U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

January 3, 2006

The Honorable Susan C. Bucklew
Chair, Advisory Committee
on the Criminal Rules
United States District Court
109 United States Courthouse
611 North Florida Avenue
Tampa, FL 33602

Dear Judge Bucklew:

The Department of Justice recommends that Rules 7 and 32.2 of the Federal Rules of Criminal Procedure be amended to address various procedural issues related to criminal forfeiture. Our proposal, which is attached below, is intended to update the rules related to forfeiture proceedings first promulgated in 2000.

The proposal speaks to a host of issues that courts have grappled with over the past half decade and longer. For example, our proposal addresses the required notice to a defendant of forfeiture proceedings, the appropriate bifurcated trial procedures in forfeiture cases, and the scope of authorized government action following the issuance of a preliminary forfeiture order. Because of the complex nature of criminal forfeiture, we believe it may be appropriate, as has been done in the past, to convene a subcommittee to review the proposed amendments. It is our hope that the Advisory Committee will be able to consider and vote on this proposal at its next meeting in April 2006, and a subcommittee that can meet several times over the next few months will be able fully address these proposals and make recommendations to the full committee.

We believe this proposal warrants timely and thorough consideration by the Advisory Committee, as it relates to important matters of law enforcement. If you would like, I would be happy to discuss with you, at your convenience, this proposal and how the Committee might best

address it. We appreciate your assistance with this proposal and look forward to continuing our work with you to improve the federal criminal justice system.

Sincerely,

Benton J. Campbell
Acting Counselor to the
Assistant Attorney General

cc: Professor Sara Sun Beale
Mr. John Rabiej

Proposed Revisions to Rules 32.2(a) and 7(c)(2)

(a) Notice to the Defendant.

(1) Indictment or Information. A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains **a Forfeiture Allegation giving** notice to the defendant that the Government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute.

(2) Money judgment. It is not necessary for the indictment or information to specify the amount of any money judgment that the Government intends to seek as part of an order of forfeiture. The court must determine the amount of the money judgment pursuant to subdivision (b)(1).

[(3) Bill of particulars. It is not necessary for the indictment or information to list the specific property subject to forfeiture. However, if the Government will be asking the jury to return a special verdict of forfeiture as to specific property that is not listed in the indictment or information, it must serve the defendant with a bill of particulars identifying such property prior to the forfeiture phase of the trial.][1]

Conforming amendment:

Rule 7(c)(2) is repealed.

Comment: Rule 32.2(a) provides that the indictment (or information) must put the defendant on notice that the Government will seek the forfeiture of his property as part of his sentence if he or she is convicted. The courts are virtually unanimous in holding, however, that the Rule is satisfied if the indictment tracks the language of the applicable forfeiture statute or statutes; it is not necessary for the indictment to list the specific property subject to forfeiture, or to set forth the amount of the money judgment that the Government will be seeking.[2] The defendant's right to know what specific property the Government is seeking to forfeit is satisfied if the Government serves him with a bill of particulars, and the amount of the money judgment is for the court to determine based on the evidence adduced at trial. This is consistent with the guidance set forth in the 2000 Advisory Committee Note. *See United States v. Iacaboni*, 221 F. Supp. 2d 104, 110 (D. Mass. 2002) (Rule 32.2(a) makes clear that itemized list of property need

[1]The bracketed language should be deleted if the statutory right to ask that the jury be retained to determine the forfeiture is stricken from current Rule 32.2(b)(4).

[2]The Government often includes a list of specific property subject to forfeiture in the indictment, but that is so that the grand jury's finding of probable cause for the forfeiture may be used to support the entry of a pre-trial restraining order, not because such a list is required by the Rule. *See United States v. Bollin*, 264 F.3d 391, 421 (4th Cir. 2001) (the grand jury's finding of probable cause is sufficient to satisfy the Government's burden); *In re Billman*, 915 F.2d 916, 919 (4th Cir. 1990) (same).

not appear in the indictment; tracking language of section 982(a)(1) was sufficient), *aff'd in part*, 363 F.3d 1 (1st Cir. 2004); *United States v. Davis*, 177 F. Supp. 2d 470, 484 (E.D. Va. 2001) (approving Government's naming automobile as subject to forfeiture in a bill of particulars where indictment used general language tracking the forfeiture statute), *aff'd*, 63 Fed. Appx. 76 (4th Cir. 2003); *United States v. Dolney*, 2005 WL 1076269, at *9 (E.D.N.Y. 2005) (following the Advisory Committee Note; there is no need to itemize the property subject to forfeiture; the Government need only inform the defendant that it will be seeking forfeiture in accordance with the statute); *Borich v. United States,* 2005 WL 1668411, at *2 (D. Minn. July 18, 2005) (forfeiture allegation stating that Government would seek forfeiture of proceeds of defendant's drug trafficking activity was sufficient; it was not necessary to name two vehicles as subject to forfeiture); *United States v. Lino*, 2001 WL 8356, at *5-6 (S.D.N.Y. 2001) (under Rule 32.2(a), Government need not detail property subject to forfeiture in the indictment; to the extent that a bill of particulars is required, Government's agreement to provide one is sufficient); *see also United States v. Tedder*, 2003 WL 23204849, at *2 (W.D. Wis. 2003) (forfeiture allegation need not make specific reference to the possibility that the forfeiture will take the form of a money judgment), *aff'd in part*, 403 F.3d 836 (7th Cir. 2005); *cf. United States v. Descent*, 292 F.3d 703, 706 (11th Cir. 2002) (because forfeiture is part of sentencing, modification of amount Government is seeking as money judgment does not constructively amend the indictment). *But see United States v. Pantelidis,* 2005 WL 1320135, at *2 (E.D. Pa. 2005) (if the Government specifies an amount subject to forfeiture in the indictment, it is "stuck with the number it chose" and cannot seek a different amount following conviction); *United States v. Idriss*, 2004 WL 733977, at *8 (D. Minn. 2004) (dismissing forfeiture allegation that tracked the language of § 982(a)(2) but did not itemize the property to be forfeited).

