[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11951

D.C. Docket No. 1:15-cr-20189-RNS-1

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

versus

NIDAL AHMED WAKED HATUM,

Defendant - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(August 11, 2020)

Before MARTIN, GRANT, and LAGOA, Circuit Judges.

MARTIN, Circuit Judge:

If a defendant is convicted of a money laundering scheme that caused no financial harm to an innocently involved bank, is an order of forfeiture still

mandatory? We conclude that it is and reverse the District Court's denial of the government's forfeiture motion in this case.

I.

A. FACTUAL BACKGROUND

Nidal Ahmed Waked Hatum is a 48-year-old citizen of Panama and Colombia. From January 2000 to February 2009, Mr. Waked was part owner and general manager of Vida Panama, Z.L., S.A. ("Vida Panama"), an electronics wholesaler and exporter based in Colón, Panama. For most of this time he was also the owner of two Miami, Florida-based corporations, Star Textile Manufacturing, Inc. ("Star Textile") and Global World Import & Export ("Global World"). Vida Panama had a line of credit at the International Commercial Bank of China ("ICBC" or the "Bank") in Panama, while Star Textile and Global World had accounts at Ocean Bank in Miami. Mr. Waked had signature authority on the bank accounts of all three corporations.

Between February 2000 and February 2009, Mr. Waked engaged in a series of so-called "mirror-image" financial transactions. Star Textile (and sometimes Global World) would send Vida Panama invoices for sums of money between $22,000 and $550,000, appearing to bill for electronics merchandise sold to Vida Panama. Mr. Waked would use these invoices to justify drawing on Vida Panama's line of credit at ICBC, which he would in turn use to pay Star Textile or

Global World. After the transfer from Vida Panama cleared, Tamas Zafir, the manager of Star Textile and Global World, would send a check in the same amount from one of those corporations back to Vida Panama. Ultimately, Mr. Waked would deposit that check in Vida Panama's bank account.

In truth, Vida Panama was not buying merchandise from Star Textile or Global World. These invoices were phony and Mr. Waked was using them to launder money among his corporations. The record is murky as to the nature of the laundered money, but regardless of the reason for the draws on Vida Panama's line of credit, Mr. Waked admitted to knowingly misrepresenting to the Bank how the drawn money would be used. Because of the mirror-image nature of the scheme, the Bank incurred no financial loss from these transactions and all draws were repaid with interest. Nevertheless, had the Bank known of the falsehoods that prompted these financial transactions, it would not have approved the draws on Vida Panama's line of credit or the wire transfers.

B. PROCEDURAL HISTORY

Mr. Waked, Mr. Zafir, Star Textile, and Vida Panama were indicted in a three-count indictment on March 24, 2015. All defendants were charged with conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h) and bank fraud in violation of 18 U.S.C. § 1344(2). Mr. Waked and Vida Panama were also charged with an additional count of conspiracy to commit money laundering

in violation of 18 U.S.C. § 1956(h). The indictment sought forfeiture from all defendants. The charges against Mr. Zafir were dismissed on speedy trial grounds on October 17, 2016.

On October 19, 2017, Mr. Waked pled guilty to conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h), based on misrepresentations to ICBC in violation of 18 U.S.C. § 1957. In return for Mr. Waked's guilty plea, the government agreed to dismiss the indictment as to the remaining defendants and to dismiss the other counts against Mr. Waked after sentencing. The plea agreement affirmatively addressed forfeiture:

> The United States and the defendant will endeavor to arrive at an agreement as to a specific sum of money that is subject to forfeiture . . . . Should the parties not come to such an agreement, each party will present its position to the court for a determination of the amount. The defendant agrees to forfeit to the United States all of his right, title, and interest in property that was involved in the commission of the offense, or traceable to such property, in an amount to be determined by the court. . . . <u>The defendant agrees to the entry of a money judgment equal to the value of the property involved in the offense which is not otherwise recovered</u> . . . .

R. Doc. 342 ¶ 9 (emphasis added). The parties agreed to a factual proffer setting forth the facts of the money laundering scheme.

Mr. Waked's guideline sentencing range was 41 to 51 months. The government recommended a sentence of 51-months imprisonment. At sentencing, the District Court asked the government why it requested such a high sentence when the defrauded bank ultimately suffered no loss. The prosecutor responded

that Mr. Waked's actions caused a large risk of harm to the bank, made worse by the long duration of the fraud. Mr. Waked, on the other hand, requested a downward variance to 30 months.

The District Court sentenced Mr. Waked to 27-months imprisonment. The court subsequently entered a preliminary order of forfeiture for "all property involved in the offense or traceable to such property" pursuant to 18 U.S.C. § 982(a)(1), the forfeiture statute for money laundering offenses. The property subject to forfeiture was not set at that time. The preliminary order noted that, pursuant to Federal Rule of Criminal Procedure 32.2(b)(2)(C) and (e)(1), the government would be permitted to move at a later date to specify the forfeiture amount.

The government requested forfeiture of $20,852,000. This was the total amount of money Mr. Waked illegally transferred from Vida Panama to Star Textile and Global World, plus the amount Vida Panama received back in mirror-image repayments.[1] At a hearing on the motion for forfeiture, the government sought to proceed under the substitute forfeiture provision of 21 U.S.C. § 853(p), which is incorporated into money laundering forfeiture pursuant to 18 U.S.C. § 982(b)(1). Section 853(p) provides for forfeiture of "any other property of the

[1] We take no position as to whether this is the correct amount. Any reference in this opinion to the amount of money transferred or the number of fraudulent transfers is derived from the District Court record.

defendant" up to the value of the forfeitable property when it is no longer in the defendant's possession. The government conceded there were no proceeds of Mr. Waked's money laundering offense, but argued that, under the broad "involved in" language of 18 U.S.C. § 982(a)(1), forfeiture of all the money Mr. Waked laundered was proper. Mr. Waked responded that the District Court was under no obligation to order forfeiture because the laundered money had already been returned to the Bank. Mr. Waked also argued that forfeiture money judgments are not authorized by statute.

At the conclusion of the forfeiture hearing, the District Court agreed with Mr. Waked and denied the government's motion for forfeiture. The court denied forfeiture based on "the unique circumstances of this case[,] where Mr. Waked returned all of the money plus interest." The District Court followed its ruling with a written order acknowledging that forfeiture is mandatory but declining to impose it because the statute's purposes—"to ensure that criminals do not retain money for themselves and to punish defendants by transferring ill-gotten gains to the United States"—would not be served here. The court also said that even if it were required to impose a forfeiture money judgment, the government's requested sum of $20,852,000 would be unconstitutionally excessive. Instead, the court would order $520,000 ($10,000 for each of the 52 transactions).

The government submitted an emergency motion pursuant to Federal Rule of Criminal Procedure 35(a) asking the District Court to correct Mr. Waked's sentence and order forfeiture. The government again sought $20,852,000, but now also requested an alternative judgment of $10,426,000 (the undisputed amount Mr. Waked caused Vida Panama to send in fraudulent transfers). At a hearing on the Rule 35(a) motion, the District Court said it was still having "a hard time getting [its] head wrapped around the idea that if the money goes back to the original victim before there's any prosecution, how is there any money to recover?" So it denied the government's request for relief. In addition to the reasons stated in its original order, the District Court also cited to the language in the plea agreement, saying that, since Mr. Waked returned all the laundered money to the Bank, there was no money to "recover."

This is the government's appeal of the final judgment, the denial of the request for forfeiture, and the denial of the Rule 35(a) motion. The government urges reversal on two fronts. First, the government argues the District Court was under an obligation to order forfeiture, and that no relevant exceptions relieved it of this obligation. Second, assuming the District Court is required to order forfeiture, the government further argues the court wrongly concluded that forfeiture in the amount of the laundered funds would violate the Eighth Amendment's prohibition against excessive fines.

II.

"[W]e review de novo the district court's legal conclusions regarding forfeiture and the court's findings of fact for clear error." United States v. Elbeblawy, 899 F.3d 925, 933 (11th Cir. 2018) (quotation marks omitted). We also review de novo the district court's determination of whether a fine is constitutionally excessive, while reviewing for clear error the factual findings made by the district court in conducting the excessiveness inquiry. United States v. Bajakajian, 524 U.S. 321, 336 n.10, 118 S. Ct. 2028, 2037 n.10 (1998). The government must prove the elements of criminal forfeiture under 18 U.S.C. § 982(a)(1) by a preponderance of the evidence. United States v. Hasson, 333 F.3d 1264, 1277 (11th Cir. 2003).

III.

A. FORFEITURE OVERVIEW

A person convicted of federal money laundering "must forfeit to the government all property that is either 'involved in' that violation or traceable thereto." United States v. Seher, 562 F.3d 1344, 1368 (11th Cir. 2009) (quoting, inter alia, 18 U.S.C. § 982(a)(1)). Property eligible for forfeiture "includes that money or property which was actually laundered ('the corpus'), along with 'any commissions or fees paid to the launderer and any property used to facilitate the laundering offense.'" Id. (alteration adopted) (quoting United States v. Puche, 350

F.3d 1137, 1153 (11th Cir. 2003)). While § 982(a)(1) provides the substantive scope of property that may be forfeited from a defendant convicted of money laundering, 18 U.S.C. § 982(b)(1) incorporates the procedural provisions of 21 U.S.C. § 853 to govern "any seizure and disposition of the property and any related judicial or administrative proceeding."

Forfeiture of property under § 982(a)(1) is part of the "historical tradition" of "in personam, criminal forfeitures." Bajakajian, 524 U.S. at 332, 118 S. Ct. at 2035. As such, criminal forfeiture under this section is wholly punitive and "serves no remedial purpose." Id. Property forfeited under the criminal forfeiture laws is conveyed to the United States, not the victim or any other third party. See United States v. Joseph, 743 F.3d 1350, 1354 (11th Cir. 2014) (per curiam).

B. OBLIGATION TO ORDER FORFEITURE

1. The Mandatory Nature of Money Laundering Forfeiture

Section 982(a)(1) says that district courts "shall order" forfeiture for defendants convicted of money laundering. The Supreme Court has made clear that when Congress provides that a district court "shall order" forfeiture, it "could not have chosen stronger words to express its intent that forfeiture be mandatory." See United States v. Monsanto, 491 U.S. 600, 607, 109 S. Ct. 2657, 2662 (1989). Although Monsanto arose in the context of forfeiture under 21 U.S.C. § 853(a), our sister circuits have had no trouble applying it to § 982(a)(1). See, e.g., United

States v. Carter, 742 F.3d 440, 446 (9th Cir. 2014) (per curiam); United States v. Hampton, 732 F.3d 687, 691 (6th Cir. 2013). Neither do we.

Because forfeiture under § 982(a)(1) is mandatory, to the extent the District Court's denial of the government's motion was based on "equitable considerations," such as the statute's purpose, this ruling was in error. See United States v. Blackman, 746 F.3d 137, 143 (4th Cir. 2014). The only way the District Court could avoid imposing forfeiture in this case is if a requirement for imposition of forfeiture was not satisfied. We must now turn to the statutory definition of property for Mr. Waked's laundering offense and ask whether any such property existed in this case.

2. Whether There Was Property "Involved in" the Laundering Scheme

The government seeks forfeiture based on the corpus of funds Mr. Waked laundered. It does not seek forfeiture of property used to facilitate the money laundering or any commissions or fees that Mr. Waked received in connection with the scheme. See Oral Arg. Recording (Feb. 11, 2020) at 16:50–16:57. Thus, this appeal comes down to whether there was any property "involved in" Mr. Waked's money laundering scheme such that forfeiture is mandatory. See 18 U.S.C. § 982(a)(1). If there was no such property, the District Court's failure to order forfeiture would be harmless error.

Mr. Waked makes two broad arguments for why forfeiture is not authorized against him. First, he says that forfeiture money judgments are not permitted by statute and, as a result, the money he laundered is not "property" for purposes of § 982(a)(1). Second, for a variety of reasons, he says the laundered money cannot be used to calculate his forfeiture obligation because the money was returned to the Bank. We reject both arguments and rule that the money Mr. Waked laundered was property "involved in" his offense.

a. Forfeiture Money Judgments

We first address Mr. Waked's argument that the money he laundered cannot be considered property "involved in" the offense because forfeiture money judgments are not authorized by statute.

Mr. Waked is right to concede that our precedent condones forfeiture money judgments. In both Seher and Puche, our Court approved forfeiture money judgments against defendants convicted of money laundering. Seher, 562 F.3d at 1355, 1373–74; Puche, 350 F.3d at 1153. And in Elbeblawy, we explained that money that is the "proceeds" of a criminal offense "constitute[s] a defendant's interest in property" and is subject to forfeiture via an in personam money judgment. 899 F.3d at 940 (quotation marks omitted). We recognize that the government seeks forfeiture from Mr. Waked under 18 U.S.C. § 982(a)(1), which does not, as many other substantive forfeiture provisions do, reach only "proceeds"

of the offense. See, e.g., 18 U.S.C. § 982(a)(2), (7); 21 U.S.C. § 853(a). However, this distinction is not material here. A defendant clearly has a personal interest in the corpus of funds he laundered.[2] See Seher, 562 F.3d at 1372; see also United States v. Huber, 404 F.3d 1047, 1056 (8th Cir. 2005) (explaining that § 982(a)(1) permits forfeiture money judgments).

The Supreme Court's decision in Honeycutt v. United States, 581 U.S. ___, 137 S. Ct. 1626 (2017), does not change this analysis. Honeycutt held only that a district court may not hold members of a conspiracy jointly and severally liable for property that one conspirator, but not the other, acquired from the crime. See id. at 1630, 1632. In holding that joint and several liability is not permitted under the forfeiture laws, the Supreme Court did not rule on the question of whether money judgments are unauthorized. See United States v. Gorski, 880 F.3d 27, 40–41 (1st Cir. 2018) (noting "Honeycutt did not rule on" the question of whether money judgments are authorized by statute (quotation marks omitted)); see also United States v. Bikundi, 926 F.3d 761, 794 (D.C. Cir. 2019) (per curiam) (stating that "it is unclear whether Honeycutt's logic extends to" forfeiture under § 982(a)(1)), cert. denied, 591 U.S. ___, ___ S. Ct. ___ (June 22, 2020) (No. 19-1020). But in any

[2] There is an exception to this rule for intermediaries who "handled but did not retain the property in the course of the money laundering offense" and did not "conduct[] three or more separate transactions involving a total of $100,000 or more in any twelve month period." 18 U.S.C. § 982(b)(2). These circumstances do not apply to Mr. Waked.

event, rather than "abolishing in personam judgments against conspirators, the [Honeycutt] Court presumed the continued existence of in personam proceedings when it stated that the statute at issue there 'adopt[ed] an in personam aspect to criminal forfeiture.'" Elbeblawy, 899 F.3d at 941 (second alteration in original) (quoting Honeycutt, 137 S. Ct. at 1635).

Unless and until Congress, the Supreme Court, or this Court sitting en banc changes the law of forfeiture, we will follow this Court's precedent permitting forfeiture money judgments.

b. The Laundered Money

Mr. Waked makes several arguments for why, even if forfeiture money judgments are allowed by statute, the District Court was right not to order forfeiture against him. First, he argues that imposition of forfeiture against him would be "impermissible double counting" because he returned the money to the Bank. Second, he argues that the interest in the laundered money was Vida Panama's, not his. Finally, he argues the property for which forfeiture is sought was not "tainted," and thus cannot be ordered forfeited. We reject all three arguments.

