiture in 18 U.S.C. § 983(d)(2) which protects only innocent third parties. Accordingly, a person who was at all times aware that her property was being used to commit a criminal offense can recover property in the ancillary proceeding if she

[330] *See* United States v. Soreide, No. 03-60235-CR-COHN/SNOW, slip op. at 11-12 (S.D. Fla. Mar. 22, 2005) (following *Hooper* and applying it not only to claimant's attempt to assert an interest in the proceeds themselves, but also to her attempt to assert an interest in property traceable to the proceeds), *aff'd on other grounds*, 461 F.3d 1351 (11th Cir. 2006); AFLUS, *supra* note 2, § 23-15(d), p. 709.

[331] *See* United States v. Carmichael, 440 F. Supp.2d 1280, 1282 (M.D. Ala. 2006) (unsecured creditor who did not obtain a judgment lien until after the property became subject to forfeiture cannot recover under § 853(n)(6)(A) because he had no interest in the property at the time of the offense); United States v. Speed Joyeros, S.A., 410 F. Supp.2d 121, 125 (E.D.N.Y. 2006) (creditor who obtained a judicial decree affirming his debt and attached defendant's property may have acquired an interest in the specific asset, but it comes too late in the day to recover under § 853(n)(6)(A) which protects interests in effect when the property became subject to forfeiture); United States v. Hayes, 2006 WL 1228972, at *4-5 (W.D. La. May 4, 2006) (judgment creditor who acquired an interest in the forfeited property immediately, by operation of state law, when defendant acquired it with his criminal proceeds, could not prevail under § 853(n)(6)(A) because the Government's interest in the proceeds – and hence in the property acquired with the proceeds – vested when the crime occurred; following *Hooper*).

[332] *See AFLUS*, *supra* note 2, § 23-15(b), p. 707.

had a pre-existing interest in it, if she is not convicted of the crime giving rise to the forfeiture in the criminal case.[333]

XXI. BONA FIDE PURCHASERS UNDER SECTION 853(N)(6)(B)

The defense under section 853(n)(6)(B) has three elements

A third party whose claim to the forfeited property under Section 853(n)(6)(A) is barred by the relation back doctrine may, in the alternative, make a claim under Section 853(n)(6)(B), which is commonly known as the bona fide purchaser provision.[334]

Section 853(n)(6)(B) is an exception to the relation back doctrine. To prevail, the claimant must show:

(1) a legal interest in the property;

(2) that was acquired as a bona fide purchaser for value;

(3) at a time when the claimant was reasonably without cause to believe that the property was subject to forfeiture.[335]

It usually makes sense for the court to consider these three elements in this order. There is no reason to reach the "bona fide purchaser" element if the claimant does not have a legal interest

[333] *See* United States v. Soreide, 461 F.3d 1351, 1354-55 (11th Cir. 2006) (innocence is not part of the third party's claim in the ancillary proceeding; a third party can recover under § 853(n)(6) if she had an interest in the property at the time it became subject to forfeiture, or if she is a bona fide purchaser for value).

[334] *See AFLUS*, *supra* note 2, § 23-16, p. 712.

[335] *See* United States v. Soreide, No. 03-60235-CR-COHN/SNOW, slip op. at 13 (S.D. Fla. Mar. 22, 2005) (the three elements of the defense are separate and conjunctive), *aff'd on other grounds*, 461 F.3d 1351 (11th Cir. 2006).

in forfeited property, and there is no reason to reach the "cause to believe" element if the claimant does not establish that she acquired her interest in exchange for something of value.[336]

Creditors and victims are not bona fide purchasers

Creditors and victims cannot recover under Section 853(n)(6)(B) because they have no legal interest in the forfeited property.[337] As the court said in *Carmichael,* "their interest lies against the debtor personally as opposed to any specific property."[338]

Claimant must give something of value

Even if the claimant has a legal interest in the property, he cannot prevail unless he acquired it in exchange for something of value. It is for this reason that the defendant's spouse cannot recover under Section 853(n)(6)(B) if she acquired her interest under state marital property law.[339] Acquiring property through marriage, divorce, inheritance, gift or other such intra-family transfer is not a "purchase" in the sense intended by the statute.