The amendment clarifies the Rule by codifying the prevailing view. It also sets forth clear guidance as to when the bill of particulars must be filed, and makes clear that the notice provision in the indictment or information should be labeled a "Forfeiture Allegation" and not a "Count." This amendment resolves a split in the courts, some of which require that the forfeiture notice be identified as a "Count" even though it is clear that it does not set forth a substantive offense. *See Libretti v. United States*, 516 U.S. 29, 38-39 (1995) (holding that criminal forfeiture is part of the sentence, not a substantive element of the offense); *United States v. Ferrario-Pozzi*, 368 F.3d 5, 8 (1st Cir. 2004) (criminal forfeiture "is a part of the sentence rather than the substantive offense") *United States v. Messino*, 382 F.3d 704, 713 (7th Cir. 2004) (the Supreme Court's decision in *Libretti* makes clear that "forfeiture is not a separate substantive offense").

Rule 7(c)(2) should also be repealed. When Rule 32.2 was enacted in 2000, it was intended to replace all of the existing Rules relating to criminal forfeiture and to consolidate all of the applicable procedures in one place. Former Rules 32(d)(2) and 31(e) were in fact repealed, but due to a drafting error, Rule 7(c)(2), which was superseded by Rule 32.2(a), was left in place. A conforming amendment striking Rule 7(c)(2) would correct this oversight.

Proposed Revisions to Rule 32.2(b)(1)

(b) Entering a Preliminary Order of Forfeiture

(1) ~~In General.~~ **Forfeiture Phase of the Trial.**

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

(B) The court's determination may be based on evidence already in the record, including any written plea agreement, ~~or~~ **and on any additional evidence or information submitted by the parties that the court finds to be relevant.** [I]f the forfeiture is contested, ~~on evidence or information presented by the parties at a hearing after the verdict of guilt~~ **the court may conduct a hearing.**

(C) In determining what property is subject to forfeiture, the court may receive and consider evidence and information that would be inadmissible under the Federal Rules of Evidence at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

Comment: Rule 32.2(b)(1) establishes that a criminal trial must be bifurcated into a guilt phase and a forfeiture phase. *See United States v. Dolney*, 2005 WL 1076269, at *10 (E.D.N.Y. May 3, 2005) (denying defendant's motion to combine guilt and forfeiture phases; Rule 32.2(b) makes clear that the trial must be bifurcated). In the forfeiture phase, the court determines whether the Government has established the forfeitability of specific property and the amount of any money judgment that the defendant will be ordered to pay.

Experience, however, has revealed several ambiguities in the Rule concerning the evidence that the court may consider in the forfeiture phase of the trial. The current Rule states that the court may consider "evidence already in the record" or "evidence or information presented by the parties at a hearing," if the forfeiture is contested. This appears to omit evidence not already in the record that the parties might submit in writing for the court to use in determining the forfeiture without a hearing. Such submissions are routine and aid the court in making the forfeiture determination. The rule is redrafted to authorize such written submissions.

Moreover, the current rule might be interpreted to require the court to consider *either* "evidence already in the record" *or* "evidence or information presented . . . at a hearing" but not both. By

changing "or" to "and", the amendment makes clear that these sources of evidence are not mutually exclusive.

It is also unclear whether the current Rule permits the court to consider hearsay in the forfeiture phase of the trial. Noting that forfeiture is part of sentencing, that hearsay is traditionally admissible at sentencing, and that Rule 32.2(b)(1) refers to "evidence *or information*" presented at a hearing, several courts have held that hearsay is admissible. *See United States v. Creighton*, 52 Fed. Appx. 31, 36 (9th Cir. 2002) (hearsay is admissible at sentencing and therefore may be considered in the forfeiture phase); *United States v. Merold*, 46 Fed. Appx. 957, 2002 WL 1853644 (11th Cir. 2002) (suggesting that hearsay is admissible in the forfeiture phase, but holding only that there is no error in admitting hearsay where non-hearsay evidence was sufficient to support the forfeiture); *United States v. Gaskin*, 2002 WL 459005, at *9 (W.D.N.Y. 2002) (in the forfeiture phase of the trial, the parties may offer evidence not already in the record; because forfeiture is part of sentencing, such evidence may include reliable hearsay), *aff'd*, 364 F.3d 438 (2d Cir. 2004). The amendment adopts those rulings.

Proposed Revisions to Rule 32.2(b)(2)

(2) Preliminary Order. **(A)** If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment, directing the forfeiture of specific property, **and directing the forfeiture of any substitute assets as to which the Government has established the statutory criteria,** without regard to any third party's interest in all or part of ~~it~~ **the property.** Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

(B) Unless it is not practical to do so, the court must enter the preliminary order of forfeiture sufficiently in advance of sentencing to allow the parties the opportunity to suggest revisions or modifications to the order before it becomes final as to the defendant pursuant to subdivision (b)(4).

(C) If the court is not able to identify all of the specific property subject to forfeiture or to calculate the total amount of the money judgment prior to sentencing, the court must enter an order describing the property to be forfeited in generic terms, listing any identified forfeitable property, and stating that the order will be amended pursuant to subdivision (e)(1) when additional specific property is identified or the amount of the money judgment has been calculated.