No court has directly confronted the question of whether laundered money that winds up back with a victim of the scheme is still property "involved in" the offense for forfeiture purposes. But two courts have examined a related question

in the context of 18 U.S.C. § 982(a)(2), which provides for forfeiture of "any property constituting, or derived from, proceeds" obtained as the result of certain financial crimes. In United States v. Boulware, 384 F.3d 794 (9th Cir. 2004), the defendant was convicted for, among other things, making false statements to obtain a loan from a financial institution, thereby triggering § 982(a)(2)'s forfeiture obligation. Id. at 813. Although the defendant repaid the loan, the Ninth Circuit held he was not entitled "to a set-off" for otherwise forfeitable property that he returned to the defrauded institution. Id.[3] The Ninth Circuit noted that "§ 982(b)(1) incorporates the provisions of 21 U.S.C. § 853(c)," which provides that the government's interest in forfeitable property vests upon the commission of the criminal act. Id. It is not difficult to apply this principle to money laundering, where the government's interest in the corpus vests "the moment" such property is laundered. See United States v. McCorkle, 321 F.3d 1292, 1294 n.2 (11th Cir. 2003). Even if we agreed that laundered funds voluntarily returned to the victim are not always subject to forfeiture, see United States v. Hawkey, 148 F.3d 920, 928 (8th Cir. 1998), that is not what happened in Mr. Waked's case. Mr. Waked does not argue that he "returned" the fraudulently obtained funds to the Bank out

[3] The Second Circuit has also held that "§ 982(a) of the criminal forfeiture statute does not permit a defendant to offset loan proceeds that have been repaid." United States v. Annabi, 746 F.3d 83, 85 (2d Cir. 2014)

of the goodness of his heart. His laundering scheme depended on the Bank being repaid in full at the conclusion of each mirror-image transaction.

Mr. Waked's reliance on cases discussing so-called "double recovery" of property is also misplaced. In United States v. Ruff, 420 F.3d 772 (8th Cir. 2005), the Eighth Circuit doubted that a district court could order restitution to a government agency where that same government agency had already received forfeiture from the defendant. See id. at 775. But no such double recovery would result here because Mr. Waked made no payment to the government body seeking forfeiture. This distinction animated our decision in Joseph, where we held the district court had no authority to offset the defendant's restitution obligation (owed to the IRS) by the forfeited amount (owed to the Department of Justice). 743 F.3d at 1355–56. Thus, even if our Circuit did follow the rule announced in Ruff, that principle would not aid Mr. Waked.

Mr. Waked next argues that only his interest in the property can be forfeited, and because the money was laundered using Vida Panama's accounts, in personam forfeiture against him is not appropriate. Mr. Waked's argument on this point relies on a misreading of this Court's precedent in United States v. Gilbert, 244 F.3d 888 (11th Cir. 2001). Mr. Waked says Gilbert stands for the idea that any forfeiture judgment is limited to the "[d]efendant's interest in the actual property subject to forfeiture." Br. of Appellee at 11 (emphasis added) (citing Gilbert, 244

F.3d at 918–19). Yet a defendant who is convicted of money laundering still has an "interest" in the money that was laundered, even if the money was not held in the defendant's personal account. See, e.g., Seher, 562 F.3d at 1368 ("A person convicted of violating 18 U.S.C. § 1956 . . . must forfeit to the government . . . that money or property which was actually laundered . . . .").

As part of his plea, Mr. Waked acknowledged that he personally applied for the credit draws and redeposited the money in Vida Panama's account with ICBC. He also acknowledged that he "intentionally misrepresented the nature and purpose of these financial transactions in order to induce ICBC to issue the loans and wire transfers." He did all this not as a bystander, but as general manager and part owner of Vida Panama with signature authority over its bank accounts. Allowing Mr. Waked to escape forfeiture on the ground that the interest in the laundered funds was actually Vida Panama's, not his own, would relieve him of culpability for the offense to which he already pled guilty. As 18 U.S.C. § 982(b)(2) makes clear, a defendant can only avoid this outcome if he "acted merely as an intermediary." Mr. Waked was more than an intermediary here. See supra at 12 & n.2.

Finally, Mr. Waked argues criminal forfeiture can only be ordered against "tainted property," and that there is no tainted property here because the laundered funds were returned to the Bank with interest. This argument derives from the

ruling in Honeycutt that forfeitable property under 21 U.S.C. § 853(a) is limited to "tainted property obtained as the result of or used to facilitate the crime." 137 S. Ct. at 1633. However, this aspect of the Honeycutt holding was based on the language of § 853(a), which limits forfeiture to "proceeds the person obtained directly or indirectly" as the result of the crime. By contrast, the government is seeking forfeiture against Mr. Waked under 18 U.S.C. § 982(a)(1). And because § 982(a)(1) contains neither a "proceeds" nor an "obtained" limitation, Honeycutt's "tainted property" requirement does not apply to this case. See United States v. Chittenden, 896 F.3d 633, 637 (4th Cir. 2018) (recognizing that Honeycutt's restriction of forfeiture to "tainted property the defendant personally acquired" is limited to § 853(a) and other laws with identical language).[4]

C. AVAILABILITY OF SUBSTITUTE FORFEITURE

The government also argues a forfeiture money judgment is available because 21 U.S.C. § 853(p) permits substitute forfeiture where, as here, a

[4] We also note that the District Court was mistaken when it construed Mr. Waked's plea agreement as precluding forfeiture. The District Court said at the Rule 35(a) hearing that the plea agreement's reference to "property . . . not otherwise recovered" as the basis for the forfeiture amount precluded forfeiture since the laundered money was returned to the Bank. This phrase does not preclude forfeiture. The plea agreement's use of the word "recovered" in the forfeiture context clearly refers to property not already recovered for forfeiture by the United States, rather than the Bank. See, e.g., Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 631, 109 S. Ct. 2646, 2655 (1989) (noting the "strong governmental interest in obtaining full recovery of all forfeitable assets").

defendant does not retain laundered funds.[5] Br. of Appellant at 32; Reply Br. at 16. Section 853(p) provides for forfeiture in the amount of "the property involved in or traceable to the crime" if that property "is not available for forfeiture." United States v. Soreide, 461 F.3d 1351, 1352 n.1 (11th Cir. 2006) (per curiam); see also United States v. Bermudez, 413 F.3d 304, 306 (2d Cir. 2005) (per curiam) (holding that substitute forfeiture for cases arising under § 982(a)(1) may be ordered in the amount of the laundering corpus). Although there are five general circumstances in which § 853(p) applies, the government argues only one is relevant here: that the forfeitable property has, "as a result of any act or omission of the defendant . . . [,] been transferred or sold to, or deposited with, a third party." 21 U.S.C. § 853(p)(1)(B).

Mr. Waked argues substitute forfeiture is unavailable—and thus that the district court should be affirmed—because the Bank is not a third party within the meaning of § 853(p)(1)(B). According to Mr. Waked, this is so because the Bank was the original and still-current owner of the laundered money, as opposed to a mere "third party" to whom the money was transferred. But Mr. Waked provides

[5] Mr. Waked says "the Government made no . . . motion or showing in the trial court" that the substantive conditions for substitute forfeiture are present, so it should not be allowed to make this argument on appeal. Br. of Appellee at 16. The record simply does not bear this out. The government repeatedly argued before the District Court that substitute forfeiture applies here. By that same token, Mr. Waked argued before the District Court—as he does on appeal—that the government's inability to satisfy the requirements of 21 U.S.C. § 853(p) precludes the court from entering an order of forfeiture.

no support for his conclusory statement that victims of money laundering cannot also be third parties under § 853(p). Neither can we find any support for this idea in the text of the statute. Section 853(p)(1)(B) distinguishes between only "the defendant" and "a third party" to whom property was transferred. We see no reason why a victim of money laundering could not also have received a transfer of the property. See United States v. Fabian, 764 F.3d 636, 637 (6th Cir. 2014) ("One of those third parties was Jerry Mais, a victim of the fraud . . . ."). Our reading is confirmed by other provisions of the law, such as § 853(c)'s use of the term "third party" to refer to "a person other than the defendant." Again, there is no obvious reason why this term could not include a victim of the defendant's conduct.

We decline to affirm the District Court on the ground that substitute asset forfeiture is improper.

* * *

The definition of property in 18 U.S.C. § 982(a)(1) is distinct from that in the other subsections of § 982(a), as well as 21 U.S.C. § 853(a). Our ruling allows forfeiture in the amount of property that Mr. Waked transferred as a part of his laundering scheme. We understand this outcome to be what Congress intended when it used the broad term "any property, real or personal, involved in such offense" and instituted a scheme of substitute forfeiture. We therefore conclude

that the District Court was under an obligation to order forfeiture against Mr. Waked and we reverse its order to the contrary.

IV.

The Eighth Amendment prohibits the imposition of "excessive fines." U.S. Const. amend. VIII. A forfeiture payment is a "fine" within the meaning of the Eighth Amendment if it "constitute[s] punishment for an offense." Bajakajian, 524 U.S. at 328, 118 S. Ct. at 2033. A criminal forfeiture money judgment is intended to punish. See id. "[A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." Id. at 334, 118 S. Ct. at 2036. In this Circuit, consideration of whether a punitive forfeiture violates the Eighth Amendment is governed by three main factors: "(1) whether the defendant falls into the class of persons at whom the criminal statute was principally directed; (2) other penalties authorized by the legislature (or the Sentencing Commission); and (3) the harm caused by the defendant." United States v. Sperrazza, 804 F.3d 1113, 1127–28 (11th Cir. 2015) (quotation marks omitted).

The District Court, applying these Eighth Amendment precepts, held that a forfeiture order of $20,852,000[6] would be excessively punitive because "little harm

[6] The government now clarifies it is seeking a forfeiture judgment in the lesser amount of "$10,426,000, representing the total amount of funds actually used in the transactions." Reply Br. at 25 n.9.

was caused by the Defendant." For this reason, the court held that, "even if it were required to impose [forfeiture], a forfeiture money judgment of $520,000 would be appropriate ($10,000 for each of the 52 transactions in this case)." The government argues on appeal that forfeiture of $10,426,000—the amount of money the Bank allowed Mr. Waked to transfer, rather than the amount both transferred and redeposited—is not constitutionally excessive.

Reviewing the District Court's legal analysis de novo, we conclude the court erred in its holding that a fine of $10,000 per transaction is the constitutional ceiling for an order of forfeiture against Mr. Waked. The District Court went astray by considering only one of the enumerated factors—harm caused by the defendant—in performing the excessiveness analysis. In addition, the District Court's application of that factor was erroneous because the court failed to properly define the harm. For these reasons, we vacate the District Court's holding that any forfeiture order above $520,000 would be unconstitutionally excessive.

A. CLASS OF PERSONS

First, Mr. Waked is within the class of persons whom the money laundering statutes were meant to cover. He was not merely an intermediary. He was a sophisticated party who carried out a multi-million-dollar money laundering scheme over the course of several years. See 18 U.S.C. § 1957(a); see also Sperrazza, 804 F.3d at 1127 (holding that defendant's unlawful tax evasion "places

him 'at the dead center' of the class of persons" at whom the statute criminalizing such conduct is directed). Mr. Waked's role necessitates an order of forfeiture to be instituted against him, presuming such an order complies with the other constitutional requirements.

B. AUTHORIZED PENALTIES

The second factor requires the court to consider whether "the order of forfeiture is excessive in relation to the penalties authorized by the Congress and the Sentencing Commission." Sperrazza, 804 F.3d at 1127. If the value of the forfeited property is within the permissible range of fines under the relevant statute or sentencing guideline, the forfeiture is presumptively constitutional. See id. The maximum fine for criminal money laundering is "twice the amount of the criminally derived property involved in the transaction." 18 U.S.C. § 1957(b)(2). And the statute defines "criminally derived property" as "any property constituting, or derived from, proceeds obtained from a criminal offense." Id. § 1957(f)(2).

Mr. Waked argues the government conceded before the District Court that "there are no proceeds of the offense" and so this penalty provision does not apply to him. This argument misunderstands the word "proceeds," which has a different meaning in § 1957 than in substantive forfeiture provisions. In the context of § 1957, the word "proceeds" generally refers to the total revenue—"receipts as well as profits"—of the underlying criminal offense. United States v. Jennings,

599 F.3d 1241, 1252 (11th Cir. 2010) (quotation marks omitted). Here, Mr. Waked defrauded the Bank by causing it to pay on Vida Panama's line of credit and allowing him to transfer money to Star Textile and Global World. These are the "proceeds" to which § 1957(f)(2) refers. See Oral Arg. Recording (Feb. 11, 2020) at 1:38–1:46 ("[T]here were proceeds from . . . the specified unlawful activity[,] the preceding bank fraud on the Panamanian bank . . . ."); see also United States v. Kratt, 579 F.3d 558, 560 (6th Cir. 2009) (defining "receipts . . . received from the fraudulently obtained loans" as including the full "amount of the loans").

Mr. Waked does not point to anything other than the government's supposed concession at the forfeiture hearing in support of his argument that § 1957(b)(2) should not be used to determine the maximum fine. As we read the record, the government did not waive the right to argue that there were bank fraud proceeds. And since the money Mr. Waked fraudulently obtained are proceeds within the meaning of § 1957(f)(2), the maximum fine for his money laundering offense is twice the amount of money "involved in" the laundering scheme. While this figure appears to be $20,852,000,[7] the District Court has not made the findings of fact

[7] The Probation Department listed this amount as the maximum fine in the PSR and Mr. Waked did not object. Assuming this figure—or something close to it—is correct, United States Sentencing Guidelines § 5E1.2(c)(2), which limits the maximum fine based on the defendant's guideline offense level, would not apply because Mr. Waked was "convicted under a statute authorizing [] a maximum fine greater than $500,000." U.S.S.G. § 5E1.2(c)(4).

necessary to arrive at the proper forfeiture amount.[8] Once it does, any forfeiture amount below the maximum fine will be presumptively constitutional.

C. HARM CAUSED BY THE DEFENDANT

Finally, the court must take account of the harm caused by the defendant. The District Court found that Mr. Waked's conduct caused little harm because "all of the funds were returned to the bank with interest." But for some crimes, including money laundering, the harm "does not generally fall upon an individual, but falls upon society in general." United States v. Martin, 320 F.3d 1223, 1227 (11th Cir. 2003) (per curiam) (quoting United States v. Thompson, 40 F.3d 48, 51 (3d Cir. 1994)). The District Court erred by failing to look beyond the impact on the Bank's bottom line when considering whether Mr. Waked's conduct was harmful.

To the extent the District Court's order implicitly considered the harm Mr. Waked caused to society, it erred in comparing his case to Bajakajian and United States v. Ramirez, 421 F. App'x 950 (11th Cir. 2011) (per curiam) (unpublished).[9]

[8] Our dissenting colleague argues we should defer any discussion of the excessiveness of the forfeiture amount until after the District Court has made the appropriate findings. Post at 33–34 & n.2. This we cannot do. In its order denying forfeiture, the District Court held that, "were [it] required to impose a forfeiture money judgment," only "a forfeiture money judgment of $520,000 would be appropriate." R. Doc. 375 at 2 n.1. We already held that the District Court is required to impose a forfeiture money judgment, supra at 19–20, so it follows that we must reach the court's alternative holding that any forfeiture amount over $520,000 would be excessive.