An interesting case testing the limits of this rule was *United States v. Cox,*[340] which involved a hotly contested divorce proceeding resulting in the defendant's wife ending up with his fraud proceeds as part of the divorce settlement. The Government argued in accordance with the general rule that the divorce settlement was not a purchase within the meaning of Section

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[336] *Soreide*, No. 03-60235-CR-COHN/SNOW, slip op. at 16-17.

[337] *See* AFLUS, *supra* note 2, § 23-16(b), pp. 713-17.

[338] United States v. Carmichael, 440 F. Supp.2d 1280, 1282 (M.D. Ala. 2006) (following *Watkins*; unsecured creditors are not bona fide purchasers for value because their interest lies against the debtor personally as opposed to any specific property). *See also* United States v. Watkins, 320 F.3d 1279, 1283 (11th Cir. 2003) (unsecured creditor, who gave defendant money to buy him a car, is not a bona fide purchaser of the cash the Government is forfeiting as a substitute asset).

[339] *See* United States v. Brooks, 112 F. Supp.2d 1035, 1041 (D. Haw. 2000) (wife cannot assert a bona fide purchaser interest in husband's criminal proceeds on the ground that she contributed uncompensated services that increased the value of the marital estate*); Soreide*, No. 03-60235-CR-COHN/SNOW, slip op. at 17 (same, following *Brooks*; also, that wife was contractually liable on the mortgage did not make her a purchaser).

[340] 2006 WL 1431694 (W.D.N.C. 2006).

853(n)(6)(B), but the court held that because she had agreed to submit to arbitration, and thus had to agree to relinquish rights to other property to receive the award, the wife had given up something of value, and thus was a bona fide purchaser.[341]

Claimant must be reasonably without cause to believe the property was subject to forfeiture

Even if the third party acquired a true interest in the forfeited property in an arms-length transaction, he will not prevail if he had reason to believe the property was subject to forfeiture.[342] But in Cox, a court that was sympathetic to the defendant's wronged spouse found that she might have believed that the property she was awarded in the divorce settlement was not the proceeds of her husband's fraud, and thus found that she had satisfied the third element of the statute.[343]

Defense attorneys

Defense attorneys who are contesting the forfeiture of their fees have a hard time prevailing under Section 853(n)(6)(B) not because they haven't given something of value in exchange for the fee, but because they are generally aware that the fee has been paid with tainted proceeds.[344] The Ninth Circuit made this point in denying an attorney's claim in *Dejanu.* A defense attorney who was aware that his client obtained the forfeited property through fraud

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[341] *Cox*, 2006 WL 1431694, at *9.

[342] *See* Pacheco v. Serendensky, 393 F.3d 348, 351 (2d Cir. 2004) (person who is aware there is a *lis pendens* on the property cannot be a bona fide purchaser); United States v. BCCI Holdings (Luxembourg) S.A. (Petition of American 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); AFLUS, *supra* note 2, § 23-16(c), p. 717.

[343] *Cox*, 2006 WL 1431694, at *9 (wife who knew husband was under investigation for fraud, and that the proceeds of his offense could be forfeited if he were convicted, nevertheless may have reasonably believed that the property she was awarded in a divorce settlement was not subject to forfeiture).

[344] *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); Federal Trade Comm'n v. Assail, Inc., 410 F.3d 256, 266 (5th Cir. 2005) (The mere fact that an attorney has read the indictment against his client is enough to put him on notice that his fees are potentially tainted and to destroy his status as a bona fide purchaser for value.); AFLUS, *supra* note 2, § 23-16(c), pp. 719-20.

cannot satisfy the "reasonably without cause to believe" prong of Section 853(n)(6)(B), the court said, and thus cannot recover his interest in the property in the ancillary proceeding.[345]