Comment: Rule 32.2(b)(2) describes what the court should do once it has determined that property is subject to forfeiture. As the Rule states, the court must "promptly" enter a preliminary order of forfeiture "setting forth the amount of any money judgment or directing the forfeiture of specific property." The Rule also makes clear that all issues regarding the ownership of the property must be deferred to the ancillary proceeding when third party claims to the property are resolved. The latter part of the Rule is non-controversial and has been applied routinely by the courts. *See United States v. Nava,* 404 F.3d 1119, 1132 (9th Cir. 2005) (district court properly instructed jury that questions of ownership "were not before them;" therefore jury's return of special verdict of forfeiture says nothing about the ownership of the property); *United States v. Cianci*, 218 F. Supp. 2d 232, 234 (D.R.I. 2002) (under Rule 32.2(b)(2), the determination of the nexus between the property and the offense is made without regard to any legitimate interest that a third party might have because "the Rule affords third parties the opportunity to assert such claims before a final forfeiture order is entered"); *United States v. Weidner*, 2003 WL 22176085 (D. Kan. 2003) (defendant cannot object to the entry of a preliminary order of forfeiture on the ground that the property really belongs to a third party; determination of the extent of the defendant's interest in the property is postponed until the ancillary proceeding); *United States v. Gaskin*, 2002 WL 459005, at *9 n.4 (W.D.N.Y. 2002) (ownership is a question for the court alone to determine in the ancillary proceeding), *aff'd*, 364 F.3d 438 (2d Cir. 2004); *United States v. Faulk*, 340 F. Supp. 2d 1312, 1315 (M.D. Ala. 2004) (Rule 32.2(b)(2) requires that the court order the forfeiture of property, including substitute assets, without regard to whether a third party has an interest in all or part of it).

Courts have encountered difficulty applying the first part of the Rule, however. First, the Rule makes no mention of including substitute assets in the preliminary order of forfeiture. All criminal forfeiture statutes provide for the forfeiture of substitute assets if certain criteria are satisfied. *See, e.g.,* 21 U.S.C. 853(p). The first reference to substitute assets in Rule 32.2 does not occur, however, until subdivision (e), which relates to amending the order of forfeiture to include newly-discovered property after the order has become final. To some, this implies that substitute assets can *only* be forfeited pursuant to subdivision (e). It is frequently the case, however, that the Government is able to identify substitute assets and satisfy the statutory requirements at the time the preliminary order of forfeiture is entered. As courts have held, in such cases there is no reason not to include the substitute assets in the preliminary order pursuant to Rule 32.2(b)(2). *See Faulk, supra.* The existing language in Rule 32.2(b)(2) is redesignated as Rule 32.2(b)(2)(A) and is amended to make that clear.

Moreover, by including the reference to substitute assets in Rule 32.2(b)(2)(A), the Rule makes clear that ownership issues regarding substitute assets must be deferred to the ancillary proceeding, just as ownership issues pertaining to other forfeited assets must be deferred. This resolves the confusion that has existed until now on that issue. *Compare Faulk,* 340 F. Supp.2d at 1315 (court must order forfeiture of substitute assets without regard to third party interests); *United States v. Weidner*, 2004 WL 432251 (D. Kan. 2004) (defendant cannot object to the forfeiture of a substitute asset on the ground that it belongs to a third party); *United States v. Saccoccia*, 62 F. Supp.2d 539, 541 (D.R.I. 1999) (defendant lacks standing to object to forfeiture of property as substitute assets on the ground that the property does not belong to him) *with United States v. Bennett*, 2003 WL 22208286, at *1 (S.D.N.Y. 2003) (to forfeit property held in third party's name as a substitute asset, court first finds, by a preponderance of the evidence, that the property belongs to the defendant and amends the order of forfeiture to include the property).

Second, notwithstanding the requirement that the preliminary order of forfeiture be entered "promptly," many courts have delayed entering the preliminary order until the time of sentencing. In such cases, the parties have no opportunity to advise the court of omissions or errors in the order before it becomes final as to the defendant upon oral announcement of the sentence and entry of the criminal judgment. Pursuant to Rule 35(a), the district court lacks jurisdiction to correct a sentence, including an incorporated order of forfeiture, more than seven days after oral announcement of the sentence; even then, corrections are limited to those necessary to correct an "arithmetical, technical or other clear error." *See United States v. King,* 368 F. Supp. 2d 509, 512-13 (D.S.C. 2005) (holding that Rule 35(a) bars corrections to the forfeiture order in a criminal case except for those made within seven days of sentencing that are necessary to correct an "arithmetical, technical or other clear error"). For that reason, delaying the entry of the preliminary order until the day of sentencing often leaves the parties with no alternative but to file an appeal if the order contains an error or if the sentence mistakenly fails to include an order of forfeiture at all.[3] This is a waste of judicial resources and runs counter to the

[3]The Solicitor General has determined not only that Rule 35(a) requires that all corrections to an order of forfeiture incorporated in a criminal sentence be made within seven days after oral

well-established policy in favor of allowing district courts to correct their own errors. See *United States v. Ibarra*, 502 U.S. 1, 4-6 (1991) (reiterating the Court's decision in *Dieter* that noted the advantages of giving district courts the opportunity to correct their own alleged errors, and thus preventing unnecessary burdens from being placed on the courts of appeals); *United States v. Dieter*, 429 U.S. 6, 8 (1976). Accordingly, Rule 32.2(b)(2) is further amended by adding sub-paragraph (B), which provides that the court must enter the preliminary order in advance of sentencing, unless it is impractical to do so.

