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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 to 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 Rules 7 (The Indictment and Information), Rule 31 (Verdict), Rule 32 (Sentence and Judgment), and Rule 38 (Stay of Execution).

Third, the Committee is considering proposed amendments to the following rules:

- Rule 10. Arraignment & Rule 43, Presence of Defendant.

- Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition .
- Rule 26. Taking of Testimony.
- Rule 43. Presence of Defendant.
- Rules Governing Habeas Corpus Proceedings; Report of Subcommittee.

Finally, the Advisory Committee has several information items to bring to the attention of the Standing Committee.

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 Rules 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.

i. 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 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 jury decide those issues. That position was based upon the Advisory Committee's reading of *Libretti v. United States*, 116 S.Ct. 356 (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 NADCL 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, *infra*, 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.

1 **32.2. Criminal Forfeiture**

2 (a) NOTICE TO THE DEFENDANT. A court shall not enter a
3 judgment of forfeiture in a criminal proceeding unless the indictment or
4 information contains notice to the defendant that the government will seek the
5 forfeiture of property as part of any sentence in accordance with the applicable
6 statute.

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

9 (1) As soon as practicable after entering a guilty verdict or
10 accepting a plea of guilty or *nolo contendere* on any count in an indictment or
11 information for which criminal forfeiture is sought, the court shall determine what
12 property is subject to forfeiture under the applicable statute. If specific property is
13 sought to be forfeited, the court shall determine whether the government has

14 established the requisite nexus between the property and the offense. If the
15 government seeks a personal money judgment against the defendant, the court
16 shall determine the amount of money that the defendant will be ordered to pay.
17 The court's determination under this subdivision may be based on evidence
18 already in the record, including any written plea agreement or, if the forfeiture is
19 contested, on evidence or information presented by the parties at a hearing after
20 the verdict or finding of guilty.

21 (2) If the court finds that property is subject to forfeiture, it
22 shall promptly enter a preliminary order of forfeiture. The preliminary order shall
23 set forth the amount of any money judgment, or direct the forfeiture of specific
24 property without regard to any third party's interest in all or part of it.
25 Determining whether a third party has such an interest shall be deferred pending
26 the filing of any third party claims in an ancillary proceeding under subdivision
27 (c).

28 (3) Entry of a preliminary order of forfeiture authorizes the
29 Attorney General (or a designee) to seize the property subject to forfeiture; to
30 conduct any discovery the court considers proper in identifying, locating, or
31 disposing of the property; and to commence proceedings consistent with any
32 statutory requirements pertaining to third-party rights. At sentencing—or at any
33 time before sentencing if the defendant consents—the order of forfeiture becomes
34 final as to the defendant and shall be made a part of the sentence and included in
35 the judgment. The court may include in the order of forfeiture whatever
36 conditions are reasonably found necessary to preserve the property's value
37 pending any appeal.

38 (4) Upon the request of any defendant or the government in a
39 case in which the finding of guilt was rendered by a jury, the determination of
40 whether the government has established the requisite nexus between the property
41 and the offense committed by the defendant shall be made by the jury.

42 (c) ANCILLARY PROCEEDING; FINAL ORDER OF
43 FORFEITURE.

44 (1) If, as prescribed by statute, a third party files a petition
45 asserting an interest in the property to be forfeited, the court shall conduct an
46 ancillary proceeding, except that no ancillary proceeding is required to the extent
47 that the forfeiture consists of a money judgment.

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

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

58 (2) When the ancillary proceeding ends, the court shall enter a
59 final order of forfeiture, amending the preliminary order as necessary to account
60 for any third party rights. If no third party files a timely claim, the preliminary
61 order becomes the final order of forfeiture, if the court finds that the defendant (or
62 any combination of defendants convicted in the case) had an interest in the

63 property that is forfeitable under the applicable statute. The defendant may not
64 object to the entry of the final order of forfeiture on the ground that the property
65 belongs, in whole or in part, to a codefendant or third party, nor may a third party
66 object to the final order on the ground that the third party had an interest in the
67 property.

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

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

73 (d) STAY PENDING APPEAL. If the defendant appeals from the
74 conviction or order of forfeiture, the court may stay its order of forfeiture on
75 terms that the court finds appropriate to ensure that the property remains available
76 pending appellate review. A stay does not delay the ancillary proceeding or the
77 determination of a third party's rights or interests. But if the court rules in favor
78 of any third party while an appeal is pending, the court may amend the order of
79 forfeiture but shall not transfer any property or interest to a third party until the
80 decision on appeal becomes final, unless the defendant so consents in writing or
81 on the record.

82 (e) SUBSEQUENTLY LOCATED PROPERTY; SUBSTITUTE
83 PROPERTY.

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

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

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

91 Rule 32.2(b)(4) does not apply to property forfeited under this subdivision.

92 (2) If the government shows that the property is subject to
93 forfeiture under (e)(1), the court shall:

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

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

98
99

100 **ADVISORY COMMITTEE NOTE**

101
102

103 Rule 32.2 consolidates a number of procedural rules governing the
104 forfeiture of assets in a criminal case. Existing Rules 7(c)(2), 31(e) and 32(d)(2)
105 are also amended to conform to the new rule. In addition, the forfeiture-related
106 provisions of Rule 38(e) are stricken.

107

108 **Subdivision (a).** Subdivision (a) is derived from Rule 7(c)(2) which
109 provides that notwithstanding statutory authority for the forfeiture of property
110 following a criminal conviction, no forfeiture order may be entered unless the
111 defendant was given notice of the forfeiture in the indictment or information. As
112 courts have held, subdivision (a) is not intended to require that an itemized list of
113 the property to be forfeited appear in the indictment or information itself. The
114 subdivision reflects the trend in caselaw interpreting present Rule 7(c). Under the
115 most recent cases, Rule 7(c) sets forth a requirement that the government give the
116 defendant notice that it will be seeking forfeiture in accordance with the
117 applicable statute. It does not require a substantive allegation in which the
118 property subject to forfeiture, or the defendant's interest in the property, must be
119 described in detail. *See United States v. DeFries*, 129 F.3d 1293 (D.C.Cir. 1997)
120 (it is not necessary to specify in either the indictment or a bill of particulars that
121 the government is seeking forfeiture of a particular asset, such as the defendant's

122 salary; to comply with Rule 7(c), the government need only put the defendant on
123 notice that it will seek to forfeit everything subject to forfeiture under the
124 applicable statute, such as all property "acquired or maintained" as a result of a
125 RICO violation). *See also United States v. Moffitt, Zwerling & Kemler, P.C.*, 83
126 F.3d 660, 665 (4th Cir. 1996), *aff'g* 846 F. Supp. 463 (E.D. Va. 1994) (*Moffitt I*)
127 (indictment need not list each asset subject to forfeiture; under Rule 7(c), this can
128 be done with bill of particulars); *United States v. Voight*, 89 F.3d 1050 (3rd Cir.
129 1996) (court may amend order of forfeiture at any time to include substitute
130 assets).

131
132 **Subdivision (b)** Subdivision (b) replaces Rule 31(e) which provides that
133 the jury in a criminal case must return a special verdict "as to the extent of the
134 interest or property subject to forfeiture." *See United States v. Saccoccia*, 58 F.3d
135 754 (1st Cir. 1995) (Rule 31(e) only applies to jury trials; no special verdict
136 required when defendant waives right to jury on forfeiture issues).

137
138 One problem under Rule 31(e) concerns the scope of the determination
139 that must be made prior to entering an order of forfeiture. This issue is the same
140 whether the determination is made by the court or by the jury.

141
142 As mentioned, the current Rule requires the jury to return a special verdict
143 "as to the extent of the interest or property subject to forfeiture." Some courts
144 interpret this to mean only that the jury must answer "yes" or "no" when asked if
145 the property named in the indictment is subject to forfeiture under the terms of the
146 forfeiture statute--*e.g.* was the property used to facilitate a drug offense? Other
147 courts also ask the jury if the defendant has a legal interest in the forfeited
148 property. Still other courts, including the Fourth Circuit, require the jury to
149 determine the *extent* of the defendant's interest in the property vis a vis third
150 parties. *See United States v. Ham*, 58 F.3d 78 (4th Cir. 1995) (case remanded to
151 the district court to impanel a jury to determine, in the first instance, the extent of
152 the defendant's forfeitable interest in the subject property).

153
154 The notion that the "extent" of the defendant's interest must be established
155 as part of the criminal trial is related to the fact that criminal forfeiture is an *in*
156 *personam* action in which only the defendant's interest in the property may be
157 forfeited. *United States v. Riley*, 78 F.3d 367 (8th Cir. 1996). When the criminal
158 forfeiture statutes were first enacted in the 1970's, it was clear that a forfeiture of
159 property other than the defendant's could not occur in a criminal case, but there
160 was no mechanism designed to limit the forfeiture to the defendant's interest.
161 Accordingly, Rule 31(e) was drafted to make a determination of the "extent" of
162 the defendant's interest part of the verdict.

163
164 The problem is that third parties who might have an interest in the
165 forfeited property are not parties to the criminal case. At the same time, a

166 defendant who has no interest in property has no incentive, at trial, to dispute the
167 government's forfeiture allegations. Thus, it was apparent by the 1980's that Rule
168 31(e) was an inadequate safeguard against the inadvertent forfeiture of property in
169 which the defendant held no interest.

