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WASHINGTON, D.C 20544

December 6, 1999

MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES
AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for the consideration of the Court new Rule 32.2 and conforming amendments to Rules 7, 31, 32, and 38 of the Federal Rules of Criminal Procedure. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering these proposed amendments, I am also transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference and the Report of the Advisory Committee on the Federal Rules of Criminal Procedure.

Leonidas Ralph Mecham

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 7. The Indictment and the Information

* * * * *

(c) NATURE AND CONTENTS.

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(2) *Criminal Forfeiture.* No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.

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Rule 31. Verdict

* * * * *

[(e) CRIMINAL FORFEITURE.](ABROGATED)

Rule 32. Sentence and Judgment

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(d) JUDGMENT.

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(2) *Criminal Forfeiture.* Forfeiture procedures are governed by Rule 32.2.

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Rule 32.2. Criminal Forfeiture

(a) NOTICE TO THE DEFENDANT. A court shall 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.

(b) ENTRY OF PRELIMINARY ORDER OF FORFEITURE; POST VERDICT HEARING.

(1) As soon as practicable after entering a guilty verdict or accepting a plea of guilty or *nolo contendere* on any count in an indictment or information with regard to which criminal forfeiture is sought, the court shall determine what property is subject to forfeiture under the applicable statute. If forfeiture of specific property is sought, the court shall determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment against the defendant, the court shall determine the amount of money that the

defendant will be ordered to pay. The court's determination may be based on evidence already in the record, including any written plea agreement or, if the forfeiture is contested, on evidence or information presented by the parties at a hearing after the verdict or finding of guilt.

(2) If the court finds that property is subject to forfeiture, it shall promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment or directing the forfeiture of specific property without regard to any third party's interest in all or part of it. Determining whether a third party has such an interest shall be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

(3) 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. At sentencing—or at any time before sentencing if the defendant consents—the order of forfeiture becomes final as to the defendant and shall be made a part of the sentence and included in the judgment. The court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.

(4) Upon a party's request in a case in which a jury returns a verdict of guilty, the jury shall determine whether the government has established the requisite nexus between the

property and the offense committed by the defendant.

(c) ANCILLARY PROCEEDING; FINAL ORDER OF FORFEITURE.

(1) If, as prescribed by statute, a third party files a petition asserting an interest in the property to be forfeited, the court shall 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 Rule 56 of the Federal Rules of Civil Procedure.

(2) When the ancillary proceeding ends, the court shall 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 claim, 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 of forfeiture 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) 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 petitions, unless the court determines that there is no just reason for delay.

(4) An ancillary proceeding is not part of sentencing.

(d) STAY PENDING APPEAL. If a defendant appeals from a conviction or 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 shall 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) 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) If the government shows that the property is subject to forfeiture under Rule 32.2(e)(1), the court shall:

(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) There is no right to trial by jury under Rule 32.2(e).

Rule 38. Stay of Execution

* * * * *

(e) NOTICE TO VICTIMS AND RESTITUTION. A sanction imposed as part of the sentence pursuant to 18 U.S.C. 3555 or 3556 may, if an appeal of the conviction or sentence is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may issue such orders as may be reasonably necessary to ensure compliance with the sanction upon disposition of the appeal, including the entering of a restraining order or an injunction or requiring a deposit in

whole or in part of the monetary amount involved into the registry of the district court or execution of a performance bond.

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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TO: Hon. Anthony J. Scirica, Chair
Standing Committee on Rules of Practice and Procedure

FROM: W. Eugene Davis, Chair
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: Report of the Advisory Committee on Criminal Rules

DATE: December 3, 1998

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure met on October 19 and 20, 1998 at Cape Elizabeth, Maine and took action on a number of proposed amendments. The draft Minutes of that meeting are included at TAB D. This report addresses matters discussed by the Committee at that meeting.

First, the Committee reconsidered its proposed new Rule 32.2, dealing with criminal forfeiture procedures. As noted in the following discussion, the Advisory Committee proposes that the revised Rule 32.2 be approved by the Committee and forwarded to the Judicial Conference.

Second, if the Committee approves new Rule 32.2, conforming amendments should also be approved to Rule 7 (The Indictment and Information), Rule 31 (Verdict), Rule 32 (Sentence and Judgment), and Rule 38 (Stay of Execution).