Finally, some courts have found the provision in Rule 32.2(b)(2) requiring the court to issue the preliminary order of forfeiture "promptly," and the companion provision in Rule 32.2(b)(3) making the forfeiture order "final as to the defendant" at sentencing, to be incompatible with the realities of complex cases in which the full schedule of the forfeitable property cannot be known until the Government has had the opportunity to conduct extensive post-conviction discovery and the court has considered the evidence discovered. *See, e.g., United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36, 44 (D.D.C. 1999) (Government and district court require seven years to locate and forfeit $1.2 billion in forfeitable assets); Rule 32.2(b)(3) and 21 U.S.C. § 853(m) (authorizing post-conviction discovery to locate forfeitable property). In some cases, courts have attempted to deal with this situation by ignoring the Rule and postponing entry of the order of forfeiture until after sentencing; *see United States v. Ferrario-Pozzi*, 368 F.3d 5, 8-9 (1st Cir. 2004) (court delays entry of order of forfeiture until it can conduct post-sentencing hearing to determine the amount of money to be forfeited); but the courts appear to be unanimous in holding that this procedure is inconsistent with the Rule, and that a forfeiture order entered for the first time after sentencing is void. *See United States v. Bennett*, ___ F.3d ___, 2005 WL 2179839 (3d Cir. Sept. 12, 2005) (the order of forfeiture does not become final as to the defendant and become part of the judgment automatically; the court must comply with Rule 32.2(b)(3); a "final order of forfeiture" that is not entered until after sentencing is a nullity); *United States v. Petrie*, 302 F.3d 1280, 1284 (11th Cir. 2002) (district court lacked jurisdiction to enter a preliminary order of forfeiture 6 months after defendant was sentenced, even though the judgment and commitment order said defendant "was subject to forfeiture as cited in count two"; the scheme set forth in Rule 32.2 is "detailed and comprehensive"); *United States v. Turcotte*, 333 F. Supp.2d 680, 682-83 (N.D. Ill. 2004) (denying Government's motion to issue preliminary order of forfeiture that should have been issued prior to sentencing but was not); *United States v. King*, 368 F. Supp. 2d 509, 512 (D.S.C. 2005) (same, following *Petrie*; where there was no mention of forfeiture either at sentencing or in the judgment, there is a clear violation of Rule 32.2(b) that cannot be corrected as a clerical error once 7 days have passed after sentencing).

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announcement of sentence, but also that the filing of a motion for reconsideration of the order of forfeiture suspends neither the seven day period under Rule 35 nor the time for filing an appeal under Appellate Rule 4. The Solicitor General's view is that one way of ensuring that the court has the flexibility to correct its own errors is to encourage the courts to enter the preliminary order of forfeiture in advance of sentencing so that errors may be identified before the time limits imposed by Rule 35(a) take effect.

Rule 32.2 anticipated the problem presented by complex cases by providing in subsection (e) that the order of forfeiture could be amended at any time to include property that was "subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered." Rule 32.2(e)(1)(A). For this to work, of course, there must be "an existing order of forfeiture" that was entered in accordance with Rules 32.2(b)(2) and (3). Thus, the drafters of the Rule anticipated that courts would harmonize Rules 32.2(b)(2) and (3) and (e)(1)(A) by entering a preliminary order in generic terms that would become final as to the defendant at sentencing, and would be amended as often as necessary to include specific property as it was identified. This was the procedure adopted by the court in *BCCI Holdings,* and was the procedure on which Rule 32.2 was modeled. *See* 2000 Advisory Committee Note (containing numerous citations to *BCCI Holdings*). The First Circuit has held that this procedure is implicit in Rule 32.2; *see Ferrario-Pozzi,* 368 F.3d at 10-11 (distinguishing *Petrie*; district court was free to sentence the defendant and to enter a forfeiture judgment in generic terms while leaving the determination of the amount to be forfeited until later); but most courts remain unaware of the procedure.

Accordingly, Rule 32.2(b)(2) is amended to include new sub-paragraph (C) expressly providing that a court may comply with the other provisions of the Rule by entering an order that describes the property subject to forfeiture in generic terms, and stating that the order will be amended pursuant to subdivision (e)(1) when specific property is identified or the amount of the money judgment has been calculated..

Revisions to Rule 32.2(b)(3)

(3) Seizing Property. The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; **to request the assistance of a foreign Government in seizing or restraining property located abroad,** to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third party rights. ~~At sentencing – or at any time before sentencing if the defendant consents – the order of forfeiture becomes final as to the defendant and must be made a part of the sentence and be included in the judgment.~~ The court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.

Comment: Rule 32.2(b)(3) authorizes the Government to take certain actions upon the entry of a preliminary order of forfeiture. Most important, it permits the Attorney General "to commence proceedings that comply with any statutes governing third party rights." This means that the Government may commence the ancillary proceeding as soon as the preliminary order of forfeiture is entered and need not wait until after the order becomes final as to the defendant at sentencing. In practice, courts have had little difficulty in applying this part of the Rule, and the Government routinely commences ancillary proceedings as soon as the preliminary order of forfeiture is entered.[4] The only suggested addition to this part of the Rule is the language relating to property located abroad.

Another part of Rule 32.2(b)(3) has proven much more difficult to apply. For the reasons set forth below, the language making the preliminary order final as to the defendant is stricken from Rule 32.2(b)(3) and moved to new Rule 32.2(b)(4).