[9] In addition to being substantively distinguishable, we note that Ramirez, an unpublished opinion, is not binding precedent in this Circuit. See 11th Cir. R. 36-2.

In Ramirez, a panel of our Court characterized the defendant as having committed a mere "reporting offense." 421 F. App'x at 952. We noted the defendant's conduct was not part of an "attempt to conceal his wrongdoing" and that the money involved in the transactions "was not connected to any illegal activity." Id. Similar facts led the Supreme Court in Bajakajian to conclude that forfeiture of $357,144, the amount of money the defendant failed to declare to customs inspectors, would be unconstitutionally excessive. See Bajakajian, 524 U.S. at 337–39, 118 S. Ct. at 2038–39. By contrast, the greater harm from money laundering is usually obvious: criminals launder money to cover up their criminal conduct, and society suffers "when criminally derived funds are laundered to allow the criminal unfettered, unashamed and camouflaged access to the fruits of those ill-gotten gains." United States v. O'Kane, 155 F.3d 969, 972–73 (8th Cir. 1998). So, in Martin, this Court approved of the district court's calculation of the "harm" as equaling the amount the defendant laundered through the 97 different monetary transactions for which he was convicted. 320 F.3d at 1226–27. Our Court said that calculating the harm simply based on the value of the stolen check that gave rise to these transactions would not take full stock of the harm to society. Id. at 1227. In such a case, society has an interest in redressing "the injection of illegal proceeds into the stream of commerce." Id. (quotation marks omitted). Similarly, when a laundering scheme covers up the movement of drug money, the conduct "is

harmful in and of itself." United States v. Chaplin's, Inc., 646 F.3d 846, 853 (11th Cir. 2011).

On remand, the District Court will have an opportunity to make detailed findings regarding the quantum of harm caused by Mr. Waked. When it does, it must consider the adverse impact on society that money laundering generally has as well as the specific conduct that Mr. Waked engaged in. Only after making those findings will the court be able to determine the constitutional contours of the forfeiture judgment against Mr. Waked.

V.

Although we reverse the District Court's denial of the government's motion for forfeiture, we do not set the amount of the forfeiture required. The District Court has not conducted any factfinding to that effect, nor has it had the opportunity to conduct a proper constitutional analysis. The District Court must be given an opportunity to do so in the first instance.

REVERSED IN PART, VACATED IN PART, AND REMANDED.

LAGOA, Circuit Judge, concurring in part and dissenting in part:

Because the statutory language in 18 U.S.C. § 982(a)(1) and 28 U.S.C. § 2461(c) is mandatory, leaving no discretion to the district court, I concur with the majority opinion that the district court must enter a forfeiture money judgment against Mr. Waked and that such judgment must reflect the total money laundered through Mr. Waked's conspiracy. *See, e.g.*, *United States v. Hernandez*, 803 F.3d 1341, 1343 (11th Cir. 2015) (discussing the mandatory nature of 28 U.S.C. § 2461(c)); *United States v. Fleet*, 498 F.3d 1225, 1229 (11th Cir. 2007) (interpreting "shall order" language in 21 U.S.C. § 853(p)). Furthermore, the text of § 982(a)(1) and our precedent leave no question that the amount subject to forfeiture in this case includes the amount laundered by Mr. Waked, even if he paid those funds back to the bank. *See* 18 U.S.C. § 982(a)(1) (requiring forfeiture of "any property . . . involved in such offense"); *United States v. Seher*, 562 F.3d 1344, 1368 (11th Cir. 2009); *see also United States v. Bermudez*, 413 F.3d 304, 306 (2d Cir. 2005) (finding that § 982(a)(1), read in conjunction with § 982(b)(2), allows for forfeiture of assets "up to the amount laundered . . . even if he never retained those funds").

I respectfully disagree, however, with the majority's discussion in Parts III(C) and IV of the opinion. The government has not yet sought substitute asset forfeiture. Similarly, the district court has not yet made the factual findings for it to conclude whether or not the forfeiture amount is excessive under the Eighth Amendment.

Because it is premature for this Court to reach either of those issues on this appeal, I respectfully dissent from those portions of the majority opinion.

I. Substitute Asset Forfeiture Pursuant to 21 U.S.C. § 853(p)

The government has three, nonexclusive avenues for forfeiture relief against Mr. Waked. *See generally United States v. Candelaria–Silva*, 166 F.3d 19, 42 (1st Cir. 1999) (discussing three types of forfeiture relief against a criminal defendant). First, the government may seek an *in personam* forfeiture money judgment against the defendant. *United States v. Elbeblawy*, 899 F.3d 925, 940–41 (11th Cir. 2018) (upholding district court's authority to enter forfeiture money judgments). Second, the government may seek direct forfeiture of specific property made forfeitable by statute. *See* 18 U.S.C. § 982(a)(1), (b)(1); 21 U.S.C. § 853(a). Third, in the absence of directly forfeitable property, the government may seek forfeiture of other property belonging to the defendant—that is, substitute property—by meeting the requirements of 21 U.S.C. § 853(p). *See* 18 U.S.C. § 982(b)(1).

These three separate forms of forfeiture relief are reflected in the Rules of Criminal Procedure. A preliminary order of forfeiture must include the amount of any money judgment, direct the forfeiture of specific property, and, "*if the government has met the statutory criteria*," direct forfeiture of any substitute property. Fed. R. Crim. P. 32.2(b)(2)(A) (emphasis added). If the government subsequently identifies substitute property subject to forfeiture under applicable

statutes, it may move for a new or amended order of forfeiture. Fed. R. Crim. P. 32.2(e). Put simply, substitute asset forfeiture and forfeiture money judgments are separate forfeiture remedies. The latter is not dependent on the existence of forfeitable substitute property or the government's entitlement under § 853(p). *See United States v. Lo*, 839 F.3d 777, 792 (9th Cir. 2016) ("[W]here the government does not seek substitute property under Rule 32.2(e), but seeks only 'a money judgment as a form of criminal forfeiture under Rule 32.2(b),' those requirements [of § 853(p)] are inapplicable.").

Here, the government sought a forfeiture money judgment against Mr. Waked. It did not request relief under § 853(p)—the substitute asset forfeiture provision—in its initial and subsequent motions and memoranda nor did it identify specific substitute property to be forfeited. Specifically, the government stated that "[b]ecause the United States has not, as of this date, identified specific property to forfeit, it seeks a money judgment in" the total amount laundered by Mr. Waked. The government mentioned the statutes governing substitute asset forfeiture only in later briefing, and did so only to support its argument that the district court could (and must) enter a forfeiture money judgment even though Mr. Waked returned all laundered funds to the bank. Specifically, the government argued that "[t]he exemption in Section 982(b)(2) on forfeiting substitute assets would make no sense if Section 982(a)(1) limited forfeiture only to the amount of funds that a defendant

had retained for himself." Moreover, in those filings, the government reiterated that it was seeking entry of an *in personam* forfeiture money judgment against Mr. Waked. Similarly, at the hearing on the government's forfeiture motion, the government pointed to the substitute asset forfeiture provisions to address the district court's main concern that it may be improper to order forfeiture of property that is no longer with the defendant. Thus, throughout the proceedings before the district court, the government maintained that it sought a forfeiture money judgment "in an amount equal to the amount of money that was involved in the money laundering offense."

On appeal, the government does not take the position that it is entitled to a forfeiture money judgment against Mr. Waked under §853(p) and § 982(b)(2) as a form of substitute asset forfeiture. Rather, the government acknowledges that the money judgment is a means for the government to memorialize Mr. Waked's forfeiture obligations so that it can later target substitute assets to satisfy that judgment. As it did below, the government discusses § 853(p) and § 982(b)(2) only to demonstrate that Congress, by incorporating substitute asset relief and providing a safe harbor for low-level laundering intermediaries, expressed an intent to hold large-scale money launderers liable for the total amount laundered, even if they do not retain the laundered proceeds. The government further clarifies its position by noting that a money judgment is necessary because it would "allow[] the government

to enforce that judgment by attempting to locate substitute property belonging to Waked up to the value of that money judgment."

The majority opinion, however, suggests that substitute asset forfeiture is available to the government and rejects Mr. Waked's argument that the bank is not a third-party transferee for purposes of § 853(p)(1)(B). The majority's conclusion appears to stem from the notion that the government based its entitlement to forfeiture, at least in part, on the substitute asset forfeiture provisions. As discussed above, the record is clear that the government moved for only a money judgment. More importantly, such a conclusion would blend two separate forfeiture remedies, and relieve the government from complying with the requirements of § 853(p) while depriving Mr. Waked of the opportunity to contest them.

I agree that the government is entitled to a forfeiture money judgment in the amount of the money laundered by Mr. Waked, *see* 18 U.S.C. § 982(a)(1), and that nothing in § 853(p) affects the district court's obligation to enter the requested money judgment. But any additional questions relating to entitlement to substitute asset forfeiture are not before this Court. Once the district court enters the requested money judgment, the government may seek forfeiture against substitute property owned by Mr. Waked, if any. If it chooses to proceed against such substitute property, the government would have to move under Rule 32.2 and meet the relevant statutory requirements by a preponderance of the evidence. *See United States v.*

Hasson, 333 F.3d 1264, 1278–79 (11th Cir. 2003). This has not happened yet, and I therefore would not address any issues relating to that process in this appeal.

II. The Eighth Amendment Analysis

In a footnote, the district court stated that the forfeiture amount requested by the government was constitutionally excessive under the Eighth Amendment because Mr. Waked's criminal activity caused little harm. The district court noted that, "if it were required to impose one, a forfeiture money judgment of $520,000 would be appropriate ($10,000 for each of the 52 transactions in this case)." In response, the majority applies this Court's excessive fine test in *United States v. Sperrazza*, 804 F.3d 1113 (11th Cir. 2015), and concludes that the district court erred in finding that any forfeiture money judgment beyond $520,000 would be unconstitutional under the Eighth Amendment.[1]

[1] The majority characterizes the district court's footnote as an alternative holding. However, the sole issue before the district court was whether entry of a forfeiture money judgement was mandatory. Nowhere in its footnote does the district court contend that the Eighth Amendment precludes *entry* of a forfeiture money judgment against Mr. Waked. Instead, the district court's brief Eighth Amendment discussion begins with "[e]ven if the Court were required to impose a forfeiture money judgment" and concludes with what amount "would be appropriate." This statement is dictum, not a holding. *See Edwards v. Prime, Inc.*, 602 F.3d 1276, 1289 (11th Cir. 2010) ("All statements that go beyond the facts of the case—and sometimes, but not always, they begin with the word 'if'—are dicta."); *see also In re BFW Liquidation*, 899 F.3d 1178, 1186 (11th Cir. 2018) (noting that a statement constitutes dictum, not a holding, if it is unnecessary to the results of the case). The only holding by the district court pertains to the entry of a forfeiture money judgment against Mr. Waked. Until the district court enters a money judgment against Mr. Waked and decides whether to limit the amount based on the Eighth Amendment, there is no holding on that issue for us to review.

Sperrazza requires us to consider "(1) whether the defendant falls into the class of persons at whom the criminal statute was principally directed; (2) other penalties authorized by the legislature (or the Sentencing Commission); and (3) the harm caused by the defendant." *Id.* at 1127 (quoting *United States v. Browne*, 505 F.3d 1229, 1281 (11th Cir. 2007)). The second prong of that inquiry, which could afford a forfeiture order a strong presumption of constitutionality, *see United States v. Dicter*, 198 F.3d 1284, 1292 (11th Cir. 1999), requires a specific factual finding in this case.[2] The maximum fine available against Mr. Waked depends on the total "amount of the criminally derived property involved in" Mr. Waked's offenses. 18 U.S.C. § 1957(b)(2); *accord* U.S.S.G. § 5E1.2(c).

This Court recognizes that the district court is the best forum to decide and weigh the various fact-based considerations that drive the excessive fine analysis. *See, e.g.*, *Seher*, 562 F.3d at 1371 (remanding Eighth Amendment issue to the district court for factual findings because this Court did not have a clear factual basis for evaluating whether forfeiture of certain assets would constitute an excessive fine); *United States v. Land, Winston County*, 163 F.3d 1295, 1303 (11th Cir. 1998) (remanding Eighth Amendment issue to the district court "[b]ecause the issue of

[2] As well, the third prong, i.e., the harm caused by Mr. Waked's conduct, also requires specific factual findings that should be better developed in the district court before reaching this Court. *See, e.g.*, *Sperrazza*, 804 F.3d at 1128 (considering evidence regarding the purpose of, and indirect harm caused by, the defendant's criminal conduct).

excessive fines may depend on various factors and conduct with which the district court is more familiar than this court"). This allocation of fact-finding reflects this Court's limited role in reviewing forfeiture orders for constitutional excessiveness: "rather than strict proportionality, we review fines only for gross disproportionality." *United States v. Chaplin's, Inc.*, 646 F.3d 846, 851 (11th Cir. 2011).

As the majority acknowledges, the district court has not made findings of fact as to the total amount laundered by Mr. Waked. And it follows that the district court has not made the factual findings required by *Sperrazza* based on that total amount. Thus, absent clear determinations from the district court, I believe that the proper procedure is to remand to the district court to provide it the opportunity to make the findings relevant to the excessive fine analysis and for this Court to defer its discussion until it is presented with those findings. Otherwise, by deciding a legal issue based on as-yet-not-made factual determinations, this Court risks issuing an advisory opinion "that merely opine[s] on 'what the law would be upon a hypothetical state of facts.'" *Gagliardi v. TJCV Land Trust*, 889 F.3d 728, 733 (11th Cir. 2018) (quoting *Chafin v. Chafin*, 568 U.S. 165, 172 (2013)).

For the foregoing reasons, I concur in reversing the order denying a forfeiture money judgment to the government, but I would defer discussion on substitute asset forfeiture and the Eighth Amendment until those issues properly reach this Court.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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October 29, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 18-11951-GG
Case Style: USA v. Nidal Hatum
District Court Docket No: 1:15-cr-20189-RNS-1

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Joseph Caruso, GG/lt
Phone #: (404) 335-6177

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11951-GG

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

versus

NIDAL AHMED WAKED HATUM,

Defendant - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: MARTIN, GRANT, and LAGOA, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46

United States District Court
for the
Southern District of Florida

United States of America, Plaintiff v. Nidal Waked Hatum, Defendant.	)))))	Criminal Case No. 15-20189-CR-Scola

Order on Government's Request for Entry of Forfeiture Money Judgment

The Court held a hearing on April 6, 2018 to determine whether a forfeiture money judgment should be entered against the Defendant and, if so, to determine the appropriate amount of the forfeiture money judgment. The Government filed its forfeiture memorandum [**ECF No. 367**], the Defendant filed his response [**ECF No. 372**] and the Government replied [**ECF No. 373**]. After considering the arguments of the parties and relevant legal authorities, and based upon the unique facts of this case, the Court finds the Government is not entitled to the entry of a forfeiture money judgment.

At the outset, the Court acknowledges that forfeiture is a mandatory part of a defendant's sentence under 18 U.S.C. § 982(a)(1) and 28 U.S.C. § 2461 and that it has the authority to enter a forfeiture money judgment pursuant to Fed. R. Crim. P. 32.2(b)(1) and (c)(1) and *United States v. Honeycutt*, 137 S.Ct. 1626 (2017) and *United States v. Padron*, 527 F.3d 1156, 1162 (11th Cir. 2008).