170

171 In 1984, Congress addressed this problem when it enacted a statutory
172 scheme whereby third party interests in criminally forfeited property are litigated
173 by the court in an ancillary proceeding following the conclusion of the criminal
174 case and the entry of a preliminary order of forfeiture. See 21 U.S.C. § 853(n); 18
175 U.S.C. § 1963(l). Under this scheme, the court orders the forfeiture of the
176 defendant's interest in the property--whatever that interest may be--in the criminal
177 case. At that point, the court conducts a separate proceeding in which all potential
178 third party claimants are given an opportunity to challenge the forfeiture by
179 asserting a superior interest in the property. This proceeding does not involve
180 relitigation of the forfeitability of the property; its only purpose is to determine
181 whether any third party has a legal interest in the forfeited property.

182

183 The notice provisions regarding the ancillary proceeding are equivalent to
184 the notice provisions that govern civil forfeitures. Compare 21 U.S.C. §
185 853(n)(1) with 19 U.S.C. § 1607(a); see *United States v. Boulter*, 927 F. Supp. 911
186 (W.D.N.C. 1996) (civil notice rules apply to ancillary criminal proceedings).
187 Notice is published and sent to third parties that have a potential interest. See
188 *United States v. BCCI Holdings (Luxembourg) S.A. (In re Petition of Indosuez*
189 *Bank)*, 916 F. Supp. 1276 (D.D.C. 1996) (discussing steps taken by government to
190 provide notice of criminal forfeiture to third parties). If no one files a claim, or if
191 all claims are denied following a hearing, the forfeiture becomes final and the
192 United States is deemed to have clear title to the property. 21 U.S.C. § 853(n)(7);
193 *United States v. Hentz*, 1996 WL 355327 (E.D. Pa. 1996) (once third party fails to
194 file a claim in the ancillary proceeding, government has clear title under §
195 853(n)(7) and can market the property notwithstanding third party's name on the
196 deed).

197

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

202

203 Since the enactment of the ancillary proceeding statutes, the requirement
204 in Rule 31(e) that the court (or jury) determine the extent of the defendant's
205 interest in the property as part of the criminal trial has become an unnecessary
206 anachronism that leads more often than not to duplication and a waste of judicial
207 resources. There is no longer any reason to delay the conclusion of the criminal
208 trial with a lengthy hearing over the extent of the defendant's interest in property
209 when the same issues will have to be litigated a second time in the ancillary

210 proceeding if someone files a claim challenging the forfeiture. For example, in
211 *United States v. Messino*, 921 F. Supp. 1231 (N.D. Ill. 1996), the court allowed
212 the defendant to call witnesses to attempt to establish that they, not he, were the
213 true owners of the property. After the jury rejected this evidence and the property
214 was forfeited, the court conducted an ancillary proceeding in which the same
215 witnesses litigated their claims to the same property.

216

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

224

225 This approach would also address confusion that occurs in multi-
226 defendant cases where it is clear that each defendant should forfeit whatever
227 interest he may have in the property used to commit the offense, but it is not at all
228 clear which defendant is the actual owner of the property. For example, suppose
229 A and B are co-defendants in a drug and money laundering case in which the
230 government seeks to forfeit property involved in the scheme that is held in B's
231 name but of which A may be the true owner. It makes no sense to invest the
232 court's time in determining which of the two defendants holds the interest that
233 should be forfeited. Both defendants should forfeit whatever interest they may
234 have. Moreover, if under the current rule the court were to find that A is the true
235 owner of the property, then B would have the right to file a claim in the ancillary
236 proceeding where he may attempt to recover the property despite his criminal
237 conviction. *United States v. Real Property in Waterboro*, 64 F.3d 752 (1st Cir.
238 1995) (co-defendant in drug/money laundering case who is not alleged to be the
239 owner of the property is considered a third party for the purpose of challenging
240 the forfeiture of the other co-defendant's interest).

241

242 The new Rule resolves these difficulties by postponing the determination
243 of the extent of the defendant's interest until the ancillary proceeding. As
244 provided in (b)(1), the court, as soon as practicable after the verdict or finding of
245 guilty in the criminal case, would determine if the property was subject to
246 forfeiture in accordance with the applicable statute, e.g., whether the property
247 represented the proceeds of the offense, was used to facilitate the offense, or was
248 involved in the offense in some other way. The determination could be made
249 based on the evidence in the record from the criminal trial or the facts set forth in
250 a written plea agreement submitted to the court at the time of the defendant's
251 guilty plea, or the court could hold a hearing to determine if the requisite
252 relationship existed between the property and the offense. Subdivision (b)(2)

253 provides that it is not necessary to determine at this stage what interest any
254 defendant might have in the property.

255

256 Subdivision (b)(1) recognizes that there are different kinds of forfeiture
257 judgments in criminal cases. One type is a personal judgment for a sum of
258 money; another is a judgment forfeiting a specific asset. *See, e.g., United States*
259 *v. Voight*, 89 F.3d 1050 (3d Cir. 1996) (government is entitled to a personal
260 money judgment equal to the amount involved in the money laundering offense,
261 as well as order forfeiting specific assets involved in, or traceable to, the offense;
262 in addition, if the statutory requirements are met, the government may be entitled
263 to forfeit substitute assets); *United States v. Cleveland*, 1997 WL 537707 (E.D.
264 La. 1997) (government entitled to a money judgment equal to the amount of
265 money defendant laundered in money laundering case). The finding the court is
266 required to make will depend on the nature of the forfeiture judgment.

267

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

278

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

284

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

289

290 Subdivision (b)(3) replaces Rule 32(d)(2) (effective December 1996). It
291 provides that once the court enters a preliminary order of forfeiture directing the
292 forfeiture of whatever interest each defendant may have in the forfeited property,
293 the government may seize the property and commence an ancillary proceeding to
294 determine the interests of any third party. The subdivision also provides that the
295 Attorney General may designate someone outside of the Department of Justice to
296 seize forfeited property. This is necessary because in cases in which the lead

297 investigative agency is in the Treasury Department, for example, the seizure of
298 the forfeited property is typically handled by agencies other than the Department
299 of Justice..

300

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

307

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

315

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

322

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

338

339 When Rule 31(e) was promulgated, it was assumed that criminal forfeiture
340 was akin to a separate criminal offense on which evidence would be presented

341 and the jury would have to return a verdict. In *Libretti v. United States*, 116 S. Ct.
342 356 (1995), however, the Supreme Court held that criminal forfeiture constitutes
343 an aspect of the sentence imposed in a criminal case and that the defendant has no
344 constitutional right to have the jury determine any part of the forfeiture. The
345 special verdict requirement in Rule 31(e), the Court said, is in the nature of a
346 statutory right that can be modified or repealed at any time.

347
348 Even before *Libretti*, lower courts had determined that criminal forfeiture
349 is a sentencing matter and concluded that criminal trials therefore should be
350 bifurcated so that the jury first returns a verdict on guilt or innocence and then
351 returns to hear evidence regarding the forfeiture. In the second part of the
352 bifurcated proceeding, the jury is instructed that the government must establish
353 the forfeitability of the property by a preponderance of the evidence. See *United*
354 *States v. Myers*, 21 F.3d 826 (8th Cir. 1994) (preponderance standard applies
355 because criminal forfeiture is part of the sentence in money laundering cases);
356 *United States v. Voight*, 89 F.3d 1050 (3rd Cir. 1996) (following *Myers*); *United*
357 *States v. Smith*, 966 F.2d 1045, 1050-53 (6th Cir. 1992) (same for drug cases);
358 *United States v. Bieri*, 21 F.3d 819 (8th Cir. 1994) (same).

359
360 Although an argument could be made under *Libretti*, that a jury trial is no
361 longer appropriate on any aspect of the forfeiture issue, which is a part of
362 sentencing, the Committee decided to retain the right for the parties, in a trial held
363 before a jury, to have the jury determine whether the government has established
364 the requisite statutory nexus between the offense and the property to be forfeited.
365 The jury, however, would not have any role in determining whether a defendant
366 had an interest in the property to be forfeited. This is a matter for the ancillary
367 proceeding which, by statute, is conducted "before the court alone, without a
368 jury." See 21 U.S.C. § 853(n)(2).

369
370 **Subdivision (c).** Subdivision (c) sets forth a set of rules governing the
371 conduct of the ancillary proceeding. When the ancillary hearing provisions were
372 added to 18 U.S.C. § 1963 and 21 U.S.C. § 853 in 1984, Congress apparently
373 assumed that the proceedings under the new provisions would involve simple
374 questions of ownership that could, in the ordinary case, be resolved in 30 days.
375 See 18 U.S.C. § 1963(l)(4). Presumably for that reason, the statute contains no
376 procedures governing motions practice or discovery such as would be available in
377 an ordinary civil case. Subdivision (c)(1) makes clear that no ancillary
378 proceeding is required to the extent that the order of forfeiture consists of a money
379 judgment. A money judgment is an *in personam* judgment against the defendant
380 and not an order directed at specific assets in which any third party could have
381 any interest.