Mortgagees and lienholders

Mortgagees and lienholders may be bona fide purchasers if they obtain their interest in the property in exchange for something of value. In *United States v. Carmichael,*[346] the court held that a person who performs work on the defendant's property, and immediately acquires a mechanic's lien in exchange, is a bona fide purchaser of the lien.[347]

Section 853(n)(6)(B) applies only to a person who acquires property from the defendant

In *Soreide,* the third party made a creative argument that revealed either extraordinary chutzpah on the part of the claimant's counsel, or an extraordinary degree of obtuseness regarding the nature and purpose of the bona fide purchaser provision. The claimant argued that she had purchased the forfeited property from another third party with money given to her by her defendant husband, and that because this was an arms-length commercial transaction, and because she had no reason to believe the property that she was purchasing was subject to forfeiture, she was entitled to contest the forfeiture in the ancillary proceeding under Section 853(n)(6)(B). This argument, of course, totally misapprehended the nature of the defense under Section 853(n)(6)(B).

[345] United States v. Dejanu, 163 Fed. Appx. 493, 498 (9th Cir. 2006). *See also* United States v. Alamoudi, Cr. No. 1:03cr513, slip op. at 27-29 (E.D. Va. Nov. 3, 2006) (because the relation back doctrine applies to substitute assets, defendant attorney can contest forfeiture of substitute asset only if he is a bona fide purchaser for value, but an attorney who is retained after the defendant is arrested cannot claim to be without knowledge of the forfeitability of the client's property).

[346] 433 F. Supp.2d 1259 (M.D. Ala. 2006).

[347] *Carmichael*, 433 F. Supp.2d at 1263.

The statute protects a third party who has given value in exchange for property that would otherwise be subject to forfeiture from the defendant under the relation back doctrine.[348] The forfeitable property in this case was the defendant's fraud proceeds; this was the money the defendant had given to his wife and which she used to make her purchases. If the wife had given something of value to the defendant in exchange for his fraud proceeds, or in exchange for property that he acquired with those proceeds, she might be a bona fide purchaser within the meaning of § 853(n)(6)(B); but the statute does not protect a person who obtains fraud proceeds as a gift from the defendant and then uses them to make a purchase from an unrelated third party![349]

XXII. CLEAR TITLE TO FORFEITED PROPERTY

When no one files a claim in the ancillary proceeding, the Government obtains clear title to the property.[350] In *United States v. Metsch & Metsch, P.A.*,[351] the Eleventh Circuit held that a third party who failed to file a claim in the ancillary proceeding had no basis for a collateral attack on the Government's title in a separate case.[352] And in *Carmichael,* the court held that because the statute gives the Government clear title to the forfeited property at the end of the ancillary proceeding, it was unnecessary for the court to enter a default judgment against a third party who did not file a claim.[353]

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[348] *See* 21 U.S.C. § 853(c).
[349] United States v. Soreide, 461 F.3d 1351, 1355-56 (11th Cir. 2006).
[350] *See* 21 U.S.C. § 853(n)(7); AFLUS, *supra* note 2, § 23-17, p. 721.
[351] 187 Fed. Appx. 946 (11th Cir. 2006).
[352] *Metsch & Metsch*, *P.A.*, 187 Fed. Appx. at 947.
[353] United States v. Carmichael, **Error! Main Document Only.**___ F. Supp.2d ___, 2006 WL 1477404 (M.D. Ala. May 26, 2006).

XXIII. APPEALS

Defendant's appeal

Generally, the defendant must appeal an order of forfeiture at the same time that he appeals other aspects of his sentence,[354] but the defendant may also appeal if the court grants a motion to amend the order of forfeiture to include newly-discovered property or substitute assets pursuant to Rule 32.2(e), months or years after the order of forfeiture is final. For example, in *United States v. Alamoudi*,[355] the Fourth Circuit noted that the defendant did not appeal the original order of forfeiture but filed a timely appeal from the order granting the Government's motion under Rule 32.2(e).[356]

Stay pending appeal

In *Carmichael,* the court held, in separate cases, that a third party with no interest in the property cannot stay its sale, nor can a defendant whose interest has already been extinguished.[357]

