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CHAPTER 26: FORFEITURE IN CRIMINAL TAX CASES

26.01 INTRODUCTION

The purpose of this chapter is twofold. First, the chapter explains Tax Division policy regarding the restraint, seizure, and forfeiture of property in criminal tax or criminal tax-related cases. Specifically, Tax Directive 145 sets forth the Tax Division's overall forfeiture policy and delegates to the United States Attorneys authority to seek and obtain Title 18 seizure warrants in criminal tax and tax-related investigations and prosecutions. (Tax Division Directives) Similarly, Tax Directive 144 sets forth Tax Division policy with respect to Stolen Identity Refund Fraud (SIRF) crimes and, among other things, delegates to United States Attorneys the authority to seek and obtain seizure warrants for forfeiture of criminally derived proceeds arising from SIRF crimes. (Tax Division Directives)

Second, the chapter provides a primer on federal asset forfeiture law. The chapter discusses the restraint and seizure of property for forfeiture; administrative, civil, and criminal forfeiture; issues arising in parallel criminal and civil forfeiture proceedings; and additional constitutional considerations arising in forfeiture cases. The chapter borrows heavily from a treatise on asset forfeiture law authored by Assistant United States Attorney Stefan Cassella, former deputy chief of the Asset Forfeiture and Money Laundering Section of the Criminal Division of the Justice Department. Mr. Cassella is the foremost authority on the asset forfeiture laws in the United States and his full treatise is available at AFMLS Online at

Asset Forfeiture in the United States: A Treatise on Forfeiture Law: Cassella (2d ed.)

26.01 [1] Forfeiture Overview

When analyzing a forfeiture issue, a prosecutor must first identify what, if any, provisions provide a basis for forfeiture in connection with the alleged criminal offense.

No single general forfeiture provision exists in federal law; instead, several different statutes provide for the forfeiture of property used in the commission of, representing the proceeds of, or otherwise related to violations of certain federal criminal laws. For example, some criminal statutes such as identity theft (18 U.S.C. § 1028) and access device fraud (18 U.S.C. § 1029) have forfeiture provisions embedded within the statutes themselves. *See* 18 U.S.C. §§ 1028(b)(5), 1029(c)(1)(C). Other Title 18 offenses

such as wire fraud, mail fraud, and money laundering rely on the primary civil (18 U.S.C. § 981) and criminal forfeiture statutes (18 U.S.C. § 982) as the statutory bases for forfeiture. And for other criminal offenses, such as making a false claim (18 U.S.C. § 287) and conspiracy to make a false claim (18 U.S.C. § 286), Congress has not provided any forfeiture authority at all.

Title 26 has its own forfeiture provisions in Sections 7302 and 7303. Forfeitures under these provisions, commonly referred to as "Code Forfeitures," are rare. Section 7302 provides for the forfeiture of any property intended for use in violating the provisions of the internal revenue laws, and Section 7303 lists specific property subject to forfeiture for offenses described in 26 U.S.C. §§ 7207, 7208, and 7271.

Next, the prosecutor must be cognizant of what type of property can be forfeited under the applicable forfeiture statutes. Each forfeiture statute defines the category of property subject to forfeiture, and the type of property that can be forfeited varies greatly from one offense to another. The three most common theories of forfeiture are that (1) the property constitutes, or is traceable to, the proceeds of a crime (proceeds theory); (2) the property was used to commit or facilitate the commission of a crime (facilitation theory); and (3) the property was "involved in" a money laundering offense. The forfeiture statutes may overlap or supplement one another. For example, in the case of an identity theft offense in violation of 18 U.S.C. § 1028, two different forfeiture statutes permit forfeiture of two different types of property, namely "facilitating property" and "proceeds property." Section 1028(b)(5) permits the forfeiture of personal property used to facilitate the offense ("any personal property used or intended to be used to commit the offense"), while Sections 981(a)(1)(C) and 982(a)(2)(B) permit the forfeiture of any property, real or personal, that constitutes or is traceable to proceeds of the crime, including identity theft. Thus, the commission of a single criminal offense can give rise to forfeiture under different statutes, and each statute might permit the forfeiture of different types of property associated with the crime.

Lastly, the prosecutor must be aware that there are three different procedures to forfeit property; namely, administrative forfeiture, civil forfeiture, and criminal forfeiture. Each method of forfeiture is governed by separate procedures defined by federal law.

The administrative forfeiture procedures permit the seizing federal agency to forfeit property without judicial involvement if the agency sends proper notice of the forfeiture action to potential claimants and no one files a claim. Administrative forfeiture

allows for the efficient disposition of seized property in uncontested cases, which represent the vast majority of forfeiture proceedings. In contrast, both civil forfeiture and criminal forfeiture entail judicial proceedings and require the commencement of a formal action in federal court.

Civil forfeiture is not part of a criminal case. Instead, the government files a separate civil action *in rem* against the property itself, and then proves by a preponderance of the evidence that the property was derived from or was used to commit a crime. The civil forfeiture action may be initiated before or after indictment, or may be initiated in the absence of any indictment.

Criminal forfeiture is part of the sentence in a criminal case. A forfeiture allegation is included in the criminal indictment, giving notice to the defendant that the government intends to extinguish the defendant's interest in any property associated with the crime upon conviction. Once the defendant is convicted, the court (or jury) hears additional evidence and argument on the forfeiture allegation and returns a special verdict deciding whether the government has established, by a preponderance of the evidence, the requisite nexus between the property and the crime. To protect the property rights of third parties, the court conducts an ancillary hearing after the trial is concluded to address ownership claims raised by third parties. All of these concepts are discussed more fully in the subchapters below.

26.02 TAX DIVISION POLICY

26.02 [1] Tax Directive 145 – Overview

Tax Directive 145 sets forth Tax Division policy with respect to the restraint, seizure, and forfeiture of property arising from the commission of a criminal tax or tax-related offense. (Tax Division Directives.) The Directive initially defines those forfeiture matters over which the Tax Division has supervisory authority. (*See* Tax Directive 145, ¶¶ 3, 4.) (Tax Division Directives.) They include all civil forfeiture actions, all criminal forfeitures, and the restraint or seizure of property for forfeiture purposes "in a criminal tax or tax related investigation and/or prosecution when an attorney for the Department of Justice (Tax Division Trial Attorney or Assistant United States Attorney)" is responsible for or assists in obtaining a federal seizure warrant. Thus, the Tax Division has supervisory authority over the forfeiture matter if the Department of Justice is involved in the tax investigation – either by supervising a tax

grand jury investigation, or assisting a law enforcement agency in its administrative criminal tax investigation (usually IRS-CI). This assistance generally entails the filing of a civil forfeiture action in federal court or making application to a federal magistrate for a seizure warrant.

It is important to note, however, that if a criminal investigation includes both tax and non-tax offenses, and the proposed restraint, seizure, and/or forfeiture of property is legally based upon the commission of a non-tax offense, then the Tax Division has no supervisory authority over the restraint, seizure, and/or forfeiture of that property. (*See* Tax Directive 145 n.3). (Tax Division Directives.) The Tax Division has supervisory authority over all criminal proceedings arising under the internal revenue laws and nothing more. An offense is considered to arise under the internal revenue laws when it involves (1) an attempt to evade responsibility imposed by the Internal Revenue Code; (2) an obstruction or impairment of the Internal Revenue Service; or (3) an attempt to defraud the government or others through the use of mechanisms established by the Internal Revenue Service for the filing of internal revenue documents or the payment, collection, or refund of taxes. 28 C.F.R. § 0.70(b).

After defining the scope of the Tax Division's supervisory authority in forfeiture matters, Tax Directive 145 next addresses the Tax Division's approval authority. Specifically, the Tax Division retains final authority to approve all Title 26 forfeiture matters (commonly referred to as "Code forfeitures"), and all Title 18 civil and criminal forfeitures arising from the commission of a criminal tax or tax-related offense. (*See* Tax Directive 145, ¶¶5, 6.) (Tax Division Directives.) However, Tax Directive 145 delegates to the United States Attorneys the authority to obtain a Title 18 restraining order or seizure warrant for personal property if the property is to be forfeited and if the forfeiture arises from the commission of a criminal tax or tax-related offense. (*See* Tax Directive 145, ¶8.) (Tax Division Directives.)

This delegation of authority to the United States Attorneys is not unlimited. First, no property shall be seized for forfeiture if the property consists entirely of legal source income and the only criminal activity associated with the property is that unpaid taxes remain due and owing on the income. By definition, legal source income is not derived from criminal activity and therefore does not constitute proceeds of a crime.

Second, in tax return preparer investigations, Tax Division approval is required before a seizing agency may enter a declaration of forfeiture against seized funds

previously held on deposit by a tax return preparer or tax return preparation business in a financial institution (as defined in 18 U.S.C. § 20) if it is determined post-seizure that the funds may include tax preparation fees or the rightful tax refunds of innocent taxpayers.

These limitations emphasize two important policy concerns articulated in Tax Directive 145. First, a prosecutor may not convert a traditional Title 26 legal-source income tax case into a Title 18 fraud and forfeiture offense even if the IRS is deemed to be the victim of tax fraud. (*See* Tax Directive 145, ¶8(a) & n.5.) (Tax Division Directives.) By definition, legal source income is lawfully earned income and does not constitute proceeds of a crime. Second, the seizure of funds from a tax return preparer or tax return preparation business requires special scrutiny. The Tax Division generally disfavors forfeiting lawfully earned return preparation fees unless the fees have been co-mingled with criminal proceeds and involved in a money laundering transaction, in violation of 18 U.S.C. §§ 1956, 1957, or 1960, thereby making them eligible for forfeiture under Title 18 forfeiture laws.

In addition, the Tax Division disfavors forfeiting any rightful tax refund of an innocent taxpayer. Under forfeiture law, an innocent taxpayer whose refund has been seized may not be entitled to notice of the initial seizure because the innocent taxpayer is deemed an unsecured creditor. *See* ***United States v. $515,060.42 in U.S. Currency***, 152 F.3d 491, 497 (6th Cir. 1998); ***United States v. One-Sixth Share Of James J. Bulger In All Present And Future Proceeds Of Mass Millions Lottery Ticket No. M246233***, 326 F.3d 36, 44 (1st Cir. 2003). As a result, an innocent taxpayer may remain unaware that his or her refund has been seized until well after it was forfeited leaving the innocent taxpayer with the additional burden of having to pursue a remission course of action administered by the Asset Forfeiture and Money Laundering Section of the Criminal Division. The limitations imposed by Tax Directive 145 seek to ensure that legal-source income is not improperly seized and that the Tax Division plays a meaningful role in evaluating seizures made from financial accounts held by tax return preparers and tax return preparation businesses.

Lastly, Tax Directive 145 imposes reporting requirements on the United States Attorneys. First, the United States Attorney must electronically transmit to the Tax Division copies of all applications and court orders and the pleadings in support of any action taken by the United States Attorney to restrain or seize property as provided in the directive. (*See* Tax Directive 145, ¶9.) (Tax Division Directives.) In addition, if property is seized, the notification must include an acknowledgement that Tax Division

authorization will be sought prior to forfeiture of any property that falls within the exceptions set forth in the directive.

Second, if Tax Division approval is required on a forfeiture matter as contemplated in the directive and a deadline for that action has been imposed by statute, regulation, Departmental policy, or court order, then either the United States Attorney or the law enforcement agency responsible for administering the seizure/forfeiture of the property shall, at the earliest possible date, but no later than ten (10) business days preceding the deadline, forward to the Tax Division all relevant materials necessary to making a determination on the matter. (*See* Tax Directive 145, ¶11.) (Tax Division Directives.) The materials should be forwarded to the appropriate Section Chief of the Tax Division's three Criminal Enforcement Sections.

26.02 [2] Tax Directive 144 – Stolen Identity Refund Fraud (SIRF)

Tax Directive 144 sets forth Tax Division policy with respect to tax and tax-related crimes associated with Stolen Identity Refund Fraud (SIRF). (Tax Division Directives.) Implemented on October 1, 2012, the purpose of Directive 144 is to delegate to United States Attorneys the authority to (1) open tax-related grand jury investigations in matters involving SIRF; (2) arrest and federally charge by criminal complaint a person engaged in SIRF crimes; and (3) seek and obtain seizure warrants for forfeiture of criminally derived proceeds arising from SIRF crimes, all without prior approval from the Tax Division.

Tax Directive 144 defines SIRF cases as those cases involving a fraudulent claim for a tax refund when the tax return is in the name of a person whose personal identification information (PII) has been stolen or unlawfully used to make the claim and the refund is intended to benefit someone other than the person to whom the PII belongs. (Tax Division Directives.) Tax Directive 144's definition also includes false claim schemes in which a person sells to a third-party, or agrees to let the third party use, his or her PII unaware that the PII will be used to make a fraudulent claim for tax refund. SIRF cases also include cases involving tax return preparers who make and/or file fraudulent claims for tax refunds using non-client PII that has been stolen or unlawfully used. For purposes of illustration, SIRF crimes generally implicate the following criminal statutes: 18 U.S.C. § 286 (conspiracy to make false claims), 18 U.S.C. § 287 (making false claims), 18 U.S.C. § 510 (Treasury check forgery), 18 U.S.C. § 641 (theft of public money), 18 U.S.C. § 1028 (identity theft), 18 U.S.C. § 1028A (aggravated identity theft),

18 U.S.C. § 1029 (access device fraud), 18 U.S.C. § 1341 (mail fraud), 18 U.S.C. § 1343 (wire fraud), 18 U.S.C. § 1708 (theft or receipt of stolen mail), and/or 18 U.S.C. § 1709 (mail theft by postal employee).

The forfeiture policy set forth in Tax Directive 144 for SIRF crimes is consistent with the Tax Division's overall forfeiture policy reflected in Tax Directive 145. (Tax Division Directives.) That is, in all SIRF cases, the United States Attorney has authority to seek and obtain seizure warrants from the federal district court for forfeiture of criminally derived proceeds arising from SIRF crimes without prior approval from the Tax Division. However, if the SIRF case involves a tax return preparer who has co-mingled SIRF proceeds with other funds held in an account with any financial institution (as defined in 18 U.S.C. § 20), and the seized funds may contain lawfully earned return preparation fees or tax refunds of innocent taxpayers, then Tax Division approval is required before the seized funds may be administratively forfeited. The policy concerns set forth in Tax Directive 145, namely, the Tax Division's general disfavor of forfeiting lawfully earned return preparation fees or rightful tax refunds of innocent taxpayers, applies with equal force to SIRF cases. (Tax Division Directives.)

26.03 SEIZING AND RESTRAINING PROPERTY FOR FORFEITURE

The government may seize property for reasons that have nothing to do with forfeiture. For example, documents and cash may be seized from a criminal at the time of arrest or during execution of a search warrant because the property represents evidence of a crime. Other property deemed to be contraband, such as drugs and guns, may be seized because they are unlawful to possess. Property that has already been seized by the government for other purposes may be forfeited without the government taking any additional steps to maintain possession of the property.

This section, however, addresses property that the government seeks to forfeit but does **not** already have in its possession. In those situations, a seizure warrant serves as the primary basis for taking possession of property for purposes of forfeiture.

26.03 [1] Seizure Warrants

If property is not in the government's possession when a forfeiture proceeding begins, the government may apply for a seizure warrant. The two statutes that govern the issuance of such seizure warrants are 18 U.S.C. § 981(b), which applies when the

government has probable cause to believe property is subject to civil forfeiture, and 21 U.S.C. § 853(f), which applies when the government has probable cause to believe property is subject to criminal forfeiture. Both statutes authorize the issuance of a seizure warrant in the same manner as provided for a search warrant. *See* 18 U.S.C. § 981(b)(1)(civil forfeiture); 18 U.S.C. § 982(b)(1); 21U.S.C. § 853(f) (criminal forfeiture); Fed. R. Crim. P. 41.