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[4]The Eleventh Circuit has held to the contrary, but that case was based on the predecessor to Rule 32.2 and would be directly contrary to the text of the Rule if applied to a current case. *See United States v. Pease*, 331 F.3d 809, 813 (11th Cir. 2003) (under Rule 32(d)(2), the Government could not commence the ancillary proceeding until the order of forfeiture became final as to the defendant at sentencing).

New Rule 32.2(b)(4)[5]

(4) Sentence and Judgment. (A) At sentencing – or at any time before sentencing if the defendant consents – the preliminary order of forfeiture becomes final as to the defendant. If the order directs the defendant to forfeit specific assets, it remains preliminary as to third parties until the ancillary proceeding is concluded pursuant to subdivision (c).

(B) The district court must include the forfeiture in the oral announcement of the sentence or otherwise ensure that the defendant is aware of the forfeiture at time of sentencing. The court must also include the order of forfeiture, directly or by reference, in the judgment. The court's failure to include the order in the judgment may be corrected at any time pursuant to Rule 36.

(C) The time for a party to file an appeal from the order of forfeiture, or from the district court's failure to enter an order, begins to run when judgment is entered. If after entry of judgment the court amends or declines to amend an order of forfeiture to include an additional asset pursuant to subdivision (e), a party may file an appeal with respect to that asset within 30 days of the entry of the order granting or denying the amendment.

(D) If a party files a motion for reconsideration of the order of forfeiture before the time for filing an appeal expires, the notice of appeal must be filed within 10 days after the entry of the order disposing of the motion, or within the previously applicable time for appeal, whichever period ends later. A motion for reconsideration is not limited to the grounds for correcting the sentence set forth in Rule 35(a).

Conforming amendment to Rule 32:

Rule 32(d)(2) is amended as follows:

(1) Strike "and" at the end of (E);

(2) Insert new (F) as follows:

> **"(F) specify whether the Government seeks forfeiture pursuant to Rule 32.2 and any other provision of law; and"**

(3) Redesignate present (F) as (G).

Comment: Present Rule 32.2(b)(3) states that the order of forfeiture becomes final as to the defendant at sentencing, and must be made part of the sentence

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[5]Present Rule 32.2(b)(4) should be repealed, or if not repealed, redesignated as Rule 32.2(b)(5).

and included in the judgment. This provision has created much confusion in the courts and should be completely revised as new Rule 32.2(b)(4).

First, sub-paragraph (A) carries forward the provision in current Rule 32.2(b)(3) that the order of forfeiture becomes final as to the defendant at sentencing or earlier with the defendant's consent, but remains preliminary as to third parties until the court has concluded the ancillary proceeding if specific assets have been forfeited. This is consistent with the overwhelming majority of recent cases. *See United States v. De Los Santos*, 260 F.3d 446, 448 & n.1 (5th Cir. 2001) (preliminary order of forfeiture is final as to defendant and is immediately appealable; defendant cannot wait until court enters final order resolving rights of third parties) (collecting cases); *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36, 43 (D.D.C. 1999) (preliminary order transfers defendant's interest to the United States and is final pertaining to the defendant at sentencing; it remains preliminary pertaining to third parties until the ancillary proceeding is concluded). *But see United States v. Croce*, 355 F. Supp. 2d 774, 778 (E.D. Pa. 2005) (*Croce III*) (preliminary order does not become final as to the defendant until after the ancillary proceeding).

Second, sub-paragraph (B) clarifies what is meant by the provision in current Rule 32.2(b)(3) that the forfeiture must be made "part of the sentence." Some courts hold that the judge must include the forfeiture in the oral announcement of the sentence while others routinely omit this. Accordingly, the Rule is amended to state expressly that the order of forfeiture must be included in the oral announcement of the sentence unless the record is clear that the court has ascertained that the defendant is aware of the forfeiture in some other manner (e.g., the forfeiture is part of the plea agreement). The requirement that the forfeiture be announced orally is not intended to overturn the case law holding that a fugitive waives his right to the oral announcement of the sentence.

At the same time, sub-paragraph (B) clarifies that the failure to include the order of forfeiture in the judgment is a clerical error that may corrected pursuant to Rule 36. This codifies the majority rule and overrules the position of the Eleventh Circuit which holds that the failure to comply with the letter of Rule 32.2(b)(3) is not clerical and renders the forfeiture void unless the Government files a timely appeal. *Compare United States v. Bennett*, ___ F.3d ___, 2005 WL 2179839 (3d Cir. Sept. 12, 2005) (if there was a preliminary order of forfeiture to which defendant did not object, the failure to include the forfeiture in both the oral pronouncement and the judgment and commitment order is a clerical error that may be corrected pursuant to Rule 36) (collecting cases); *United States v. Loe*, 248 F.3d 449, 464 (5th Cir. 2001) (if district court forgets to include forfeiture in the judgment, it may amend the judgment pursuant to Rule 36); *United States v. Hatcher*, 323 F.3d 666, 673 (8th Cir. 2003) (if there was a preliminary order of forfeiture, the failure to include the forfeiture in the judgment at sentencing is a clerical error that may be corrected at any time pursuant to Rule 36); *United States v. Isaacs*, 88 Fed. Appx. 654,654 (4th Cir. 2004) (affirming district court's use of Rule 36 to correct its failure to make preliminary order of forfeiture part of the judgment) *with United States v. Pease*, 331 F.3d 809, 816-17 (11th Cir. 2003) (the omission of the order of forfeiture from the judgment in a criminal case is not a clerical error that can be corrected pursuant to Rule 36; if the district court does not

make the order of forfeiture part of the judgment at sentencing, and the Government does not appeal, the forfeiture is void); *United States v. Robinson,* 137 Fed. Appx. 273, 276-77 (11th Cir. 2005) (refusing to reconsider *Pease* and refusing to consider a preliminary order of forfeiture self-executing when it states that it will be made part of the judgment, but granting the Government's appeal and remanding with instructions to include the forfeiture in the judgment).