XXIV. POST-CONVICTION ISSUES

Abatement

A criminal forfeiture judgment abates if the defendant dies before his or her appeal is final.[358] The most recent and notorious example of this occurred when Kenneth Lay, the

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[354] *See AFLUS*, *supra* note 2, § 24-2, p. 724.
[355] 452 F.3d 310 (4th Cir. 2006).
[356] *Alamoudi*, 452 F.3d at 312 n.1.
[357] United States v. Carmichael, 440 F. Supp.2d 1280, 1282-83 (M.D. Ala. 2006). *See also* United States v. Carmichael, 436 F. Supp.2d 1244, 1247 (M.D. Ala 2006) (§ 853(h) bars defendant from objecting to the sale of the forfeited property pending appeal; his interest in the property has been extinguished).

convicted lead defendant in the Enron case, died after the jury returned its guilty verdict but before sentencing.[359] As a consequence, Lay was never sentenced in the criminal case, and because criminal forfeiture is part of sentencing, no forfeiture judgment could be imposed. Civil forfeiture remained available as a remedy, however, to the extent the Government was able to satisfy the requirements of the *in rem* forfeiture procedure.

Motion for the return of forfeited property

If the court enters an order of forfeiture in a criminal case, the defendant's remedy is direct appeal; as the Seventh Circuit held in *United States v. Stokes,*[360] the district court lacks subject matter jurisdiction over a separate civil action for the return of the forfeited property.[361]

On the other hand, if the defendant's property is not forfeited but is nevertheless retained by the Government after the criminal case is over, his remedy is to file a Rule 41(g) motion for the return of seized property.[362]

Coram nobis petitions

In *United States v. Riedl*,[363] a district court addressed one of the most esoteric issues in all of forfeiture law: the application of the doctrine of *coram nobis* to a criminal forfeiture judgment. *Coram nobis,* the court said, can be used to challenge a criminal conviction when *habeas corpus* is no longer available as a remedy — because the defendant is no longer incarcerated — but the

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[358] *See* AFLUS, *supra* note 2, § 24-8, p. 733.

[359] United States v. Lay, 456 F. Supp.2d 869, 873-74 (S.D. Tex. 2006) (the normal rule is that a conviction abates if the defendant dies after he is sentenced but before his appeal is final, but it applies equally where the defendant dies before sentencing, and thus before judgment is even entered).

[360] 191 Fed. Appx. 441 (7th Cir. 2006).

[361] *Stokes*, 191 Fed. Appx. at 443-44.

[362] *See* United States v. Fossis, 2006 WL 2433455, at *2 (E.D. Tenn. Aug. 15, 2006) (if Government uses property seized by the locals as evidence in federal criminal case but fails to obtain forfeiture judgment, it must return the property to the defendant pursuant to Rule 41(g) once the criminal case is over).

[363] 2006 WL 1119162 (D. Haw. Apr. 24, 2006).

defendant continues to suffer the consequences of the conviction. This may be the case when, as a result of the conviction, the defendant's property has been forfeited. But a *coram nobis* petition will not be granted, the court concluded, if the issues raised in the petition could have been raised on direct appeal or later in a Section 2255 petition while the defendant was incarcerated.[364]

Collateral Estoppel

The doctrine of collateral estoppel bars a defendant from challenging his criminal order of forfeiture in any other forum. In *United States v. Rashid*,[365] the Third Circuit held that the defendant's quiet title action against the Government, filed pursuant to 28 U.S.C. § 2409a(a), was barred by collateral estoppel because any judgment in defendant's favor would necessarily imply that the order forfeiting the property as part of defendant's sentence in his criminal case was invalid.[366]

XXV. PARALLEL FORFEITURES

In most forfeiture cases, the Government has the option of proceeding civilly or criminally, or doing both in parallel with each other.[367] In fact, it is quite common for federal agency that seizes a defendant's property to commence administrative forfeiture proceedings against it even as the Assistant U.S. Attorney is including a forfeiture allegation in the defendant's criminal indictment. In *United States v. Houshar*,[368] a defendant challenged this procedure, but in an extended footnote, the court held that there was nothing wrong with the seizing agency's