Property originally seized under the civil statute can be forfeited in a criminal case if certain procedural steps are taken; similarly, property seized under the criminal statute can be forfeited in a civil case. Either statute may be used to take possession of property before an administrative forfeiture proceeding is commenced.

When a prosecutor is uncertain whether forfeiture will be pursued civilly or criminally, both statutes can be cited in the application for the seizure warrant and related probable cause affidavit. In such instances, the warrant application should say, on its face, that the warrant is sought pursuant to 18 U.S.C. § 981(b) and 21U.S.C. § 853(f). Obtaining a seizure warrant under Section 981(b) and Section 853(f) means that the government will already be in compliance with Section 983(a)(3)(B) when forfeiture of the property is sought in an indictment, without needing to commence a parallel administrative or civil forfeiture proceeding. ***United States v. Dupree***, 781 F. Supp. 2d 115, 131-32 & n.9 (E.D.N.Y. 2011); ***United States v. Wiese***, 2012 WL 43369, at *2 (E.D. Mich. 2012).

Even after commencing forfeiture proceedings, the government may seek to keep the affidavit submitted in support of a seizure warrant under seal if unsealing the affidavit would jeopardize an ongoing criminal investigation. In reviewing a defense motion to unseal the affidavit and application, a court will typically balance the public's right of access to judicial documents against the government's interest in protecting an ongoing criminal investigation. ***United States v. All Funds on Deposit at Wells Fargo Bank***, 643 F. Supp. 2d 577, 583-85 (S.D.N.Y. 2009).

26.03 [1][a] Civil warrants — 18 U.S.C. § 981(b)

Title 18, United State Code Section 981(b) applies when the government has probable cause to believe that property is subject to civil forfeiture. Section 981(b), which applies to all seizures under Section 981, sets forth the general rule that "[s]eizures pursuant to this section shall be made pursuant to a warrant obtained in the same manner

as provided for a search warrant under the Federal Rules of Criminal Procedure . . ." unless certain exceptions apply.[1] In order to obtain a seizure warrant under Section 981, the government must show that there is probable cause to believe that the property is subject to forfeiture.

26.03 [1][b] Criminal warrants – 21 U.S.C. § 853(f)

Title 21, United State Code Section 853(f) applies when the government has probable cause to believe that property is subject to criminal forfeiture. It provides that:

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

As with a civil forfeiture warrant application, the government must show there is probable cause to believe that the property is subject to forfeiture. In other words, the affidavit must describe the nexus between the charged crime and property to be seized, thereby allowing the court to find probable cause of forfeitability. *See* ***United States v. Harvey***, 2006 WL 3513940, at *6 (D.V.I. 2006) (finding invalid affidavit for seizure warrant where affidavit provided no reason for affiant's conclusion that property was subject to forfeiture).

Probable cause may be based upon the same theory of forfeiture that would support a finding of forfeitability at trial. *See* ***United States v. Dupree***, 2011 WL 3235637, at *8 (E.D.N.Y. 2011). In determining whether probable cause exists, the court may consider that a federal grand jury found probable cause to charge defendant with the offense giving rise to seizure and forfeiture of the property. ***United States v. Bollin***, 264 F.3d 391, 421 (4th Cir. 2001); ***United States v. Lewis***, 2006 WL 1579855, at *8 (D. Minn. 2006). Even if a grand jury has made such a finding, the facts supporting probable cause must be set forth in the application for the seizure warrant: inclusion of a forfeiture

[1] It should be noted that drug offenses have their own civil forfeiture statute, 21 U.S.C. § 881, with its own seizure provision.

allegation in the indictment does not suffice. ***United States v. Walker***, 943 F. Supp. 1326, 1329 (D. Col. 1996).

In its application for the seizure warrant, the government must also make a showing that a restraining order will not be sufficient to assure the availability of the property at trial. 21 U.S.C. § 853(f). The requirement can typically be met by showing that the property at issue can be easily moved, concealed, or dissipated by a person unwilling to comply with a restraining order. *See, e.g.*, ***Lewis***, 2006 WL 1579855, at *5 (personal property including vehicles and funds in a bank account); ***Wiese***, 2012 WL 43369, at *2-3 (funds in bank account); ***United States v. Martin***, 460 F. Supp. 2d 669, 677 (D. Md. 2006); *but see* ***Walker***, 943 F. Supp. at 1331 (agent's guess of what the defendants might do if they left the country not sufficient to establish need for a restraining order); ***In re: 2000 White Mercedes ML320***, 220 F. Supp. 2d 1322, 1325-26 (M.D. Fla. 2001) (finding that government had failed to make required showing that a restraining order would be insufficient). In the case of cash or personal property, the government may also cite evidence that some forfeitable property has already been dissipated.

Depending on the circumstances, the government may obtain and execute a seizure warrant before or after indictment, after the defendant has been found guilty, or after the court has entered an order of forfeiture. ***Dupree***, 781 F. Supp. 2d at 131-32; ***Lewis***, 2006 WL 1579855, at *4. There is no requirement that the property at issue be in the government's possession before the court can order forfeiture as part of the defendant's sentence.

26.03 [2] Standard for Seizure

For both civil and criminal seizures, the government must show that there is probable cause to believe that the property to be seized is forfeitable.

Probable cause means the same thing in the forfeiture context as it does in any other case. ***United States v. $9,041,598.68***, 163 F.3d 238, 246 (5th Cir. 1998); ***United States v. Real Property 874 Gartel Drive***, 79 F.3d 918, 922 (9th Cir. 1996); ***United States v. $149,442.43 in U.S. Currency***, 965 F.2d 868, 876 (10th Cir. 1992). The government must show, based on the totality of circumstances and a practical, commonsense approach that there is a fair probability that the property was derived from, used to commit, or otherwise involved in the commission of an act giving rise to forfeiture under

the applicable statute. ***United States v. 1948 Martin Luther King Drive***, 270 F.3d 1102, 1111 (7th Cir. 2001); ***United States v. One 1987 Mercedes Benz 300E***, 820 F. Supp. 248, 251 (E.D. Va. 1993). The government may rely on circumstantial evidence to establish probable cause, such as a lack of legitimate income and the timing of the assets' acquisition. ***United States v. Melrose East Subdivision***, 357 F.3d 493, 507, 507 n.18 (5th Cir. 2004).

What the government has to show to establish probable cause necessarily depends on its theory of forfeiture. If the theory is that the property constitutes or is traceable to the proceeds of a crime, there must be probable cause to believe that such a nexus exists. This could be shown by strictly tracing the property to the offense or relying on a "but for" test, accepted accounting principles, or a lack of legitimate funds.

26.03 [3] Out-of-District Warrants

Both civil and criminal seizure warrants must be issued in accordance with Rule 41. And while Rule 41(b) provides that the warrant must be issued in the district in which the warrant is to be executed, 21 U.S.C. § 853(l) makes clear that criminal seizure warrants can be served anywhere in the United States. Section 853(l) provides that district courts may issue orders for property subject to forfeiture regardless of the property's location. In 2000, the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) amended Section 981(b). Section 981(b)(3) now provides that, notwithstanding Rule 41(b), a seizure warrant may be issued in any district in which a forfeiture action may be filed and may be executed in any district in which the property is found. Thus, both civil and criminal seizure warrants may be served outside the district in which they were issued.

26.03 [4] Appeals

Pursuant to 28 U.S.C. § 1291, the government may appeal the denial of an application for a seizure warrant. ***In re Application for Warrant to Seize One 1988 Chevrolet Monte Carlo***, 861 F.2d 307, 309 (1st Cir. 1988). The issuance of a warrant, however, is not appealable. ***United States v. Quintana-Aguayo***, 235 F.3d 682, 686-87 (1st Cir. 2000) (per curiam); ***United States v. Victoria-21***, 3 F.3d 571, 574-75 (2d Cir. 1993) (generally interlocutory order denying an application to vacate an in rem arrest

warrant is not immediately appealable, but if a business is "virtually shut down" by the seizure, order denying vacatur of seizure is appealable).

26.03 [5] Warrantless Seizure

Department of Justice policy recommends using a seizure warrant to seize property for forfeiture. Property may be seized without a warrant, however, if one of the exceptions to the Fourth Amendment warrant requirement applies or the property was lawfully seized by a state or local law enforcement agency and then turned over to a federal agency. 18 U.S.C. §§ 981(b)(2)(B), (b)(2)(C). The most common exceptions to the warrant requirement include consent, the automobile exception, search incident to arrest, the plain view doctrine, exigent circumstances, and abandoned property. Some of these exceptions are discussed briefly below.

26.03 [5][a] Automobile Exception

In ***Florida v. White***, 526 U.S. 559, 564-66 (1999), the Supreme Court held that the warrantless seizure of an automobile did not violate the Fourth Amendment where there was probable cause to believe that the automobile itself was subject to forfeiture and it was found in a public place. *See* ***United States v. Nelson***, 530 F. Supp. 2d 719, 729-30 (D. Md. 2008). If the car is located on private land, however, law enforcement may need to obtain either a search warrant or writ of entry to make the seizure. In ***United States v. Mendoza***, 438 F.3d 792, 796 (7th Cir. 2006), however, the Seventh Circuit held that police officers, who had probable cause to believe that a vehicle was subject to forfeiture, were able to enter upon private land and seize a vehicle without a warrant when they saw the vehicle in plain view in the defendant's unattached, open garage. In that case, the court concluded that the defendant had no expectation of privacy in the place from which the vehicle was seized. *See also* ***United States v. Musick***, 291 Fed. Appx. 706, 722 (6th Cir. 2008) (right to seize a vehicle for forfeiture from a public place without a warrant under ***Florida v. White*** applies to vehicle seized from an auto repair shop and to vehicle defendant was driving when he arrived at the shop to pick up the first vehicle).

26.03 [5][b] Search Incident to Lawful Arrest and Plain View Doctrine

Property subject to forfeiture may be seized without a warrant if it is found during a search incident to a lawful arrest or otherwise discovered in plain view by law enforcement officers who are lawfully in the place where the property is found. *See* ***United States v. $557,933.89 More or Less, in U.S. Funds***, 287 F.3d 66, 81-87 (2d Cir. 2002); ***$149,442.43 in U.S. Currency***, 965 F.2d at 875-76; ***Nelson***, 530 F. Supp. 2d at 729-30; *see also* ***United States v. Medina***, 301 F. Supp. 2d 322, 332-33 (S.D.N.Y. 2004) (agents did not exceed scope of protective sweep search incident to lawful arrest); ***United States v. Warren***, 181 F. Supp. 2d 1232, 1244-47 (D. Kan. 2001) (officer could properly seize guns not described in warrant as the guns were in plain view and officer knew that the defendant's possession of the guns violated state law); ***Lefler v. United States***, 2011 WL 2132827, at *2 (S.D. Cal. 2011) (owner of motor home had notice of its seizure as it was seized in his presence when he was arrested).

26.03 [5][c] Exigent Circumstances

Exigent circumstances may justify a warrantless seizure based on probable cause. ***United States v. $291,828.00 in U.S. Currency***, 536 F.3d 1234, 1237-38 (11th Cir. 2008); ***United States v. Daccarett***, 6 F.3d 37, 49 (2d Cir. 1993)

26.03 [5][d] Abandoned Property

If a person disclaims ownership in property, law enforcement officers may seize it regardless of whether they have probable cause to believe that it is subject to forfeiture. *See* ***Medina***, 301 F. Supp. 2d at 331.

26.03 [6] Exclusionary Rule

The Fourth Amendment exclusionary rule applies to civil forfeiture cases. ***One 1958 Plymouth Sedan v. Pennsylvania***, 380 U.S. 693, 696-703 (1965); ***United States v. $186,410 in U.S. Currency***, 590 F.3d 942, 950 (9th Cir. 2010). Thus, a property owner may challenge the legality of a seizure by filing a motion to suppress under Supplemental Rule G(8)(a) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions (hereinafter Fed. R. Civ. P. Supp.). *See* ***U.S. v. $285,350.00 in U.S. Currency***, 547 Fed. Appx. 886, 887 (10th Cir. 2013).

Supplemental Rule G(8)(a) provides that:

> If the defendant property was seized, a party with standing to contest the lawfulness of the seizure may move to suppress use of the property as evidence. Suppression does not affect forfeiture of the property based on independently derived evidence.

The exclusionary rule operates in the same way in a forfeiture case as in any other case. Thus, the rule is subject to the good faith exception, and only persons with Fourth Amendment standing to contest the seizure may move to suppress the use of the seized property in the forfeiture case. *See* ***United States v. Salvucci***, 448 U.S. 83, 86-88 (1980); ***Rakas v. Illinois***, 439 U.S. 128, 130-31, 133-34 (1978). A claimant will generally not have Fourth Amendment standing to object to a seizure that occurs of property in third party's possession, unless the item seized was in a closed container. *See* ***United States v. $90,178.20 U.S. Currency***, 2006 WL 3025614, at *2 (W.D. Wis. 2006) (claimant retained an expectation of privacy in container he left in third party's house, and therefore had Fourth Amendment standing to move to suppress currency found in that container when the house was searched); ***United States v. $100,120.00 in U.S. Currency***, 494 F. Supp. 2d 960, 965-66 (N.D. Ill. 2007) (claimant retained an expectation of privacy in contents of a locked briefcase he entrusted to a courier, and therefore had standing to move to suppress the fruits of an illegal search of the briefcase), *aff'd on this point, but reversed on other grounds*, ***United States v. Marrocco***, 578 F.3d 627, 631 n.4 (7th Cir. 2009); s*ee also* ***United States v. $40,955.00 in U.S. Currency***, 554 F.3d 752, 757-58 (9th Cir. 2009) (to establish standing, a defendant must show a legitimate expectation of privacy in the area searched); ***United States v. $572,204 in U.S. Currency***, 606 F. Supp. 2d 153, 158-59 (D. Mass. 2009); ***United States v. $1,790,021 in U.S. Currency***, 261 F. Supp. 2d 310, 316-17 (M.D. Pa. 2003).

Conversely, the Fifth Amendment's Self-Incrimination Clause is only applicable to civil forfeiture proceedings where the forfeiture statute makes the culpability of the owner relevant or where the owner faces the possibility of subsequent criminal proceedings. *See* ***United States v. $141,770.00 in U.S. Currency***, 157 F.3d 600, 606 n.5 (8th Cir. 1998) (citing ***Austin v. United States***, 509 U.S. 602, 608 & n.4 (1993)). "In rem forfeitures under 21 U.S.C. § 881 are not predicated on the culpability of any defendant," and where there is no evidence that a claimant faces any criminal proceedings related to civil forfeiture, such cases are considered civil actions for the purpose of the Fifth Amendment. *See* ***$141,770.00 in U.S. Currency***, 157 F.3d at 606 n.5 (citing ***United States v. Two Parcels of Real Prop. Located in Russell County, Ala.***, 92 F.3d 1123,

1129 (11th Cir.1996)); ***United States v. $107,840 in U.S. Currency***, 784 F.Supp.2d 1109, 1118-19 (S.D. Iowa 2011).