382
383 Experience has shown that ancillary hearings can involve issues of
384 enormous complexity that require years to resolve. See *United States v. BCCI*

385 *Holdings (Luxembourg) S.A.*, 833 F. Supp. 9 (D.D.C. 1993) (ancillary proceeding
386 involving over 100 claimants and \$451 million); *United States v. Porcelli*, CR-85-
387 00756 (CPS), 1992 U.S. Dist. LEXIS 17928 (E.D.N.Y. Nov. 5, 1992) (litigation
388 over third party claim continuing 6 years after RICO conviction). In such cases,
389 procedures akin to those available under the Federal Rules of Civil Procedure
390 should be available to the court and the parties to aid in the efficient resolution of
391 the claims.

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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. 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 a legal or possessory 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.

429 This subdivision combines and preserves two established tenets of current
430 law. One is that criminal forfeitures are *in personam* actions that are limited to
431 the property interests of the defendant. (This distinguishes criminal forfeiture,
432 which is imposed as part of the defendant's sentence, from civil forfeiture which
433 may be pursued as an action against the property *in rem* without regard to who the
434 owner may be.) The other tenet of current law is that if a third party has notice of
435 the forfeiture but fails to file a timely claim, his or her interests are extinguished,
436 and may not be recognized when the court enters the final order of forfeiture. *See*
437 *United States v. Hentz*, 1996 WL 355327 (E.D. Pa. 1996) (once third party fails to
438 file a claim in the ancillary proceeding, government has clear title under 21
439 U.S.C. § 853(n)(7) and can market the property notwithstanding third party's
440 name on the deed). In the rare event that a third party claims that he or she was
441 not afforded adequate notice of a criminal forfeiture action, the person may file a
442 motion under Rule 60(b) of the Federal Rules of Civil Procedure to reopen the
443 ancillary proceeding. *See United States v. Boulder*, 927 F. Supp. 911 (W.D.N.C.
444 1996) (Rule 60(b) is the proper means by which a third party may move to reopen
445 an ancillary proceeding).

446
447 If no third parties assert their interests in the ancillary proceeding, the
448 court must nonetheless determine that the defendant, or combination of
449 defendants) had an interest in the property. Criminal defendants may be jointly
450 and severally liable for the forfeiture of the entire proceeds of the criminal
451 offense. *See United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995) (government can
452 collect the proceeds only once, but subject to that cap, it can collect from any
453 defendant so much of the proceeds as was foreseeable to that defendant); *United*
454 *States v. Cleveland*, 1997 WL 602186 (E.D. La. Sept. 29, 1997) (same); *United*
455 *States v. McCarroll*, 1996 WL 355371 at *9 (N.D. Ill. June 19, 1996) (following
456 *Hurley*), *aff'd sub nom. United States v. Jarrett*, 133 F.3d 519 (7th Cir. 1998);
457 *United States v. DeFries*, 909 F. Supp. 13, 19-20 (D.D.C. 1995) (defendants are
458 jointly and severally liable even where government is able to determine precisely
459 how much each defendant benefited from the scheme), *rev'd on other grounds*,
460 129 F.3d 1293 (D.C. Cir. 1997). Therefore, the conviction of any of the
461 defendants is sufficient to support the forfeiture of the entire proceeds of the
462 offense, even if the defendants have divided the money among themselves.

463
464 As noted in (c)(4), the ancillary proceeding is not considered a part of
465 sentencing. Thus, the Federal Rules of Evidence would apply to the ancillary
466 proceeding, as is the case currently.

467
468 **Subdivision (d).** Subdivision (d) replaces the forfeiture provisions of
469 Rule 38(e) which provide that the court may stay an order of forfeiture pending
470 appeal. The purpose of the provision is to ensure that the property remains intact
471 and unencumbered so that it may be returned to the defendant in the event the
472 appeal is successful. Subdivision (d) makes clear, however, that a district court is

473 not divested of jurisdiction over an ancillary proceeding even if the defendant
474 appeals his or her conviction. This allows the court to proceed with the resolution
475 of third party claims even as the appellate court considers the appeal. Otherwise,
476 third parties would have to await the conclusion of the appellate process even to
477 *begin* to have their claims heard. *See United States v. Messino*, 907 F. Supp. 1231
478 (N.D. Ill. 1995) (the district court retains jurisdiction over forfeiture matters while
479 an appeal is pending).

480

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

492

493 **Subdivision (e).** Subdivision (e) makes clear, as courts have found, that
494 the court retains jurisdiction to amend the order of forfeiture at any time to
495 include subsequently located property which was originally included in the
496 forfeiture order and any substitute property. *See United States v. Hurley*, 63 F.3d
497 1 (1st Cir. 1995) (court retains authority to order forfeiture of substitute assets
498 after appeal is filed); *United States v. Voight*, 89 F.3d 1050 (3rd Cir. 1996)
499 (following *Hurley*). Third parties, of course, may contest the forfeiture of
500 substitute assets in the ancillary proceeding. *See United States v. Lester*, 85 F.3d
501 1409 (9th Cir. 1996).

502

503 Subdivision (e)(1) makes clear that the right to a bifurcated jury trial to
504 determine whether the government has established the requisite nexus between
505 the property and the offense, *see* (b)(4), does not apply to the forfeiture of
506 substitute assets or to the addition of newly-discovered property to an existing
507 order of forfeiture. It is well established in the case law that the forfeiture of
508 substitute assets is solely an issue for the court. *See United States v. Hurley*, 63
509 F.3d 1 (1st Cir. 1995) (court retains authority to order forfeiture of substitute
510 assets after appeal is filed); *United States v. Voight*, 89 F.3d 1050 (3d Cir. 1996)
511 (following *Hurley*; court may amend order of forfeiture at any time in include
512 substitute assets); *United States v. Thompson*, 837 F. Supp. 585 (S.D.N.Y. 1993)
513 (court, not jury, orders forfeiture of substitute assets). As a practical matter,
514 courts have also determined that they, not the jury, must determine the
515 forfeitability of assets discovered after the trial is over and the jury has been
516 dismissed. *See United States v. Saccoccia*, 898 F. Supp. 53 (D.R.I. 1995)

517 (government may conduct post-trial discovery to determine location and identity
518 of forfeitable assets; post-trial discovery resulted in discovery of gold bars buried
519 in defendant's mother's backyard several years after the entry of an order
520 directing the defendant to forfeit all property, up to \$137 million, involved in his
521 money laundering offense).

Summary of Comments on Rule 32.2

The summary of the comments and testimony on the originally proposed version of Rule 32.2 are located at TAB A, infra, following this Report.

GAP Report--Rule 32.2

The GAP report on the Committee's changes following publication and as presented to the Standing Committee at its June 1998 meeting are located at TAB A, infra, following this Report.

1 **Rule 7. The Indictment and the Information**

2 (c) NATURE AND CONTENTS.

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

8 * * * * *

9
10 **COMMITTEE NOTE**

11
12 The rule is amended to reflect new rule 32.2 which now governs
13 criminal forfeiture procedures.

1 sanction upon disposition of the appeal, including the entering of a
2 restraining order or an injunction or requiring a deposit in whole or in part
3 of the monetary amount involved into the registry of the district court or
4 execution of a performance bond.

COMMITTEE NOTE

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

Summary of Comments on Rule 38.

The Committee received no comments on the proposed change to Rule 38.

GAP Report--Rule 38

The Committee made no changes to the published draft.

III. Information Items--Rules Pending Further Discussion

At its April 1998 meeting the Committee discussed a number of proposed amendments to other Rules of Criminal Procedure. Although several of them are ready for publication and comment, the Committee has decided to defer any further action on those rules. None of the proposed amendments are critical at this point, and as noted, *infra*, the Committee will shortly embark on a restyling project of all of the rules. The Committee believed that the amendments should thus be deferred until the restyled rules are published.

A. Rules 10 (Arraignment) and 43 (Presence of Defendant) (Ability of Defendant to Waive Appearance at Arraignment).

The Committee is actively considering amendments to Rules 10 and 43 which would permit a defendant to waive an appearance at his or her arraignment. The rule would require that the waiver be in writing and with the consent of the court. In conjunction with those amendments, the Committee will also consider the possibility of amending Rules 10 and 43 to permit a defendant to waive an appearance for entering a plea on superseding indictment.

B. Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition. (Court-Ordered Examination)

At its April 1999 meeting, the Committee will continue its consideration of amendments to Rule 12.2 which would accomplish two results. First, a defendant who intends to introduce expert testimony on the issue of mental condition at a capital sentencing proceeding would be required to give notice of an intent to do so. And second, the rule would make it clear that the trial court would have the authority to order a mental examination of a defendant who had given such notice. The Committee is considering what provision should be made for releasing the results of that examination to the parties and the possible implications on the defendant's right against self-incrimination.

C. Rule 26. Taking of Testimony (Electronic Transmission)

The Committee has considered an amendment to Rule 26 which would conform that rule to Civil Rule 43 regarding the taking of testimony in court through means other than oral testimony. After discussing the rule, however, the Committee decided to defer further consideration of that amendment until it has had an opportunity to discuss further possible Confrontation Clause concerns and whether such testimony should be preferred over deposition testimony. The Committee will finalize the draft of this amendment at its April 1999 meeting.