Sub-paragraph © clarifies when the time to appeal from an order of forfeiture begins to run. Most courts hold that the defendant's time to appeal begins to run when the order of forfeiture becomes final as to him at sentencing. *See United States v. De Los Santos*, 260 F.3d 446, 448 & n.1 (5th Cir. 2001) (preliminary order of forfeiture is final as to defendant and is immediately appealable; defendant cannot wait until court enters final order resolving rights of third parties) (collecting cases); *United States v. Derman*, 211 F.3d 175, 182 (1st Cir. 2000) (time for appeal runs from the time of sentencing—not from the time the preliminary order is entered); *United States v. Bennett*, 147 F.3d 912, 914 (9th Cir. 1998) (preliminary order of forfeiture is final pertaining to defendant and is immediately appealable); *United States v. Christunas*, 126 F.3d 765, 768 (6th Cir. 1997) (same, notwithstanding ongoing ancillary proceeding). But the Eleventh Circuit has rendered conflicting opinions, including one that holds that the defendant must appeal when the preliminary order is entered, even if sentencing has not yet occurred. *Compare United States v. Gilbert*, 244 F.3d 888, 925-26 (11th Cir. 2001) (preliminary order of forfeiture is not final as to defendant until sentencing, and is not immediately appealable; following *Derman*) *with United States v. Gross*, 213 F.3d 599, 600 (11th Cir. 2000) (preliminary order of forfeiture is final as to the defendant and is immediately appealable). Moreover, the Tenth Circuit holds that a defendant has no right at all to appeal from a money judgment, but must wait until the Government actually recovers some of his assets. *See United States v. Wilson*, 244 F.3d 1208, 1214 (10th Cir. 2001) (defendant has no right to appeal from a forfeiture order consisting only of a money judgment; because a money judgment does not immediately deprive a defendant of any property, an appeal would be premature).

The new Rule provides that, as to both parties, the time to appeal from an order of forfeiture begins to run when the defendant is sentenced. This includes forfeiture orders listing specific assets and orders consisting only of a money judgment. If the court later amends the order of forfeiture to include additional assets pursuant to Rule 32.2(e), the time to file an appeal *as to the additional asset* would begin to run again from the time when the order of forfeiture was amended.

Finally, prosecutors frequently find it necessary to file motions for reconsideration in criminal forfeiture cases to apprize the district court of an error in its application of forfeiture law. For example, in recent cases, the Government has asked the district court reconsider such issues as whether there is criminal forfeiture authority in mail and wire fraud cases, and if so, whether the court can order the forfeiture of substitute assets; whether criminal forfeiture is mandatory regardless of the defendant's ability to pay; and whether the court erred in making an ownership determination in the case-in-chief instead of deferring that issue to the ancillary proceeding.

These issues arise with some frequency because forfeiture law is evolving and complex, and courts and practitioners are therefore equally unfamiliar with the applicable law. Moreover, in such cases, the error may only come to light some time after sentencing.[6] Thus, a motion for reconsideration often provides the first and only opportunity for the Government to apprise the district court of the applicable forfeiture law, and for the court to correct its own error before it is necessary for the Government to file an appeal. But it highly uncertain that a motion for reconsideration is available for this purpose under current law.

The traditional rule is that a motion for reconsideration of a judgment or order may be filed at any time before the time to appeal has expired, and that the filing of such a motion suspends the time to file an appeal.[7] But Rule 35(a) provides that a motion to correct an "arithmetical, technical or other clear error" in the defendant's sentence must be filed, and ruled upon, within 7 days after sentencing.[8] Moreover, in 2002, Appellate Rule 4(b)(5) was amended to make clear that a motion filed under Rule 35(a) does not suspend the time for filing a notice of appeal. *See* Advisory Committee Note to 2002 Amendment. If, as appears likely, a forfeiture order is considered part of the sentence for the purposes of Rule 35, then motions for reconsideration of the kind the Government has traditionally filed in forfeiture cases may be barred entirely by Rule 35(a) (because they do not deal with arithmetical, technical or other clear errors), or have little practical value because they would have to be acted upon within 7 days to have any effect. In practice, courts often do not rule on motions for reconsideration of the type typically filed in criminal forfeiture cases until much more time has passed. Application of Rule 35(a) and

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[6]It is hoped that this situation is mitigated to a large extent by the amendment to Rule 32.2(b)(2)(B), *supra*, directing the district court to enter the preliminary order of forfeiture "sufficiently in advance of sentencing to allow the parties the opportunity to suggest revisions or modifications to the order." But it is unlikely that the need for motions for reconsideration will be entirely eliminated by that improvement in the Rule.