* * * * *

II. Action Items—Recommendations to Forward Amendments to the Judicial Conference

A. Summary and Recommendations

At its June 1997 meeting, the Standing Committee approved the publication of proposed amendments to nine rules for public comment from the bench and bar. One of those amendments, Rule 32.2 was a new rule designed to bring together in one rule the procedures associated with criminal forfeitures. That Rule, which generated a number of written comments and testimony, was presented to the Standing Committee at its Santa Fe meeting in June 1998. The Standing Committee discussed the Rule and eventually voted not to approve the Rule for transmission to the Judicial Conference.

The Committee has reconsidered Rule 32.2 and at its meeting in October approved a modified Rule that addresses the concerns raised by members of the Standing Committee. The following discussion briefly summarizes the changes to proposed Rule 32.2 and the conforming amendments to other Rules of Criminal Procedure.

1. ACTION ITEM—Rule 32.2. Forfeiture Procedures.

a. Background of Rule 32.2.

The Committee proposes adoption of Rule 32.2, a new rule dedicated solely to the question of forfeiture proceedings. As noted in the our report to the Standing Committee in June, over the last several years the Committee has discussed the problems associated with criminal forfeiture. Under existing rules provisions, when a verdict of guilty is returned on any substantive count on which the government alleges that property may be forfeited, the jury is asked to decide questions of ownership or property interests vis a vis the defendant(s). As initially published and presented to this Committee, the Rule eliminated that right to have a jury decide those issues. That position was based upon the Advisory Committee's reading of *Libretti v. United States*, 516 U.S. 29 (1995), in which the Supreme Court indicated that criminal forfeiture constitutes an aspect of the sentence imposed in the case and

that the defendant has no constitutional right to have a jury decide any part of the sentence.

As noted at the Standing Committee's last meeting, the Advisory Committee had received only six written comments and most of those supported the Rule. The NACDL adamantly opposed the proposed rule, and provided two witnesses who testified before the Committee. Their key point was that the new rule abrogated the critical right to a jury trial. Under the draft presented to the Standing Committee in June, the jury's role would have been eliminated and the court would have initially decided whether the defendant had an interest in the property. In a later proceeding the court would resolve any third party claims to the property subject to forfeiture. A witness for the Department of Justice pointed out that after the Supreme Court's decision is *Libretti*, *supra*, forfeiture proceedings are a part of sentencing, a matter to be decided by the trial judge.

b. Action on Rule 32.2 by Standing Committee in June 1998.

At its June 1998 meeting, the Standing Comment disapproved Rule 32.2. Most of the discussion had focused on two key issues: abrogation of the jury's role in forfeiture proceedings and the ability of the defendant to present evidence at the post-verdict hearing. There was also some question about making style changes to portions of the Rule.

c. Reconsideration of Rule 32.2 by Advisory Committee.

Following the Standing Committee's action on the Rule, a Rule 32.2 Subcommittee of the Advisory Committee considered proposed changes submitted by the Department of Justice and at its October 1998 meeting, recommended to the Advisory Committee that Rule 32.2 be revised and resubmitted to the Standing Committee. The revisions included restoration of the jury's role in determining nexus in forfeiture proceedings (Rule 32.2(b)(4)) and clarified that both the government and the defense may present evidence at the post-verdict hearing to determine if there is a nexus between the property to be forfeited and the offense for which the defendant has been found guilty (Rule 32.2(b)(2)).

d. Summary of Changes in Rule 32.2 Following Standing Committee Meeting.

Rule 32.2 has been changed to reflect current caselaw interpreting Rule 7(c) which does not require a substantive allegation that certain property is subject to forfeiture. The defendant need only receive notice that the government will be seeking forfeiture under the applicable statute. A comparison chart is at TAB B.

Rule 32.2(b)(1) has been revised to clarify that there are different kinds of forfeiture judgments: forfeiture of specific assets and money judgments. To the extent that the case involves forfeiture of specific assets, the court or jury must find a nexus between the property and the crime for which the defendant has been found guilty.