The forfeiture statute in this case, 18 U.S.C. § 982(a)(1), states:

> The Court, in imposing sentence on a person convicted of an offense in violation of section 1956, 1957, or 1960 of this title, *shall* order that the person forfeit to the United States any property, real or personal, *involved in* such offense, of any property traceable to such property. (Emphases added)

18 U.S.C. § 982(b)(2) expressly authorizes the forfeiture of all of the money laundered by the defendant, even if he retained none of it for himself, so long as he conducted three or more separate transactions involving a total of $100,000 in a 12 month period.

So, why then, is the Court not imposing a forfeiture money judgment? The purpose of forfeiture is to ensure that criminals do not retain money for themselves and to punish defendants by transferring ill-gotten gains to the United States. *See United States v. Browne,* 505 F.3d 1229, 1280-81 (11th Cir. 2007); *United States v. Paley,* 442 F.3d 1273, 1278 (11th Cir. 2006). In this case, all of the funds that were laundered were returned to the bank, with interest.

There are no laundered funds that were retained by the Defendant or any other co-conspirator to be forfeited.

Accordingly, it is hereby **ordered** that no forfeiture money judgment shall be entered and the Court **vacates** the Preliminary Order of Forfeiture [**ECF No. 354**] entered on December 18, 2017.[1]

Done and ordered at Miami, Florida, on April 9, 2018.

Robert N. Scola, Jr.
United States District Judge

1 Even if the Court were required to impose a forfeiture money judgment, the amount requested by the Government, $20,852,000, is excessive. *See United States v. Bajakajian*, 524 U.S. 321, 337 (1998); *United States v. Ramirez,* 421 Fed. Appx. 950, 952 (11th Cir. 2011). Since all of the funds were returned to the bank with interest, little harm was caused by the Defendant. Using the reasoning and methodology of *Ramirez,* the Court finds that even if it were required to impose one, a forfeiture money judgment of $520,000 would be appropriate ($10,000 for each of the 52 transactions in this case).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-20189-CR-SCOLA

UNITED STATES OF AMERICA

v.

NIDAL WAKED HATUM,

Defendant.
_____/

FACTUAL PROFFER

The United States of America and the defendant, Nidal Waked Hatum, hereby agree that if this case had proceeded to trial, the United States would have presented evidence sufficient to establish the following facts, which provide the factual basis for the defendant's plea of guilty to Count 1 of the Indictment:

1. During the time period of approximately 2000 through February 2009, the defendant was the general manager of Vida Panama, Z.L., S.A., a Panamanian-based corporation, and was the owner of two Miami-based corporations, Star Textile Manufacturing and Global World Import & Export. He had signature authority on the bank accounts of all three corporations.

2. The defendant during that time period entered into an agreement with others to engage in monetary transactions involving issuance of wire transfers and checks that resulted in transfers of funds between a bank in Panama and a bank in Miami, in the Southern District of Florida, which was insured by the Federal Deposit Insurance Corporation.

3. The value of those funds exceeded $10,000, and the funds were derived from fraud on a bank in Panama in which Vida Panama maintained an account.

4. More specifically, on multiple occasions, the defendant issued wire transfers drawn

on Vida Panama's credit line at the International Commercial Bank of China (ICBC) in Panama, which were sent to the accounts of Star Textile and Global World at Ocean Bank in Miami. The amounts of these wire transfers ranged from approximately $22,000 to $550,000. All of these wire transfers were from loans drawn on a line of credit the defendant had available from ICBC.

5. In order to support the draws on Vida Panama's line of credit, ICBC required justification to show that these international transfers of funds were for purchases of goods to then be sold by Vida Panama.

6. In order to show that the international wire transfers were for such business deals, the defendant claimed that each transfer was for the purchase of goods from Global or from Star. He submitted invoices to ICBC with each wire transfer application that purported to show that Vida Panama had purchased a shipment of televisions or other similar electronic equipment, or appliances, from the company in Miami, which was to be paid for with the wire transfer.

7. There were no such purchases of televisions, electronics, or appliances by Vida Panama from Star or Global, and the invoices were all false. The defendant applied for the credit draws and wire transfers knowing that the supposed reasons for them that he had provided to the bank were untrue.

8. The defendant intentionally misrepresented the nature and purpose of these financial transactions in order to induce ICBC to issue the loans and wire transfers. Had ICBC known of the falsehoods in the applications, it would not have approved the draws on Vida panama's line of credit or the international wire transfers.

9. On each occasion, within approximately 24 hours after the wire transfer was cleared to the account of Star or Global, the defendant deposited one or more checks from that corporation's account into the account of Vida Panama, in a total amount virtually identical to the amount of the wire transfer. The defendant arranged with his co-conspirators to have these checks

sent to him in advance of his making the wire transfers. In most instances, he signed the checks himself when he was ready to have them deposited. This scheme resulted in the same funds being moved from Panama to Miami and almost simultaneously from Miami back to Panama.

10. No bank incurred any financial losses from these transactions and all the draws from the banks were re-paid on time with interest.

NIDAL WAKED HATUM
DEFENDANT

FRANK H. TAMEN
ASSISTANT U.S. ATTORNEY

NORMAN A. MOSCOWITZ
DEFENSE COUNSEL

WALTER NORKIN
ASSISTANT U.S. ATTORNEY

SAMUEL J. RABIN
DEFENSE COUNSEL

Oct. 19, 2017
DATE

10/19/17
HOWARD SREBNICK
DEFENSE COUNSEL

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 46. Forfeiture (Refs & Annos)

18 U.S.C.A. § 981

§ 981. Civil forfeiture

Effective: February 18, 2016

Currentness

(a)(1) The following property is subject to forfeiture to the United States:

(A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 1956, 1957 or 1960 of this title, or any property traceable to such property.

(B) Any property, real or personal, within the jurisdiction of the United States, constituting, derived from, or traceable to, any proceeds obtained directly or indirectly from an offense against a foreign nation, or any property used to facilitate such an offense, if the offense--

(i) involves trafficking in nuclear, chemical, biological, or radiological weapons technology or material, or the manufacture, importation, sale, or distribution of a controlled substance (as that term is defined for purposes of the Controlled Substances Act), or any other conduct described in section 1956(c)(7)(B);

(ii) would be punishable within the jurisdiction of the foreign nation by death or imprisonment for a term exceeding 1 year; and

(iii) would be punishable under the laws of the United States by imprisonment for a term exceeding 1 year, if the act or activity constituting the offense had occurred within the jurisdiction of the United States.

(C) Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of section 215, 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 656, 657, 670, 842, 844, 1005, 1006,

1007, 1014, 1028, 1029, 1030, 1032, or 1344 of this title or any offense constituting "specified unlawful activity" (as defined in section 1956(c)(7) of this title), or a conspiracy to commit such offense.

(D) Any property, real or personal, which represents or is traceable to the gross receipts obtained, directly or indirectly, from a violation of--

(i) section 666(a)(1) (relating to Federal program fraud);

(ii) section 1001 (relating to fraud and false statements);

(iii) section 1031 (relating to major fraud against the United States);

(iv) section 1032 (relating to concealment of assets from conservator or receiver of insured financial institution);

(v) section 1341 (relating to mail fraud); or

(vi) section 1343 (relating to wire fraud),

if such violation relates to the sale of assets acquired or held by the the[1] Federal Deposit Insurance Corporation, as conservator or receiver for a financial institution, or any other conservator for a financial institution appointed by the Office of the Comptroller of the Currency or the National Credit Union Administration, as conservator or liquidating agent for a financial institution.

(E) With respect to an offense listed in subsection (a)(1)(D) committed for the purpose of executing or attempting to execute any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent statements, pretenses, representations or promises, the gross receipts of such an offense shall include all property, real or personal, tangible or intangible, which thereby is obtained, directly or indirectly.

(F) Any property, real or personal, which represents or is traceable to the gross proceeds obtained, directly or indirectly, from a violation of--

(i) section 511 (altering or removing motor vehicle identification numbers);

(ii) section 553 (importing or exporting stolen motor vehicles);

(iii) section 2119 (armed robbery of automobiles);

(iv) section 2312 (transporting stolen motor vehicles in interstate commerce); or

(v) section 2313 (possessing or selling a stolen motor vehicle that has moved in interstate commerce).

(G) All assets, foreign or domestic--

(i) of any individual, entity, or organization engaged in planning or perpetrating any any[1] Federal crime of terrorism (as defined in section 2332b(g)(5)) against the United States, citizens or residents of the United States, or their property, and all assets, foreign or domestic, affording any person a source of influence over any such entity or organization;

(ii) acquired or maintained by any person with the intent and for the purpose of supporting, planning, conducting, or concealing any Federal crime of terrorism (as defined in section 2332b(g)(5)[2] against the United States, citizens or residents of the United States, or their property;

(iii) derived from, involved in, or used or intended to be used to commit any Federal crime of terrorism (as defined in section 2332b(g)(5)) against the United States, citizens or residents of the United States, or their property; or

(iv) of any individual, entity, or organization engaged in planning or perpetrating any act of international terrorism (as defined in section 2331) against any international organization (as defined in section 209 of the State Department Basic Authorities Act of 1956 (22 U.S.C. 4309(b)) or against any foreign Government.[3] Where the property sought for forfeiture is located beyond the territorial boundaries of the United States, an act in furtherance of such planning or perpetration must have occurred within the jurisdiction of the United States.

(H) Any property, real or personal, involved in a violation or attempted violation, or which constitutes or is derived from proceeds traceable to a violation, of section 2339C of this title.

(I) Any property, real or personal, that is involved in a violation or attempted violation, or which constitutes or is derived from proceeds traceable to a prohibition imposed pursuant to section 104(a) of the North Korea Sanctions and Policy Enhancement Act of 2016.

(2) For purposes of paragraph (1), the term “proceeds” is defined as follows:

(A) In cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes, the term “proceeds” means property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net

gain or profit realized from the offense.

(B) In cases involving lawful goods or lawful services that are sold or provided in an illegal manner, the term "proceeds" means the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services. The claimant shall have the burden of proof with respect to the issue of direct costs. The direct costs shall not include any part of the overhead expenses of the entity providing the goods or services, or any part of the income taxes paid by the entity.

(C) In cases involving fraud in the process of obtaining a loan or extension of credit, the court shall allow the claimant a deduction from the forfeiture to the extent that the loan was repaid, or the debt was satisfied, without any financial loss to the victim.

(b)(1) Except as provided in section 985, any property subject to forfeiture to the United States under subsection (a) may be seized by the Attorney General and, in the case of property involved in a violation investigated by the Secretary of the Treasury or the United States Postal Service, the property may also be seized by the Secretary of the Treasury or the Postal Service, respectively.

(2) Seizures pursuant to this section shall be made pursuant to a warrant obtained in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure, except that a seizure may be made without a warrant if--

(A) a complaint for forfeiture has been filed in the United States district court and the court issued an arrest warrant in rem pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims;

(B) there is probable cause to believe that the property is subject to forfeiture and--

(i) the seizure is made pursuant to a lawful arrest or search; or

(ii) another exception to the Fourth Amendment warrant requirement would apply; or

(C) the property was lawfully seized by a State or local law enforcement agency and transferred to a Federal agency.

(3) Notwithstanding the provisions of rule 41(a) of the Federal Rules of Criminal Procedure, a seizure warrant may be issued pursuant to this subsection by a judicial officer in any district in which a forfeiture action against the property may be filed under section 1355(b) of title 28, and may be executed in any district in which the property is

found, or transmitted to the central authority of any foreign state for service in accordance with any treaty or other international agreement. Any motion for the return of property seized under this section shall be filed in the district court in which the seizure warrant was issued or in the district court for the district in which the property was seized.

(4)(A) If any person is arrested or charged in a foreign country in connection with an offense that would give rise to the forfeiture of property in the United States under this section or under the Controlled Substances Act, the Attorney General may apply to any Federal judge or magistrate judge in the district in which the property is located for an ex parte order restraining the property subject to forfeiture for not more than 30 days, except that the time may be extended for good cause shown at a hearing conducted in the manner provided in rule 43(e) of the Federal Rules of Civil Procedure.

(B) The application for the restraining order shall set forth the nature and circumstances of the foreign charges and the basis for belief that the person arrested or charged has property in the United States that would be subject to forfeiture, and shall contain a statement that the restraining order is needed to preserve the availability of property for such time as is necessary to receive evidence from the foreign country or elsewhere in support of probable cause for the seizure of the property under this subsection.

(c) Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under this subsection, the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, may--

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

(d) For purposes of this section, the provisions of the customs laws relating to the seizure, summary and judicial forfeiture, condemnation of property for violation of the customs laws, the disposition of such property or the proceeds from the sale of such property under this section, the remission or mitigation of such forfeitures, and the compromise of claims (19 U.S.C. 1602 et seq.), insofar as they are applicable and not inconsistent with the provisions of this section, shall apply to seizures and forfeitures incurred, or alleged

to have been incurred, under this section, except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be. The Attorney General shall have sole responsibility for disposing of petitions for remission or mitigation with respect to property involved in a judicial forfeiture proceeding.

(e) Notwithstanding any other provision of the law, except section 3 of the Anti Drug Abuse Act of 1986, the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, is authorized to retain property forfeited pursuant to this section, or to transfer such property on such terms and conditions as he may determine--

(1) to any other Federal agency;

(2) to any State or local law enforcement agency which participated directly in any of the acts which led to the seizure or forfeiture of the property;

(3) in the case of property referred to in subsection (a)(1)(C), to any Federal financial institution regulatory agency--

(A) to reimburse the agency for payments to claimants or creditors of the institution; and

(B) to reimburse the insurance fund of the agency for losses suffered by the fund as a result of the receivership or liquidation;

(4) in the case of property referred to in subsection (a)(1)(C), upon the order of the appropriate Federal financial institution regulatory agency, to the financial institution as restitution, with the value of the property so transferred to be set off against any amount later recovered by the financial institution as compensatory damages in any State or Federal proceeding;

(5) in the case of property referred to in subsection (a)(1)(C), to any Federal financial institution regulatory agency, to the extent of the agency's contribution of resources to, or expenses involved in, the seizure and forfeiture, and the investigation leading directly to the seizure and forfeiture, of such property;

(6) as restoration to any victim of the offense giving rise to the forfeiture, including, in the case of a money laundering offense, any offense constituting the underlying specified unlawful activity; or

(7) In[3] the case of property referred to in subsection (a)(1)(D), to the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, or any other Federal financial institution regulatory agency (as defined in section 8(e)(7)(D) of the Federal Deposit Insurance Act).

The Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, shall ensure the equitable transfer pursuant to paragraph (2) of any forfeited property to the appropriate State or local law enforcement agency so as to reflect generally the contribution of any such agency participating directly in any of the acts which led to the seizure or forfeiture of such property. A decision by the Attorney General, the Secretary of the Treasury, or the Postal Service pursuant to paragraph (2) shall not be subject to review. The United States shall not be liable in any action arising out of the use of any property the custody of which was transferred pursuant to this section to any non-Federal agency. The Attorney General, the Secretary of the Treasury, or the Postal Service may order the discontinuance of any forfeiture proceedings under this section in favor of the institution of forfeiture proceedings by State or local authorities under an appropriate State or local statute. After the filing of a complaint for forfeiture under this section, the Attorney General may seek dismissal of the complaint in favor of forfeiture proceedings under State or local law. Whenever forfeiture proceedings are discontinued by the United States in favor of State or local proceedings, the United States may transfer custody and possession of the seized property to the appropriate State or local official immediately upon the initiation of the proper actions by such officials. Whenever forfeiture proceedings are discontinued by the United States in favor of State or local proceedings, notice shall be sent to all known interested parties advising them of the discontinuance or dismissal. The United States shall not be liable in any action arising out of the seizure, detention, and transfer of seized property to State or local officials. The United States shall not be liable in any action arising out of a transfer under paragraph (3), (4), or (5) of this subsection.