[364] *Riedl*, 2006 WL 1119162, at *2-4.
[365] 205 Fed. Appx. 952 (3d Cir. 2006).
[366] *Rashid*, 205 Fed. Appx. at 953.
[367] *See* AFLUS, *supra* note 2, § 24-9, p. 734.
[368] 2006 WL 562206 (E.D. Pa. Mar. 7, 2006).

proceeding with the administrative forfeiture even though it was on notice of the defendant's belief that he could contest the criminal forfeiture of his property at trial. "Parallel civil and criminal forfeiture actions are routine," the court said. "Thus, it was the Government's prerogative to initiate parallel proceedings, and even if [Defendant] would have preferred to assert his claims as part of his criminal proceedings, in order to protect his rights he was required to follow the Government's lead."[369]

XXVI. FORFEITURE AND BANKRUPTCY

Every year there is a new case dealing with the interface between asset forfeiture and bankruptcy law. In 2006 in *United States v. Zaccagnino,*[370] a court held that because the Government's interest in the forfeited property vested at the time of the offense giving rise to the forfeiture, the property never became part of the bankruptcy estate that was created subsequently when the defendant filed for bankruptcy.[371] Thus the bankruptcy trustee had no claim to assert against the forfeited property in the ancillary proceeding.

XXVII. FORFEITURE OF RETIREMENT ACCOUNTS

Another perennial issue is whether the anti-alienation provision in the Employee Retirement Income Security Act (ERISA) precludes the entry of a forfeiture order against a defendant's IRA,

[369] *Houshar*, 2006 WL 562206, at *6 n.10 (internal quotation marks and citation omitted).
[370] 2006 WL 1005042 (C.D. Ill. Apr. 18, 2006).
[371] *Zaccagnino*, 2006 WL 1005042, at *4.

401(k) plan, or other retirement account. The rule appears to be that an IRA is fair game for forfeiture, but an ERISA-protected pension plan is not.[372]

XXVIII. RETROACTIVITY / EX POST FACTO CLAUSE

The Ex Post Facto Clause bars any increase in the defendant's punishment for an offense committed before the effective date of the statute authorizing the enhanced sentence. Generally, that means that a newly-enacted statute that authorizes criminal forfeiture for an offense for which no form of forfeiture was previously authorized cannot apply retroactively to past conduct. In *United States v. Smairat,*[373] however, the court said that the Ex Post Facto Clause is not violated when a new criminal forfeiture statute is applied to a continuing offense that straddles the effective date of the forfeiture provision. The court went on to hold, however, that wire fraud is not a continuing offense for this purpose.[374]

XXIX. DISPOSITION OF ASSETS

Sale or disposition of forfeited property

[372] *Compare* United States v. Infelise, 159 F.3d 300, 303-04 (7th Cir. 1998) (defendant's IRA is subject to forfeiture notwithstanding provision in ERISA stating that such accounts are non-forfeitable), *with* United States v. Hargrove, 2006 WL 2524133, at *1 (N.D. Ill. June 26, 2006) (the Supreme Court's decision in *Guidry* bars forfeiture of a defendant's interest in an ERISA pension plan as a substitute asset). *Cf.* United States v. Wahlen, 205 F. Supp.2d 800, 822 (E.D. Wis. 2006) (apparently holding that even if an IRA could not be forfeited under ERISA's anti-alienation provision, it nevertheless may be garnished for restitution).

[373] 2006 WL 1554412 (N.D. Ill. June 1, 2006).

[374] *Smairat*, 2006 WL 1554412, at *6.