D. Rule 30. Submission of Requests for Instructions.

An amendment to Rule 30, which would permit the court to require the parties to submit pretrial requests for instructions was published for public comment last fall. At its April 1998 meeting, the Committee discussed the comments received and decided to defer any further consideration of amendments to the Rule. The Civil Rules Committee is considering similar amendments to Rule 51 and is also considering possible amendments which would clarify issues of preservation of error re instructions errors. The Committee will continue discussions of this item.

E. Rules Governing § 2254 and § 2255 Rules (Habeas Corpus Proceedings)

At its October 1998 meeting, the Advisory Committee adopted a number of proposed changes to the rules governing habeas corpus proceedings which will make the two sets of rules consistent with each other and make any other

conforming amendments resulting from the Antiterrorism and Effective Death Penalty Act of 1996. The Committee will revisit this topic at future meetings.

IV. Information Items--Rules Possibly Affected by Legislative Proposals.

A. Study of Grand Jury Practices; Attorney's Presence in Grand Jury Proceeding

The Advisory Committee is aware that Congress recently enacted legislation that requires the Judicial Conference to review the question of whether defense attorney's should be permitted to attend grand jury proceedings. A subcommittee has been appointed to assist in that project, with a view to presenting its findings to the Advisory Committee and Standing Committee.

B. Status Report on Proposed Restyling of Criminal Rules.

The Style Subcommittee of the Standing Committee has been actively working on draft of the Criminal Rules with a view to presenting that draft to the Advisory Committee by the end of the year. Two subcommittees have been appointed to review the draft. The Committee plans to hold several additional meetings over the next year to address the restyling project.

Attachments:

- A. Original Draft of Proposed Rule 32.2 (June 1998 meeting) w/summary of comments.
- B. Comparison Chart: Original and Revised Rules 32.2
- C. Suggested Style Changes to Original Rule and Department of Justice's Memo regarding those changes.
- D. Draft Minutes of October 1998 Meeting

TAB A

1 **32.2. Criminal Forfeiture**

2 (a) INDICTMENT OR INFORMATION. No judgment of
3 forfeiture may be entered in a criminal proceeding unless the indictment or
4 information alleges that a defendant has an interest in property that is
5 subject to forfeiture in accordance with the applicable statute.

6 (b) HEARING AND ORDER OF FORFEITURE.

7 (1) As soon as practicable after entering a guilty verdict
8 or accepting a plea of guilty or nolo contendere on any count in the
9 indictment or information for which criminal forfeiture is alleged,
10 the court shall determine what property is subject to forfeiture
11 because it is related to the offense. The determination may be
12 based on evidence already in the record, including any written plea
13 agreement, or on evidence adduced at a post trial hearing. If the
14 property is subject to forfeiture, the court shall enter a preliminary
15 order directing the forfeiture of whatever interest each defendant
16 may have in the property, without determining what that interest is.
17 Deciding the extent of each defendant's interest is deferred until
18 any third party claiming an interest in the property has petitioned
19 the court to consider the claim.

20 (2) If no third party petition as provided in (b)(1) is
21 timely filed, the court shall determine whether the property should
22 be forfeited in whole or in part depending on the extent of the

23 defendant's interest in the property. The determination may be
24 made at any time before the order of forfeiture becomes final under
25 subdivision (c), and may be based on evidence already in the
26 record, including a written plea agreement, or evidence submitted
27 by the government in a motion for entry of a final order of
28 forfeiture. The defendant may not object to the entry of the final
29 order of forfeiture on the ground that the property belongs, in
30 whole, or in part, to a co-defendant or a third party. If the court
31 determines that the defendant, or any combination of co-
32 defendants, were the only persons with a legal interest (or in the
33 case of illegally obtained property, a possessory interest) in the
34 property, the court shall enter a final order forfeiting the property
35 in its entirety. If the court determines that the defendant or
36 combination of co-defendants, had a legal interest (or in the case of
37 illegally obtained property, a possessory interest) in only a portion
38 of the property, the court shall enter a final order forfeiting the
39 property to the extent of the defendant's or defendants' interest.

40 (3) When the court enters a preliminary order of
41 forfeiture, the Attorney General may seize the property subject to
42 forfeiture; conduct any discovery as the court considers proper in
43 identifying, locating or disposing of the property; and commence
44 proceedings consistent with any statutory requirements pertaining

45 to third-party rights. At sentencing—or at any time before
46 sentencing if the defendant consents—the order of forfeiture
47 becomes final as to the defendant and shall be made a part of the
48 sentence and included in the judgment. The court may include in
49 the order of forfeiture whatever conditions are reasonably
50 necessary to preserve the property's value pending any appeal.

51 (c) ANCILLARY PROCEEDING.

52 (1) If, as prescribed by statute, a third party files a petition
53 asserting an interest in the forfeited property, the court shall
54 conduct an ancillary proceeding.

55 (i) The court may consider a motion to dismiss
56 the petition for lack of standing, for failure to state a claim
57 upon which relief can be granted, or for any other ground.
58 For purposes of the motion, the facts set forth in the
59 petition are assumed to be true.

60 (ii) If a Rule 32.2(c)(1) motion to dismiss is
61 denied, or not made, the court may permit the parties to
62 conduct discovery in accordance with the Federal Rules of
63 Civil Procedure to the extent that the court determines such
64 discovery to be necessary or desirable to resolve factual
65 issues before conducting an evidentiary hearing. After
66 discovery ends, either party may ask the court to dispose of

67 the petition on a motion for summary judgment in the
68 manner described in Rule 56 of the Federal Rules of Civil
69 Procedure.

70 (2) After the ancillary proceeding, the court shall enter
71 a final order of forfeiture amending the preliminary order as
72 necessary to account for the disposition of any third-party petition.

73 (3) If multiple petitions are filed in the same case, an
74 order dismissing or granting fewer than all of the petitions is not
75 appealable until all petitions are resolved, unless the court
76 determines that there is no just reason for delay and directs the
77 entry of final judgment on one or more but fewer than all of the
78 petitions.

79 (4) The ancillary proceeding is not considered a part of
80 sentencing.

81 (d) STAY OF FORFEITURE PENDING APPEAL. If the
82 defendant appeals from the conviction or order of forfeiture, the court may
83 stay the order of forfeiture upon terms that the court finds appropriate to
84 ensure that the property remains available in case the conviction or order
85 of forfeiture is vacated. The stay will not delay the ancillary proceeding or
86 the determination of a third party's rights or interests. If the defendant's
87 appeal is still pending when the court determines that the order of
88 forfeiture shall be amended to recognize a third party's interest in the

89 property, the court shall amend the order of forfeiture but shall refrain
90 from directing the transfer of any property or interest to the third party
91 until the defendant's appeal is final, unless the defendant consents in
92 writing, or on the record, to the transfer of the property or interest to the
93 third party.

94 (e) SUBSEQUENTLY LOCATED PROPERTY; SUBSTITUTE
95 PROPERTY.

96 (1) The court, on motion by the government, may at
97 any time enter an order of forfeiture—or amend an existing order
98 of forfeiture—to include property which:

99 (i) is subject to forfeiture under an existing
100 order of forfeiture and was located and identified after that
101 order of forfeiture was entered; or

102 (ii) is substitute property which qualifies for
103 forfeiture under an applicable statute.

104 (2) If the government makes the requisite showing that
105 the property is subject to forfeiture under either (e)(1)(i) or
106 (e)(1)(ii), the court shall:

107 (i) enter an order forfeiting the property, or
108 amend an existing preliminary or final order to include that
109 property;

- 110 (ii) if a third party files a petition with the court,
111 conduct an ancillary proceeding under subdivision (c) as to
112 the property; and
113 (iii) if no third party files a petition, enter an
114 order forfeiting the property under subdivision (b)(2).

115 **COMMITTEE NOTE**

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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.

Subsection (a). Subsection (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, subsection (a) is not intended to require that an itemized list of the property to be forfeited appear in the indictment or information itself; instead, such an itemization may be set forth in one or more bills of particulars. *See 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). *See United States v. Voight*, 89 F.3d 1050 (3rd Cir. 1996) (court may amend order of forfeiture at any time to include substitute assets).

Subsection (b) Subsection (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 jury right on forfeiture issues). After the Rule was promulgated in 1972, changes in the law created several problems.