Although an illegal seizure may require suppression of evidence, it does not always require dismissal of the civil forfeiture complaint. ***United States v. Property, Parcel of Aguilar***, 337 F.3d 225, 234 (2d Cir. 2003); ***United States v. One 1974 Learjet***, 191 F.3d 668, 673 (6th Cir. 1999); ***$9,041,598.68***, 163 F.3d at 246; ***Madewell v. Downs***, 68 F.3d 1030, 1044 n.18 (8th Cir. 1995); *see also* ***INS v. Lopez-Mendoza***, 468 U.S. 1032, 1039-40 (1984) (mere fact of an illegal arrest has no bearing on a subsequent deportation proceeding); *but see* ***United States v. One Parcel of Real Property, Located at 9638 Chicago Heights***, 27 F.3d 327, 330 (8th Cir.1994) (lack of required notice and a hearing prior to the issuance of a warrant for the seizure of the real property rendered warrant invalid and unconstitutional, forfeiture action must be dismissed, government can seek to obtain proper warrant, if time permits). Rather, the government may proceed with the forfeiture action against the property that was seized illegally and attempt to establish that the property is forfeitable based on untainted, independently-derived evidence. ***$186,410 in U.S. Currency***, 590 F.3d at 953-54; ***United States v. $404,905.00 in U.S. Currency***, 182 F.3d 643, 646 (8th Cir. 1999); ***United States v. $493,850.00 in U.S. Currency***, 518 F.3d 1159, 1165 (9th Cir. 2008); ***United States v. $174,206.00 in U.S. Currency***, 320 F.3d 658, 663 (6th Cir. 2003); ***United States v. Real Property Known as 415 East Mitchell Ave.***, 149 F.3d 472, 476 (6th Cir. 1998); *but see* ***One Parcel of Real Property, Located at 9638 Chicago Heights***, 27 F.3d at 330.

A party that has litigated the suppression issue in a parallel criminal case or state case will be collaterally estopped from attempting to relitigate the issue by filing a motion to suppress in a civil forfeiture case. ***Real Property Known as 415 East Mitchell Ave.***, 149 F.3d at 476; ***United States v. Real Property Located in El Dorado County***, 59 F.3d 974, 979-80 (9th Cir. 1995); ***United States v. One Parcel of Real Property Known as 16614 Cayuga Road***, 69 Fed Appx. 915, 918 (10th Cir. 2003).

26.04 ADMINISTRATIVE FORFEITURE

Administrative forfeiture is commonly used when a federal law enforcement agency seizes property during the course of an investigation. The administrative forfeiture process allows the agency to obtain clear title to the seized property quickly

and without any judicial involvement. ***United States v. Ninety-Three (93) Firearms***, 330 F.3d 414, 422 (6th Cir. 2003); ***Malladi Drugs and Pharmaceuticals, Ltd. v. Tandy***, 552 F.3d 885, 889-90 (D.C. Cir. 2009); ***One 1988 Chevrolet Monte Carlo***, 861 F.2d at 310. A prerequisite to administrative forfeiture is that the seizure was lawful, meaning there was probable cause to believe that the property is subject to forfeiture. Such seizures should generally be pursuant to a judicial warrant, unless one of the exceptions to the Fourth Amendment warrant requirement applies.

In order to undertake administrative forfeiture, the law enforcement agency must have jurisdiction over the property, or *res*. An agency generally obtains jurisdiction by seizing the property at issue. ***United States v. Thomas***, 319 F.3d 640, 634-44 (3d. Cir. 2003). After the property has been seized, administrative forfeiture commences when the federal law enforcement agency sends notice of its intent to forfeit the property to anyone with a potential interest in contesting the action and by publishing a notice in a printed publication, such as a newspaper. If no one contests the forfeiture by filing a claim within the prescribed time period, the matter is concluded by the agency entering a declaration of forfeiture. This declaration has the same force and effect as a judicial order. 19 U.S.C. § 1609(b).

There is no judicial review of administrative forfeitures, except to ensure that the procedures followed by the seizing agency satisfied the requirements of due process. An agency may entertain "petitions for remission," through which persons with no legal defense to forfeiture ask the seizing agency to remit all or part of the property as an exercise of executive discretion. 19 U.S.C. § 1618; 28 C.F.R. Part 9. Agency denials of petitions for remission are not subject to judicial review.

26.04 [1] Statutory Authority

Administrative forfeiture is authorized by the Tariff Act of 1930, 19 U.S.C. §§ 1602-21. Statutes that cross-reference the provisions of the Tariff Act, including 18 U.S.C. § 981(d) and 21 U.S.C. § 881(d), authorize administrative forfeiture. Additionally, any civil forfeiture statute that incorporates the procedures of Title 18, Chapter 46 authorizes administrative forfeiture. Even if administrative forfeiture of property is authorized by statute, the seizing agency must also have statutory authority to process administrative forfeitures.

26.04 [2] Civil Asset Forfeiture Reform Act of 2000 (CAFRA)

CAFRA reformed some of the procedures that apply to administrative forfeitures. These new procedures, which apply to most administrative forfeiture proceedings, were codified at 18 U.S.C. § 983(a)(1), (2); ***Malladi Drugs***, 552 F.3d at 887; ***VanHorn v. Florida***, 67 7 F. Supp. 2d 1288, 1293 (M.D. Fla. 2009). It should be noted, however, that CAFRA did not replace prior administrative forfeiture procedures, but instead superimposed new procedures on the existing ones, making the new procedures applicable in some situations and not others. Consequently, some administrative forfeitures are governed by CAFRA, others are not.

Under CAFRA, the seizing agency must begin the forfeiture proceeding within a fixed period of time and must give the property owner ample time to file a claim. 18 U.S.C. § 983(a)(1) & (2), 19 U.S.C. § 1602 *et seq*. If someone does file a claim, the agency must refer the matter to the United States Attorney, who must commence a judicial action for civil or criminal forfeiture within 90 days or return the property. 18 U.S.C. § 983(a)(3).

26.04 [2][a] Customs Carve-Out to CAFRA

Section 983(i) exempts certain categories of forfeiture cases from any of the CAFRA reforms in 18 U.S.C. 983, including Section 983(a)(1) and (2). Cases brought under the following provisions are exempt:

(A) the Tariff Act of 1930 or any other provision of law codified in Title 19;
(B) the Internal Revenue Code of 1986[2];
(C) the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 301 *et seq*.);
(D) the Trading with the Enemy Act (50 U.S.C. § 1 *et seq*.) or the International Emergency Economic Powers Act (IEEPA) (50 U.S.C. § 1701 *et seq*.);
(E) Section 1 of Title IV of the Act of June 15, 1917 (22 U.S.C. § 401).

It should be noted that the Section 983(1) carve-out only applies to the provisions of Section 983. The provisions in Section 985 (real property) or Section 2465(b) (attorney fee and interest provisions) apply to all civil forfeiture actions

[2] United States v. One TRW, Model M14, 7.62 Caliber Rifle, 414 F.3d 416, 418 (6th Cir. 2006); United States v. TRW Rifle 7.26X51MM Caliber, One Model 14 Serial 593006, 447 F.3d 686, 689 (9th Cir. 2006).

26.04 [2][b] When Both CAFRA and pre-CAFRA Law Apply

Section 983 is the statute that contains the reforms enacted by CAFRA. It does not, however, contain all the procedures that govern administrative forfeitures, even when CAFRA applies. Rather, the provisions of Section 983 "supersede preexisting law" only to the extent that the old law is "inconsistent" with its provisions. Otherwise, the old law remains in effect. H. Rep. 106-192, 106th Cong. (1999), at 21.

Thus, in cases where CAFRA applies, Section 983 should generally be looked to first. If Section 983 addresses the issue, it governs. If it is silent or does not apply for some reason, the pre-CAFRA law still applies.

26.04 [3] Limits on Administrative Forfeiture

Many types of property may be seized and forfeited administratively. There are exceptions. For example, real property may never be forfeited administratively. 18 U.S.C. § 985(a).

Additionally, under Title 18, United States Code Section 1607(a), administrative forfeiture of personal property is also restricted. Personal property can be administratively forfeited only (1) where the value does not exceed $500,000; (2) where its importation is illegal; (3) where the property, regardless of its value, is a vessel, vehicle, or aircraft used to import, export, transport, or store any controlled substance or listed chemical; or (4) where it is currency or a monetary instrument of any value. In all other cases, administrative forfeiture of personal property is not available. 19 U.S.C. § 1610. For the purposes of Section 1610, bank accounts are considered neither currency nor monetary instruments, so are subject to the $500,000 limit.

There is some question whether assets seized simultaneously should be aggregated for the purpose of applying the $500,000 limit. Department of Justice policy requires seizures of personal property to be aggregated for the purposes of the $500,000 requirement if the seizures arose out of the same case or investigation. *Asset Forfeiture Policy Manual* (2013), Chap. 2, § I.A, p.47. (Asset Forfeiture Policy Manual (2013).)

26.04 [4] Notice of Forfeiture

26.04 [4][a] Timing

While pre-CAFRA law required only that forfeiture proceedings be commenced "forthwith" and prosecuted "without delay" once the property was seized, CAFRA set a statutory deadline for commencing an administrative forfeiture proceeding.

Under CAFRA, the government must typically send notice to potential claimants within 60 days of the seizure. 18 U.S.C. § 983(a)(1). Seizure may be deemed to occur at the time the government interferes with the owner's possession, use, or control, even if the government is not in physical possession of the property. ***United State v. Assorted Jewelry***, 386 F. Supp. 2d. 9, 13 (D.P.R. 2005); ***Salmo v. United States***, 2006 WL 2975503, at *2-3 (E.D. Mich. 2006).

When the property is seized by a state or local agency, then turned over to a federal agency for forfeiture under federal law, the federal agency has 90 days to commence an administrative forfeiture proceeding. ***United States v. One Ford Coupe Auto***, 272 U.S. 321, 325 (1926); ***Madewell***, 68 F.3d at 1037. In some instances, state law may require the state or local agency to obtain a judicial order releasing the property from the jurisdiction of the state court before it can be turned over to the federal agency. CAFRA does not provide relief should the state court fail to act in sufficient time for the federal agency to comply with the 90-day notice deadline. In such cases, the government may have to ask the court for an extension of time in which to send the notice.

26.04 [4][a][i] Extension of Deadlines

In some cases, because of the notice requirement, the government may not want to commence administrative forfeiture proceedings within the 60 or 90-day statutory period. The required notice might have potential adverse effects on ongoing criminal investigations. Complying with the requirement could, for example, require the government to notify targets of ongoing investigations before the government is ready to do so.

Section 983(a)(1)(B) provides that the supervisory official in the headquarters office of the seizing agency may extend the period for sending notice by 30 days. The agency can only grant this extension once. Any additional extensions must be sought by

requesting an *ex parte* order from the court. The court may extend the deadline for additional 60-day intervals as long as the court deems necessary.

Both the court and the agency supervisory official may only grant extensions if certain criteria are met. These criteria are set forth in Section 983(a)(1)(D). Criteria that may justify extensions include a belief that sending notice will endanger the life or physical safety of an individual, cause flight from prosecution, result in the destruction of evidence or intimidation of a potential witness, or otherwise seriously jeopardize an investigation or unduly delay a trial. 18 U.S.C. § 983(a)(1)(D).

26.04 [4][a][ii] Exceptions

The Section 983(a)(1)(A) notice requirement applies only to "nonjudicial forfeiture under a civil forfeiture statute." It does not apply:

(1) To cases that fall within the scope of Section 983(i) (Customs carve-out).

(2) When property is *not* eligible for administrative forfeiture, such as when the aggregate value of property exceeds $500,000 or the seizing agency lacks administrative forfeiture authority. *See, e.g.*, ***Chaim v. United States***, 692 F. Supp. 2d 461, 466 (D.N.J. 2010); ***DWB Holding Co. v. United States***, 593 F. Supp. 2d 1271, 1272 (M.D. Fla. 2009).

(3) When there is a nonjudicial forfeiture proceeding, because the property was not seized for forfeiture but rather for some other purpose, such as evidence in a criminal case. ***Celata v. United States***, 334 Fed. Appx. 801, 802 (9th Cir. 2009); ***Langbord v. United States Dep't of Treasury***, 2009 WL 2342638, at *4 (E.D. Pa. 2009).

(4) If, at the time of the seizure, the government intended to forgo administrative forfeiture and proceeds by civil or criminal forfeiture – even if the property is eligible and seized for the purpose of a forfeiture proceeding. 18 U.S.C. § 983(a)(1)(A)(ii) (civil judicial forfeiture exception), § (a)(1)(A)(iii) (criminal judicial forfeiture exception). (Under this exception, the government must file a civil judicial forfeiture action against the property and provide notice of that action before the 60-day period expires. ***United States v. Vehicle 2007 Mack 600 Dump Truck***, 680 F. Supp. 2d 816, 824 n.6 (E.D. Mich. 2010). Or it must include the property in a criminal indictment within 60 (or 90) days of seizure.)

(5) If the government did not seize the property for the purpose of forfeiting it administratively, whether or not the government commences a civil or criminal forfeiture action within 60 or 90 days of the seizure.

In contrast to a civil judicial forfeiture action, it should be noted that the inclusion of property in a criminal indictment does not automatically terminate an administrative forfeiture action. 18 U.S.C. § 983(a)(3)(C). Rather, the government may continue the administrative forfeiture action to see whether anyone files a claim; if not, the property is forfeited by default. 18 U.S.C. § 1609.

If a claim is filed, the government can proceed with the criminal forfeiture action or file a parallel judicial forfeiture action. If the government continues the administrative forfeiture proceeding notwithstanding the criminal indictment, it must send notice of the administrative forfeiture proceeding as required under Section 983(a)(1)(A)(i): the criminal forfeiture action is not considered sufficient notice for the administrative proceeding because notice is only provided to the defendant at the time of indictment and no third parties are given notice of criminal forfeiture until the defendant is convicted and the court has entered a preliminary order of forfeiture.

26.04 [4][b] Content of Notice

Section 983(a)(1)(A)(i) is silent regarding what the notice of administrative forfeiture must contain. The notice must identify the property, as well as the time and place where it was seized. *See* ***Adames v. United States***, 171 F.3d 728, 730 n.2 (2d Cir. 1999) (noting that government understandably did not argue that notice referring only to amount of currency at issue and the date on which the forfeiture complaint was filed as adequate). The notice should also describe the procedure for contesting the forfeiture, which involves either filing a verified claim under Section 983(a)(2) or filing a remission petition; the notice should explain that the claimant cannot do both. *See* ***Martin v. Leonhart***, 717 F. Supp. 2d 92, 98-99 (D.D.C. 2010). Direct notice to a potential claimant will also generally state the deadline for filing a claim. A least one court has held that the notice need not advise the claimant that a remission petition is not subject to judicial review. ***Laconia Savings Bank v. United States***, 116 F. Supp. 2d 248, 255 (D.N.H. 2000).

As long as the notice is "'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to

present their objections,'" ***Lobzun v. United States***, 422 F.3d 503, 507 (7th Cir. 2005) (quoting ***Mullane v. Cent. Hanover Bank & Trust Co.***, 339 U.S. 306, 314 (1950)), the notice may not need to detail the illegal acts or facts supporting the government's theory of recovery. *See* ***Mohammad v. United States***, 169 Fed. Appx. 475, 482 (7th Cir. 2006) (DEA form notice is constitutionally adequate.) At least one court has also held that the required newspaper notification need not name the potential claimants. ***United States v. Latham***, 54 Fed. Appx. 441, 446 (6th Cir. 2002).

26.04 [4][c] Persons to Whom Notice Must Be Sent

Pursuant to 19 U.S.C. § 1607(a), notice of administrative forfeiture must be sent "to each party who appears to have an interest in the seized article." This includes the person from whom the property was seized, the owner of the premises from which it was seized (even if he was not in direct possession), the titled owner of the property, lienholders, and any other person known to the government to have an interest. *See* ***Assorted Jewelry***, 386 F. Supp. 2d at 12-13; ***Kadonsky v. United States***, 3 Fed. Appx. 898, 902-03 (10th Cir. 2001) (party "appear[ed] to have an interest" in the check made out in his name and was entitled to notice); *see also* ***United States v. Ritchie***, 342 F.3d 903, 910-11 (9th Cir. 2003) (all circuits to consider the issue have held that government must make reasonable additional efforts to provide personal notice once it has learned that an initial effort has failed).