[7]*See* 16A Charles A. Wright et al., Wright & Miller's Federal Practice & Procedure § 3950.10 (2005) ("It is not only those motions expressly listed in Rule 4(b) that stall the running of the time in which to appeal . . . A timely motion for reconsideration . . . postpones the appeal time."); 5 Am. Jur. 2d *Appellate Review* § 303 (2004) ("In an appeal from a District Court to the United States Supreme Court, the time for appeal does not begin to run until the court entering judgment disposes of a proper motion for . . . reconsideration."). *See United States v. Ibarra*, 502 U.S. 1, 6 (1991) (rejecting attempts to get around *Healy* and *Dieter,* a motion for reconsideration renders a final decision not final until the district court can rule on the motion, which suspends the time period for filing an appeal); *United States v. Dieter*, 429 U.S. 6, 8 (1976) ("consistent practice in civil and criminal cases alike has been to treat timely petitions for rehearing as rendering the original judgment nonfinal for purposes of appeal for as long as the petition is pending"); *United States v. Healy*, 376 U.S. 75, 77-78 (1964) (same); *United States v. Correa-Gomez*, 328 F.3d 297, 299 (6th Cir. 2003) (citing *Ibarra*, reiterating that a timely motion for reconsideration means that the period to file an appeal begins to run only after the district court has ruled on the motion for reconsideration).

[8]Rule 35(c) defines "sentencing" as the "oral announcement of the sentence."

Appellate Rule 4(b)(5) to motions filed in criminal forfeiture cases would thus make the correction of forfeiture orders by the district court impractical.

For these reasons, Rule 32.2(b) is amended to provide expressly for the right of either party to file a motion for reconsideration of the order of forfeiture. The conforming amendment to Rule 32(d)(2) is intended to ensure that the court does not overlook the forfeiture in imposing sentence in accordance with that Rule.

Repeal or Revision to Present Rule 32.2(b)(4)

Rule 32.2(b)(4) is repealed.

or

(4 5) Jury Determination. **(A)** ~~Upon a party's request in a case in which a jury returns a verdict of guilty, the jury must~~ **In a case in which a jury returns a verdict of guilty, either party may request that the jury be retained to determine the forfeitability of specific property. The request must be made in writing or on the record before the jury returns its verdict of guilty.**

(B) If a timely request to have the jury determine the forfeiture is made, the Government must submit a proposed Special Verdict Form as to each asset subject to forfeiture, asking the jury to determine whether the Government has established the requisite nexus between the property and the offense committed by the defendant.

(C) There is no right to have a jury determine the amount of a money judgment or the forfeitability of substitute assets.

Comment: When Rule 32.2 was first proposed in the 1990s, the Government suggested that in light of the Supreme Court's decision in *Libretti v. United States,* holding that there is no Sixth Amendment right to a jury determination of the forfeiture of property, the Rule should make no provision for the determination of the forfeiture by the jury. *See Libretti v. United States*, 516 U.S. 29, 49 (1995) ("the nature of criminal forfeiture as an aspect of sentencing compels the conclusion that the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection"). The Advisory Committee agreed, but the Standing Committee subsequently remanded the Rule with instructions to include a statutory right to have the jury retained to determine the forfeiture. That right is embodied in present Rule 32.2(b)(4). *See United States v. Gaskin*, 2002 WL 459005, at *9 n.3 (W.D.N.Y. 2002) (notwithstanding *Libretti*, which appears to make trial by jury on the forfeiture issue inappropriate, Rule 32.2(b)(4) gives the defendant the right to have the jury determine the forfeiture, if the case was tried before a jury), *aff'd*, 364 F.3d 438 (2d Cir. 2004).

Since Rule 32.2 took effect, the Supreme Court has substantially revised its Sixth Amendment jurisprudence in *Apprendi, Blakely* and *Booker.* Nevertheless, the courts unanimously hold that none of those holdings affects the Court's conclusion in *Libretti* that the Sixth Amendment right to a jury does not apply to forfeiture. *See United States v. Fruchter,* 411 F.3d 377, 382-83 (2d Cir. 2005) (*Booker* and *Blakely* do not apply to criminal forfeiture for two reasons: because the Supreme Court expressly stated in *Booker* that its decision did not affect forfeiture under 18 U.S.C. § 3554, and because *Booker* applies only to a determinate sentencing system in which the jury's verdict mandates a sentence within a specific range; criminal forfeiture is not a determinate system); *United States v. Tedder*, 403 F.3d 836, 841 (7th Cir. 2005) (*Booker* does

not apply to criminal forfeiture); *United States v. Hall*, 411 F.3d 651, 655 (6th Cir. 2005) (same, following *Tedder*; *Booker* merely extended *Apprendi* to the sentencing guidelines and redefined what constitutes the statutory maximum, but the guidelines do not apply to forfeiture, and the forfeiture statutes contain no statutory maximum; forfeiture is a form of indeterminate sentencing "which has never presented a Sixth Amendment problem"); *United States v. Washington,* 131 Fed. Appx. 976, 977 (5th Cir. 2005) (neither *Blakely* nor *Booker* overrule the holding in *Libretti* that there is no Sixth Amendment right to a jury on the forfeiture issues in a criminal case); *United States v. Messino*, 382 F.3d 704, 713 (7th Cir. 2004) ("The criminal forfeiture provisions do not include a statutory maximum; they are open-ended in that *all* property representing proceeds of criminal activity is subject to forfeiture. Therefore *Blakely*, like *Apprendi*, does not apply to forfeiture proceedings." Moreover, the reasonable doubt standard only applies to elements of the offense, and *Libretti* makes clear that "forfeiture is not a separate substantive offense."); *United States v. Swanson*, 394 F.3d 520, 526 (7th Cir. 2005) (following *Messino* and *Vera*; forfeiture and restitution do not fall within *Apprendi* because there is no statutory maximum); *United States v. Keene*, 341 F.3d 78, 85-86 (1st Cir. 2003) ("forfeiture is not viewed as a separate charge, but as an aspect of punishment imposed following conviction of a substantive offense"; therefore, notwithstanding *Apprendi*, the preponderance standard applies); *United States v. Vera*, 278 F.3d 672 (7th Cir. 2002) (like restitution, forfeiture has no statutory maximum; it is open-ended; thus, a forfeiture of property described by a criminal forfeiture statute can never exceed the statutory maximum in a way that makes *Apprendi* applicable); *United States v. Corrado*, 227 F.3d 543, 550-51 (6th Cir. 2000) (*Corrado I*) (*Apprendi* does not apply to criminal forfeiture; under *Libretti*, forfeiture is an aspect of the sentence, not a separate offense; therefore, forfeiture need not be submitted to a jury or proved beyond a reasonable doubt); *United States v. Corrado*, 286 F.3d 934, 939-40 (6th Cir. 2002) (*Corrado II*) (petition for rehearing denied).