The first problem concerns the role of the jury. 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*, 116 S. Ct. 356 (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

153 Court said, is in the nature of a statutory right that can be modified or
154 repealed at any time.

155
156 Even before *Libretti*, lower courts had determined that criminal
157 forfeiture is a sentencing matter and concluded that criminal trials
158 therefore should be bifurcated so that the jury first returns a verdict on
159 guilt or innocence and then returns to hear evidence regarding the
160 forfeiture. In the second part of the bifurcated proceeding, the jury is
161 instructed that the government must establish the forfeitability of the
162 property by a preponderance of the evidence. See *United States v. Myers*,
163 21 F.3d 826 (8th Cir. 1994) (preponderance standard applies because
164 criminal forfeiture is part of the sentence in money laundering cases);
165 *United States v. Voight*, 89 F.3d 1050 (3rd Cir. 1996) (following *Myers*);
166 *United States v. Smith*, 966 F.2d 1045, 1050-53 (6th Cir. 1992) (same for
167 drug cases); *United States v. Bieri*, 21 F.3d 819 (8th Cir. 1994) (same).
168

169 Traditionally, juries do not have a role in sentencing other than in
170 capital cases, and elimination of that role in criminal forfeiture cases
171 would streamline criminal trials. Undoubtedly, it may be confusing for a
172 jury to be instructed regarding a different standard of proof in the second
173 phase of the trial, and it is burdensome to have to return to hear additional
174 evidence after what may have been a contentious and exhausting period of
175 deliberation regarding the defendant's guilt or innocence.
176

177 For these reasons, the proposal replaces Rule 31(e) with a
178 provision that requires the court alone, as soon as practicable after the
179 verdict in the criminal case, to hold a hearing to determine if the property
180 was subject to forfeiture, and to enter a preliminary order of forfeiture.
181

182 The second problem with Rule 31(e) concerns the scope of the
183 determination that must be made prior to entering an order of forfeiture.
184 This issue is the same whether the determination is made by the court or
185 by the jury.
186

187 As mentioned, the current Rule requires the jury to return a special
188 verdict "as to the extent of the interest or property subject to forfeiture."
189 Some courts interpret this to mean only that the jury must answer "yes" or
190 "no" when asked if the property named in the indictment is subject to
191 forfeiture under the terms of the forfeiture statute--e.g. was the property
192 used to facilitate a drug offense? Other courts also ask the jury if the
193 defendant has a legal interest in the forfeited property. Until other courts,
194 including the Fourth Circuit, require the jury to determine the *extent* of the
195 defendant's interest in the property vis a vis third parties. See *United*
196 *States v. Ham*, 58 F.3d 78 (4th Cir. 1995) (case remanded to the district
197 court to empanel a jury to determine, in the first instance, the extent of the
198 defendant's forfeitable interest in the subject property).
199

200 The notion that the "extent" of the defendant's interest must be
201 established as part of the criminal trial is related to the fact that criminal
202 forfeiture is an *in personam* action in which only the defendant's interest

203 in the property may be forfeited. *United States v. Riley*, 78 F.3d 367 (8th
204 Cir. 1996). When the criminal forfeiture statutes were first enacted in the
205 1970's, it was clear that a forfeiture of property other than the defendant's
206 could not occur in a criminal case, but there was no mechanism designed
207 to limit the forfeiture to the defendant's interest. Accordingly, Rule 31(e)
208 was drafted to make a determination of the "extent" of the defendant's
209 interest part of the verdict.

210
211 The problem, of course, is that third parties who might have an
212 interest in the forfeited property are not parties to the criminal case. At the
213 same time, a defendant who has no interest in property has no incentive, at
214 trial, to dispute the government's forfeiture allegations. Thus, it was
215 apparent by the 1980's that Rule 31(e) was an inadequate safeguard
216 against the inadvertent forfeiture of property in which the defendant held
217 no interest.

218
219 In 1984, Congress addressed this problem when it enacted a
220 statutory scheme whereby third party interests in criminally forfeited
221 property are litigated by the court in an ancillary proceeding following the
222 conclusion of the criminal case and the entry of a preliminary order of
223 forfeiture. *See* 21 U.S.C. § 853(n); 18 U.S.C. § 1963(l). Under this
224 scheme, the court orders the forfeiture of the defendant's interest in the
225 property--whatever that interest may be--in the criminal case. At that
226 point, the court conducts a separate proceeding in which all potential third
227 party claimants are given an opportunity to challenge the forfeiture by
228 asserting a superior interest in the property. This proceeding does not
229 involve relitigation of the forfeitability of the property; its only purpose is
230 to determine whether any third party has a legal interest in the property
231 such that the forfeiture of the property from the defendant would be
232 invalid.

233
234 The notice provisions regarding the ancillary proceeding are
235 equivalent to the notice provisions that govern civil forfeitures. *Compare*
236 21 U.S.C. § 853(n)(1) *with* 19 U.S.C. § 1607(a); *see United States v.*
237 *Bouler*, 927 F. Supp. 911 (W.D.N.C. 1996) (civil notice rules apply to
238 ancillary criminal proceedings). Notice is published and sent to third
239 parties who have a potential interest. *See United States v. BCCI Holdings*
240 *(Luxembourg) S.A. (In re Petition of Indosuez Bank)*, 916 F. Supp. 1276
241 (D.D.C. 1996) (discussing steps taken by government to provide notice of
242 criminal forfeiture to third parties). If no one files a claim, or if all claims
243 are denied following a hearing, the forfeiture becomes final and the United
244 States is deemed to have clear title to the property. 21 U.S.C. § 853(n)(7);
245 *United States v. Hentz*, 1996 WL 355327 (E.D. Pa. 1996) (once third party
246 fails to file a claim in the ancillary proceeding, government has clear title
247 under § 853(n)(7) and can market the property notwithstanding third
248 party's name on the deed).

249
250 Thus, the ancillary proceeding has become the forum for
251 determining the extent of the defendant's forfeitable interest in the
252 property. It allows the court to conduct a proceeding in which all third

253 party claimants can participate and which ensures that the property
254 forfeited actually belongs to the defendant.
255

256 Since the enactment of the ancillary proceeding statutes, the
257 requirement in Rule 31(e) that the court (or jury) determine the extent of
258 the defendant's interest in the property as part of the criminal trial has
259 become an unnecessary anachronism that leads more often than not to
260 duplication and a waste of judicial resources. There is no longer any
261 reason to delay the conclusion of the criminal trial with a lengthy hearing
262 over the extent of the defendant's interest in property when the same issues
263 will have to be litigated a second time in the ancillary proceeding if
264 someone files a claim challenging the forfeiture. For example, in *United*
265 *States v. Messino*, 921 F. Supp. 1231 (N.D. Ill. 1996), the court allowed
266 the defendant to call witnesses to attempt to establish that they, not he,
267 were the true owners of the property. After the jury rejected this evidence
268 and the property was forfeited, the court conducted an ancillary
269 proceeding in which the same witnesses litigated their claims to the same
270 property.
271

272 A more sensible procedure would be for the court, once it
273 determines that property was involved in the criminal offense for which
274 the defendant has been convicted, to order the forfeiture of whatever
275 interest a defendant may have in the property without having to determine
276 exactly what that interest is. If third parties assert that they have an
277 interest in all or part of the property, those interests can be adjudicated at
278 one time in the ancillary proceeding.
279

280 This approach would also address confusion that occurs in multi-
281 defendant cases where it is clear that each defendant should forfeit
282 whatever interest he may have in the property used to commit the offense,
283 but it is not at all clear which defendant is the actual owner of the
284 property. For example, suppose A and B are co-defendants in a drug and
285 money laundering case in which the government seeks to forfeit property
286 involved in the scheme that is held in B's name but of which A may be the
287 true owner. It makes no sense to invest the court's time in determining
288 which of the two defendants holds the interest that should be forfeited.
289 Both defendants should forfeit whatever interest they may have.
290 Moreover, to the extent that the current rule forces the court to find that A
291 is the true owner of the property, it gives B the right to file a claim in the
292 ancillary proceeding where he may attempt to recover the property despite
293 his criminal conviction. *United States v. Real Property in Waterboro*, 64
294 F.3d 752 (1st Cir. 1995) (co-defendant in drug/money laundering case who
295 is not alleged to be the owner of the property is considered a third party
296 for the purpose of challenging the forfeiture of the other co-defendant's
297 interest).
298

299 The new Rule resolves these difficulties by postponing the
300 determination of the extent of the defendant's interest until the ancillary
301 proceeding. As provided in (b)(1), the court, as soon as practicable after
302 the verdict in the criminal case, would determine if the property was

303 subject to forfeiture in accordance with the applicable statute, e.g.,
304 whether the property represented the proceeds of the offense, was used to
305 facilitate the offense, or was involved in the offense in some other way.
306 The determination could be made by the court alone based on the evidence
307 in the record from the criminal trial or the facts set forth in a written plea
308 agreement submitted to the court at the time of the defendant's guilty plea,
309 or the court could hold a hearing to determine if the requisite relationship
310 existed between the property and the offense. It would not be necessary to
311 determine at this stage what interest any defendant might have in the
312 property. Instead, the court would order the forfeiture of whatever interest
313 each defendant might have in the property and conduct the ancillary
314 proceeding.
315

316 If someone files a claim, the court would determine the respective
317 interests of the defendants versus the third party claimants and amend the
318 order of forfeiture accordingly. On the other hand, as recognized in (b)(2),
319 if no one files a claim in the ancillary proceeding, the court would make a
320 finding as to the extent of the defendant's interest in the property. If the
321 court finds that the defendant (or any combination of defendants) were the
322 only persons with an interest in the property, then it would enter an order
323 forfeiting the property in its entirety. Otherwise, the final order may
324 forfeit only the defendant's interest in the property. This corresponds to
325 the requirement under current law, at least as it is interpreted in some
326 courts, in instances where Rule 31(e) applies.
327

328 The court may make the determination of the defendant's interest
329 based on evidence in the record, or on additional evidence submitted by
330 the government in support of the motion for the entry of a final judgment
331 of forfeiture. The defendant would have no standing to object to the
332 forfeiture on the ground that the property belonged to someone who could
333 have filed a petition in the ancillary proceeding but failed to do so.
334

335 Subsection (b)(3) replaces Rule 32(d)(2) (effective December
336 1996). It provides that once the court enters a preliminary order of
337 forfeiture directing the forfeiture of whatever interest each defendant may
338 have in the forfeited property, the government may seize the property and
339 commence an ancillary proceeding to determine the interests of any third
340 party. Again, if no third party files a claim, the court, at the time of
341 sentencing, will enter a final order forfeiting the property to the extent of
342 the defendant's interest. If a third party files a claim, the order of
343 forfeiture will become final as to the defendant at the time of sentencing
344 but will be subject to amendment in favor of a third party pending the
345 conclusion of the ancillary proceeding.
346

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

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Subsection (c). Subsection (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.