(f) All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

(g)(1) Upon the motion of the United States, the court shall stay the civil forfeiture proceeding if the court determines that civil discovery will adversely affect the ability of the Government to conduct a related criminal investigation or the prosecution of a related criminal case.

(2) Upon the motion of a claimant, the court shall stay the civil forfeiture proceeding with respect to that claimant if the court determines that--

(A) the claimant is the subject of a related criminal investigation or case;

(B) the claimant has standing to assert a claim in the civil forfeiture proceeding; and

(C) continuation of the forfeiture proceeding will burden the right of the claimant against self-incrimination in the related investigation or case.

(3) With respect to the impact of civil discovery described in paragraphs (1) and (2), the court may determine that a stay is unnecessary if a protective order limiting discovery would protect the interest of one party without unfairly limiting the ability of the opposing party to pursue the civil case. In no case, however, shall the court impose a protective order as an alternative to a stay if the effect of such protective order would be to allow one party to pursue discovery while the other party is substantially unable to do so.

(4) In this subsection, the terms "related criminal case" and "related criminal investigation" mean an actual prosecution or investigation in progress at the time at which the request for the stay, or any subsequent motion to lift the stay is made. In determining whether a criminal case or investigation is "related" to a civil forfeiture proceeding, the court shall consider the degree of similarity between the parties, witnesses, facts, and circumstances involved in the two proceedings, without requiring an identity with respect to any one or more factors.

(5) In requesting a stay under paragraph (1), the Government may, in appropriate cases, submit evidence ex parte in order to avoid disclosing any matter that may adversely affect an ongoing criminal investigation or pending criminal trial.

(6) Whenever a civil forfeiture proceeding is stayed pursuant to this subsection, the court shall enter any order necessary to preserve the value of the property or to protect the rights of lienholders or other persons with an interest in the property while the stay is in effect.

(7) A determination by the court that the claimant has standing to request a stay pursuant to paragraph (2) shall apply only to this subsection and shall not preclude the Government from objecting to the standing of the claimant by dispositive motion or at the time of trial.

(h) In addition to the venue provided for in section 1395 of title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

(i)(1) Whenever property is civilly or criminally forfeited under this chapter, the Attorney General or the Secretary of the Treasury, as the case may be, may transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer--

(A) has been agreed to by the Secretary of State;

(B) is authorized in an international agreement between the United States and the foreign country; and

(C) is made to a country which, if applicable, has been certified under section 481(h) of the Foreign Assistance Act of 1961.

A decision by the Attorney General or the Secretary of the Treasury pursuant to this paragraph shall not be subject to review. The foreign country shall, in the event of a transfer of property or proceeds of sale of property under this subsection, bear all expenses incurred by the United States in the seizure, maintenance, inventory, storage, forfeiture, and disposition of the property, and all transfer costs. The payment of all such expenses, and the transfer of assets pursuant to this paragraph, shall be upon such terms and conditions as the Attorney General or the Secretary of the Treasury may, in his discretion, set.

(2) The provisions of this section shall not be construed as limiting or superseding any other authority of the United States to provide assistance to a foreign country in obtaining property related to a crime committed in the foreign country, including property which is sought as evidence of a crime committed in the foreign country.

(3) A certified order or judgment of forfeiture by a court of competent jurisdiction of a foreign country concerning property which is the subject of forfeiture under this section and was determined by such court to be the type of property described in subsection (a)(1)(B) of this section, and any certified recordings or transcripts of testimony taken in a foreign judicial proceeding concerning such order or judgment of forfeiture, shall be admissible in evidence in a proceeding brought pursuant to this section. Such certified order or judgment of forfeiture, when admitted into evidence, shall constitute probable cause that the property forfeited by such order or judgment of forfeiture is subject to forfeiture under this section and creates a rebuttable presumption of the forfeitability of such property under this section.

(4) A certified order or judgment of conviction by a court of competent jurisdiction of a foreign country concerning an unlawful drug activity which gives rise to forfeiture under this section and any certified recordings or transcripts of testimony taken in a foreign

judicial proceeding concerning such order or judgment of conviction shall be admissible in evidence in a proceeding brought pursuant to this section. Such certified order or judgment of conviction, when admitted into evidence, creates a rebuttable presumption that the unlawful drug activity giving rise to forfeiture under this section has occurred.

(5) The provisions of paragraphs (3) and (4) of this subsection shall not be construed as limiting the admissibility of any evidence otherwise admissible, nor shall they limit the ability of the United States to establish probable cause that property is subject to forfeiture by any evidence otherwise admissible.

(j) For purposes of this section--

(1) the term "Attorney General" means the Attorney General or his delegate; and

(2) the term "Secretary of the Treasury" means the Secretary of the Treasury or his delegate.

(k) Interbank accounts.--

(1) In general.--

(A) In general.--For the purpose of a forfeiture under this section or under the Controlled Substances Act (21 U.S.C. 801 et seq.), if funds are deposited into an account at a foreign financial institution (as defined in section 984(c)(2)(A) of this title), and that foreign financial institution (as defined in section 984(c)(2)(A) of this title) has an interbank account in the United States with a covered financial institution (as defined in section 5318(j)(1) of title 31), the funds shall be deemed to have been deposited into the interbank account in the United States, and any restraining order, seizure warrant, or arrest warrant in rem regarding the funds may be served on the covered financial institution, and funds in the interbank account, up to the value of the funds deposited into the account at the foreign financial institution (as defined in section 984(c)(2)(A) of this title), may be restrained, seized, or arrested.

(B) Authority to suspend.--The Attorney General, in consultation with the Secretary of the Treasury, may suspend or terminate a forfeiture under this section if the Attorney General determines that a conflict of law exists between the laws of the jurisdiction in which the foreign financial institution (as defined in section 984(c)(2)(A) of this title) is located and the laws of the United States with respect to liabilities arising from the restraint, seizure, or arrest of such funds, and that such suspension or termination would be in the interest of justice and would not harm the national interests of the United States.

(2) No requirement for government to trace funds.--If a forfeiture action is brought against funds that are restrained, seized, or arrested under paragraph (1), it shall not be necessary for the Government to establish that the funds are directly traceable to the funds that were deposited into the foreign financial institution (as defined in section 984(c)(2)(A) of this title), nor shall it be necessary for the Government to rely on the application of section 984.

(3) Claims brought by owner of the funds.--If a forfeiture action is instituted against funds restrained, seized, or arrested under paragraph (1), the owner of the funds deposited into the account at the foreign financial institution (as defined in section 984(c)(2)(A) of this title) may contest the forfeiture by filing a claim under section 983.

(4) Definitions.--For purposes of this subsection, the following definitions shall apply:

(A) Interbank account.--The term "interbank account" has the same meaning as in section 984(c)(2)(B).

(B) Owner.--

(i) In general.--Except as provided in clause (ii), the term "owner"--

(I) means the person who was the owner, as that term is defined in section 983(d)(6), of the funds that were deposited into the foreign financial institution (as defined in section 984(c)(2)(A) of this title) at the time such funds were deposited; and

(II) does not include either the foreign financial institution (as defined in section 984(c)(2)(A) of this title) or any financial institution acting as an intermediary in the transfer of the funds into the interbank account.

(ii) Exception.--The foreign financial institution (as defined in section 984(c)(2)(A) of this title) may be considered the "owner" of the funds (and no other person shall qualify as the owner of such funds) only if--

(I) the basis for the forfeiture action is wrongdoing committed by the foreign financial institution (as defined in section 984(c)(2)(A) of this title); or

(II) the foreign financial institution (as defined in section 984(c)(2)(A) of this title) establishes, by a preponderance of the evidence, that prior to the restraint, seizure, or arrest of the funds, the foreign financial institution (as defined in section 984(c)(2)(A) of this title) had discharged all or part of its obligation to

the prior owner of the funds, in which case the foreign financial institution (as defined in section 984(c)(2)(A) of this title) shall be deemed the owner of the funds to the extent of such discharged obligation.

CREDIT(S)

(Added Pub.L. 99-570, Title I, § 1366(a), Oct. 27, 1986, 100 Stat. 3207-35; amended Pub.L. 100-690, Title VI, §§ 6463(a), (b), 6469(b), 6470(b), (e), (f), 6471(c), Nov. 18, 1988, 102 Stat. 4374, 4377, 4378; Pub.L. 101-73, Title IX, § 963(a), (b), Aug. 9, 1989, 103 Stat. 504; Pub.L. 101-647, Title I, § 103, Title XXV, §§ 2508, 2524, 2525(a), Title XXXV, § 3531, Nov. 29, 1990, 104 Stat. 4791, 4862, 4873, 4874, 4924; Pub.L. 102-393, Title VI, § 638(d), Oct. 6, 1992, 106 Stat. 1788; Pub.L. 102-519, Title I, § 104(a), Oct. 25, 1992, 106 Stat. 3385; Pub.L. 102-550, Title XV, §§ 1525(c)(1), 1533, Oct. 28, 1992, 106 Stat. 4065, 4066; Pub.L. 103-322, Title XXXIII, § 330011(s)(2), Sept. 13, 1994, 108 Stat. 2146; Pub.L. 103-447, Title I, § 102(b), Nov. 2, 1994, 108 Stat. 4693; Pub.L. 106-185, §§ 2(c)(1), 5(a), 6, 8(a), 20, Apr. 25, 2000, 114 Stat. 210, 213 to 215, 224; Pub.L. 107-56, Title III, §§ 319(a), 320, 372(b)(1), 373(b), Title VIII, § 806, Oct. 26, 2001, 115 Stat. 311, 315, 339, 340, 378; Pub.L. 107-197, Title III, § 301(d), June 25, 2002, 116 Stat. 728; Pub.L. 107-273, Div. B, Title IV, § 4002(a)(2), Nov. 2, 2002, 116 Stat. 1806; Pub.L. 109-177, Title I, §§ 111, 120, Title IV, §§ 404, 406(a)(3), Mar. 9, 2006, 120 Stat. 209, 221, 244; Pub.L. 111-203, Title III, § 377(3), July 21, 2010, 124 Stat. 1569; Pub.L. 112-186, § 3, Oct. 5, 2012, 126 Stat. 1428; Pub.L. 114-122, Title I, § 105(a), Feb. 18, 2016, 130 Stat. 101.)

Notes of Decisions (364)

Footnotes

[1] So in original.

[2] So in original. A closing parenthesis probably should appear.

[3] So in original. Probably should not be capitalized.

18 U.S.C.A. § 981, 18 USCA § 981
Current through P.L. 116-259. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 46. Forfeiture (Refs & Annos)

18 U.S.C.A. § 982

§ 982. Criminal forfeiture

Effective: June 5, 2012

Currentness

(a)(1) court, in imposing sentence on a person convicted of an offense in violation of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

(2) The court, in imposing sentence on a person convicted of a violation of, or a conspiracy to violate--

(A) section 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1344 of this title, affecting a financial institution, or

(B) section 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 555, 842, 844, 1028, 1029, or 1030 of this title,

shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation.

(3) The court, in imposing a sentence on a person convicted of an offense under--

(A) section 666(a)(1) (relating to Federal program fraud);

(B) section 1001 (relating to fraud and false statements);

(C) section 1031 (relating to major fraud against the United States);

(D) section 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of insured financial institution);

(E) section 1341 (relating to mail fraud); or

(F) section 1343 (relating to wire fraud),

involving the sale of assets acquired or held by the the[1] Federal Deposit Insurance Corporation, as conservator or receiver for a financial institution or any other conservator for a financial institution appointed by the Office of the Comptroller of the Currency, or the National Credit Union Administration, as conservator or liquidating agent for a financial institution, shall order that the person forfeit to the United States any property, real or personal, which represents or is traceable to the gross receipts obtained, directly or indirectly, as a result of such violation.

(4) With respect to an offense listed in subsection (a)(3) committed for the purpose of executing or attempting to execute any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent statements, pretenses, representations, or promises, the gross receipts of such an offense shall include any property, real or personal, tangible or intangible, which is obtained, directly or indirectly, as a result of such offense.

(5) The court, in imposing sentence on a person convicted of a violation or conspiracy to violate--

(A) section 511 (altering or removing motor vehicle identification numbers);

(B) section 553 (importing or exporting stolen motor vehicles);

(C) section 2119 (armed robbery of automobiles);

(D) section 2312 (transporting stolen motor vehicles in interstate commerce); or

(E) section 2313 (possessing or selling a stolen motor vehicle that has moved in interstate commerce);

shall order that the person forfeit to the United States any property, real or personal, which represents or is traceable to the gross proceeds obtained, directly or indirectly, as a result of such violation.

(6)(A) The court, in imposing sentence on a person convicted of a violation of, or conspiracy to violate, section 274(a), 274A(a)(1), or 274A(a)(2) of the Immigration and

Nationality Act or section 555, 1425, 1426, 1427, 1541, 1542, 1543, 1544, or 1546 of this title, or a violation of, or conspiracy to violate, section 1028 of this title if committed in connection with passport or visa issuance or use, shall order that the person forfeit to the United States, regardless of any provision of State law--

(i) any conveyance, including any vessel, vehicle, or aircraft used in the commission of the offense of which the person is convicted; and

(ii) any property real or personal--

(I) that constitutes, or is derived from or is traceable to the proceeds obtained directly or indirectly from the commission of the offense of which the person is convicted; or

(II) that is used to facilitate, or is intended to be used to facilitate, the commission of the offense of which the person is convicted.

(B) The court, in imposing sentence on a person described in subparagraph (A), shall order that the person forfeit to the United States all property described in that subparagraph.

(7) The court, in imposing sentence on a person convicted of a Federal health care offense, shall order the person to forfeit property, real or personal, that constitutes or is derived, directly or indirectly, from gross proceeds traceable to the commission of the offense.

(8) The court, in sentencing a defendant convicted of an offense under section 1028, 1029, 1341, 1342, 1343, or 1344, or of a conspiracy to commit such an offense, if the offense involves telemarketing (as that term is defined in section 2325), shall order that the defendant forfeit to the United States any real or personal property--

(A) used or intended to be used to commit, to facilitate, or to promote the commission of such offense; and

(B) constituting, derived from, or traceable to the gross proceeds that the defendant obtained directly or indirectly as a result of the offense.

(b)(1) The forfeiture of property under this section, including any seizure and disposition of the property and any related judicial or administrative proceeding, shall be governed by the provisions of section 413 (other than subsection (d) of that section) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853).

(2) The substitution of assets provisions of subsection 413(p) shall not be used to order a defendant to forfeit assets in place of the actual property laundered where such defendant acted merely as an intermediary who handled but did not retain the property in the course of the money laundering offense unless the defendant, in committing the offense or offenses giving rise to the forfeiture, conducted three or more separate transactions involving a total of $100,000 or more in any twelve month period.