In light of the unanimous case law, the Advisory Committee may want to revisit the suggestion that the statutory right to a jury in the forfeiture phase of the trial be repealed. The Department of Justice, however, does not object to the retention of the statutory provision. If the Advisory Committee determines that the statutory right to have the jury determine the forfeiture should be retained, the provision in Rule 32.2(b)(4) should be revised to clarify several issues identified in the case law.

First, the current Rule seems to limit the role of the jury to determining the forfeitability of specific assets, while leaving it to the court to determine the amount of a money judgment. *See* Rule 32.2(b)(4) ("the jury must determine whether the Government has established *the requisite nexus between the property and the offense*") (emphasis added). The Seventh Circuit has adopted that interpretation, *see Tedder*, 403 F.3d at 841 (the defendant's right under Rule 32.2(b)(4) is to have the jury determine if the Government has established the required nexus between the property and his crime; the rule does not give the defendant the right to have the jury determine the amount of a money judgment); *United States v. Reiner,* ___ F. Supp.2d ___, 2005 WL 2652625 (D. Me. Oct. 12, 2005) (same, following *Tedder*; Rule 32.2(b)(4) applies only when the Government is required to establish a nexus between the property and the offense; when the Government is seeking only a money judgment, there is no nexus requirement and thus

no nexus for the jury to find). There are no other published cases on this issue, however, and courts remain uncertain as to the scope of the Rule. The amendment adopts the Seventh Circuit's interpretation, making it clear that the right to have the jury determine the forfeiture applies only to the forfeiture of specific property.

Second, courts have held that the right to have the jury determine the forfeiture is the right to have the jury that determined the defendant's guilt *retained*, not to have a new jury empaneled. Thus, if neither party makes its request for a jury trial on the forfeiture before the jury is dismissed, the jury right is waived. *See United States v. Anderson*, 2005 WL 1027174 (D. Neb. May 2, 2005) (defendant waived his statutory right to a jury when he remained silent while the jury was excused). Moreover, the request to have the jury determine the forfeiture must be specific to that issue; a general request for a jury trial at the time of arraignment is not sufficient. *See United States v. Davis*, 177 F. Supp. 2d 470, 482 (E.D. Va. 2001) (under Rule 32.2(b)(4), defendant must make a specific request to have the jury retained to determine the forfeiture; a general request for a jury trial at the time of arraignment is not sufficient; defendant, who stood silent while the jury was dismissed, waived his right to have the jury determine the forfeiture and could not request that a new jury be empaneled), *aff'd*, 63 Fed. Appx. 76 (4th Cir. 2003). The courts have not yet determined, however, "the more difficult question of what, at a minimum, would constitute a sufficient request and when, in the course of the proceedings, such a request would have to be made." *United States v. Davis,* 63 Fed. Appx. at 82.

As revised and re-designated, Rule 32.2(b)(5) would resolve these ambiguities by clarifying that a party must make a specific request, in writing or on the record, that the jury be retained to determine the forfeiture, and that the request must be made prior to the jury's return of the verdict of guilty.

Finally, sub-paragraph (B) is added to make clear that the Government should propose, and the court should submit to the jury, a Special Verdict Form asking the jury to determine whether the Government has established the required nexus between the asset and a crime of conviction to support forfeiture of the item.

Proposed Revision to Rule 32.2(d)

(d) Stay Pending Appeal. If a defendant appeals from a conviction or an order of forfeiture, the court may, **to the extent permitted by the applicable statute,** stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review. . . .

Comment: Rule 32.2(d) authorizes the court to exercise its discretion to stay the disposition of the forfeited property pending the defendant's appeal. *See United States v. Riedl*, 214 F. Supp. 2d 1079, 1082-83 (D. Haw. 2001) (notwithstanding § 853(h), defendant has standing pursuant to Rule 32.2(d) to seek stay of forfeiture pending appeal; but authority to grant stay is discretionary and stay may be denied on equitable grounds, including wasting of property and burden on U.S. Marshals Service); *United States v. Hronek*, 2003 WL 23374653 (N.D. Ohio 2003) (stay pending appeal from a criminal forfeiture order will be granted only if it appears the defendant is likely to succeed on the merits); *United States v. Schulze*, CR. NO. 02-00090 DAE (D. Haw. April 18, 2005) (using 4-factor test to deny defendant's motion for stay pending appeal: (1) the likelihood of success on appeal; (2) whether the forfeited assets will likely depreciate in value over time; (3) the intrinsic value of the forfeited asset to the Defendant and the availability of substitutes; and (4) the expense and burden of maintaining the property).

As the *Riedl* court pointed out, however, the Rule appears to conflict with the forfeiture statute, 21 U.S.C. § 853(h). Under the statute, a stay of the forfeiture may be granted only "upon application of a person other than the defendant or a person acting in concert with him on or his behalf." The amendment recognizes that the Rule was not intended to override the applicable statute.