Experience has shown, however, 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*, CR85-00756 (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 part of 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. 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).

As noted in (c)(5), 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.

Subsection (d). Subsection (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

403 property remains intact and unencumbered so that it may be returned to
404 the defendant in the event the appeal is successful. Subsection (d) makes
405 clear, however, that a district court is not divested of jurisdiction over an
406 ancillary proceeding even if the defendant appeals his or her conviction.
407 This allows the court to proceed with the resolution of third party claims
408 even as the appeal is considered by the appellate court. Otherwise, third
409 parties would have to await the conclusion of the appellate process even to
410 *begin* to have their claims heard. *See United States v. Messino*, 907 F.
411 Supp. 1231 (N.D. Ill. 1995) (the district court retains jurisdiction over
412 forfeiture matters while an appeal is pending).
413

414 Finally, subsection (d) provides a rule to govern what happens if
415 the court determines that a third-party claim should be granted but the
416 defendant's appeal is still pending. The defendant, of course, is barred
417 from filing a claim in the ancillary proceeding. *See* 18 U.S.C. §
418 1963(l)(2); 21 U.S.C. § 853(n)(2). Thus, the court's determination, in the
419 ancillary proceeding, that a third party has an interest in the property
420 superior to that of the defendant cannot be binding on the defendant. So,
421 in the event that the court finds in favor of the third party, that
422 determination is final only with respect to the government's alleged
423 interest. If the defendant prevails on appeal, he or she recovers the
424 property as if no conviction or forfeiture ever took place. But if the order
425 of forfeiture is affirmed, the amendment to the order of forfeiture in favor
426 of the third party becomes effective.
427

428 **Subsection (e).** Subsection (e) makes clear, as courts have found,
429 that the court retains jurisdiction to amend the order of forfeiture at any
430 time to include subsequently located property which was originally
431 included in the forfeiture order and any substitute property. *See United*
432 *States v. Hurley*, 63 F.3d 1 (1st Cir. 1995) (court retains authority to order
433 forfeiture of substitute assets after appeal is filed); *United States v. Voight*,
434 89 F.3d 1050 (3rd Cir. 1996) (following *Hurley*). Third parties, of course,
435 may contest the forfeiture of substitute assets in the ancillary proceeding.
436 *See United States v. Lester*, 85 F.3d 1409 (9th Cir. 1996).

Summary of Comments to Rule 32.2--Original Rule 32.2

Jack E. Horsley, Esq. (CR-003)
Craig & Craig
Mattoon, Illinois
September 23, 1997

Mr. Horsley favors all of the proposed changes.

James W. Evans (CR-005)
Harrisburg, Pennsylvania
September 25, 1997

Mr. Evans supports the proposed amendment.

Ms. Leslie Hagin (CR-013)
National Association of Criminal Defense Lawyers
Legislative Director and Counsel
December 12, 1997

Ms. Hagin states that his organization is submitting several significant proposed rule changes being considered by the committee. She requests permission to testify about the proposed changes to Rule 32.2.

Mr. Ronald F. Waterman (CR-014)
Gough, Shanahan, Johnons, & Waterman
Helena, Montana
December 16, 1997

Mr. Waterman writes that lenders and third parties have concerns about the procedures followed in forfeiture of a criminal defendant's interest in property, whether justified or not. He says that there exists a concern that a third party can lose legal interest in property without a meaningful opportunity to appear and defend title to the property. He adds that the adoption on Rule 32.2 is good because it resolves concerns raised by lenders and others immersing people in ancillary proceedings unless there is a finding that a criminal defendant has an interest in the property.

Peter Goldberger (CR-021b)
Ardmore, Pennsylvania
Co-Chair, National Association of Criminal Defense Lawyers
Committee on Rules of Procedure
February 15, 1998

The NACDL is adamantly opposed to the continuing efforts to abolish the right to jury trial on government claims for criminal forfeiture, and to undermine procedural rights associated with such claims. The NACDL states that the proposed amendment is "undemocratic, disrespectful of our legal culture and history, and flawed in numerous particulars." The NACDL contends that the proposal appears to breach the Rules Enabling Act wall between procedural reform and substantive rights. It recommends that the Advisory Committee reject the proposed rule changes almost completely. The NACDL states that there is no good reason to abolish the historically-grounded right to a jury trial in criminal forfeiture allegations and that such practice is unconstitutional, despite the Supreme Court's decision in *Libretti v. United States*, 516 U.S. 29 (1995). The NACDL notes that the right to jury trial in criminal forfeiture cases was not the formal question presented to the court in that case and it maintains that eliminating juries will not streamline the process. It also suggests that juries will not be confused by varying standards of proof if

the standard “beyond a reasonable doubt” is carried over into forfeiture proceedings. The organization contends that the jury’s collective conscience should be preserved, allowing it to protect the citizens from overreaching prosecutors. It states that it believes the proposed reform has nothing to do with procedural reform, but everything to do with the desire to punish and the desire to win.

The NACDL also maintains that the proposed amendment to Rule 32.2(b) would eliminate the requirement of 31(e) requiring a fact-finder to determine the extent of the interest or property subject to forfeiture. The NACDL states that the proposed changes to 32.2(a) would “further devastate the fairness of the criminal forfeiture process by destroying” the grand jury’s and trial jury’s respective functions. The NACDL urges the Committee to clarify, despite contrary judicial decisions, that “only property or interests in property specifically named in the indictment may be forfeited criminally.” The NACDL writes that Proposed Rule 32.2(f) should safeguard the defendant’s and interested third parties’ rights to be heard on the issue.

The NACDL states that the creation of rules to ensure fairness in ancillary forfeiture proceedings is an excellent idea. It notes that the rights of “third parties” should not be less than the rights of anyone making a claim in a civil forfeiture proceeding. The NACDL attached a copy of Petitioner’s Brief in *Libretti v. United States*.

Federal Magistrate Judges Association (CR-024)
Hon. Tommy Miller, President
United States Magistrate Judge
February 2, 1998

The Association supports the adoption of new Rule 32.2. It notes that adoption of Rule 32.2 would effectively repeal the “statutory” right in Rule 31(e) to a jury trial for forfeitures but that the rule is a sensible and cost-effective procedure to resolve criminal forfeiture procedures.

Summary of Testimony--Original Rule 32.2

Mr. Bo Edwards
Mr. David Smith
National Association of Criminal Defense Lawyers

The witnesses expressed strong opposition to the proposed new Rule. Their chief objection centered on the fact that the new rule removes the right of jury to decide whether the defendant should forfeit any

property. That right, they said, was not abrogated by the Supreme Court's decision in *Libretti*; the issue of whether a jury trial was not available in a forfeiture proceeding was not even briefed by the parties in that case. Even assuming that the right to jury is not constitutionally required, they urged the Committee to nonetheless retain that right under the Rules of Procedure. Doing so, they argued, would recognize the value that Americans place on property rights. They also objected to the summary procedures for making forfeiture proceedings and the possibility that the property rights of innocent third parties would not be adequately protected.

Mr. Steff Casella
Department of Justice

Mr. Casella responded to the testimony of the witnesses representing the NADCL and pointed out that the Supreme Court in *Libretti* did clearly say that forfeiture proceedings are a part of sentencing. Based upon that view, the Department of Justice believed that the rule was consistent with existing practice and the constitution. He noted that the rights of third parties would be as protected as they currently are under statutory schemes for determining their interests in "ancillary proceedings."

GAP Report--Original 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.