CREDIT(S)

(Added Pub.L. 99-570, Title I, § 1366(a), Oct. 27, 1986, 100 Stat. 3207-39; amended Pub.L. 100-690, Title VI, §§ 6463(c), 6464, Nov. 18, 1988, 102 Stat. 4374, 4375; Pub.L. 101-73, Title IX, § 963(c), Aug. 9, 1989, 103 Stat. 504; Pub.L. 101-647, Title XIV, §§ 1401, 1403, Title XXV, § 2525(b), Nov. 29, 1990, 104 Stat. 4835, 4874; Pub.L. 102-393, Title VI, § 638(e), Oct. 6, 1992, 106 Stat. 1788; Pub.L. 102-519, Title I, § 104(b), Oct. 25, 1992, 106 Stat. 3385; Pub.L. 102-550, Title XV, § 1512(c), Oct. 28, 1992, 106 Stat. 4058; Pub.L. 103-322, Title XXXIII, § 330011(s)(1), Sept. 13, 1994, 108 Stat. 2145; Pub.L. 104-191, Title II, § 249(a), (b), Aug. 21, 1996, 110 Stat. 2020; Pub.L. 104-208, Div. C, Title II, § 217, Sept. 30, 1996, 110 Stat. 3009-573; Pub.L. 105-184, § 2, June 23, 1998, 112 Stat. 520; Pub.L. 105-318, § 6(a), Oct. 30, 1998, 112 Stat. 3010; Pub.L. 106-185, § 18(b), Apr. 25, 2000, 114 Stat. 223; Pub.L. 107-56, Title III, § 372(b)(2), Oct. 26, 2001, 115 Stat. 339; Pub.L. 107-273, Div. B, Title IV, § 4002(b)(10), Nov. 2, 2002, 116 Stat. 1808; Pub.L. 109-295, Title V, § 551(c), Oct. 4, 2006, 120 Stat. 1390; Pub.L. 110-161, Div. E, Title V, § 553(b), Dec. 26, 2007, 121 Stat. 2082; Pub.L. 111-203, Title III, § 377(4), July 21, 2010, 124 Stat. 1569; Pub.L. 112-127, § 5, June 5, 2012, 126 Stat. 371.)

Notes of Decisions (139)

Footnotes

[1] So in original.

18 U.S.C.A. § 982, 18 USCA § 982
Current through P.L. 116-259. Some statute sections may be more current, see credits for details.

United States Code Annotated
Title 21. Food and Drugs (Refs & Annos)
Chapter 13. Drug Abuse Prevention and Control (Refs & Annos)
Subchapter I. Control and Enforcement
Part D. Offenses and Penalties

21 U.S.C.A. § 853

§ 853. Criminal forfeitures

Effective: December 1, 2009

Currentness

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law--

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Meaning of term "property"

Property subject to criminal forfeiture under this section includes--

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) Third party transfers

All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) Rebuttable presumption

There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that--

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II.

(e) Protective orders

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section--

(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that--

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(4) Order to repatriate and deposit

(A) In general

Pursuant to its authority to enter a pretrial restraining order under this section, the court may order a defendant to repatriate any property that may be seized and forfeited, and to deposit that property pending trial in the registry of the court, or with the United States Marshals Service or the Secretary of the Treasury, in an interest-bearing account, if appropriate.

(B) Failure to comply

Failure to comply with an order under this subsection, or an order to repatriate property under subsection (p), shall be punishable as a civil or criminal contempt of court, and may also result in an enhancement of the sentence of the defendant under the obstruction of justice provision of the Federal Sentencing Guidelines.

(f) Warrant of seizure

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

(g) Execution

Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

(h) Disposition of property

Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

(i) Authority of the Attorney General

With respect to property ordered forfeited under this section, the Attorney General is authorized to--

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(j) Applicability of civil forfeiture provisions

Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d) of this title shall apply to a criminal forfeiture under this section.

(k) Bar on intervention

Except as provided in subsection (n), no party claiming an interest in property subject to forfeiture under this section may--

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(l) Jurisdiction to enter orders

The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(m) Depositions

In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(n) Third party interests

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that--

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(o) Construction

The provisions of this section shall be liberally construed to effectuate its remedial purposes.

(p) Forfeiture of substitute property

(1) In general

Paragraph (2) of this subsection shall apply, if any property described in subsection (a), as a result of any act or omission of the defendant--

(A) cannot be located upon the exercise of due diligence;

(B) has been transferred or sold to, or deposited with, a third party;

(C) has been placed beyond the jurisdiction of the court;

(D) has been substantially diminished in value; or

(E) has been commingled with other property which cannot be divided without difficulty.

(2) Substitute property

In any case described in any of subparagraphs (A) through (E) of paragraph (1), the court shall order the forfeiture of any other property of the defendant, up to the value of any property described in subparagraphs (A) through (E) of paragraph (1), as applicable.

(3) Return of property to jurisdiction

In the case of property described in paragraph (1)(C), the court may, in addition to any other action authorized by this subsection, order the defendant to return the property to the jurisdiction of the court so that the property may be seized and forfeited.

(q) Restitution for cleanup of clandestine laboratory sites

The court, when sentencing a defendant convicted of an offense under this subchapter or subchapter II involving the manufacture, the possession, or the possession with intent to distribute, of amphetamine or methamphetamine, shall--

(1) order restitution as provided in sections 3612 and 3664 of Title 18;

(2) order the defendant to reimburse the United States, the State or local government concerned, or both the United States and the State or local government concerned for the costs incurred by the United States or the State or local government concerned, as the case may be, for the cleanup associated with the manufacture of amphetamine or methamphetamine by the defendant, or on premises or in property that the defendant owns, resides, or does business in; and

(3) order restitution to any person injured as a result of the offense as provided in section 3663A of Title 18.

CREDIT(S)

(Pub.L. 91-513, Title II, § 413, as added and amended Pub.L. 98-473, Title II, §§ 303, 2301(d)-(f), Oct. 12, 1984, 98 Stat. 2044, 2192, 2193; Pub.L. 99-570, Title I, §§ 1153(b), 1864, Oct. 27, 1986, 100 Stat. 3207-13, 3207-54; Pub.L. 104-237, Title II, § 207, Oct. 3,

1996, 110 Stat. 3104; Pub.L. 106-310, Div. B, Title XXXVI, § 3613(a), Oct. 17, 2000, 114 Stat. 1229; Pub.L. 107-56, Title III, § 319(d), Oct. 26, 2001, 115 Stat. 314; Pub.L. 109-177, Title VII, § 743(a), Mar. 9, 2006, 120 Stat. 272; Pub.L. 111-16, § 5, May 7, 2009, 123 Stat. 1608.)

Notes of Decisions (518)

21 U.S.C.A. § 853, 21 USCA § 853
Current through P.L. 116-259. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Federal Rules of Criminal Procedure for the United States District Courts (Refs & Annos)
Title VII. Post-Conviction Procedures

Federal Rules of Criminal Procedure, Rule 32.2

Rule 32.2 Criminal Forfeiture

Currentness

(a) Notice to the Defendant. A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute. The notice should not be designated as a count of the indictment or information. The indictment or information need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment that the government seeks.

(b) Entering a Preliminary Order of Forfeiture.

(1) Forfeiture Phase of the Trial.

(A) Forfeiture Determinations. As soon as practical after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay.

(B) Evidence and Hearing. The court's determination may be based on evidence already in the record, including any written plea agreement, and on any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable. If the forfeiture is contested, on either party's request the court must conduct a hearing after the verdict or finding of guilty.

(2) Preliminary Order.

(A) Contents of a Specific Order. If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment, directing the forfeiture of specific property, and directing the forfeiture of any substitute property if the government has met the statutory criteria. The court must enter the order without regard to any third party's interest in the property. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

(B) Timing. Unless doing so is impractical, the court must enter the preliminary order sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant under Rule 32.2(b)(4).

(C) General Order. If, before sentencing, the court cannot identify all the specific property subject to forfeiture or calculate the total amount of the money judgment, the court may enter a forfeiture order that:

(i) lists any identified property;

(ii) describes other property in general terms; and

(iii) states that the order will be amended under Rule 32.2(e)(1) when additional specific property is identified or the amount of the money judgment has been calculated.

(3) Seizing Property. The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third-party rights. The court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.

(4) Sentence and Judgment.

(A) When Final. At sentencing--or at any time before sentencing if the defendant consents--the preliminary forfeiture order becomes final as to the defendant. If the order directs the defendant to forfeit specific property, it remains preliminary as to third parties until the ancillary proceeding is concluded under Rule 32.2(c).

(B) Notice and Inclusion in the Judgment. The court must include the forfeiture when orally announcing the sentence or must otherwise ensure that the defendant knows of the forfeiture at sentencing. The court must also include the forfeiture order, directly or by reference, in the judgment, but the court's failure to do so may be corrected at any time under Rule 36.

(C) Time to Appeal. The time for the defendant or the government to file an appeal from the forfeiture order, or from the court's failure to enter an order, begins to run when judgment is entered. If the court later amends or declines to amend a forfeiture order to include additional property under Rule 32.2(e), the defendant or the government may file an appeal regarding that property under Federal Rule of Appellate Procedure 4(b). The time for that appeal runs from the date when the order granting or denying the amendment becomes final.

(5) Jury Determination.

(A) Retaining the Jury. In any case tried before a jury, if the indictment or information states that the government is seeking forfeiture, the court must determine before the jury begins deliberating whether either party requests that the jury be retained to determine the forfeitability of specific property if it returns a guilty verdict.

(B) Special Verdict Form. If a party timely requests to have the jury determine forfeiture, the government must submit a proposed Special Verdict Form listing each property subject to forfeiture and asking the jury to determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

(6) Notice of the Forfeiture Order.

(A) Publishing and Sending Notice. If the court orders the forfeiture of specific property, the government must publish notice of the order and send notice to any person who reasonably appears to be a potential claimant with standing to contest the forfeiture in the ancillary proceeding.

(B) Content of the Notice. The notice must describe the forfeited property, state the times under the applicable statute when a petition contesting the forfeiture must be filed, and state the name and contact information for the government attorney to be served with the petition.

(C) Means of Publication; Exceptions to Publication Requirement. Publication must take place as described in Supplemental Rule G(4)(a)(iii) of the Federal Rules

of Civil Procedure, and may be by any means described in Supplemental Rule G(4)(a)(iv). Publication is unnecessary if any exception in Supplemental Rule G(4)(a)(i) applies.

(D) Means of Sending the Notice. The notice may be sent in accordance with Supplemental Rules G(4)(b)(iii)-(v) of the Federal Rules of Civil Procedure.

(7) Interlocutory Sale. At any time before entry of a final forfeiture order, the court, in accordance with Supplemental Rule G(7) of the Federal Rules of Civil Procedure, may order the interlocutory sale of property alleged to be forfeitable.

(c) Ancillary Proceeding; Entering a Final Order of Forfeiture.

(1) In General. If, as prescribed by statute, a third party files a petition asserting an interest in the property to be forfeited, the court must conduct an ancillary proceeding, but no ancillary proceeding is required to the extent that the forfeiture consists of a money judgment.

(A) In the ancillary proceeding, the court may, on motion, dismiss the petition for lack of standing, for failure to state a claim, or for any other lawful reason. For purposes of the motion, the facts set forth in the petition are assumed to be true.

(B) After disposing of any motion filed under Rule 32.2(c)(1)(A) and before conducting a hearing on the petition, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure if the court determines that discovery is necessary or desirable to resolve factual issues. When discovery ends, a party may move for summary judgment under Federal Rule of Civil Procedure 56.

(2) Entering a Final Order. When the ancillary proceeding ends, the court must enter a final order of forfeiture by amending the preliminary order as necessary to account for any third-party rights. If no third party files a timely petition, the preliminary order becomes the final order of forfeiture if the court finds that the defendant (or any combination of defendants convicted in the case) had an interest in the property that is forfeitable under the applicable statute. The defendant may not object to the entry of the final order on the ground that the property belongs, in whole or in part, to a codefendant or third party; nor may a third party object to the final order on the ground that the third party had an interest in the property.

(3) Multiple Petitions. If multiple third-party petitions are filed in the same case, an order dismissing or granting one petition is not appealable until rulings are made on all the petitions, unless the court determines that there is no just reason for delay.

(4) Ancillary Proceeding Not Part of Sentencing. An ancillary proceeding is not part of sentencing.

(d) Stay Pending Appeal. If a defendant appeals from a conviction or an order of forfeiture, the court may stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review. A stay does not delay the ancillary proceeding or the determination of a third party's rights or interests. If the court rules in favor of any third party while an appeal is pending, the court may amend the order of forfeiture but must not transfer any property interest to a third party until the decision on appeal becomes final, unless the defendant consents in writing or on the record.

(e) Subsequently Located Property; Substitute Property.

(1) In General. On the government's motion, the court may at any time enter an order of forfeiture or amend an existing order of forfeiture to include property that:

(A) is subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered; or

(B) is substitute property that qualifies for forfeiture under an applicable statute.

(2) Procedure. If the government shows that the property is subject to forfeiture under Rule 32.2(e)(1), the court must:

(A) enter an order forfeiting that property, or amend an existing preliminary or final order to include it; and

(B) if a third party files a petition claiming an interest in the property, conduct an ancillary proceeding under Rule 32.2(c).

(3) Jury Trial Limited. There is no right to a jury trial under Rule 32.2(e).

CREDIT(S)

(Added Apr. 17, 2000, eff. Dec. 1, 2000; amended Apr. 29, 2002, eff. Dec. 1, 2002; Mar. 26, 2009, eff. Dec. 1, 2009.)

ADVISORY COMMITTEE NOTES

2000 Adoption

Rule 32.2 consolidates a number of procedural rules governing the forfeiture of assets in

a criminal case. Existing Rules 7(c)(2), 31(e) and 32(d)(2) are also amended to conform to the new rule. In addition, the forfeiture-related provisions of Rule 38(e) are stricken.

Subdivision (a). Subdivision (a) is derived from Rule 7(c)(2) which provides that notwithstanding statutory authority for the forfeiture of property following a criminal conviction, no forfeiture order may be entered unless the defendant was given notice of the forfeiture in the indictment or information. As courts have held, subdivision (a) is not intended to require that an itemized list of the property to be forfeited appear in the indictment or information itself. The subdivision reflects the trend in caselaw interpreting present Rule 7(c). Under the most recent cases, Rule 7(c) sets forth a requirement that the government give the defendant notice that it will be seeking forfeiture in accordance with the applicable statute. It does not require a substantive allegation in which the property subject to forfeiture, or the defendant's interest in the property, must be described in detail. *See United States v. DeFries*, 129 F.3d 1293 (D.C.Cir. 1997) (it is not necessary to specify in either the indictment or a bill of particulars that the government is seeking forfeiture of a particular asset, such as the defendant's salary; to comply with Rule 7(c), the government need only put the defendant on notice that it will seek to forfeit everything subject to forfeiture under the applicable statute, such as all property "acquired or maintained" as a result of a RICO violation). *See also United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660, 665 (4th Cir. 1996), *aff'g* 846 F.Supp. 463 (E.D. Va. 1994) (*Moffitt* I) (indictment need not list each asset subject to forfeiture; under Rule 7(c), this can be done with bill of particulars); *United States v. Voigt*, 89 F.3d 1050 (3rd Cir. 1996) (court may amend order of forfeiture at any time to include substitute assets).

Subdivision (b). Subdivision (b) replaces Rule 31(e) which provides that the jury in a criminal case must return a special verdict "as to the extent of the interest or property subject to forfeiture." *See United States v. Saccoccia*, 58 F.3d 754 (1st Cir. 1995) (Rule 31(e) only applies to jury trials; no special verdict required when defendant waives right to jury on forfeiture issues).