The government must send notice even if a person is a fugitive. *See* ***United States v. Gonzalez-Gonzalez***, 257 F.3d 31, 38 (1st Cir. 2001) (reversing, *sua sponte*, dismissal by the district court and remanding for consideration of whether the government knew of the fugitive's whereabouts and failed to direct notice to that location); ***United States v. Rodgers***, 108 F.3d 1247, 1253 (10th Cir. 1997). If the government does not know the fugitive's whereabouts, attempts to send notice by certified mail to the last known address are considered sufficient. ***Latham***, 54 Fed. Appx. at 444-45.

The government is not required to send written notice to persons who deny ownership in the property or whose interest in the property is nil. ***Arango v. United States***, 1998 WL 417601, at *2-3 (N.D. Ill. 1998); ***United States v. Howell***, 425 F.3d 971, 975 (11th Cir. 2005). Nor is the government required to send notice to unsecured creditors whose interest in the property arose after the criminal acts giving rise to the forfeiture. 18 U.S.C. § 983(d)(6)(B)(i); ***United States v. Carmichael***, 440 F. Supp. 2d 1280, 1282 (M.D. Ala. 2006); *but see* ***United States v. $4,224,958.57***, 392 F.3d 1002,

1005 (9th Cir. 2004) (if bank depositors can prove their claims to have been defrauded, they are the beneficiaries of the constructive trust and have, therefore, equitable interests in it, and are consequently entitled to notice of a pending forfeiture action). The government may send notice to a person without that notice being treated as a concession that the intended recipient has standing to contest the forfeiture. *See* ***United States v. BCCI Holdings***, 69 F. Supp. 2d 36, 56 n.22 (D.D.C. 1999).

In some instances, the identity of a person with an interest in the property is not known to the seizing agency at the time of the seizure, but is learned before the agency enters a declaration of forfeiture. In those cases, Section 983(a)(1)(A)(v) provides that the government has another 60 (or 90) days from the date it learns of the identity of the new party to send written notice to that party, in accordance with Section 983(a)(1)(A)(i). The newly-identified party then has the opportunity to file a claim. This additional period is only for the new party, however. It does not reopen the claims period for any other person to whom the government previously sent notice in the initial 60 or 90-day period.

The requirement to reopen the notice period in Section 983(a)(1)(A)(v) only applies if the new party's identity is discovered "before a declaration of forfeiture is entered." If the government learns of a new party after entering a declaration of forfeiture, it may withdraw the declaration and restart the process. It may also decline to do so, in which case the only recourse for the newly-discovered party is to move to set aside the forfeiture pursuant to Section 983(e) on the ground that the notice of the administrative forfeiture was inadequate.

26.04 [4][d] Manner of Sending Notice

Section 983(a)(1)(A)(i) requires notice "be sent in a manner to achieve proper notice." Both pre- and post-CAFRA case law requires that notice be sent in accord with the Supreme Court's decision in ***Mullane v. Central Hanover Bank & Trust Co.***, 339 U.S. 306 (1950). In ***Mullane***, the Court held that the notice must be reasonably calculated to apprise interested parties of the pendency of the action. 339 U.S. at 315. Further, it must be sent by means and in a manner that would be employed by one actually desirous of achieving notice. *Id.* at 315; ***Dusenbery v. United States***, 534 U.S. 161, 167 2002); ***Gonzalez-Gonzalez***, 257 F.3d at 36-37; ***Rodgers***, 108 F.3d at 1251 (where DEA could reasonably have been aware that person maintained three different

residences and mailed notice only to two of the residences, DEA should have mailed a seizure notice to the third residence)**.**

The government is not, however, required to prove that notice was actually received. *See* ***Dusenberry***, 534 U.S. at 172-73 (Due Process Clause does not require heroic efforts by the government; it requires only that the government's effort be reasonably calculated to apprise a party of the pendency of the action); ***Valderrama v. United States***, 417 F.3d 1189, 1197 (11th Cir. 2005). Thus, it is generally sufficient to send notice by certified mail to an address that the government believes is valid. ***Krecioch v. United States***, 221 F.3d 976, 980-81 (7th Cir. 2000); ***United States v. Clark***, 84 F.3d 378, 381 (10th Cir. 1996); ***Albalon v. Gugliotta***, 72 F. Supp. 2d 1362, 1370 (S.D. Fla. 1999). For example, the government is entitled to rely on the address a potential claimant provides when arrested or at the time the property was seized. ***Lobzun***, 422 F.3d at 508-09. The government may assume its efforts were sufficient if the notice was sent by certified mail and it receives a delivery confirmation. ***In re Seizure of $143,265.78***, 384 Fed. Appx. 471, 474-75 (6th Cir. 2010).

When an attorney represents a potential claimant, the majority of courts hold that it is sufficient to send notice of administrative forfeiture to the attorney, in appropriate circumstances. ***Nunley v. Department of Justice***, 425 F.3d 1332, 1139 (8th Cir. 2005); ***Bye v. United States***, 105 F.3d 856, 857 (2d Cir. 1997); ***Allen v United States***, 38 F. Supp. 2d 436, 437 (D. Md. 1999); ***Willis v. United States***, 2010 WL 4735737, at *3 (S.D. Ga. 2010); ***Hernandez Diaz v. United States***, 2006 WL 2853879, at *4 (E.D.N.Y. 2006); ***Arredondo v. United States***, 2004 WL 1171203, at *3 (N.D. Tex. 2004); *but see* ***United States v. $184,505.01***, 72 F.3d 1160, 1164 (3d Cir. 1995) (attorney for claimant was not claimant's attorney in the forfeiture proceedings at issue); ***United States v. Houshar***, 2006 WL 562206, at *7 n.11 (E.D. Pa. 2006).

When the potential claimant is a prisoner, the government satisfies the notice requirement if the notice is sent to the prisoner where he is incarcerated and the facility has procedures in place to deliver mail to the prisoners. ***Dusenberry***, 534 U.S. at 162; ***United States v. Huggins***, 385 Fed. Appx. 225, 227 (3d Cir. 2010). The government does not have to prove that the prisoner actually received the notice.

With regards to the procedures used by the prison to deliver mail, there is a circuit split regarding what proof the government must offer. Several courts have held that ***Dusenbery*** does not require an inquiry into how each jail handles the mail and that proof

of delivery to the potential claimant's jail is sufficient. *See* ***Chairez v. United States***, 355 F.3d 1099, 1101-02 (7th Cir. 2004); ***Collette v. United States***, 247 Fed. Appx. 87, 88-90 (9th Cir. 2007); ***United States v. $13,946.00 in U.S. Currency***, 2011 WL 4499131, at *3 (N.D. Ill. 2011); *see also* ***Perez v. United States,*** 2010 WL 1542171, at *3 (N.D. Tex. 2010) (claimant did not assert or prove that prison mail delivery procedures were inadequate); ***United States v. Daniels***, 2010 WL 5140853, at *4 (E.D. La. 2010). In contrast, the Third Circuit places the burden on the government, when it relies on something less than actual notice, to demonstrate that the prison employs mail distribution procedures that "are reasonably calculated to ensure that notice will be received." ***United States v. One Toshiba Color Television***, 213 F.3d 147, 155-56 (3d Cir. 2000). And the Eight Circuit has adopted a middle-ground holding that there is no presumption of reliability as to the jail's internal delivery system and putting the burden on the prisoner to demonstrate that the procedures are inadequate. ***Nunley***, 425 F.3d at 1137.

If the government has actual knowledge that its attempts to provide notice have been unsuccessful, the government must take additional steps to send notice. ***Jones v. Flowers***, 547 U.S. 220 (2006). Under the Supreme Court's decision in Jones, the government can satisfy due process by re-sending the notice by first class mail or taking other "additional steps" designed to give notice, *id.* at 230, such as checking law enforcement databases for other addresses, contacting the local police department, or sending notice to the potential claimant's attorney. *See* ***VanHorn v. DEA***, 677 F. Supp. 2d 1299, 1310 (M.D. Fla. 2009) (resending notice by regular mail or posting notice on a front door); ***Turner v. Attorney General***, 579 F. Supp. 2d 1097, 1107-08 (N.D. Ind. 2008); ***United States v. Lawrence***, 2010 WL 529490, at *3 (N.D. Cal. 2010); ***Folks v. DEA***, 2006 WL 3096687, at *2 (M.D.N.C. 2006).

26.04 [4][e] Notice by Publication

The government is also required to give public notice of an administrative forfeiture in a newspaper for at least three successive weeks. 19 U.S.C. § 1607. The government may choose a newspaper of general circulation; it does not have to publish the notice in a newspaper distributed in a particular jurisdiction, even if the local newspaper may be more likely to achieve actual notice. ***United States v. Robinson***, 434 F.3d 357, 367-68 (5th Cir.2005). Importantly, newspaper publication alone does not satisfy due process if the identity and whereabouts of a potential claimant are known to

the government or could be determined with reasonable effort. *See* ***Robinson v. Hanrahan***, 409 U.S. 38, 40 (1972); ***Garcia v. Meza***, 235 F.3d 287, 292 (7th Cir. 2000); ***Volpe v. United States***, 543 F. Supp. 2d 113, 119-20 (D. Mass. 2008).

26.04 [4][f] Actual Notice

There is no due process violation if the claimant has actual notice of the forfeiture action, be it an administrative or judicial action. *See* ***Nunley***, 425 F.3d at 1139; ***United States v. One 1987 Jeep Wrangler***, 972 F.2d 472, 481 (2d Cir. 1992) (due process satisfied by the claimant's admitted actual knowledge of the seizure); ***Pimentel v. DEA***, 99 F. Supp. 2d 420, 428 n.6 (S.D.N.Y. 2000); *see also* Fed. R. Civ. P. Supp. G(4).

26.04 [5] Sanctions for Failure to Provide Notice

If the government fails to provide the required notice to the person from whom the property was seized within the specified time period and does not obtain an extension in which to do so, the government "shall return the property to that person without prejudice to the right of the Government to commence a forfeiture proceeding at a later time." 18 U.S.C. § 983(a)(1)(F). By its terms, Section 983(a)(1)(F) does not require the government to return the property to any other potential claimant, even if it failed to send notice.

If the seizing agency misses the notice deadline and thus loses the option to pursue administrative forfeiture, the agency can still refer the case to the Department of Justice for commencement of a judicial forfeiture action. *See* ***United States v. Real Property Located at 1184 Drycreek Road, Granville, Ohio 43023***, 174 F. 3d 720, 729 (6th Cir. 1999) (inadequate notice does not immunize property from forfeiture); ***Salmo***, 2006 WL 2975503, at *3. Upon such a referral, Department of Justice policy allows the filing of a forfeiture complaint without returning the property. *Asset Forfeiture Policy Manual* (2013), Ch. 2, § I.F, p. 55 (setting forth the recommended procedure for filing a civil judicial forfeiture following the inadvertent failure to commence a timely administrative forfeiture proceeding). (Asset Forfeiture Policy Manual (2013).) *See also* ***In Re Return of Seized Property (Jordan)***, 625 F. Supp. 2d 949, 953-55 (C.D. Cal. 2009); ***Salmo***, 2006 WL 2975503, at *3; ***Manjarrez v. United States***, 2002 WL 31870533, at *1-2 (N.D. Ill. 2002). Alternately, should the seizing agency miss the

deadline and pursue an administrative forfeiture anyway, the resulting forfeiture is valid unless the claimant files a claim and seeks redress for the procedural error.

Section 983(a)(1)(F) provides an exception to the return of property rule, under which the government does not have to return "contraband or other property that the person from whom the property was seized may not legally possess." *See* ***Manjarrez***, 2002 WL 31870533, at *1-2. Thus, the seizing agency does not have to return stolen property, smuggled goods/currency, or illegal drugs seized from a drug trafficker. *See ibid.* (if U.S. currency seized from claimant could be traced to drug transactions, government would never have an obligation to return it to him); *see also* ***United States v. An Antique Platter of Gold***, 991 F. Supp. 222, 233 (S.D.N.Y. 1997) (illegally imported goods are contraband).

26.04 [6] Filing a Claim

Sections 982(a)(2)(A) through (E) set out the procedure for filing a claim in an administrative forfeiture proceeding. They substantially supersede the pre-CAFRA procedures in the Customs laws at 19 U.S.C. § 1608. To the extent that Section 983(a)(2) is silent or ambiguous, however, Section 1608 is incorporated by the applicable civil forfeiture statute and applies.

If no party files a valid claim, the seizing agency may enter a declaration of forfeiture that gives clear title to the United States. 19 U.S.C. § 1609. The agency is not required to provide any additional notice; once forfeited, the property may be destroyed unless needed as evidence in a criminal case. *See* ***United States v. McNealy***, 625 F.3d 858, 869-70 (5th Cir. 2010) (government's failure to send notice of a civil forfeiture action to a criminal defendant, and the resulting destruction of property containing potentially useful evidence when he defaulted, was negligent on the government's part, but did not deprive the defendant of due process in the criminal case because there was no showing of bad faith); ***United States v. Connors***, 2002 WL 24520, at *2 (N.D. Ill. 2002) (because no one realized forfeited property would be needed as evidence years later when defendant was indicted, there was no due process violation in destruction of property to which defendant did not file a claim; but Government warned not to destroy property that will be needed as evidence in future criminal cases even if the forfeiture is uncontested).

26.04 [7] Judicial Review

As discussed above, administrative forfeiture is handled solely by the federal law enforcement agency that seized the property. If a person with standing to contest the administrative forfeiture files a timely claim pursuant to 18 U.S.C. § 983(a)(2), the seizing agency must terminate the administrative forfeiture proceeding and refer the case to the United States Attorney's Office, which must either direct the agency to return the property or file a judicial forfeiture action in district court. If the government commences a judicial action, the claimant may then contest forfeiture on any ground provided in the applicable statute(s) or under the Constitution.

A person who chooses not to file a claim waives any judicial review and must accept the seizing agency's determination. *See* ***Malladi Drugs***, 552 F.3d at 889; ***Linarez v. Department of Justice***, 2 F.3d 208, 213 (7th Cir. 1993); ***United States v. Vereda Ltd.***, 271 F.3d 1367, 1375 (Fed. Cir. 2001).

Judicial review of administrative forfeiture is narrow and limited in scope, because a claimant requesting review did not, as he or she could have, file a claim. The primary purpose of judicial review of administrative forfeitures is to ensure that the agency afforded the property owners due process of law. In other words, a court lacks jurisdiction to hear a challenge to the forfeitability of the property on the merits or a challenge based on an alleged violation of a constitutional right (other than a due process claim based on inadequate notice) that the claimant could have raised in district court if he or she had filed a claim. *See* ***United States v. Eubanks***, 169 F.3d 672, 674 (11th Cir. 1999) (generally court lacks jurisdiction to review agency's forfeiture decision, but may exercise jurisdiction if the agency refused to consider a request that it exercise its discretion or may exercise equitable jurisdiction to prevent manifest injustice); ***Chairez***, 355 F.3d at 1102; ***McKinney v. U.S. Dep't of Justice***, 580 F. Supp. 2d 1, 4 (D.D.C. 2008). A district court also lacks jurisdiction to review the denial of a remission petition, when the claimant filed such a petition instead of a claim under Section 983(a)(2). ***Reyna v. United States***, 180 Fed. Appx. 495, 496 (5th Cir. 2006); *but see* ***Tourus Records v. DEA***, 259 F.3d 731, 735 (D.C. Cir. 2001) (collecting cases discussing different standards of review for denials of petitions to remit or mitigate).