Section 853(i) authorizes the Attorney General to sell or otherwise dispose of forfeited property. In *United States v. Carmichael*,[375] the defendant objected to the sale of his forfeited property pending appeal, arguing that he had an interest in making sure that the property was sold for its fair market value because whatever the Government realized from the sale would be used to reduce his remaining obligations to the Government under the money judgment portion of the order of forfeiture. But the court overruled the objection; to the extent defendant had an interest in seeing property sell for fair market value, the court said, the Government had the same interest, and there was no showing that the price negotiated by the Government was too low.[376]

Persons eligible to buy forfeited property

Section 853(h) bars the defendant from repurchasing his forfeited property. In *Hronek v. United States*,[377] a district court held that defense counsel's advice to the contrary was erroneous but did not amount to ineffective assistance of counsel within the meaning of Section 2255.[378] The problem for the defendant was that he could not show that but for the erroneous advice he would not have pled guilty.

XXX. FORFEITURE AND RESTITUTION

The courts are split over whether a defendant is entitled to credit against a forfeiture judgment for the amount he has paid as restitution. In 2006, the Seventh Circuit applied what

[375] United States v. Carmichael, 436 F. Supp.2d 1244 (M.D. Ala 2006).
[376] *Carmichael*, 436 F. Supp.2d at 1249-50.
[377] 2006 WL 287990, at *4 (N.D. Ohio Feb. 6, 2006).
[378] *Hronek*, 2006 WL 287990, at *4.

appears to be the majority rule, holding that no such offset is allowed.[379] There is also a difference of opinion on the converse – i.e., whether the defendant is entitled to an offset against his restitution order for the amount he has forfeited. The Fourth and Ninth Circuits have both held that he is not,[380] but district courts in those circuits reached conflicting conclusions.

In *United States v. Holmes,*[381] a district court in the Eastern District of Virginia held that allowing the defendant to use his forfeited funds to offset his restitution obligation is a matter that falls solely in the discretion of the Attorney General. "While the Government may allow a Defendant to apply forfeited property to offset his restitution amount," the court said, "the Mandatory Victims Restitution Act precludes the Court from ordering the Government to do so . . . . ."[382] But in *United States v. Caulder*,[383] a district court in the Northern District of California distinguished the Ninth Circuit cases on this issue, and held that a court has discretion to allow the defendant to use forfeitable property to satisfy a restitution order if it chooses to do so.[384]

XXXI. APPLICATION OF SECTION 2461(C)

Purpose of 28 U.S.C. § 2461(c)

[379] *See* United States v. Leahy, 464 F.3d 773, 793 n.8 (7th Cir. 2006) (following *United States v. Emerson*, 128 F.3d 557, 566-67 (7th Cir. 1997) (forfeiture and restitution are not mutually exclusive; defendant may be made to pay twice and is not entitled to reduce restitution by the amount of the forfeiture)).

[380] *See* United States v. Alalade, 204 F.3d 536, 540-41 (4th Cir. 2000) (under the Mandatory Victims Restitution Act, the defendant is not entitled to an offset against the restitution order for the value of the fraud proceeds that the Government forfeited administratively); United States v. Bright, 353 F.3d 1114, 1122-23 (9th Cir. 2004) (same, following *Alalade*).

[381] 2006 WL 2709699 (E.D. Va. Sept. 21, 2006).

[382] *Holmes*, 2006 WL 2709699, at *1.

[383] 2006 WL 1646100 (N.D. Cal. June 9, 2006).

[384] *Caulder*, 2006 WL 1646100, at *1.

Section 2461(c) of Title 28 was enacted as part of the Civil Forfeiture Reform Act of 2000 to expand the situations in which the Government could seek criminal forfeiture.[385] As originally enacted, the statute provided that the Government could seek forfeiture in any criminal case in which the defendant was charged with an offense for which civil forfeiture was authorized but where there was no existing criminal forfeiture provision for the particular offense. For example, as a district court said in *United States v. Rudaj*,[386] this meant that after 2000, the Government could seek the criminal forfeiture of property involved in illegal gambling, even though the applicable forfeiture statute, 18 U.S.C. § 1955(d), authorized only civil forfeiture for gambling offenses.[387]

Using Section 2461(c) in conjunction with Section 981(a)(1)(C)

Section 2461(c) is used most often in mail and wire fraud cases. The proceeds of any mail or wire fraud offense are subject to civil forfeiture under 18 U.S.C. § 981(a)(1)(C). Because there is no corresponding criminal forfeiture provision, the Government will use Section 2461(c) in conjunction with Section 981(a)(1)(C) to forfeit mail and wire fraud proceeds in a criminal case.