One problem under Rule 31(e) concerns the scope of the determination that must be made prior to entering an order of forfeiture. This issue is the same whether the determination is made by the court or by the jury.

As mentioned, the current rule requires the jury to return a special verdict "as to the extent of the interest or property subject to forfeiture." Some courts interpret this to mean only that the jury must answer "yes" or "no" when asked if the property named in the indictment is subject to forfeiture under the terms of the forfeiture statute--*e.g.* was the property used to facilitate a drug offense? Other courts also ask the jury if the defendant has a legal interest in the forfeited property. Still other courts, including the Fourth

Circuit, require the jury to determine the *extent* of the defendant's interest in the property vis a vis third parties. *See United States v. Ham*, 58 F.3d 78 (4th Cir. 1995) (case remanded to the district court to impanel a jury to determine, in the first instance, the extent of the defendant's forfeitable interest in the subject property).

The notion that the "extent" of the defendant's interest must be established as part of the criminal trial is related to the fact that criminal forfeiture is an *in personam* action in which only the defendant's interest in the property may be forfeited. *United States v. Riley*, 78 F.3d 367 (8th Cir. 1996). When the criminal forfeiture statutes were first enacted in the 1970's, it was clear that a forfeiture of property other than the defendant's could not occur in a criminal case, but there was no mechanism designed to limit the forfeiture to the defendant's interest. Accordingly, Rule 31(e) was drafted to make a determination of the "extent" of the defendant's interest part of the verdict.

The problem is that third parties who might have an interest in the forfeited property are not parties to the criminal case. At the same time, a defendant who has no interest in property has no incentive, at trial, to dispute the government's forfeiture allegations. Thus, it was apparent by the 1980's that Rule 31(e) was an inadequate safeguard against the inadvertent forfeiture of property in which the defendant held no interest.

In 1984, Congress addressed this problem when it enacted a statutory scheme whereby third party interests in criminally forfeited property are litigated by the court in an ancillary proceeding following the conclusion of the criminal case and the entry of a preliminary order of forfeiture. *See* 21 U.S.C. § 853(n); 18 U.S.C. § 1963(1). Under this scheme, the court orders the forfeiture of the defendant's interest in the property--whatever that interest may be--in the criminal case. At that point, the court conducts a separate proceeding in which all potential third party claimants are given an opportunity to challenge the forfeiture by asserting a superior interest in the property. This 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.

The notice provisions regarding the ancillary proceeding are equivalent to the notice provisions that govern civil forfeitures. *Compare* 21 U.S.C. § 853(n)(1) *with* 19 U.S.C. § 1607(a); *see United States v. Bouler*, 927 F.Supp. 911 (W.D.N.C. 1996) (civil notice rules apply to ancillary criminal proceedings). Notice is published and sent to third parties that have a potential interest. *See United States v. BCCI Holdings (Luxembourg) S.A. (In re Petition of Indosuez Bank*), 916 F.Supp. 1276 (D.D.C. 1996) (discussing steps taken by government to provide notice of criminal forfeiture to third parties). If no one files a claim, or if all claims are denied following a hearing, the forfeiture becomes final and the United States is deemed to have clear title to the property. 21 U.S.C. § 853(n)(7);

United States v. Hentz, 1996 WL 355327 (E.D. Pa. June 20, 1996) (once third party fails to file a claim in the ancillary proceeding, government has clear title under § 853(n)(7) and can market the property notwithstanding third party's name on the deed).

Thus, the ancillary proceeding has become the forum for determining the extent of the defendant's forfeitable interest in the property. This allows the court to conduct a proceeding in which all third party claimants can participate and which ensures that the property forfeited actually belongs to the defendant.

Since the enactment of the ancillary proceeding statutes, the requirement in Rule 31(e) that the court (or jury) determine the extent of the defendant' s interest in the property as part of the criminal trial has become an unnecessary anachronism that leads more often than not to duplication and a waste of judicial resources. There is no longer any reason to delay the conclusion of the criminal trial with a lengthy hearing over the extent of the defendant's interest in property when the same issues will have to be litigated a second time in the ancillary proceeding if someone files a claim challenging the forfeiture. For example, in *United States v. Messino*, 917 F.Supp. 1307 (N.D. Ill. 1996), the court allowed the defendant to call witnesses to attempt to establish that they, not he, were the true owners of the property. After the jury rejected this evidence and the property was forfeited, the court conducted an ancillary proceeding in which the same witnesses litigated their claims to the same property.

A more sensible procedure would be for the court, once it (or a jury) determines that property was involved in the criminal offense for which the defendant has been convicted, to order the forfeiture of whatever interest a defendant may have in the property without having to determine exactly what that interest is. If third parties assert that they have an interest in all or part of the property, those interests can be adjudicated at one time in the ancillary proceeding.

This approach would also address confusion that occurs in multi-defendant cases where it is clear that each defendant should forfeit whatever interest he may have in the property used to commit the offense, but it is not at all clear which defendant is the actual owner of the property. For example, suppose A and B are co-defendants in a drug and money laundering case in which the government seeks to forfeit property involved in the scheme that is held in B's name but of which A may be the true owner. It makes no sense to invest the court's time in determining which of the two defendants holds the interest that should be forfeited. Both defendants should forfeit whatever interest they may have. Moreover, if under the current rule the court were to find that A is the true owner of the property, then B would have the right to file a claim in the ancillary proceeding where he may attempt to recover the property despite his criminal conviction. *United States v. Real Property in Waterboro*, 64 F.3d 752 (1st Cir. 1995) (co-defendant in drug/money

laundering case who is not alleged to be the owner of the property is considered a third party for the purpose of challenging the forfeiture of the other co-defendant's interest).

The new rule resolves these difficulties by postponing the determination of the extent of the defendant's interest until the ancillary proceeding. As provided in (b)(1), the court, as soon as practicable after the verdict or finding of guilty in the criminal case, would determine if the property was subject to forfeiture in accordance with the applicable statute, *e.g.*, whether the property represented the proceeds of the offense, was used to facilitate the offense, or was involved in the offense in some other way. The determination could be made based on the evidence in the record from the criminal trial or the facts set forth in a written plea agreement submitted to the court at the time of the defendant's guilty plea, or the court could hold a hearing to determine if the requisite relationship existed between the property and the offense. Subdivision (b)(2) provides that it is not necessary to determine at this stage what interest any defendant might have in the property. Instead, the court would order the forfeiture of whatever interest each defendant might have in the property and conduct the ancillary proceeding.

Subdivision (b)(1) recognizes that there are different kinds of forfeiture judgments in criminal cases. One type is a personal judgment for a sum of money; another is a judgment forfeiting a specific asset. *See, e.g., United States v. Voigt*, 89 F.3d 1050 (3d Cir. 1996) (government is entitled to a personal money judgment equal to the amount involved in the money laundering offense, as well as order forfeiting specific assets involved in, or traceable to, the offense; in addition, if the statutory requirements are met, the government may be entitled to forfeit substitute assets); *United States v. Cleveland*, 1997 WL 537707 (E.D. La. Aug. 26, 1997), *modified*, 1997 WL 602186 (E.D.La. Sept. 29, 1997) (government entitled to a money judgment equal to the amount of money defendant laundered in money laundering case). The finding the court is required to make will depend on the nature of the forfeiture judgment. A number of cases have approved use of money judgment forfeitures. The Committee takes no position on the correctness of those rulings.

To the extent that the government is seeking forfeiture of a particular asset, such as the money on deposit in a particular bank account that is alleged to be the proceeds of a criminal offense, or a parcel of land that is traceable to that offense, the court must find that the government has established the requisite nexus between the property and the offense. To the extent that the government is seeking a money judgment, such as a judgment for the amount of money derived from a drug trafficking offense or the amount involved in a money laundering offense where the actual property subject to forfeiture has not been found or is unavailable, the court must determine the amount of money that the defendant should be ordered to forfeit.

The court may make the determination based on evidence in the record, or on additional evidence submitted by the defendant or evidence submitted by the government in support of the motion for the entry of a judgment of forfeiture. The defendant would have no standing to object to the forfeiture on the ground that the property belonged to someone else.

Under subdivision (b)(2), if the court finds that property is forfeitable, it must enter a preliminary order of forfeiture. It also recognizes that any determination of a third person's interest in the property is deferred until an ancillary proceeding, if any, is held under subdivision (c).

Subdivision (b)(3) replaces Rule 32(d)(2) (effective December 1996). It provides that once the court enters a preliminary order of forfeiture directing the forfeiture of whatever interest each defendant may have in the forfeited property, the government may seize the property and commence an ancillary proceeding to determine the interests of any third party. The subdivision also provides that the Attorney General may designate someone outside of the Department of Justice to seize forfeited property. This is necessary because in cases in which the lead investigative agency is in the Treasury Department, for example, the seizure of the forfeited property is typically handled by agencies other than the Department of Justice.

If no third party files a claim, the court, at the time of sentencing, will enter a final order forfeiting the property in accordance with subdivision (c)(2), discussed *infra*. If a third party files a claim, the order of forfeiture will become final as to the defendant at the time of sentencing but will be subject to amendment in favor of a third party pending the conclusion of the ancillary proceeding.

Because the order of forfeiture becomes final as to the defendant at the time of sentencing, his right to appeal from that order begins to run at that time. As courts have held, because the ancillary hearing has no bearing on the defendant's right to the property, the defendant has no right to appeal when a final order is, or is not, amended to recognize third party rights. *See, e.g., United States v. Christunas*, 126 F.3d 765 (6th Cir. 1997) (preliminary order of forfeiture is final as to the defendant and is immediately appealable).

Because it is not uncommon for sentencing to be postponed for an extended period to allow a defendant to cooperate with the government in an ongoing investigation, the rule would allow the order of forfeiture to become final as to the defendant before sentencing, if the defendant agrees to that procedure. Otherwise, the government would be unable to dispose of the property until the sentencing took place.

Subdivision (b)(4) addresses the right of either party to request that a jury make the determination of whether any property is subject to forfeiture. The provision gives the defendant, in all cases where a jury has returned a guilty verdict, the option of asking that the jury be retained to hear additional evidence regarding the forfeitability of the property. The only issue for the jury in such cases would be whether the government has established the requisite nexus between the property and the offense. For example, if the defendant disputes the government's allegation that a parcel of real property is traceable to the offense, the defendant would have the right to request that the jury hear evidence on that issue, and return a special verdict, in a bifurcated proceeding that would occur after the jury returns the guilty verdict. The government would have the same option of requesting a special jury verdict on this issue, as is the case under current law. *See* Rule 23(a) (trial by jury may be waived only with the consent of the government).

When Rule 31(e) was promulgated, it was assumed that criminal forfeiture was akin to a separate criminal offense on which evidence would be presented and the jury would have to return a verdict. In *Libretti v. United States*, 516 U.S. 29 (1995), however, the Supreme Court held that criminal forfeiture constitutes an aspect of the sentence imposed in a criminal case and that the defendant has no constitutional right to have the jury determine any part of the forfeiture. The special verdict requirement in Rule 31(e), the Court said, is in the nature of a statutory right that can be modified or repealed at any time.

Even before *Libretti*, lower courts had determined that criminal forfeiture is a sentencing matter and concluded that criminal trials therefore should be bifurcated so that the jury first returns a verdict on guilt or innocence and then returns to hear evidence regarding the forfeiture. In the second part of the bifurcated proceeding, the jury is instructed that the government must establish the forfeitability of the property by a preponderance of the evidence. *See United States v. Myers*, 21 F.3d 826 (8th Cir. 1994) (preponderance standard applies because criminal forfeiture is part of the sentence in money laundering cases); *United States v. Voigt*, 89 F.3d 1050 (3rd Cir. 1996) (following *Myers*); *United States v. Smith*, 966 F.2d 1045, 1050-53 (6th Cir. 1992) (same for drug cases); *United States v. Bieri*, 21 F.3d 819 (8th Cir. 1994) (same).

Although an argument could be made under *Libretti*, that a jury trial is no longer appropriate on any aspect of the forfeiture issue, which is a part of sentencing, the Committee decided to retain the right for the parties, in a trial held before a jury, to have the jury determine whether the government has established the requisite statutory nexus between the offense and the property to be forfeited. The jury, however, would not have any role in determining whether a defendant had an interest in the property to be forfeited. This is a matter for the ancillary proceeding which, by statute, is conducted "before the court alone, without a jury." *See* 21 U.S.C. § 853(n)(2).

Subdivision (c). Subdivision (c) sets forth a set of rules governing the conduct of the ancillary proceeding. When the ancillary hearing provisions were added to 18 U.S.C. § 1963 and 21 U.S.C. § 853 in 1984, Congress apparently assumed that the proceedings under the new provisions would involve simple questions of ownership that could, in the ordinary case, be resolved in 30 days. *See* 18 U.S.C. § 1963(1)(4). Presumably for that reason, the statute contains no procedures governing motions practice or discovery such as would be available in an ordinary civil case. Subdivision (c)(1) makes clear that no ancillary proceeding is required to the extent that the order of forfeiture consists of a money judgment. A money judgment is an *in personam* judgment against the defendant and not an order directed at specific assets in which any third party could have any interest.

Experience has shown that ancillary hearings can involve issues of enormous complexity that require years to resolve. *See United States v. BCCI Holdings (Luxembourg) S.A.*, 833 F.Supp. 9 (D.D.C. 1993) (ancillary proceeding involving over 100 claimants and $451 million); *United States v. Porcelli*, CR-85-00756 (CPS), 1992 WL 355584 (E.D.N.Y Nov. 5, 1992) (litigation over third party claim continuing 6 years after RICO conviction). In such cases, procedures akin to those available under the Federal Rules of Civil Procedure should be available to the court and the parties to aid in the efficient resolution of the claims.

Because an ancillary hearing is connected to a criminal case, it would not be appropriate to make the Civil Rules applicable in all respects. The amendment, however, describes several fundamental areas in which procedures analogous to those in the Civil Rules may be followed. These include the filing of a motion to dismiss a claim, conducting discovery, disposing of a claim on a motion for summary judgment, and appealing a final disposition of a claim. Where applicable, the amendment follows the prevailing case law on the issue. *See, e.g., United States v. Lavin*, 942 F.2d 177 (3rd Cir. 1991) (ancillary proceeding treated as civil case for purposes of applying Rules of Appellate Procedure); *United States v. BCCI Holdings (Luxembourg) S.A. (In re Petitions of General Creditors)*, 919 F.Supp. 31 (D.D.C. 1996) ("If a third party fails to allege in its petition all elements necessary for recovery, including those relating to standing, the court may dismiss the petition without providing a hearing"); *United States v. BCCI (Holdings) Luxembourg S.A. (In re Petition of Department of Private Affairs)*, 1993 WL 760232 (D.D.C. Dec. 8, 1993) (applying court's inherent powers to permit third party to obtain discovery from defendant in accordance with civil rules). The provision governing appeals in cases where there are multiple claims is derived from Fed.R. Civ. P. 54(b). *See also United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Banque Indosuez*), 961 F.Supp. 282 (D.D.C. 1997) (in resolving motion to dismiss court assumes all facts pled by third party petitioner to be true, applying Rule 12(b)(6) and denying government's motion because whether claimant had superior title turned on factual

dispute; government acted reasonably in not making any discovery requests in ancillary proceeding until court ruled on its motion to dismiss).