Under revised Rule 32.2(b)(2), the Rule makes it clear that what is deferred to the ancillary proceeding is the question of whether any third party has a superior interest in the property. Former language regarding what the court should do if no party files a claim has been moved to (c)(2).

Rule 32.2(b)(3) had been changed to make it clear that the Attorney General could designate someone outside the Department to seize the forfeited property.

The major change, rests in Rule 32.2(b)(4) which retains the right of either the defendant or the government to request that the jury make the decision whether there is a nexus between the property and the crime. This provision was designed specifically to address the concerns raised by some members of the Standing Committee.

Rule 32.2(c)(1) has been revised to reflect that no ancillary proceeding is necessary regarding money judgments and (c)(2) had been revised to simplify what had appeared at (b)(2) in the original version. Subdivision (c)(2) preserves two tenets of current law: that criminal forfeiture is an in personam action and that if no third party files a claim to the property, his or her rights are extinguished. Under the revised Rule, if no third party files a claim the court is not required to determine the extent of the defendant's interest. It is only required to decide whether the defendant had an interest in the property.

Rule 32.2(e)(1) has been revised to make it clear that the right to a bifurcated procedure does not apply to forfeiture of substitute assets or to the addition of newly-discovered property to an existing forfeiture order.

e. Style Changes to Revised Rule 32.2

In redrafting Rule 32.2, the Advisory Committee considered the suggested style changes submitted by the Style Subcommittee. Most of those changes have been incorporated into the Rule and Comment. A number of the suggestions, however, would have resulted in what the Department of Justice considered to be substantive changes. The suggested style changes and the Department's response are attached at TAB C, following this Report.

Recommendation—The Committee recommends that Rule 32.2 be approved as amended and forwarded to the Judicial Conference.

2. ACTION ITEM—Rule 7. The Indictment and the Information

The amendment to Rule 7(c)(2), which addresses one aspect of criminal forfeiture, is a conforming amendment reflecting proposed new Rule 32.2. That rule provides comprehensive coverage of forfeiture procedures. The Committee received no comments on the proposed amendment to the rule.

Recommendation—The Committee recommends that the amendment to Rule 7 be approved and forwarded to the Judicial Conference.

3. ACTION ITEM—Rule 31. Verdict.

The proposed amendment to Rule 31 deletes subdivision (e) which related to the requirement that the jury return a special verdict regarding criminal forfeiture. The amendment conforms the rule to proposed new Rule 32.2 which provides comprehensive guidance on criminal forfeitures. The Committee received no

comments on this proposed change.

Recommendation—The Committee recommends that the amendment to Rule 31 be approved and forwarded to the Judicial Conference.

4. ACTION ITEM—Rule 32. Sentence and Judgment.

The proposed amendment to Rule 32(d), which deals with criminal forfeiture, conforms that provision to proposed new Rule 32.2 which provides comprehensive guidance on forfeiture procedures. The Committee received no comments on this proposed amendment.

Recommendation—The Committee recommends that the amendment to Rule 32 be approved and forwarded to the Judicial Conference.

5. ACTION ITEM—Rule 38. Stay of Execution.

The amendment to Rule 38 (e) is a technical, conforming amendment resulting from proposed new Rule 32.2 which provides comprehensive guidance on criminal forfeitures. The Committee received no comments on the proposed change.

Recommendation—The Committee recommends that the amendment to Rule 38 be approved as published and forwarded to the Judicial Conference.

B. Text of Proposed Amendments; Summary of Comments and GAP Reports.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 7. The Indictment and the Information

* * * * *

(c) NATURE AND CONTENTS.

* * * * *

(2) *Criminal Forfeiture*. No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information ~~shall allege the extent of the interest or property subject to forfeiture~~ provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.

* * * * *

COMMITTEE NOTE

The rule is amended to reflect new Rule 32.2, which now governs criminal forfeiture procedures.

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* New material is underlined; matter to be omitted is lined through.

GAP Report—Rule 7

The Committee initially made no changes to the published draft of the Rule 7 amendment. However, because of changes to Rule 32.2(a), discussed *infra*, the proposed language has been changed to reflect that the indictment must provide notice of an intent to seek forfeiture.

Rule 31. Verdict

* * * * *

~~(c) CRIMINAL FORFEITURE. If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.~~

COMMITTEE NOTE

The rule is amended to reflect the creation of new Rule 32.2, which now governs criminal forfeiture procedures.