This practice became commonplace after 2000, but two district courts held that an ambiguity in the statute precluded the Government from using it as Congress had intended. The ambiguity was that although there was no criminal forfeiture counterpart to Section 981(a)(1)(C) that authorized criminal forfeiture in ordinary mail and wire fraud cases, there is a criminal forfeiture provision in 18 U.S.C. § 982(a)(2) that authorizes criminal forfeiture in mail and wire

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[385] *See* AFLUS, *supra* note 2, § 15-4, p. 487.
[386] 2006 WL 1876664 (S.D.N.Y. 2006).
[387] *Rudaj*, 2006 WL 1876664, at *3-4. *See also* United States v. Alamoudi, 452 F.3d 310, 313 (4th Cir. 2006) (if the defendant is convicted of any offense covered by section 981(a)(1)(C), including an IEEPA offense under 50 U.S.C. § 1705, the court must order the forfeiture of the proceeds of that offense pursuant to section 2461(c)).

fraud cases "affecting a financial institution." The two district courts held that this provision meant that the Government could seek criminal forfeiture in mail and wire fraud cases *only* where the forfeiture affected a financial institution, and that the Government could not use Sections 2461(c) and 981(a)(1)(C) to seek criminal forfeiture in mail and wire fraud cases where no financial institution was involved.[388]

The majority of courts rejected this view.[389] In the leading case, *United States v. Vampire Nation*,[390] the Third Circuit held that because Section 981(a)(1)(C) authorizes civil forfeiture for general mail and wire fraud, and no statutory provision specifically authorizes criminal forfeiture in such cases, the Government may seek criminal forfeiture in mail and wire fraud cases pursuant to Section 2461(c).[391] As the court pointed out, this construction was consistent with the legislative intent, which was to make criminal forfeiture essentially coextensive with civil forfeiture.

A number of other courts reached the same conclusion,[392] but in 2006 Congress resolved the issue by amending Section 2461(c) to strike the phrase "if no specific statutory provision is

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[388] *See* United States v. Day, 416 F. Supp.2d 79, 86 (D.D.C. 2006) (the Government may not forfeit mail fraud proceeds under sections 981(a)(1)(C) and 2461(c) because § 2461(c) applies only where no specific statutory provision is made for criminal forfeiture upon conviction, and there is a more specific provision in § 982(a)(2) that limits forfeitures to mail and wire fraud cases affecting a financial institution); United States v. Croce, 345 F. Supp.2d 492 (E.D. Pa. 2004) (same).

[389] *See* AFLUS, *supra* note 2, § 15-4, p. 488 n.40.

[390] 451 F.3d 189 (3d Cir. 2006).

[391] *Vampire Nation*, 451 F.3d at 199-201.

[392] *See* United States v. Rutledge, 437 F.3d 917, 921 (9th Cir. 2006) (Congress intended § 2461(c) to authorize criminal forfeiture when no other criminal forfeiture provision applies to the charges alleged in a particular case; because §§ 982(a)(2) and (8) apply only to other types of fraud, § 2461(c) must apply to the fraud allegedly committed by the defendant), opinion withdrawn as moot because of intervening guilty plea, 448 F.3d 1080 (9th Cir. 2006); United States v. Smairat, 2006 WL 1554412, at *8-10 (N.D. Ill. June 1, 2006) (§ 2461(c) is a gap filler that allows the Government to pursue criminal forfeiture in general wire fraud cases because there is no other criminal forfeiture provision for such offenses; the 2006 amendment to § 2461(c) reinforces that view). *See also* United States v. Edelkind, 467 F.3d 791, 799-800 (1st Cir. 2006) (finding it unnecessary to determine whether the pre-2006 version of § 2461(c) permitted the Government to rely on § 981(a)(1)(C) in a criminal forfeiture case involving bank fraud

made for criminal forfeiture upon conviction," thus making it clear that Section 2461(c) is applicable to any case where either civil or criminal forfeiture is authorized.[393]