26.04 [7][a] Scope of Review

Except for cases that fall within the carve-out of Section 983(i), challenges to administrative forfeitures commenced after August 23, 2000, are governed exclusively by 18 U.S.C. § 983(e). *See* ***United States v. Sims***, 376 F.3d 705, 707 (7th Cir. 2004); ***Valderrama***, 417 F.3d at 1195 (for forfeiture proceedings begun after August 23, 2000, 5 year statute of limitations in 18 U.S.C. § 983(e)(3) applies); ***United States v. Tinajero-Porras***, 378 Fed. Appx. 850, 851 (10th Cir. 2010) (Section 983 is the exclusive vehicle to challenge forfeiture under 22 U.S.C. § 881); ***United States v. Triplett***, 240 Fed. Appx. 736, 736 (8th Cir. 2007)

26.04 [7][b] Section 983(e) Petitions

Section 983(e) only applies to due process challenges that are based on lack of notice. Other challenges are generally treated as actions for equitable relief and treated as they were before enactment of Section 983(e). *See* ***Rodriguez v. United States***, 219 Fed. Appx. 22 (1st Cir. 2007) (district court had jurisdiction over merits of claimant's due process claims); ***United States v. Dacre***, 256 Fed. Appx. 866, 867 (8th Cir. 2007) (because claimant received notice of forfeiture from the DEA, he was not entitled to relief under Section 983(e)). Again, any requests for equitable relief do not go to the merits – only the procedures used by the seizing agency in commencing and concluding the administrative forfeiture proceeding are subject to review.

When a Section 983(e) petition is filed, a threshold matter is whether the moving party has standing to challenge the forfeiture. If so, the court then reviews the efforts the government made to provide notice to the moving party and whether those efforts were constitutionally sufficient. If the notice is found to be inadequate, the court then looks to whether the claimant nevertheless had actual notice of the seizure in sufficient time to file a timely claim.

To prevail on a Section 983(e) petition, the claimant must show that (1) the government knew or should have known of the claimant's interest in the property but "failed to take reasonable steps" to provide the claimant with notice (18 U.S.C. § 983(e)(1)(A)), and (2) the claimant "did not know or have reason to know of the seizure within sufficient time to timely file a claim." 18 U.S.C. § 983(e)(1)(B).

Section 983(e) and pre-CAFRA case law are not clear as to who has the burden of proof on a Section 983(e) motion. Two district courts to consider the matter have both suggested that the claimant has the initial burden of showing that he was entitled to receive notice and that no notice was received. *See* ***United States v. Johnson,*** 2004 WL 2538649, at *5 (S.D. Ind. 2004); ***Foehl v. United States***, 2002 WL 32075774, at *7-8 (E.D. Tex. 2002). On that initial showing, the ***Foehl*** court found that the burden shifted to the government to show what efforts it made to give notice, with the claimant having the ultimate burden to show those efforts were unreasonable under ***Mullane***. ***Foehl***, 2002 WL 32075774, at *7-8. In ***Johnson***, the district court held that the claimant had the burden of showing that the government did not take reasonable steps to provide notice and that he did not have reason to know of the seizure with sufficient time to file a timely claim. 2004 WL 2538649, at *5.

A Section 983(e) petition must be filed "not later than 5 years after the date of final publication of notice of seizure of the property." 18 U.S.C. § 983(e). Section 983(e) contains no venue provision. While venue appears to always be proper in the district where the seizure took place, some courts have held that a Section 983(e) petition can also be filed in another district, such as where the claimant is incarcerated. *See* ***Foehl v. United States***, 238 F.3d 474, 461 (3d Cir. 2001) (case challenging forfeiture was brought under Administrative Procedures Act, and venue was controlled by 28 U.S.C. §§ 1391, 1406); ***Clymore v. United States***, 164 F.3d 569, 574-75 (10th Cir. 1999) (venue proper where seizure took place); ***Polanco v. DEA***, 158 F.3d 647, 655 (2d Cir. 1998).

26.05 CIVIL JUDICIAL FORFEITURE

26.05 [1] Statutory Authority

The main provisions governing civil forfeiture procedure are found in 18 U.S.C. § 983(a)(3), which was enacted as part of CAFRA, and Rule G of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. The procedures set forth in 18 U.S.C. § 983(a)(3) apply in cases governed by any statute authorizing civil forfeiture, except those exempted from CAFRA under 18 U.S.C. § 983(i). By contrast, the provisions of Supplemental Rule G apply to all civil judicial forfeiture actions. ***United States v. $11,918.00***, 2007 WL 3037307, at *3 (E.D. Cal. Oct. 17, 2007) (noting that the Advisory Committee Note to Supplemental Rule G extends the Rule to all civil forfeiture actions, even if they are exempted under 18 U.S.C. § 983(i)).

The provisions of the Internal Revenue Code authorizing forfeiture are among those exempted from the 18 U.S.C. § 983(a)(3) deadlines. ***United States v. One TRW, Model M14, 7.62 Caliber Rifle***, 441 F.3d 416, 418 (6th Cir. 2006) (forfeiture cases based on Title 26 offenses are exempt under 18 U.S.C. § 983(i)); ***United States v TRW Rifle 7.26X51MM Caliber, One Model 14 Serial 593006***, 447 F.3d 686, 689 & n.3 (9th Cir. 2006) (same). For discussion of the time limits for filings of civil forfeiture complaints in cases exempt from the 18 U.S.C. § 983(a)(3) deadlines, *see infra*, Section 26.05[2].

26.05 [2] Deadline for Commencing a Civil Forfeiture Action

As explained *supra*, Section 26.04[4], an administrative forfeiture proceeding is terminated when a claimant files a claim. Under 18 U.S.C. § 983(a)(3), when a claim is filed in an administrative forfeiture proceeding governed by CAFRA, the government has 90 days to (1) file a civil forfeiture complaint, (2) list the property in a forfeiture allegation in a criminal indictment, or (3) release the property. The 90-day clock runs from the time the seizing agency receives the claim, not the time the claim is mailed. ***United States v. Real Property Located at 475 Martin Lane***, 545 F.3d 1134, 1141 (9th Cir. 2008). The deadline may be extended by the court for "good cause shown or upon agreement of the parties." 18 U.S.C. § 983(a)(3)(A). The clock does not begin when a claim is filed before the seizing agency has sent the notice required, under 18 U.S.C. § 983(a)(1)(A), of its intent to administratively forfeit seized property. ***United States v. $200,255 in U.S. Currency***, 2006 WL 1687774, at *4-6 (M.D. Ga. 2006); *but see* ***United States v. 1996 Freightliner FLD Tractor***, 634 F.3d 1113, 1117 (9th Cir. 2011) (noting that claimant may shorten the government's deadline to 60 days by filing a cost bond along with the claim under unrepealed pre-CAFRA DEA regulation, which the government conceded remains in effect).

The 90-day clock also does not start running unless the seizing agency receives a valid claim containing the elements enumerated in 18 U.S.C. § 983(a)(2)(C) – the specific property being claimed, a statement of the claimant's interest in the property, and an oath that the claim is subject to penalties of perjury. ***Manjarrez***, 2002 WL 31870533, at *2 (90-day period did not begin to run when claimant did not make claim under penalties of perjury). Department policy calls for seizing agencies to strictly enforce this requirement, but to consult with the U.S. Attorney prior to declaring an administrative forfeiture in situations where it is unclear whether a valid claim has been filed. For

further discussion, see the Criminal Division's *Asset Forfeiture Policy Manual* (2013), Chap. 2, §. I.D, p. 51. (Asset Forfeiture Policy Manual (2013).)

When a seizing agency misses the 90-day deadline under 18 U.S.C. § 983(a)(3) for filing a civil forfeiture complaint because the seizing agency believed, mistakenly but in good faith, that a claim was invalid, some courts have held that the deadline may be equitably tolled. *See, e.g.*, ***United States v. $114,143.00 in U.S. Currency***, 609 F. Supp. 2d 1321, 1322-23 (S.D. Fla. 2009); ***Longenette v. Krusing***, 322 F.3d 758, 768 (3d Cir. 2003) (tolling statute of limitations under pre-CAFRA law to allow government to file a judicial forfeiture action where government acted in good faith in rejecting, as untimely, a claim filed in administrative forfeiture proceedings). Department policy calls for asserting that equitable tolling applies under such circumstances. *See Asset Forfeiture Policy Manual* (2013), Chap. 2, § I.D.3, p. 54. (Asset Forfeiture Policy Manual (2013).)

Absent tolling, the effect of failure to comply with the 90-day rule is that the government is forever barred from pursuing civil forfeiture of the property identified in the claim "in connection with the underlying offense." 18 U.S.C. § 983(a)(3)(B). ***Real Property Located at 475 Martin Lane***, 545 F.3d at 1141. The government, however, may still seek criminal forfeiture of the property even if the 90-day rule is violated. *See* ***United States v. Martin***, 662 F.3d 301, 306 (4th Cir. 2011) (holding that illegal seizure of property does not immunize property from forfeiture if the government can sustain the forfeiture with independent evidence).

It is important to remember that the 90-day deadline applies only to cases that begin as administrative forfeitures, ***United States v. 1866.75 Board Feet and 11 Doors and Casings***, 587 F. Supp.2d 740, 751-52 (E.D. Va. 2008), *aff'd sub nom.* ***United States v. Thompson***, 332 Fed. Appx. 882 (4th Cir. 2009), and only to forfeitures authorized by statutes not excepted under 18 U.S.C. § 983(i). In cases to which the 90-day limit does not apply, the only time limitation placed on the filing of a civil forfeiture complaint is that imposed by considerations of due process. In ***United States v. $8,850 in U.S. Currency***, 461 U.S. 555, 564 (1983), a pre-CAFRA case, the Supreme Court adopted the four-part balancing test of ***Barker v. Wingo***, 407 U.S. 514, 530 (1972), in holding that the government's 18-month delay in filing a civil forfeiture action following a complaint did not violate the claimant's due process rights. The factors the Court considered were (1) the length of the delay, (2) the reason for the delay, (3) the claimant's assertion of her right, and (4) prejudice to the claimant. ***$8,850***, 461 U.S. at 564. In cases not subject to CAFRA's 90-day deadline, courts have continued to consider the factors set forth in

$8,850 to determine whether judicial forfeiture actions have been timely filed. *See, e.g.*, ***Ancient Coin Collector's Guild v. Customs and Border Protection***, 801 F. Supp. 2d 383, 414-16 (D. Md. 2011), *aff'd* 698 F.3d 171 (4th Cir. 2012); ***United States v. Assets Described in "Attachment A"***, 2010 WL 1893327, at *5-*7 (M.D. Fla. 2010).

Although the due process limitations set forth in ***$8,850*** provide the only legal restriction on the time for commencing judicial forfeiture actions not subject to the 90-day rule under 18 U.S.C. § 983(a)(3), Department policy is that time limits analogous to those in 18 U.S.C. § 983 should be followed in some cases. *Asset Forfeiture Policy Manual* (2013), Chap. 2, § G.3.a, p. 58-59. (Asset Forfeiture Policy Manual (2013).) In cases where a forfeiture action could have been initiated as an administrative forfeiture action consistent with the property type and value limitations of 19 U.S.C. § 1607 – detailed *infra*, Section 26.04[3] – but the government has chosen to directly pursue judicial forfeiture of the property, the complaint should be filed within 150 days of the seizure of the property. *Asset Forfeiture Policy Manual* (2013), Chap. 2, § G.3.d, p. 60. (Asset Forfeiture Policy Manual (2013).) This time period represents the sum of the 60-day period the government has for giving notice, under 18 U.S.C. § 983(a)(1), and the 90-day deadline, under 18 U.S.C. § 983(a)(3), for filing suit after receiving a claim. *Asset Forfeiture Policy Manual* (2013), Chap. 2, § G.3.d, p. 60. (Asset forfeiture Policy Manual (2013).) By contrast, in cases where the government was prohibited from pursuing administrative forfeiture by 19 U.S.C. § 1607, Department policy requires only that suit be initiated within 90 days of receipt of a written request for the property from a claimant. *Asset Forfeiture Policy Manual* (2013), Chap. 2, § G.3.d, p. 60-61. (Asset Forfeiture Policy Manual (2013).)

26.05 [3] Jurisdiction

In a civil forfeiture action, the district court must have both subject matter jurisdiction and *in rem* jurisdiction over the defendant property. Under 28 U.S.C. §§ 1345 and 1355(a), the district courts have subject matter jurisdiction over civil forfeiture actions begun under any provision of federal law. ***United States v. $6,190.00 in U.S. Currency***, 581 F.3d 881, 884 (9th Cir. 2009).

Generally, a district court must have physical possession or constructive control of the defendant property to have *in rem* jurisdiction. ***United States v. One Oil Painting***, 362 F. Supp. 2d 1175, 1182-84 (C.D. Cal. 2005). Ordinarily, the district court obtains *in rem* jurisdiction over the defendant property by issuing an arrest warrant *in rem*,

following the procedures set forth in Supplemental Rule G(3). The clerk of the court may directly issue an arrest warrant *in rem* if the property is already in the possession, custody, or control of the government; otherwise, the district court must issue the warrant after making a finding of probable cause. Fed. R. Civ. P. Supp. G(3)(b)(i)-(ii). Procedures for arresting intangible property, however, are found in Supplemental Rule E(4)(c). ***United States v. 3 Parcels in La Plata County***, 919 F. Supp. 1449, 1454 (D. Nev. 1995)

The principal exceptions to the rule that the district court must obtain possession, custody, or control of the defendant property to obtain *in rem* jurisdiction are for real property and for property located abroad. The district court does not need to seize real property to obtain *in rem* jurisdiction over the property. ***United States v. James Daniel Good Real Property***, 510 U.S. 43, 57-58 (1993). The district court obtains *in rem* jurisdiction over real property when the government, in accordance with 18 U.S.C. § 985(c)(1), files a civil forfeiture complaint, posts notice of the complaint on the property, and serves the property owner with notice. 18 U.S.C. § 985(c)(3).

Courts have divided on the issue whether foreign authorities must take property into their possession, custody, or control in order for a district court to obtain *in rem* jurisdiction over the property. At issue is the interpretation of 28 U.S.C. § 1355(b)(2), which provides that "[w]henever property subject to forfeiture under the laws of the United States is located in a foreign country, or has been detained or seized pursuant to legal process or competent authority of a foreign government, an action or proceeding for forfeiture may be brought . . . ." The majority view is that, by virtue of 28 U.S.C. § 1355(b)(2), the district courts possess *in rem* jurisdiction over any property located in a foreign country, regardless whether foreign authorities have acted to bring the property under their control. ***United States v. Approximately $1.67 Million (U.S.)***, 513 F.3d 991, 996-97 (9th Cir. 2008); ***Contents of Account Number 03001288 Held in the Name of Jalal v. United States***, 344 F.3d 399, 403-05 (3d Cir. 2003)); *see also* ***United States v. All Funds in Account Nos. 747.034/278 (Banco Espanol de Credito)***, 295 F.3d 23, 27 (D.C. Cir. 2002) (agreeing with ***Hong Kong Banking,*** 96 F.3d 20, 22 (2d Cir. 1996), that district courts have jurisdiction to order forfeiture of property in another country and noting that district court issued warrant for arrest *in rem* and a Spanish court restrained the funds); ***United States v. Certain Funds Located at the Hong Kong & Shanghai Banking Corp.***, 96 F,3d 20, 22 (2d Cir. 1996). The minority view, however, was that 28 U.S.C. § 1355(b)(2) merely gives the district court subject matter jurisdiction over

foreign property, and that the district court only obtains *in rem* jurisdiction over the property if it is seized by foreign authorities at the request of the United States. ***United States v. All Funds in Any Accounts Maintained in the Names of Meza***, 63 F.3d 148, 152-53 (2d Cir. 1995). It is not clear, however, whether ***Meza*** remains good law even in the Second Circuit. As noted above, in ***Hong Kong Banking***, the Second Circuit held that Section 1355 conferred *in rem* jurisdiction without reference to the necessity of constructive or actual control. ***United States v. $1.67 Million (US) in Cash***, 513 F.3d at 997 & n.3.