Subdivision (c)(2) provides for the entry of a final order of forfeiture at the conclusion of the ancillary proceeding. Under this provision, if no one files a claim in the ancillary proceeding, the preliminary order would become the final order of forfeiture, but the court would first have to make an independent finding that at least one of the defendants had an interest in the property such that it was proper to order the forfeiture of the property in a criminal case. In making that determination, the court may rely upon reasonable inferences. For example, the fact that the defendant used the property in committing the crime and no third party claimed an interest in the property may give rise to the inference that the defendant had a forfeitable interest in the property.

This subdivision combines and preserves two established tenets of current law. One is that criminal forfeitures are *in personam* actions that are limited to the property interests of the defendant. (This distinguishes criminal forfeiture, which is imposed as part of the defendant's sentence, from civil forfeiture which may be pursued as an action against the property *in rem* without regard to who the owner may be.) The other tenet of current law is that if a third party has notice of the forfeiture but fails to file a timely claim, his or her interests are extinguished, and may not be recognized when the court enters the final order of forfeiture. *See United States v. Hentz*, 1996 WL 355327 (E.D.Pa. June 20, 1996) (once third party fails to file a claim in the ancillary proceeding, government has clear title under 21 U.S.C. § 853(n)(7) and can market the property notwithstanding third party's name on the deed). In the rare event that a third party claims that he or she was not afforded adequate notice of a criminal forfeiture action, the person may file a motion under Rule 60(b) of the Federal Rules of Civil Procedure to reopen the ancillary proceeding. *See United States v. Bouler*, 927 F.Supp.911 (W.D.N.C. 1996) (Rule 60(b) is the proper means by which a third party may move to reopen an ancillary proceeding).

If no third parties assert their interests in the ancillary proceeding, the court must nonetheless determine that the defendant, or combination of defendants, had an interest in the property. Criminal defendants may be jointly and severally liable for the forfeiture of the entire proceeds of the criminal offense. *See United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995) (government can collect the proceeds only once, but subject to that cap, it can collect from any defendant so much of the proceeds as was foreseeable to that defendant); *United States v. Cleveland*, 1997 WL 602186 (E.D. La. Sept. 29, 1997) (same); *United States v. McCarroll*, 1996 WL 355371 at *9 (N.D. Ill. June 25, 1996) (following *Hurley*), *aff'd sub nom. United States v. Jarrett*, 133 F.3d 519 (7th Cir. 1998); *United States v. DeFries*, 909 F.Supp. 13, 19-20 (D.D.C. 1995)(defendants are jointly and severally liable even where government is able to determine precisely how much each defendant benefitted from the scheme), *rev'd on other grounds*, 129 F.3d 1293 (D.C. Cir. 1997).

Therefore, the conviction of any of the defendants is sufficient to support the forfeiture of the entire proceeds of the offense, even if the defendants have divided the money among themselves.

As noted in (c)(4), the ancillary proceeding is not considered a part of sentencing. Thus, the Federal Rules of Evidence would apply to the ancillary proceeding, as is the case currently.

Subdivision (d). Subdivision (d) replaces the forfeiture provisions of Rule 38(e) which provide that the court may stay an order of forfeiture pending appeal. The purpose of the provision is to ensure that the property remains intact and unencumbered so that it may be returned to the defendant in the event the appeal is successful. Subdivision (d) makes clear, however, that a district court is not divested of jurisdiction over an ancillary proceeding even if the defendant appeals his or her conviction. This allows the court to proceed with the resolution of third party claims even as the appellate court considers the appeal. Otherwise, third parties would have to await the conclusion of the appellate process even to *begin* to have their claims heard. *See United States v. Messino*, 907 F.Supp. 1231 (N.D. Ill. 1995) (the district court retains jurisdiction over forfeiture matters while an appeal is pending).

Finally, subdivision (d) provides a rule to govern what happens if the court determines that a third-party claim should be granted but the defendant's appeal is still pending. The defendant is barred from filing a claim in the ancillary proceeding. *See* 18 U.S.C. § 1963(1)(2); 21 U.S.C. § 853(n)(2). Thus, the court's determination, in the ancillary proceeding, that a third party has an interest in the property superior to that of the defendant cannot be binding on the defendant. So, in the event that the court finds in favor of the third party, that determination is final only with respect to the government's alleged interest. If the defendant prevails on appeal, he or she recovers the property as if no conviction or forfeiture ever took place. But if the order of forfeiture is affirmed, the amendment to the order of forfeiture in favor of the third party becomes effective.

Subdivision (e). Subdivision (e) makes clear, as courts have found, that the court retains jurisdiction to amend the order of forfeiture at any time to include subsequently located property which was originally included in the forfeiture order and any substitute property. *See United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995) (court retains authority to order forfeiture of substitute assets after appeal is filed); *United States v. Voigt*, 89 F.3d 1050 (3rd Cir. 1996) (following *Hurley*). Third parties, of course, may contest the forfeiture of substitute assets in the ancillary proceeding. *See United States v. Lester*, 85 F.3d 1409 (9th Cir. 1996).

Subdivision (e)(1) makes clear that the right to a bifurcated jury trial to determine whether the government has established the requisite nexus between the property and the offense, *see* (b)(4), does not apply to the forfeiture of substitute assets or to the addition of newly-discovered property to an existing order of forfeiture. It is well established in the case law that the forfeiture of substitute assets is solely an issue for the court. *See United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995) (court retains authority to order forfeiture of substitute assets after appeal is filed); *United States v. Voigt*, 89 F.3d 1050 (3d Cir. 1996) (following *Hurley*; court may amend order of forfeiture at any time to include substitute assets); *United States v. Thompson*, 837 F.Supp. 585 (S.D.N.Y. 1993) (court, not jury, orders forfeiture of substitute assets). As a practical matter, courts have also determined that they, not the jury, must determine the forfeitability of assets discovered after the trial is over and the jury has been dismissed. *See United States v. Saccoccia*, 898 F.Supp. 53 (D.R.I. 1995) (government may conduct post-trial discovery to determine location and identity of forfeitable assets; post-trial discovery resulted in discovery of gold bars buried in defendant's mother's backyard several years after the entry of an order directing the defendant to forfeit all property, up to $137 million, involved in his money laundering offense).

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The Committee amended the rule to clarify several key points. First, subdivision (b) was redrafted to make it clear that if no third party files a petition to assert property rights, the trial court must determine whether the defendant has an interest in the property to be forfeited and the extent of that interest. As published, the rule would have permitted the trial judge to order the defendant to forfeit the property in its entirety if no third party filed a claim.

Second, Rule 32.2(c)(4) was added to make it clear that the ancillary proceeding is not a part of sentencing.

Third, the Committee clarified the procedures to be used if the government (1) discovers property subject to forfeiture after the court has entered an order of forfeiture and (2) seeks the forfeiture of "substitute" property under a statute authorizing such substitution.

2002 Amendments

The language of Rule 32.2 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

2009 Amendments

Subdivision (a). The amendment responds to some uncertainty regarding the form of the required notice that the government will seek forfeiture as part of the sentence, making it clear that the notice should not be designated as a separate count in an indictment or information. The amendment also makes it clear that the indictment or information need only provide general notice that the government is seeking forfeiture, without identifying the specific property being sought. This is consistent with the 2000 Committee Note, as well as many lower court decisions.

Although forfeitures are not charged as counts, the federal judiciary's Case Management and Electronic Case Files system should note that forfeiture has been alleged so as to assist the parties and the court in tracking the subsequent status of forfeiture allegations.

The court may direct the government to file a bill of particulars to inform the defendant of the identity of the property that the government is seeking to forfeit or the amount of any money judgment sought if necessary to enable the defendant to prepare a defense or to avoid unfair surprise. *See, e.g., United States v. Moffitt, Zwerdling, & Kemler, P.C.,* 83 F.3d 660, 665 (4th Cir. 1996) (holding that the government need not list each asset subject to forfeiture in the indictment because notice can be provided in a bill of particulars); *United States v. Vasquez-Ruiz*, 136 F.Supp. 2d 941, 944 (N.D. Ill. 2001) (directing the government to identify in a bill of particulars, at least 30 days before trial, the specific items of property, including substitute assets, that it claims are subject to forfeiture); *United States v. Best*, 657 F.Supp. 1179, 1182 (N.D. Ill. 1987) (directing the government to provide a bill of particulars apprising the defendants as to the time periods during which they obtained the specified classes of property through their alleged racketeering activity and the interest in each of these properties that was allegedly obtained unlawfully). *See also United States v. Columbo*, 2006 WL 2012511 * 5 & n.13 (S.D. N.Y. 2006) (denying motion for bill of particulars and noting that government proposed sending letter detailing basis for forfeiture allegations).

Subdivision (b)(1). Rule 32.2(b)(1) sets forth the procedure for determining if property is subject to forfeiture. Subparagraph (A) is carried forward from the current Rule without change.

Subparagraph (B) clarifies that the parties may submit additional evidence relating to the forfeiture in the forfeiture phase of the trial, which may be necessary even if the forfeiture is not contested. Subparagraph (B) makes it clear that in determining what evidence or information should be accepted, the court should consider relevance and reliability. Finally, subparagraph (B) requires the court to hold a hearing when forfeiture is contested. The Committee foresees that in some instances live testimony will be needed

to determine the reliability of proffered information. *Cf.* Rule 32.1(b)(1)(B)(iii) (providing the defendant in a proceeding for revocation of probation or supervised release with the opportunity, upon request, to question any adverse witness unless the judge determines this is not in the interest of justice).

Subdivision (b)(2)(A). Current Rule 32.2(b) provides the procedure for issuing a preliminary forfeiture order once the court finds that the government has established the nexus between the property and the offense (or the amount of the money judgment). The amendment makes clear that the preliminary order may include substitute assets if the government has met the statutory criteria.

Subdivision (b)(2)(B). This new subparagraph focuses on the timing of the preliminary forfeiture order, stating that the court should issue the order "sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final." Many courts have delayed entry of the preliminary order until the time of sentencing. This is undesirable because the parties have no opportunity to advise the court of omissions or errors in the order before it becomes final as to the defendant (which occurs upon oral announcement of the sentence and the entry of the criminal judgment). Once the sentence has been announced, the rules give the sentencing court only very limited authority to correct errors or omissions in the preliminary forfeiture order. Pursuant to Rule 35(a), the district court may correct a sentence, including an incorporated forfeiture order, within seven days after oral announcement of the sentence. During the seven-day period, corrections are limited to those necessary to correct "arithmetical, technical, or other clear error." *See United States v. King*, 368 F.Supp. 2d 509, 512-13 (D.S.C. 2005). Corrections of clerical errors may also be made pursuant to Rule 36. If the order contains errors or omissions that do not fall within Rules 35(a) or 36, and the court delays entry of the preliminary forfeiture order until the time of sentencing, the parties may be left with no alternative to an appeal, which is a waste of judicial resources. The amendment requires the court to enter the preliminary order in advance of sentencing to permit time for corrections, unless it is not practical to do so in an individual case.

Subdivision (b)(2)(C). The amendment explains how the court is to reconcile the requirement that it make the forfeiture order part of the sentence with the fact that in some cases the government will not have completed its post-conviction investigation to locate the forfeitable property by the time of sentencing. In that case the court is authorized to issue a forfeiture order describing the property in "general" terms, which order may be amended pursuant to Rule 32.2(e)(1) when additional specific property is identified.

The authority to issue a general forfeiture order should be used only in unusual circumstances and not as a matter of course. For cases in which a general order was properly employed, see *United States v. BCCI Holdings (Luxembourg*), 69 F.Supp. 2d 36 (D.D.C. 1999) (ordering forfeiture of all of a large, complex corporation's assets in the United States, permitting the government to continue discovery necessary to identify and trace those assets); *United States v. Saccoccia*, 898 F.Supp. 53 (D.R.I. 1995) (ordering forfeiture of up to a specified amount of laundered drug proceeds so that the government could continue investigation which led to the discovery and forfeiture of gold bars buried by the defendant in his mother's back yard).

Subdivisions (b)(3) and (4). The amendment moves the language explaining when the forfeiture order becomes final as to the defendant to new subparagraph (b)(4)(A), where it is coupled with new language explaining that the order is not final as to third parties until the completion of the ancillary proceedings provided for in Rule 32.2(c).

New subparagraphs (B) and (C) are intended to clarify what the district court is required to do at sentencing, and to respond to conflicting decisions in the courts regarding the application of Rule 36 to correct clerical errors. The new subparagraphs add considerable detail regarding the oral announcement of the forfeiture at sentencing, the reference to the forfeiture order in the judgment and commitment order, the availability of Rule 36 to correct the failure to include the forfeiture order in the judgment and commitment order, and the time to appeal.

New subparagraph (C) clarifies the time for appeals concerning forfeiture by the defendant or government from two kinds of orders: the original judgment of conviction and later orders amending or refusing to amend the judgment under Rule 32.2(e) to add additional property. This provision does not address appeals by the government or a third party from orders in ancillary proceedings under Rule 32.2(c).

Subdivision (b)(5)(A). The amendment clarifies the procedure for requesting a jury determination of forfeiture. The goal is to avoid an inadvertent waiver of the right to a jury determination, while also providing timely notice to the court and to the jurors themselves if they will be asked to make the forfeiture determination. The amendment requires that the court determine whether either party requests a jury determination of forfeiture in cases where the government has given notice that it is seeking forfeiture and a jury has been empaneled to determine guilt or innocence. The rule requires the court to make this determination before the jury retires. Jurors who know that they may face an additional task after they return their verdict will be more accepting of the additional responsibility in the forfeiture proceeding, and the court will be better able to plan as well.

Although the rule permits a party to make this request just before the jury retires, it is desirable, when possible, to make the request earlier, at the time when the jury is empaneled. This allows the court to plan, and also allows the court to tell potential jurors what to expect in terms of their service.

Subdivision (b)(5)(B) explains that "the government must submit a proposed Special Verdict Form listing each property subject to forfeiture." Use of such a form is desirable, and the government is in the best position to draft the form.

Subdivisions (b)(6) and (7). These provisions are based upon the civil forfeiture provisions in Supplemental Rule G of the Federal Rules of Civil Procedure, which are also incorporated by cross reference. The amendment governs such mechanical and technical issues as the manner of publishing notice of forfeiture to third parties and the interlocutory sale of property, bringing practice under the Criminal Rules into conformity with the Civil Rules.

Changes Made to Proposed Amendment Released for Public Comment. The proposed amendment to Rule 32.2 was modified to use the term "property" throughout. As published, the proposed amendment used the terms property and asset(s) interchangeably. No difference in meaning was intended, and in order to avoid confusion, a single term was used consistently throughout. The term "forfeiture order" was substituted, where possible, for the wordier "order of forfeiture." Other small stylistic changes (such as the insertion of "the" in subpart titles) were also made to conform to the style conventions.

In new subpart (b)(4)(C), dealing with the time for appeals, the words "the defendant or the government" were substituted for the phrase "a party." This portion of the rule addresses only appeals from the original judgment of conviction and later orders amending or refusing to amend the judgment under Rule 32.2(e) to add additional property. Only the defendant and the government are parties at this stage of the proceedings. This portion of the rule does not address appeals by the government or a third party from orders in ancillary proceedings under Rule 32.2(c). This point was also clarified in the Committee note.

Additionally, two other changes were made to the Committee Note: a reference to the use of the ECF system to aid the court and parties in tracking the status of forfeiture allegations, and an additional illustrative case.

Notes of Decisions (96)

Fed. Rules Cr. Proc. Rule 32.2, 18 U.S.C.A., FRCRP Rule 32.2
Including Amendments Received Through 3-1-21

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