TAB B

COMARISON CHART — RULE 32.2

Original Draft of Rule 32.2 Presented to Standing Committee at its June 1998 Meeting	Revised Draft of Rule 32.2	Summary of Change from Original Draft
<p>(a) <u>INDICTMENT OR INFORMATION</u>. No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or information alleges that a defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.</p>	<p>(a) <u>NOTICE TO THE DEFENDANT</u>. 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.</p>	<p>Original draft required substantive allegation in indictment. 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.</p>
<p>(b) <u>HEARING AND ORDER OF FORFEITURE</u>.</p> <p>(1) <u>As soon as practicable</u> after entering a guilty verdict or accepting a plea of guilty or nolo contendere on any count in the indictment or information for which criminal forfeiture is alleged, the court shall determine what property is subject to forfeiture because it is related to the offense. The determination may be based on evidence already in the record, including any written plea agreement, or on evidence adduced at a post trial hearing. If the property is subject to forfeiture, the court shall enter a preliminary order directing the forfeiture of whatever interest each defendant may have in the property, without determining what that interest is. Deciding the extent of each defendant's interest is deferred until any third party claiming an interest in the property has petitioned the court to consider the claim.</p>	<p>(b) <u>ENTRY OF PRELIMINARY ORDER OF FORFEITURE: POST-VERDICT HEARING</u>.</p> <p>(1) <u>As soon as practicable</u> after entering a guilty verdict or accepting a plea of guilty or <i>nolo contendere</i> on any count in an indictment or information for which criminal forfeiture is sought, the court shall determine what property is subject to forfeiture under the applicable statute. If specific property is sought to be forfeited, 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 under this subdivision 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</p>	<p>Title has been changed to include reference to post-verdict hearing.</p> <p>Subdivision (b)(1) has been revised to reflect different types of forfeiture—specific assets and money judgments.</p>

<p>(2) <u>If no third party petition as provided in (b)(1) is timely filed, the court shall determine whether the property should be forfeited in whole or in part depending on the extent of the defendant's interest in the property. The determination may be made at any time before the order of forfeiture becomes final under subdivision (c), and may be based on evidence already in the record, including a written plea agreement, or evidence submitted by the government in a motion for entry of a final order of forfeiture. 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 co-defendant or a third party. If the court determines that the defendant, or any combination of co-defendants, were the only persons with a legal interest (or in the case of illegally obtained property, a possessory interest) in the property, the court shall enter a final order forfeiting the property in its entirety. If the court determines that the defendant or combination of co-defendants, had a legal interest (or in the case of illegally obtained property, a possessory interest) in only a portion of the property, the court shall enter a final order forfeiting the property to the extent of the defendant's or defendants' interest.</u></p> <p>(3) <u>When the court enters a preliminary order of forfeiture, the Attorney General may seize the property subject to forfeiture, conduct any discovery as the court considers proper in identifying, locating or disposing of the property, and commence proceedings consistent with any statutory requirements pertaining to 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</u></p>	<p>hearing after the verdict or finding of guilty.</p> <p>(2) <u>If the court finds that property is subject to forfeiture, it shall promptly enter a preliminary order of forfeiture. The preliminary order shall set forth the amount of any money judgment, or direct 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 pending the filing of any third party claims in an ancillary proceeding under subdivision (c).</u></p> <p>(3) <u>Entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the property subject to forfeiture, to conduct any discovery the court considers proper in identifying, locating, or disposing of the property, and to commence proceedings consistent with any statutory requirements pertaining to 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</u></p>	<p>Subdivision (b)(2) has been revised to make clear that resolution of any third party's interest in property is deferred until ancillary hearing. See (c), <i>infra</i>. Some material in original (b)(2) has been simplified and moved to new (c)(2)</p> <p>Subdivision (b)(3) has been revised to permit the Attorney General to designate someone outside the Department of Justice to seize the forfeited property.</p>
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<p>shall be made a part of the sentence and included in the judgment. The court may include in the order of forfeiture whatever conditions are reasonably found necessary to preserve the property's value pending any appeal.</p>	<p>shall be made a part of the sentence and included in the judgment. The court may include in the order of forfeiture whatever conditions are reasonably found necessary to preserve the property's value pending any appeal.</p> <p>(4) Upon the request of any defendant or the government in a case in which the finding of guilt was rendered by a jury, the determination of whether the government has established the requisite nexus between the property and the offense committed by the defendant shall be made by the jury.</p>	<p>Subdivision (b)(4) is major change from original draft and permits defendant or government to request that jury decide whether nexus exists between the property and the crime.</p>
<p>(d) <u>STAY OF FORFEITURE</u> <u>PENDING APPEAL.</u> If the defendant appeals from the conviction or order of forfeiture, the court may stay the order of forfeiture upon terms that the court finds appropriate to ensure that the property remains available in case the conviction or order of forfeiture is vacated. The stay will not delay the ancillary proceeding or the determination of a third party's rights or interests. If the defendant's appeal is still pending when the court determines that the order of forfeiture shall be amended to recognize a third party's interest in the property, the court shall amend the order of forfeiture but shall refrain from directing the transfer of any property or interest to the third party until the defendant's appeal is final, unless the defendant consents in writing, or on the record, to the transfer of the property or interest to the third party.</p>	<p>(d) <u>STAY PENDING APPEAL.</u> If the defendant appeals from the conviction or order of forfeiture, the court may stay its order of forfeiture on terms that the court finds 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. But 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 or interest to a third party until the decision on appeal becomes final, unless the defendant so consents in writing or on the record.</p>	

<p>(e) <u>SUBSEQUENTLY LOCATED PROPERTY: SUBSTITUTE PROPERTY.</u> (1) <u> </u> The court, on motion by the government, may at any time enter an order of forfeiture—or amend an existing order of forfeiture—to include property which: (i) <u> </u> is subject to forfeiture under an existing order of forfeiture and was located and identified after that order of forfeiture was entered; or (ii) <u> </u> is substitute property which qualifies for forfeiture under an applicable statute. (2) <u> </u> If the government makes the requisite showing that the property is subject to forfeiture under either (e)(1)(i) or (e)(1)(ii), the court shall: (i) <u> </u> enter an order forfeiting the property, or amend an existing preliminary or final order to include that property; (ii) <u> </u> if a third party files a petition with the court, conduct an ancillary proceeding under subdivision (c) as to the property; and (iii) <u> </u> if no third party files a petition, enter an order forfeiting the property under subdivision (b)(2).</p>	<p>(e) <u>SUBSEQUENTLY LOCATED PROPERTY: SUBSTITUTE PROPERTY.</u> (1) <u> </u> 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. Rule 32.2(b)(4) does not apply to property forfeited under this subdivision. (2) If the government shows that the property is subject to forfeiture under (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).</p>	
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TAB C



U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

October 28, 1998

Professor David A. Schlueter
St. Mary's University School of Law
One Camino Santa Maria
San Antonio, Texas 78228-8602

Dear Dave:

Enclosed please find a redraft of Rule 32.2 that incorporates the changes made by the Advisory Committee last week, and endeavors to include as many of the changes suggested by the Style Subcommittee as possible. For example, we have included all the "musts" notwithstanding our preference for "may" and "shall" and despite our doubts whether the Supreme Court will countenance the use of "must" on an other than comprehensive basis throughout the Federal Rules of Criminal Procedure.

We rejected many of the style changes as inconsistent with actions taken by the Advisory Committee, or because they would inadvertently make substantive changes to the Rule adopted by the Committee. Indeed, the changes made by the Style Subcommittee version are so extensive that, if included in the proposed Rule, we could no longer support it. You and the Chairman may wish to communicate with the Style Subcommittee before the Standing Committee meeting. If further restyling is required, we would be available to meet with the Style Subcommittee to make sure that no inadvertent substantive changes result from the restyling --- unfortunately a probable outcome otherwise given the complexity and highly specialized nature of the subject matter.

For example, the Style Subcommittee uniformly omitted the language "under the applicable statute" or "in accordance with the applicable statute," apparently because it thought the language mere surplusage. It is not. In subdivision (a), for instance, the quoted words are needed to avoid allowing the government, without tracking the statute, to state merely "the government plans to seek forfeiture in this case." Later on, in subdivision (b), the quoted words are crucial because they embody

- 2 -

an important concept - namely that the standard contained in the applicable statute will control the government's burden in establishing that the property is the defendant's. You may recall that this addition was crucial to Professor Stith's support of the Rule.

The following summarizes the reasoning underlying our rejection of certain proposed Style changes, and may be useful in persuading members of the Style Subcommittee not to pursue the changes further without consultation with our Committee.

1. In (a), the Advisory Committee approved the language "contains notice." "Adequately informs" - the Style Subcommittee's alternative formulation - is arguably different so was not included.

2. In (b)(1), in an apparent effort to condense the Rule, the Style Subcommittee proposed to lump into the nexus determination both money judgment and specific property forfeiture cases. This makes a substantive change in the proposal. The nexus determination doesn't apply to money judgment cases. A money judgment is available whether or not the government can establish a nexus between the offense and any particular property.

3. Likewise in (b)(1), the re-styled version would have made two other substantive changes. First, it would have dropped the language "or, if forfeiture is contested," which we had included directly in response to a comment from a member of the Standing Committee who thought the former Rule was not clear on when the court could hold a hearing to take additional evidence. The Advisory Committee approved the quoted phrase as a useful clarification. Consequently we retained it. Second, the re-styled version would have authorized a post-verdict hearing to adduce additional information only "[i]n the case of specific property." The possibility of a hearing is, however, appropriate both for specific property and money judgment cases, as provided in the Rule approved by the Advisory Committee.