GAP Report—Rule 31

The Committee made no changes to the published draft amendment to Rule 31.

Rule 32. Sentence and Judgment

* * * * *

(d) JUDGMENT.

* * * * *

(2) *Criminal Forfeiture*. Forfeiture procedures are governed by Rule 32.2. ~~If a verdict contains a finding that property is subject to criminal forfeiture, or if a defendant enters a guilty plea subjecting property to such forfeiture, the court may enter a preliminary order of forfeiture after providing notice to the defendant and a reasonable opportunity to be heard on the timing and form of the order. The order of forfeiture shall authorize the Attorney General to seize the property subject to forfeiture, to conduct any discovery that the court considers proper to help identify, locate, or dispose of the property, and to begin proceedings consistent with any statutory requirements pertaining to ancillary hearings and the~~

~~rights of third parties. At sentencing, a final order of forfeiture shall be made part of the sentence and included in the judgment. The court may include in the final order such conditions as may be reasonably necessary to preserve the value of the property pending any appeal.~~

* * * * *

COMMITTEE NOTE

The rule is amended to reflect the creation of new Rule 32.2, which now governs criminal forfeiture procedures.

Rule 32.2. Criminal Forfeiture

(a) NOTICE TO THE DEFENDANT. A court shall 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.

(b) ENTRY OF PRELIMINARY ORDER OF FORFEITURE; POST VERDICT HEARING.

(1) As soon as practicable after entering a guilty verdict or accepting a plea of guilty or *nolo contendere* on any count in an indictment or information with regard to which criminal forfeiture is sought, the court shall determine what property is subject to forfeiture under the applicable statute. If forfeiture of specific property is sought, the court shall determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment against the defendant, the court shall determine the amount of money that the defendant will be ordered to pay. The court's determination may be based on evidence already in the record, including any written plea agreement or, if the forfeiture is contested, on evidence or information presented by the parties at a hearing after the verdict or finding of guilt.

(2) If the court finds that property is subject to forfeiture, it shall promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment or directing the forfeiture of specific property without regard to any third party's interest in all or part of it. Determining whether a third party has such an interest shall be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

(3) 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. At sentencing—or at any time before sentencing if the defendant consents—the order of forfeiture becomes final as to the defendant and shall be

made a part of the sentence and included in the judgment. The court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.

(4) Upon a party's request in a case in which a jury returns a verdict of guilty, the jury shall determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

(c) ANCILLARY PROCEEDING; FINAL ORDER OF FORFEITURE.

(1) If, as prescribed by statute, a third party files a petition asserting an interest in the property to be forfeited, the court shall 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 Rule 56 of the Federal Rules of Civil Procedure.

(2) When the ancillary proceeding ends, the court shall 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 claim, 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 of forfeiture 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) 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 petitions, unless the court determines that there is no just reason for delay.

(4) An ancillary proceeding is not part of sentencing.

(d) STAY PENDING APPEAL. If a defendant appeals from a conviction or 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 shall 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) 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) If the government shows that the property is subject to forfeiture under Rule 32.2(e)(1), the court shall:

(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) There is no right to trial by jury under Rule 32.2(e).

COMMITTEE NOTE

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(l). 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 (lst 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(l)(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 U.S. Dist. LEXIS 17928 (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(l)(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 (lst 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).

GAP Report—Rule 32.2

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.

Rule 38. Stay of Execution

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(e) ~~CRIMINAL FORFEITURE~~, NOTICE TO VICTIMS~~,~~ AND RESTITUTION. A sanction imposed as part of the sentence pursuant to 18 U.S.C. ~~3554,~~ 3555 or 3556 may, if an appeal of the conviction or sentence is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may issue such orders as

may be reasonably necessary to ensure compliance with the sanction upon disposition of the appeal, including the entering of a restraining order or an injunction or requiring a deposit in whole or in part of the monetary amount involved into the registry of the district court or execution of a performance bond.

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COMMITTEE NOTE

The rule is amended to reflect the creation of new Rule 32.2 which now governs criminal forfeiture procedures.

GAP Report—Rule 38

The Committee made no changes to the published draft.