Under the "concurrent jurisdiction doctrine," only one court may exercise *in rem* jurisdiction over property at any given time, and jurisdiction lies with the first court to obtain jurisdiction over the property. *See, e.g.*, ***Madewell***, 68 F.3d at 1041 n.13 (8th Cir. 1995) (collecting cases). Thus, so long as property is subject to the *in rem* jurisdiction of a state court, it cannot be forfeited by a federal agency administratively or by the United States in a federal civil forfeiture action. ***Scarabin v. DEA***, 966 F.2d 989, 993-95 (5th Cir. 1992); ***United States v. $490,920 in U.S. Currency***, 911 F. Supp. 720, 728 (S.D.N.Y. 1996). The concurrent jurisdiction doctrine, however, does not prohibit a federal court from ordering forfeiture of property subject to the *in rem* jurisdiction of a state court as part of a defendant's sentence in a federal criminal case. *Cf*. ***United States v. Timley***, 443 F.3d 615, 628 (8th Cir. 2006) (where state court, upon holding that it could not forfeit money from the defendant, ordered money released to the defendant's lawyer, federal district court had jurisdiction as the res had been distributed – defendant could agree in guilty plea to forfeiture.).

26.05 [4] Venue

Under 28 U.S.C. § 1355(b)(1), venue for a civil forfeiture action lies in "the district court for the district in which any of the acts or omissions giving rise to the forfeiture occurred," or any other district "specifically provided for" by statute. Other statutes provide that venue also lies in the district where property is found, 28 U.S.C. § 1395(b), and in the district where criminal charges based on the violation giving rise to the forfeiture are pending against the property owner. 18 U.S.C. § 981(h); 21 U.S.C. § 881(j).

26.05 [5] Notice Requirement

The requirements for sending notice of a civil forfeiture action to potential claimants are set forth in Supplemental Rule G(4). Notice by publication is generally required in civil forfeiture actions. Fed. R. Civ. P. Supp. G(4)(a)(i). Publication may be made either by newspaper, or on "an official internet government forfeiture site for at least 30 consecutive days." Fed. R. Civ. P. Supp. G(4)(a)(iv)(C). The Department's policy is to use the official government forfeiture site - www.forfeiture.gov - to satisfy the Supplemental Rule G(4) publication requirement, absent a "compelling reason to use print publication." *Asset Forfeiture Policy Manual* (2013), Chap. 9, § V, p. 134. (Asset Forfeiture Policy Manual (2013).) Print publication, however, may be appropriate in some circumstances involving assets located abroad. *Id.*

The government is also required to send direct notice of a civil forfeiture and a copy of the complaint "to any person who reasonably appears to be a potential claimant . . . ." Fed. R. Civ. P. Supp. G(4)(b)(i). This notice must be sent "by means reasonably calculated to reach the potential claimant," Fed. R. Civ. P. Supp. G(4)(b)(iii)(A), which include sending notice to a claimant's attorney who is representing the claimant with respect to the seizure of the property or related proceedings. Fed. R. Civ. P. Supp. G(4)(b)(iii)(B). Because claimants are not defendants, actual service of the notice satisfying the requirements of Federal Rule of Civil Procedure 4 is not required. ***United States v. $22,050.00 in U.S. Currency***, 595 F.3d 318, 320 n.1 (6th Cir. 2010). When a potential claimant is incarcerated, the notice must be sent to the place of incarceration. Fed. R. Civ. P. Supp. G(4)(b)(iii)(C). The government agency that arrested a potential claimant or that seized property from a potential claimant is permitted to use the last address given by the potential claimant to the agency to send notice to the potential claimant. Fed. R. Civ. P. Supp. G(4)(b)(iii)(D), (E).

Notice of a civil forfeiture action must include the date of the notice, the deadline for filing a claim, the deadline for filing an answer or a motion under Federal Rule of Civil Procedure 12 following filing of a claim, and the name of the government attorney to be served with the claim and answer. Fed. R. Civ. P. Supp. G(4)(b)(ii). As discussed *infra*, Section 26.05[7], different deadlines for filing a claim apply to notice by publication and direct notice, so the deadline in the notice should reflect the type of notice being sent. *See* ***United States v. One 2001 Ford F350***, 2011 WL 147715, at *3 (S.D. Tex. Jan. 18, 2011) (defective notice setting forth incorrect and unclear deadlines effective, although deadlines were incorrect, the date fell within the correct deadline).

26.05 [6] The Complaint

A civil forfeiture complaint must (a) be verified, (b) state the grounds for jurisdiction and venue, (c) "describe the property with reasonable particularity," (d) identify the current location of tangible property, (e) identify the statute under which the action is brought, and (f) "state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial." Fed. R. Civ. P. Supp. G(2).

For a complaint to be "verified," it must be filed under penalties of perjury. ***United States v. 8 Gilcrease Lane***, 587 F. Supp. 2d 133, 138-39 (D.D.C. 2008). Either the government attorney filing the complaint or a federal agent who has prepared an affidavit attached to the complaint may verify under penalties of perjury that the facts set forth in the complaint are true and correct. *Id*. The affiant may qualify this statement by stating that the facts are true to the best of the affiant's "knowledge and belief." *Id.*

Though the government must describe the property it is seeking to forfeit with reasonable particularity, care must be taken when the government chooses to only seek forfeiture of an individual's partial interest in property in which others have an interest. *See, e.g.*, ***United States v. One-Sixth Share***, 326 F.3d 36, 42 (1st Cir. 2003). However, the government is not required to state the fractional interests of various owners when it seeks forfeiture of the entire property, and is not required to state the portion of property subject to forfeiture when it proceeds on a theory – such as a proceeds theory, when property is partially acquired using proceeds of crime – that only supports forfeiture of part of the property. *See* ***United States v. One Parcel of Real Property***, 921 F.2d 370, 375 (1st Cir. 1990).

The requirement under Supplemental Rule G(2)(f) that the complaint "state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial" is commonly known as the "particularity requirement." This requirement developed through the caselaw interpreting former Supplemental Rule E(2)(a), *see* ***United States v. Mondragon***, 313 F.3d 862, 865 (4th Cir. 2002), and carried over "without change" when Supplemental Rule G was adopted. 2006 Advisory Committee Note to Supplemental Rule G; ***United States v. All Assets Held at Bank Julius Baer & Co.***, 571 F. Supp. 2d 1, 16 (D.D.C. 2008)***;*** *but see* ***Mondragon***, 313 F.3d at 865 (in light of CAFRA's change in the burden of proof, "it is a bit awkward to say now that Rule E(2)(a) requires the complaint to allege facts sufficient to support a

reasonable belief that the government can establish probable cause for forfeiture at trial. We therefore decline to adopt this interpretation," noting that a "useful point survives the pre-CAFRA opinions [sic] . . . most of these opinions begin by recognizing the general standard that a complaint under Rule E(2)(a) must allege sufficient facts to support a belief that the property is subject to forfeiture. We, too, adopt this standard.").

The rationale for the particularity requirement in civil forfeiture cases, by contrast to the notice pleading customary in most other civil actions, is that the filing of a civil forfeiture proceeding generally deprives a claimant of the means to contest the probable cause determination that supported the seizure or otherwise seek return of the property. *See supra*, Section 26.03[2]. Thus, the particularity requirement prevents the Government from "seizing and holding property on the basis of mere conclusory allegations that the property is forfeitable." ***United States v. $8,221,877.16 in U.S. Currency***, 330 F.3d 141, 154 (3d Cir. 2003).

The particularity requirement does not obligate the government to state all of the facts necessary to establish the forfeitability of the property. ***United States v. Real Property Located at 5208 Los Franciscos Way***, 385 F.3d 1187, 1193 (9th Cir. 2004) ("the Government is not required to prove its case simply to get in the courthouse door"); ***One 1974 Learjet***, 191 F.3d at 673-74 (government does not have to establish forfeitability of the property until time of trial); ***Daccarett***, 6 F.3d at 47 (same). The complaint, however, must state facts sufficient to permit a claimant, without further information, to "commence an investigation of the facts" and "frame a responsive pleading." ***Mondragon***, 313 F.3d at 865-66.

The "reasonable belief" requirement of Supplemental Rule G(2)(f) is a lesser standard than the probable cause standard – explained *supra*, Section 26.03[2] – necessary to support a seizure for forfeiture. *See* ***United States v. Lopez-Burgos***, 435 F.3d 1, 2 (1st Cir. 2006); ***United States v. $78,850.00 in U.S. Currency***, 444 F. Supp. 2d 630, 638-39 (D.S.C. 2006). CAFRA, moreover, provides that the burden in a civil forfeiture case remains with the government, 18 U.S.C. § 983(c)(1), and that "no complaint may be dismissed on the ground that the Government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property." 18 U.S.C. § 983(a)(3)(D). Thus, for forfeitures subject to CAFRA, most courts have held that a failure to establish probable cause through the allegations in the complaint is not grounds to grant a motion to dismiss. *See* ***United States v. $85,688 in U.S. Currency***, 740 F. Supp. 2d 1284, 1286-87 (D. Utah 2010) (collecting cases). The

Ninth Circuit, however, has held that a showing of probable cause is necessary, in addition to the reasonable belief requirement of Supplemental Rule G(2)(f), on the theory that the probable cause requirement found in 19 U.S.C. § 1615 survived the enactment of CAFRA. ***$493,850.00 in U.S. Currency***, 518 F.3d at 1168, 1168 n.4; *see also* ***$186,410 in U.S. Currency***, 590 F.3d at 954-55 (holding that government had failed to show that it had probable cause to institute its forfeiture action against funds seized from a marijuana clinic; based on the government's pleadings, and as the result of suppressing certain evidence, the court was "left without a clue as to whether currency of an unknown amount discovered at [the clinic] was indeed revenue from the Clinic's operations or was, for instance, a small amount of personal cash that an employee had acquired elsewhere and kept in a locked drawer at work").

26.05 [7] Filing a Claim and Answer

Supplemental Rule G(5) sets forth the rules for filing of claims and answers in civil forfeiture cases. A claim must (A) identify the property claimed, (B) identify the claimant and the claimant's interest in the property, (C) be signed by the claimant under penalties of perjury, and (D) be served on the government attorney identified in the notice the claimant received. Fed. R. Civ. P. Supp. G(5)(a)(i).

A claim must be signed under penalties of perjury by the claimant, not the claimant's attorney. Fed. R. Civ. P. Supp. G(5)(a)(i). Even if a civil judicial forfeiture case begins as an administrative forfeiture, the claimant is required to file a new claim, under penalties of perjury, in connection with the civil forfeiture action. *See* ***United States v. $23,000***, 356 F.3d 157, 162, 165-66 (1st Cir. 2004).

Identification of the claimant's interest in the property requires more than "conclusory or hearsay allegations of some interest in the forfeited property." ***United States v. $100,348***, 354 F.3d 1110, 1118-19 (9th Cir. 2004) (quoting ***Baker v. United States***, 722 F.2d 517, 519 (9th Cir. 1983)). Rather, courts generally require that the claim explain the nature of the claimant's interest and how it arose. *See, e.g.*, ***United States v. $134,750 in U.S. Currency***, 2010 WL 1741359, at *3 (D. Md. Apr. 28, 2010) (granting claimant leave to amend claim, claimant in structuring case was required to explain how he obtained possession of the currency and describe the transaction that generated the currency).

The time limit for filing a claim depends on the type of notice the claimant received. If the claimant received direct notice, the deadline is the deadline stated in the notice. Fed. R. Civ. P. Supp. G(5)(a)(ii)(A). This deadline must be at least 35 days after the notice is sent. Fed. R. Civ. P. Supp. G(4)(b)(ii)(B). If the claimant did not receive direct notice, the deadline is 30 days after the final day of print publication, or 60 days after the first day of publication on the internet. Fed. R. Civ. P. Supp. G(5)(a)(ii)(B).

A claimant must file an answer within 21 days of filing a claim. Fed. R. Civ. P. Supp. G(5)(b). Objections to *in rem* jurisdiction and venue must be raised in the answer, or they are waived. *Id.* The requirements for the answer are otherwise found in Federal Rule of Civil Procedure 8. Fed. R. Civ. P. Supp. G(1); ***2007 Mack 600 Dump Truck***, 680 F. Supp. 2d at 827-28.

26.05 [8] Default Judgments

If no claims are filed within the applicable time limits, or if all claims filed have been dismissed, the government may move, after moving for and receiving an entry of default from the Clerk under Rule 55(a), for entry of a default judgment against anyone who might have filed a claim under Federal Rule of Civil Procedure 55(b). Most courts will grant a default judgment under these circumstances if the government complied with the Supplemental Rule G(4) notice requirements. *See, e.g.*, ***United States v. $16,010.00 in U.S. Currency***, 2011 WL 2746338, at *4-6 (D.N.J. 2011). Some courts, however, have reviewed the allegations in the complaint to see whether, if true, they establish a factual basis for forfeiture prior to entering a default judgment. *See, e.g.*, ***United States v. Approximately $194,752 in U.S. Currency***, 2011 WL 3652509, at *3-4 (N.D. Cal. 2011).

26.05 [9] Advantages and Disadvantages of Civil Forfeiture

As between civil judicial and administrative forfeiture, Department policy is to use administrative forfeiture when the property in question is subject to administrative forfeiture, unless certain exceptions apply. *Asset Forfeiture Policy Manual* (2013), Chap. 2, § I.A, p. 47. (Asset forfeiture Policy Manual (2013).) These exceptions include, *inter alia*, the situation where several items of property that collectively are worth more than $500,000 are subject to judicial forfeiture on the same facts and statutory authority and have a common owner. *Id.*

As between civil and criminal forfeiture, there are several advantages and disadvantages to civil forfeiture that should be considered and weighed before choosing which of the two to pursue, or to pursue both simultaneously. *See infra*, Section 26.07 (discussing parallel civil and criminal forfeitures).

One advantage for the government of using the civil forfeiture procedures is the favorable burden of proof. In a civil forfeiture case, the government need only prove its case – including the underlying crime – by a preponderance of the evidence, not beyond a reasonable doubt as in a criminal forfeiture.

Relatedly, another advantage of civil forfeiture is that the government need not obtain a criminal conviction to forfeit property civilly. *See* ***United States v. One Assortment of 89 Firearms***, 465 U.S. 354, 366 (1984) (acquittal on gun charge does not bar related civil forfeiture action). Thus, civil forfeiture may be the only avenue open to the government when a criminal defendant dies or is a fugitive, when the government is able to prove that property was involved in crime but cannot prove who committed the crime, or when the property belongs to a third party who is not a defendant in the criminal case.

A third advantage of civil forfeiture is that, by contrast to a criminal forfeiture, the forfeiture order is not limited to the property involved in the particular offense of conviction. Thus, civil forfeiture can be used to forfeit property involved in related offenses that were not charged in the criminal indictment.

The main disadvantage of civil forfeiture, as compared to criminal forfeiture, is that the government generally must prove that the defendant property is directly traceable to the underlying criminal offense, and the court, therefore, cannot order forfeiture in the form of a money judgment or of substitute assets as it can in a criminal case. *See infra*, Section 26.06[1] (discussing use of substitute assets in criminal forfeiture). A limited exception exists, however, for cash and electronic funds, which are considered fungible for one year after the offense. 18 U.S.C. § 984.