4. Also in (b)(1), the re-styled version would have stricken the phrase "including any written plea agreement," presumably because it was thought to be clear that the plea agreement was part of the "record." While one would hope this is so, our forfeiture attorneys emphasized the practical importance of having the Rule recognize that the plea agreement often includes acknowledgment of the facts that establish the forfeitability of the property. On this matter, we are willing to compromise and thus have bracketed the language "including any written plea agreement." We would be amenable to its deletion, provided the Note is amended to include a sentence using a written plea agreement as an illustration of evidence that is

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part of the record supporting a determination by the court under (b) (1).

5. In (b) (2), the Style Subcommittee proposes to delete the sentence beginning with "Deciding" and to insert the phrase "subject to a third party's later claim." In our view, while this may have no substantive effect, a separate sentence is appropriate here to emphasize the critical point that the resolution of third party claims - unlike the situation under present law - must be deferred until the ancillary proceeding. Accordingly, we have kept a separate sentence to this effect in the Rule.

6. In (b) (3), the re-styled version would have deleted the adjective "reasonably" before "necessary to preserve". This too would make a substantive change, since without "reasonably" an appellate court could conclude that, if it disagreed as a matter of law as to what was "necessary" it must reverse, whereas the "reasonably necessary" standard requires affirmance if the appellate court concludes that a reasonable person could find (even if the appellate court judges did not), that the condition imposed by the trial court to preserve the property was necessary.

7. In (b) (4), the Advisory Committee determined to begin the paragraph with "Upon request" and to add at the appropriate place the phrase "committed by the defendant" as an important clarification (see below). The enclosed draft therefore embodies those changes, rather than the formulation suggested by the Style Subcommittee.

8. In (c) (1) (B), the Style Subcommittee revision would not capture the important concept that discovery should take place only after the court has denied any motion to dismiss. Otherwise, defendants may assert a right to discovery while the government's motion to dismiss for lack of standing is pending.

9. In (c) (2), the re-styled version would strike "(or any combination of defendants)." This would make a substantive change. The quoted phrase is needed to assure that the court does not have to determine which of multiple defendants convicted in the case has an interest in the property (e.g. if each claims it is the other's). Because the Advisory Committee determined that the proposal should be clear that the "defendants" referred to must have been convicted in that case, our enclosed re-draft includes that clarification.

10. Also in (c) (2), the proposed revision of the Style Subcommittee would make a substantive change that is inconsistent with the underlying statute. The re-styled version would permit

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the court to enter a wholly new "final order of forfeiture." But the underlying statute, 21 U.S.C. 853(n)(6), requires the court to "amend the order of forfeiture [to account for third party rights]." Thus, we have retained the language in the draft approved by the Advisory Committee about "amending the preliminary order as necessary."

11. Finally, in (e)(1)(b), the restyled version would make a substantive change. The right to a jury trial is inapplicable under current law not only to cases involving "substitute" property but also to cases involving after-located property originally ordered to be forfeited. Therefore, our draft retains the scope of (b)(4) approved by the Advisory Committee.

Sincerely,

Mary Harkenrider
Roger Pauley

cc: Honorable W. Eugene Davis
David D. Dowd, Jr.

MARKED

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Report to Standing Committee
Criminal Rules Committee
May 1998

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

19 *****

COMMITTEE NOTE

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

Summary of Comments on Rule 32.

The Committee received no comments on the proposed conforming amendment to Rule 32(d).

GAP Report—Rule 32.

The Committee made no changes to the published draft.

1 **32.2. Criminal Forfeiture**

2 (a) INDICTMENT OR INFORMATION. No judgment of
3 forfeiture may be entered in a criminal proceeding unless the indictment or
4 information alleges that a defendant has an interest in property that is
5 subject to forfeiture in accordance with the applicable statute.

6 (b) HEARING AND ORDER OF FORFEITURE.

7 (1) As soon as practicable after entering a guilty verdict
8 or accepting a plea of guilty or nolo contendere on any count in the

9 indictment or information for which criminal forfeiture is alleged,
10 the court shall determine what property is subject to forfeiture
11 (because it is related to the offense.) The determination may be
12 based on evidence already in the record, including any written plea
13 agreement, or on evidence adduced at a post trial hearing. If the
14 property is subject to forfeiture, the court shall enter a preliminary
15 order directing the forfeiture of whatever interest each defendant
16 may have in the property, without determining what that interest is.
17 Deciding the extent of each defendant's interest is deferred until any
18 third party claiming an interest in the property has petitioned the
19 court to consider the claim.

20 (2) If no third-party petition as provided in (b)(1) is
21 timely filed, the court shall determine whether the property should
22 be forfeited in whole or in part depending on the extent of the
23 defendant's interest in the property. The determination may be
24 made at any time before the order of forfeiture becomes final under
25 subdivision (c), and may be based on evidence already in the record,
26 including a written plea agreement, or evidence submitted by the
27 government in a motion for entry of a final order of forfeiture. The
28 defendant may not object to the entry of the final order of forfeiture
29 on the ground that the property belongs, in whole, or in part, to a

30 co-defendant or a third party. If the court determines that the
31 defendant^a or any combination of co-defendants^a were the only
32 persons with a legal interest (or in the case of illegally obtained
33 property, a possessory interest) in the property, the court shall enter
34 a final order forfeiting the property in its entirety. If the court
35 determines that the defendant or combination of co-defendants^a had
36 a legal interest (or in the case of illegally obtained property, a
37 possessory interest) in only a portion of the property, the court shall
38 enter a final order forfeiting the property to the extent of the
39 that
defendant's or defendants' interest.

40 (3) When the court enters a preliminary order of
41 forfeiture, the Attorney General may seize the property subject to
42 forfeiture; conduct any discovery^{that} as the court considers proper in
43 identifying, locating, or disposing of the property; and commence
44 proceedings consistent with any statutory requirements pertaining
45 to third-party rights. At sentencing—or at any time before
46 sentencing if the defendant consents—the order of forfeiture
47 becomes final as to the defendant and shall be made a part of the
48 sentence and included in the judgment. The court may include in
49 the order of forfeiture whatever conditions are reasonably necessary
50 to preserve the property's value pending any appeal.

51 (c) ANCILLARY PROCEEDING.

52 (1) If, as prescribed by statute, a third party files a petition
53 asserting an interest in the forfeited property, the court shall
54 conduct an ancillary proceeding.

55 (i) ^A The court may consider a motion to dismiss
56 the petition for lack of standing, for failure to state a claim
57 upon which relief can be granted, or for any other ground.
58 For purposes of the motion, the facts set forth in the
59 petition are assumed to be true.

60 (ii) ^B If a Rule 32.2(c)(1) ^(A) motion to dismiss is
61 ~~denied or not made,~~ the court may permit the parties to
62 conduct discovery in accordance with the Federal Rules of
63 Civil Procedure to the extent that the court determines such
64 discovery to be necessary or desirable ^{in resolving} ~~to resolve~~ factual
65 issues before ~~conducting~~ an evidentiary hearing. After
66 discovery ends, either party may ^{move for summary judgment} ~~ask the court to dispose of~~
67 ~~the petition on a motion for summary judgment in the~~
68 ~~manner described in~~ Rule 56 of the Federal Rules of Civil
69 Procedure.

70 (2) After the ancillary proceeding, the court shall enter a
71 final order of forfeiture amending the preliminary order as necessary

*or is made
and denied,*

in resolving
move for summary judgment
as provided in

72 to account for the disposition of any third-party petition.

73 (3) If multiple petitions are filed in the same case, an
74 order dismissing or granting fewer than all of the petitions is not
75 appealable until all petitions are resolved, unless the court
76 determines that there is no just reason for delay and directs the
77 entry of final judgment on one or more but fewer than all of the
78 petitions.

79 (4) The ancillary proceeding is not considered a part of
80 sentencing.

81 (d) STAY OF FORFEITURE PENDING APPEAL. If the
82 defendant appeals from the conviction or order of forfeiture, the court may
83 stay the order of forfeiture upon terms that the court finds appropriate to
84 ensure that the property remains available in case the conviction or order of
85 forfeiture is vacated. The stay will not delay the ancillary proceeding or the
86 determination of a third party's rights or interests. If the defendant's appeal
87 is still pending when the court ^{decides to amend} ~~determines that~~ the order of forfeiture shall
88 be amended to recognize a third party's interest in the property, the court
89 shall amend the order of forfeiture but (shall) refrain from directing the
90 transfer of any property or interest to the third party until the defendant's
91 appeal is final, unless the defendant consents in writing, or on the record, to
92 the transfer of the property or interest to the third party.

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(e) SUBSEQUENTLY LOCATED PROPERTY; SUBSTITUTE PROPERTY.

(1) ~~The court~~ ^{the court} (on motion by the government) may at any time enter an order of forfeiture—or amend an existing order of forfeiture—to include property ^{that} which:

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

^B (ii) is substitute property ^{that} which qualifies for forfeiture under an applicable statute.

(2) If the government ^{shows} makes the requisite showing that ^{Rule 32.2} the property is subject to forfeiture under either (e)(1)(i) or ¹ (e)(1)(ii), the court shall:

^A (i) enter an order forfeiting the property, or amend an existing preliminary or final order to include that property.

^B (ii) if a third party files a petition with the court, conduct an ancillary proceeding under subdivision (c) ^{as to} ^{stet} the property, and

^C (iii) if no third party files a petition, enter an order forfeiting the property under subdivision (b)(2).