Availability of a pretrial restraining order

Another ambiguity in the original version of Section 2461(c) concerned the authority of the court to enter a pretrial restraining order pursuant to Section 853(e). Most courts held that Section 2461(c) incorporated *all* of the provisions of Section 853, including the restraining order provision in subsection (e), but the Second Circuit held that because the statute said that the provisions of Section 853 would apply "upon conviction," the pre-trial restraining order provision was not incorporated.[394] In the 2006 amendment to § 2461(c) Congress resolved this issue as well, striking the phrase "upon conviction" and inserting language making it clear that the procedures in Section 853 apply to all stages of the criminal forfeiture case.

Availability of substitute assets

By making all of the procedures in Section 853 applicable to all criminal forfeiture cases, Section 2461(c) authorized the forfeiture of substitute assets in all such cases.[395]

Ex Post Facto Issues

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because, given the availability of a parallel civil forfeiture, there was no prejudice to the defendant in doing the forfeiture criminally).

[393] *See Smairat*, 2006 WL 1554412, at *10 (the 2006 version of § 2461(c) allows the Government to seek criminal forfeiture whenever either civil or criminal forfeiture is authorized by statute for a given offense); *Edelkind*, 467 F.3d at 800 (noting that the amended version of § 2461(c) would allow the Government to use § 981(a)(1)(C) to seek criminal forfeiture in a bank fraud case, even though there is a specific criminal forfeiture statute for bank fraud in § 982(a)(2)).

[394] *Compare* United States v. Razmilovic, 419 F.3d 134, 137-38 (2d Cir. 2005) (section 2461(c) incorporates only the post-conviction procedures in section 853; because section 853(e) is not a post-conviction procedure, it is not incorporated, and there was no need for Congress to expressly exclude it), *with* United States v. Causey, 309 F. Supp.2d 917, 922 (S.D. Tex. 2004) (section 2461(c) incorporates the restraining order provision in section 853(e); if Congress meant to exclude that subsection, it would not have expressly excluded only subsection (d)); United States v. Wittig, 2004 WL 1490406, at *2 (D. Kan. June 30, 2004) (section 2461(c) incorporates pretrial restraining order provision in section 853(e)).

[395] *See* United States v. Alamoudi, 452 F.3d 310, 313 (4th Cir. 2006) (the cross-reference in section 2461(c) to the procedures in section 853 includes the substitute asset provision in section 853(p)).

Finally, in *United States v. Rudaj*,[396] the defendant contested the right of the Government to seek criminal forfeiture pursuant to Section 2461(c) for an offense occurring before the effective date of the 2006 amendment to the statute, but the court held that there was no *ex post facto* violation. Because property used to commit a violation of Section 1955, the federal gambling offense, was forfeitable criminally under the original version of Section 2461(c), the court said, there was no *ex post facto* violation in invoking Section 2461(c) after the 2006 amendment.[397]

CONCLUSION

The rapid increase in litigation pursuant to the criminal forfeiture statutes, and the resulting explosion in the development of the case law, continued unabated in 2006, with no indication that it would slow down any time soon. Including a forfeiture provision in an indictment is becoming a routine part of federal criminal practice. As more federal prosecutors become experienced in dealing with the concepts and procedural details – and hence more confident that attempting to recover the forfeitable property will not unduly complicate their cases – pursuing forfeiture and obtaining a forfeiture judgment at the end of the trial will become as commonplace as calculating the defendant's offense level under the sentencing guidelines. The number of cases decided in the past year indicates that this process is well underway.

[396] 2006 WL 1876664 (S.D.N.Y. July 5, 2006).
[397] *Rudaj*, 2006 WL 1876664, at *6.