Another potential disadvantage of civil forfeiture is that it may expose the government to civil discovery that may be detrimental to its successful prosecution of a related criminal case. The government however, is permitted to move for a stay of discovery in the civil forfeiture case on grounds that "civil discovery will adversely affect the ability of the Government to conduct a related criminal investigation or the prosecution of a related criminal case." 18 U.S.C. § 981(g)(1). The government is also

permitted to depose a claimant in a civil forfeiture case, so a claimant who is the subject of a related criminal investigation or case is also permitted to, and often does, move for a stay of a civil forfeiture case on grounds that "continuation of the forfeiture proceeding will burden the right of the claimant against self-incrimination in the related investigation or case." 18 U.S.C. § 981(g)(2)(C).

Other disadvantages of civil forfeiture include the requirement to pay attorney's fees and other litigation expenses to all successful claimants, 28 U.S.C. § 2465(b), and the "death penalty" provision of CAFRA, 18 U.S.C. § 983(a)(3)(B), forever barring forfeiture of property seized for judicial forfeiture when the government fails to timely file suit or timely return the seized property. *See supra*, Section 26.05[2] (discussing filing deadlines).

26.06 CRIMINAL FORFEITURE

26.06 [1] Overview

Criminal forfeiture is part of the defendant's sentence. It is imposed as part of the sentencing process, following conviction of a substantive criminal offense. ***Libretti v. United States***, 516 U.S. 29, 39-41 (1995); ***United States v. Ferrario-Pozzi***, 368 F.3d 5, 8 (1st Cir. 2004); ***United States v. Descent***, 292 F.3d 703, 706 (11th Cir. 2002). It is not a separate crime, nor a separate action against property. Criminal forfeiture deprives defendants of the fruits of their illegal acts and deters future crimes. ***Caplin & Drysdale v. United States***, 491 U.S. 617, 630 (1989); ***United States v. Usery***, 518 U.S. 267, 291 (1996); ***United States v. Martin***, 662 F.3d at 309; ***United States v. Emor***, 850 F. Supp. 2d 176, 215 (D.D.C. 2012).

Unlike civil forfeiture, criminal forfeiture is *in personam*. ***United States v. Lazarenko***, 476 F.3d 642, 647 (9th Cir. 2007); ***United States v. Vampire Nation***, 451 F.3d 189, 202 (3d Cir. 2006). This means that the court can order the defendant to pay a money judgment or to forfeit substitute assets if the directly forfeitable property has been dissipated or cannot be found. In that regard, criminal forfeiture is considered broader and more powerful than civil forfeiture.

Criminal forfeiture requires conviction on a criminal count for which forfeiture is authorized by statute. ***United States v. Baker***, 678 F.3d 858, 897 (10th Cir. 2012); ***United States v. Rosario***, 111 F.3d 293, 301 (2d Cir. 1997). Accordingly, if the

defendant's conviction on the forfeiture related count is vacated or overturned on appeal, the forfeiture must generally be vacated too. ***United States v. Harris***, 666 F.3d 905, 910 (5th Cir. 2012); ***United States v. Warshak***, 631 F.3d 266, 333 (6th Cir. 2010); ***United States v. Singh***, 518 F.3d 236, 241 (4th Cir. 2008); ***United States v. Lake***, 472 F.3d 1247, 1250-51 (10th Cir. 2007); ***United States v. Cherry***, 330 F.3d 658, 670 (4th Cir. 2003).

Because different statutes authorize forfeiture of different categories of criminal property, the court must determine what is forfeitable for each defendant, as to each count of conviction. ***United States v. Davenport***, 668 F.3d 1316, 1320 n.7 (11th Cir. 2012); ***United States v. St. Pierre***, 809 F. Supp. 2d 541 (E.D. La. 2011); ***United States v. Wingerter***, 369 F. Supp. 2d 799, 809 n.19 (E.D. Va. 2005).

26.06 [2] Statutory Authority

There is no common-law right to forfeiture. Criminal forfeiture may only be imposed if Congress has specifically authorized forfeiture for the offense of conviction. ***United States v. Anghaie***, 2011 WL 2671242, at *1 (N.D. Fla. 2011); ***United States v. Simon***, 2010 WL 5359708, at *1 (N.D. Ind. 2010). What can be forfeited varies greatly from one offense to another.

For some crimes, Congress has not authorized forfeiture at all. For others, only "proceeds" of the offense itself may be forfeited. 18 U.S.C. § 981(a)(1)(C). And other statutes are broader and permit forfeiture of any property "involved" in the offense. 18 U.S.C. § 981(a)(1)(A), (a)(1).

In 2000, CAFRA amended 28 U.S.C. § 2461(c) to provide that whenever civil forfeiture is authorized in connection with a criminal offense, the government may pursue criminal forfeiture as well, even if there is no criminal forfeiture statute directly applicable to the offense and even if the statute specifically refers to civil forfeiture procedures. ***United States v. Razmilovic***, 419 F.3d 134, 136 (2d Cir. 2006); ***United States v. Black***, 526 F. Supp. 2d 870, 878 (N.D. Ill. 2007). For example, prior to CAFRA, criminal forfeiture for mail and wire fraud offenses was limited to cases in which the fraud "affected a financial institution" or involved a health care fraud or a telemarketing offense. CAFRA authorized civil forfeiture for all types of mail and wire fraud. Through the operation of Section 2461(c), CAFRA also authorized criminal forfeiture in all mail and wire fraud cases. *See* ***Vampire Nation***, 451 F.3d at 199-201;

United States v. Jennings, 487 F.3d 564, 584 (8th Cir. 2007); ***United States v. Day***, 524 F.3d 1361, 1376 (D.C. Cir. 2008).

Thus, because 18 U.S.C. § 981(a)(1)(C) authorizes civil forfeiture of the proceeds of the 250 or so offenses defined as specified unlawful activities in 18 U.S.C. § 1956(c)(7), applying Section 2461(c) means that when a defendant is convicted of any of those 250 offenses, the government can seek criminal forfeiture of the proceeds of the offense. ***United States v. Newman***, 659 F.3d 1235, 1240 (9th Cir. 2011); ***United States v. Taylor***, 582 F.3d 558, 565 (5th Cir. 2009).

The procedure for criminally forfeiting property is codified in Rule 32.2 of the Federal Rules of Criminal Procedure and Title 18, United States Code Section 853. ***Davenport***, 668 F.3d at 1320-21; ***Lazarenko***, 476 F.3d at 647-48; ***United States v. Liquidators of European Federal Credit Bank***, 630 F.3d 1139, 1144-46 (9th Cir. 2011); ***United States v. Posey***, 217 F.3d 282, 283-84 (5th Cir. 2000). Section 2461(c) provides that the procedures relating to criminal forfeiture in 21 U.S.C. § 853, the criminal forfeiture statute for drug trafficking offenses, apply in all criminal forfeiture cases regardless of whether the particular statute authorizing criminal forfeiture contains procedures relating to criminal forfeiture. This includes cases where there is a civil forfeiture provision but no criminal forfeiture provision, cases where the statute authorizes criminal forfeiture but contains no applicable procedures of its own, and cases where the criminal forfeiture provision was enacted with its own set of procedures. In all such cases, the court can restrain property pretrial, order forfeiture of substitute assets, and do all of the other things that a court may do in a case in which the procedures of Section 853 apply. Thus, once Congress enacts a civil forfeiture provision, parallel authority to forfeit property criminally arises pursuant to Section 2461(c), following the procedures in Section 853.

Section 981(a)(1)(C) authorizes forfeiture of "proceeds" of more than 250 different state and federal crimes. The crimes for which forfeiture is authorized by Section 981(a)(1)(C) are listed in 18 U.S.C. § 1956(c)(7).

Proceeds are defined by a "but for" test; they consist of any property that the defendant would not have obtained (or retained) but for the crime. The property may be real or personal, intangible or tangible. Proceeds are not limited to net profits, but encompass the gross proceeds of the offense without a reduction for any overhead expenses or start-up costs. Proceeds also include property derived indirectly from an

offense, such as appreciation in the value of property purchased with criminal proceeds. A defendant may, however, avoid forfeiture to the extent he can prove what portions of the property were purchased with legitimate funds. ***United States v. One 1980 Rolls Royce***, 905 F.2d 89, 90 (5th Cir. 1990).

26.06 [3] What is Forfeitable

Property subject to forfeiture must have a nexus to the offense for which the defendant is convicted. ***United States v. Messino***, 382 F.3d 704, 714 (7th Cir. 2004). Generally, only property involved in or derived from the offenses alleged in the indictment may be forfeited. ***United States v. Capoccia***, 503 F.3d 103, 114 (2d Cir. 2007); ***United States v. Adams***, 189 Fed. Appx. 600, 602 (9th Cir. 2006); ***United States v. Bornfield***, 145 F.3d 1123, 1138 (10th Cir. 1998). Proceeds of the crime are always subject to forfeiture, and the government need not make a showing that the money ever legally belonged to the defendant. ***United States v. Evanson***, 2008 WL 3107332, at *3 (D. Utah 2008); *see also* ***United States v. McKay***, 506 F. Supp. 2d 1206, 1211-12 (S.D. Fla. 2007) (court ordered forfeiture for the full amount of the illegal proceeds irrespective of whether the money was in the possession of the defendant at the time of the forfeiture).

Thus, even if the defendant has longstanding involvement in the same or similar criminal conduct, forfeiture cannot be based on uncharged conduct that occurred prior to the offense of conviction. ***United States v. Nava***, 404 F.3d 1119, 1129 n.5 (9th Cir. 2005). The government must prove that the property sought to be forfeited is traceable to the activity underlying the defendant's conviction, not the defendant's criminal conduct generally. *See* ***United States v. Juluke***, 426 F.3d 323, 328-29 (5th Cir. 2005) (government failed to produce evidence that seized jewelry was proceeds of drug activity charged in indictment).

A similar principle applies to money judgments or substitute assets; both are limited to the amount of property derived from the offense of conviction. *See* ***Adams***, 189 Fed Appx. at 602-03 (substitute property can be seized in lieu of property traceable to a fraud but only up to the value of funds derived from the offense, without a determination of how much the defendant earned from his fraud during the period covered by the indictment, court could not order forfeiture of substitute asset).

The Sixth Circuit imposes an additional limitation that assets subject to criminal forfeiture are limited to property that the defendant owned at the time of the offense and

may not include property that he acquired thereafter, unless there is evidence that the property was involved in criminal activity after the date alleged in the indictment. *See* ***United States v. Jones***, 502 F.3d 388, 394 (6th Cir. 2007) (refusing to forfeit property in the absence of legitimate evidence that criminal activity occurred on the property after the date alleged in the indictment as the end of the offense).

An exception to the general rule against forfeiting proceeds or property for uncharged conduct can be found in cases that charge continuing schemes and conspiracies. In such cases, the amount involved in the entire scheme is forfeitable. A defendant incurs forfeiture liability for the damage or harm caused by the entire conspiracy, including damage caused by conduct in which the defendant was not personally involved. *See* ***United States v. Benevento***, 836 F.2d 129, 130 (2d Cir. 1988); ***United States v. Hatfield***, 795 F. Supp. 2d 219, 227 (E.D.N.Y. 2011) (citing ***United States v. Sanchez***, 419 Fed. Appx. 27, 33 (2d Cir. 2011) *and* ***United States v. Stathakis***, 2008 WL 413782, at *11 (E.D.N.Y. 2008)). Thus, if the defendant is charged with and convicted of conspiracy to launder money, forfeiture may be based on amounts the defendant conspired to launder, even if this includes amounts derived from uncharged substantive conduct or substantive counts for which the defendant was acquitted, if the sentencing court finds by a preponderance of the evidence that the criminal activities occurred. *See* ***United States v. Royer***, 549 F.3d 886, 904 (2d Cir. 2008) (including in forfeiture amount loss caused by securities fraud with respect to counts for which the defendant was acquitted); ***United States v. Genova***, 333 F.3d 750, 762-63 (7th Cir. 2003) (acquittal does not eliminate all possibility of forfeiture based on those activities); ***United States v. Capoccia***, 402 Fed. Appx. 639, 640 (2d Cir. 2010) (district court properly included transactions covered by the conspiracy count regardless of whether the conduct was charged in the substantive counts of conviction); ***Hatfield***, 795 F. Supp. 2d at 227***;*** ***Black***, 526 F. Supp. 2d at 882-83 (fact that the defendant was acquitted of counts does not eliminate all possibility of forfeiture based on those activities, if the government proves that there are proceeds traceable to any offense, in this case, the charged scheme to defraud, forfeiture is appropriate); *but see* ***United States v. Hasson***, 333 F.3d 1264, 1279 n.19 (11th Cir. 2003) ("We do not mean to imply that a court could impose a forfeiture order based on a money laundering offense for which the defendant was not charged or for which he was acquitted.").

Similarly, where a mail or wire fraud case is charged as a continuing scheme, the defendant can be held liable for the full amount derived from the scheme, even if the

defendant is only convicted of a few substantive counts. *See* ***United States v. Venturella***, 585 F.3d 1013, 1015-17 (7th Cir. 2009); ***Jennings***, 487 F.3d at 584-86; ***Emor***, 850 F. Supp. 2d at 217; ***United States v. Boesen***, 473 F. Supp. 2d 932, 952-53 (S.D. Iowa 2007); ***United States v. Yass***, 636 F. Supp. 2d 1177, 1185 (D. Kan. 2009); *see also* ***Capoccia***, 503 F.3d at 117 (holding that property subject to forfeiture was limited to charged transfers of stolen money, because the defendant was not charged with engaging in a scheme, conspiracy, or racketeering enterprise). The Third Circuit may follow an even broader rule, under which forfeiture extends beyond the counts of conviction to all related conduct, so long as the conduct and the proceeds were foreseeable to the defendant. *See* ***United States v. Plaskett***, 355 Fed. Appx. 639, 644 (3d Cir. 2009) (as long as the sentencing court finds by a preponderance of the evidence that the criminal conduct through which the proceeds were gained "'was foreseeable to the defendant, the proceeds should form part of the forfeiture judgment.'") (quoting ***United States v. Fruchter***, 411 F.3d 377, 384 (2d Cir. 2005))**.**

26.06 [3][a] Property Held in a Third Party's Name

The fact that property is held by a third party nominee or transferred to a third party does not preclude criminal forfeiture. In such instances, the government should be prepared to submit evidence during the forfeiture proceeding that the third party is a mere nominee owner and to show the nexus between the property and the charged crimes. *See* ***United States v. Totaro***, 345 F.3d 989, 995-96 (8th Cir. 2003) (noting that straw or nominal owners may not defeat forfeiture, holding that the case did not present the hallmarks of nominee ownership – lack of possession and no exercise of dominion or control over the property); ***United States v. Houlihan***, 92 F.3d 1271, 1299-1300 (1st Cir. 1996); ***United States v. Ida***, 14 F. Supp. 2d 454, 460-61 (S.D.N.Y. 1998) (once government makes a prima facie showing that a third party claimant is a nominee owner, the claimant must present evidence of dominion and control or other evidence of true ownership) (collecting cases).

Additionally, courts may disregard the corporate form and order forfeiture of property titled in the name of a corporation when the court finds a corporation to be the alter ego of a defendant. ***United States v. Peters***, 257 F.R.D. 377, 384-85 (W.D.N.Y. 2009); ***United States v. Segal***, 339 F. Supp. 2d 1039, 1050 n.14 (N.D. Ill. 2004); ***United States v. BCCI Holdings***, 977 F. Supp. 27, 32-33 (D.D.C. 1997); ***United States v. BCCI Holdings***, 795 F. Supp. 477, 479-80 (D.D.C. 1992).

The ownership interest of a third party, if any, is litigated in the ancillary proceeding discussed *infra*, Section 26.06[8]. *See* ***United States v. Shanholtzer***, 492 Fed. Appx. 798, 799 (9th Cir. 2012); ***United States v. Padilla-Galarza***, 351 F.3d 594, 600 (1st Cir. 2003); ***United States v. Cuartes***, 155 F. Supp. 2d 1338, 1342-43 (S.D. Fla. 2001).

26.06 [4] Restraining Orders

In contrast to administrative forfeiture, there is no requirement that the property subject to forfeiture be in the government's possession before the government seeks criminal forfeiture. Rather, Rule 32.2(b) specifically contemplates that the government may take possession of criminally forfeited property for the first time after the criminal case is complete. Fed. R. Crim. P. 32.2(b)(3).

When the property sought to be forfeited is not in the government's custody, the government may apply for a pre-trial restraining order to preserve the property pending the conclusion of the criminal trial. 21 U.S.C. § 853(e); 28 U.S.C. § 2461(c).

26.06 [5] Indictment

To initiate a criminal forfeiture action, a prosecutor must give the defendant notice of the government's intent to forfeit his property by including a forfeiture allegation in the indictment or information.

26.06 [5][a] Rule 32.2 – Forfeiture Notice

Rule 32.2(a) provides that a court may not enter an order of forfeiture in a criminal case "unless the indictment or information contains notice to the defendant that the Government will seek forfeiture of property" as part of the defendant's sentence.

In the indictment or information, forfeiture should not be designated as a "count" because it is not a separate substantive criminal charge. Instead, the government should comply with Rule 32.2 by including a "forfeiture notice" or "forfeiture allegation" in the indictment.

The forfeiture notice should set forth the theory of forfeiture, such as whether the property is forfeitable as "proceeds" or "facilitating property," in the terms of the applicable forfeiture statute. There should be a correct citation in the indictment to the particular forfeiture statute on which the government intends to rely. *But see* ***United***

States v. Silvious, 512 F.3d 364, 369 (7th Cir. 2008); ***United States v. Wall***, 285 Fed. Appx. 675, 684-85 (11th Cir. 2008) (an incorrect statutory citation is harmless if the allegation otherwise adequately informs the defendant that his property will be subject to forfeiture.).

If the indictment contains multiple offenses that each support a different theory of forfeiture, the forfeiture notice should generally contain a separate paragraph for each theory, alleging them in the conjunctive. Similarly, if a single offense supports forfeiture under multiple theories, such as proceeds and facilitating property, the indictment may allege both theories in the conjunctive.

The forfeiture notice need not identify specific property or the amount of any money judgment that the government seeks. Nor does the government have to list property that it intends to forfeit as substitute assets. ***United States v. Misla-Aldarondo***, 478 F.3d 52, 75 (1st Cir. 2007); ***United States v. Parrett***, 530 F.3d 422, 426 (6th Cir. 2008); ***United States v. Bollin***, 264 F.3d 391, 422 & n.21 (4th Cir. 2001)**.** It is sufficient for the notice to track the language of the applicable forfeiture statutes. *See* ***Lazarenko***, 504 F. Supp. 2d at 796-97.

26.06 [5][b] Statute of Limitations and Venue

There is no separate statute of limitations for the forfeiture portion of the defendant's sentence. Because forfeiture is part of the sentence, as long as the indictment charging the defendant with the offense giving rise to forfeiture was returned before the statute of limitations expired, the government may supersede at any time after the timely return of an indictment to add a forfeiture notice. *See* ***Jennings***, 487 F.3d at 586-87 (Section 984(b) is not applicable to criminal forfeiture); Lazarenko, 504 F. Supp. 2d at 796.

There is no separate venue for criminal forfeiture. Thus, the defendant's property may be forfeited in a criminal case, with proper venue, in which he is convicted, regardless of where the property was obtained by the defendant or where it was seized.

26.06 [6] Bifurcated Proceeding

At trial, no mention is made of forfeiture unless and until the defendant is convicted. Only then does the court, or jury, hear additional evidence, argument, and

instructions regarding forfeiture. The jury is then asked to return a special verdict as to whether that the government, by a preponderance of the evidence, has established the requisite nexus between the property and the crime. Fed. R. Crim. P. 32.2(b). A defendant who pleads guilty is not entitled to a jury trial on forfeiture; rather, any hearing is conducted by the court.

Once the court or jury makes the requisite finding required by the applicable forfeiture statute, the court enters a preliminary order of forfeiture. That preliminary order is made final and included in the judgment of the court at sentencing.

26.06 [7] Final Order of Forfeiture and Sentencing

Because criminal forfeiture is part of sentencing, the court must follow certain procedures when accepting a guilty plea and announcing a defendant's sentence. Under Rule 11(b) of the Federal Rules of Criminal Procedure, the court must advise the defendant of the forfeiture aspect of his sentence at the time he enters a guilty plea. The court must also refer to the forfeiture in the oral announcement of sentence and include the preliminary order of forfeiture, which becomes final as to the defendant at sentencing, in the judgment. Fed. R. Crim. P. 32.2(b)(3).

After the order of forfeiture has become final, the government acquires whatever interest the defendant had in the property. The government also assumes all of the defendant's attendant obligations and liabilities with respect to the property forfeited. ***Hardie v. United States***, 367 F.3d 1288, 1291 (Fed. Cir. 2004).

26.06 [8] Ancillary Proceeding

Any property described in the applicable forfeiture statute may be included in the order of forfeiture, if the government establishes a connection between the property and offense by a preponderance of the evidence. Accordingly, criminal forfeiture is not limited to property owned by the defendant: at the time an order of forfeiture is entered, the defendant's ownership in the property is irrelevant. *See* ***De Almeida v. United States***, 459 F.3d 377, 381 (2d Cir. 2006) (criminal forfeiture is not a measure restricted to property owned by the criminal defendant, it reaches any property that is involved in the offense); *see also* ***United States v. Watts***, 477 Fed. Appx. 816, 817-18 (2d Cir. 2012); ***Padilla-Galarza***, 351 F.3d at 600.

Because third parties are excluded from participating in the defendant's criminal case, there must be a procedure for ensuring that the property subject to criminal forfeiture does not belong to a third party. This procedure is called an ancillary proceeding. It protects a third party's due process rights. And it occurs after the criminal case is concluded. Fed. R. Crim. P. 32.2(b)(2); ***United States v. Grossi***, 482 Fed. Appx. 252, 254-56 (9th Cir. 2012); ***Nava***, 404 F.3d at 1124-26; ***Totaro***, 345 F.3d at 993-94; ***Pacheco v. Serendensky***, 393 F.3d 348, 355-57 (2d Cir. 2004); ***United States v. O'Dell***, 247 F.3d 655, 680 (6th Cir. 2001); ***United States v. Gilbert***, 244 F.3d 888, 919-20 (11th Cir. 2001); ***United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Chawla)***, 46 F.3d 1185, 1190-91 (D.C. Cir. 1995); ***Ida***, 14 F. Supp. 2d at 459-60.

26.07 PARALLEL CIVIL AND CRIMINAL FORFEITURES

26.07 [1] In General

CAFRA expressly authorizes parallel administrative and criminal forfeiture proceedings. *See* 18 U.S.C. § 983(a)(1)(A)(iii)(I). There is, moreover, nothing improper about initially pursuing forfeiture of property civilly and then switching to criminal forfeiture, or *vice versa*. *See* ***United States v. Leyland***, 277 F.3d 628, 632-33 (2d Cir. 2002); (criminal to civil); ***United States v. Candelaria-Silva***, 166 F.3d 19, 43-44 (1st Cir. 1999) (civil to criminal). But care must be taken to comply with required deadlines if switching from civil or criminal forfeiture proceedings.

For example, when the government seizes property for purposes of a criminal forfeiture, the 60 day notice provision under CAFRA is not triggered – it applies only to "nonjudicial civil forfeiture proceeding[s]." 18 U.S.C. § 983(a)(1)(A)(i). If the government initially seizes property planning to seek criminal forfeiture and only later decides to pursue an administrative forfeiture, it may have had possession of the property for longer than 60 days before deciding to pursue administrative forfeiture. In such instances, because the notice requirement cannot be met, the Criminal Division's Asset Forfeiture and Money Laundering Section recommends that a case be brought as a civil judicial forfeiture rather than an administrative forfeiture *See Asset Forfeiture Policy Manual* (2013), Chap. 2, § II.D, p.63-65. (Asset Forfeiture Policy Manual (2013).)

26.07 [2] Issue Preclusion

In many instances, a claimant will be precluded from litigating issues in a civil forfeiture case that were decided in a related criminal case. Claimants can be precluded from relitigating their criminal liability as found by a jury (*see, e.g.*, ***United States v. Two Real Properties Situated in Bluefield***, 2009 WL 3181453, at *4 (S.D. W. Va. 2009)); the forfeitability of property found forfeitable by a special jury verdict (*see, e.g.*, ***United States v. $455,273.72 in Funds***, 813 F. Supp. 2d 124, 129-31 (D.D.C. 2011)); admissions in a guilty plea (*see, e.g.*, ***United States v. U.S. Currency ($248,430)***, 2004 WL 958010, at *3 (E.D.N.Y. Apr. 14, 2004)); affirmative defenses rejected by the jury in the claimant's criminal case (***United States v. Beaty***, 245 F.3d 617, 624-25 (6th Cir. 2001)); and a suppression claim rejected in the claimant's criminal case (***Real Property Located in El Dorado County***, 59 F.3d at 979-80). The government may also be precluded from relitigating a forfeiture issue in a criminal case that was decided against it in a civil forfeiture case. *See, e.g.*, ***Liquidators of European Federal Credit Bank***, 630 F.3d at 1149.

Issue preclusion, however, does not generally bar the later civil forfeiture of property when the claimant has been acquitted in a related criminal case. ***One Assortment of 89 Firearms***, 465 U.S. at 361-62; ***One Lot Emerald Cut Stones v. United States***, 409 U.S. 232, 234-35 (1972). The government, likewise, is not precluded from bringing a later civil forfeiture action when it elected not to pursue forfeiture in a related criminal case. *See, e.g.*, ***United States v. Wade***, 230 F. Supp. 2d 1298, 1308 n.9 (M.D. Fla. 2002).

26.07 [3] Effect of Civil Forfeiture on a Criminal Case

The procedures set forth in Federal Rule of Criminal Procedure 32.2 only govern criminal forfeitures (***United States v. Daniels***, 2010 WL 5140853, at *2 (E.D. La. Dec. 10, 2010)), and the CAFRA time limits and other procedural provisions generally do not apply to criminal forfeitures (s*ee* ***United States v. Martin***, 662 F.3d at 305-06). Thus, even if a district court finds that it lacks authority to control property in a criminal case, the property can still be held in connection with the civil case. ***United States v. Ruedlinger***, 1997 WL 808662, at *2 (D. Kan. Dec. 15, 1997). And even if the government fails to meet a statutory deadline in a civil forfeiture case and is therefore

barred from pursuing a civil forfeiture, it can still pursue criminal forfeiture. *See supra*, Section 26.05[2].

The fact that property has been civilly forfeited is generally not a ground for a downward departure under the United States Sentencing in a related criminal case. ***United States v. Hoffer***, 129 F.3d 1196, 1204 (11th Cir. 1997); ***United States v. Weinberger***, 91 F.3d 642, 644 (4th Cir. 1996). The Third Circuit, however, has held that voluntary abandonment of a meritorious defense to a forfeiture action may nonetheless provide grounds for a downward departure when it reflects "an extraordinary sense of contrition and desire to make amends for the offense." ***United States v. Faulks***, 143 F.3d 133, 138 (3d Cir. 1998).

The pendency of a civil forfeiture case does not impact the ability of a court to impose a sentence of restitution in a related criminal case. *See* ***United States v. Various Computers***, 82 F.3d 582, 588 (3d Cir. 1996). In criminal tax cases, prosecutors should take care to ensure that any combined use of restitution and forfeiture is consistent with Tax Division policy. *See supra*, Section 26.02.

26.07 [4] Use of Grand Jury Information

Disclosure of grand jury information "to an attorney for the government . . . for use in connection with any civil forfeiture provision of Federal law" is expressly authorized by statute under CAFRA. 18 U.S.C. § 3322(a). CAFRA, however, did not expressly resolve the issue whether an attorney who receives grand jury information pursuant to this provision may in turn disclose that information to the public in a civil forfeiture case without first obtaining a court order authorizing the disclosure. *See id.* The Department's position on this issue is that subsequent disclosure in a civil forfeiture proceeding is authorized by 18 U.S.C. § 3322(a) because such disclosure is part of the "use" of the information within the meaning of the statute. *See Asset Forfeiture Policy Manual* (2013), Chap. 8, § I.B.1, p. 119-21. (Asset Forfeiture Policy Manual (2013).)

However, with respect to disclosure of grand jury information to agency counsel for purposes of an administrative forfeiture action and to government contractors in connection with a civil forfeiture action, if the information has not already been publicly disclosed as part of the civil forfeiture action, the Department takes the opposite position. In such situations, the Department's position is that 18 U.S.C. § 3322 does not authorize disclosure and an order authorizing the disclosure must be obtained pursuant to Federal

Rule of Criminal Procedure 6 prior to disclosure. *See Asset Forfeiture Policy Manual* (2013), Chap. 8, § I.B.2, p. 121. (Asset Forfeiture Policy Manual (2013).)

26.07 [5] Civil Discovery Use in a Criminal Case

There is little case law directly addressing the issue of the use, in the criminal case, of evidence obtained through discovery in a civil forfeiture case. In ***United States v. Kordel***, 397 U.S. 1, 13 (1970), the Supreme Court held that the use of interrogatory answers given in an *in rem* civil condemnation proceeding against a corporation's property in the subsequent criminal prosecution of the corporate officer who answered the interrogatories was consistent with the Fifth Amendment privilege against self-incrimination. Though the Court stated that it agreed with the court of appeals that "the Government may not use evidence against a defendant in a criminal case which has been coerced from him under penalty of either giving the evidence or suffering a forfeiture of his property," the Court found no violation of the corporate officer's Fifth Amendment rights. *Id.* at 13. This was so because the corporate officer answering the interrogatories could have refused to answer on Fifth Amendment grounds, but "fail[ed] at any time to assert the constitutional privilege," and did not assert that he was not represented by counsel or that he did not appreciate the possible consequences of the government's criminal investigation. *Id.* at 9-10.

In criminal cases involving discovery obtained in non-forfeiture civil cases, courts have in some instances found that the use of civil discovery in a parallel criminal proceeding was improper where the government used civil discovery in bad faith to obtain evidence for use in a related criminal case. For instance, in ***United States v. Tweel***, 550 F.2d 297 (5th Cir. 1977), the court held that evidence that was obtained from a search of the defendant's records should have been suppressed because the defendant's consent to the search was obtained by literally true but "sneaky" and "shocking" assurance by an IRS revenue agent that no "special agent" was involved, when the IRS civil audit had been commenced at the specific request of the Department of Justice's Organized Crime and Racketeering Section. *Id.* at 298-300. *See also* ***United States v. Scrushy***, 366 F. Supp. 2d 1134, 1135-40 (N.D. Ala. 2005) (suppressing deposition of defendant given in related SEC investigation).

In situations where a prospective deponent in a civil forfeiture proceeding is known to be a target or a subject of a parallel criminal investigation or prosecution, the Criminal Division's Asset Forfeiture and Money Laundering Section suggests that

prosecutors consider either deferring the deposition until the completion of the related criminal case, or giving an advisement to the deponent similar to the advisements given in federal grand jury practice. *See Asset Forfeiture Policy Manual* (2013), Chap. 11, § VI, p. 156-57 (providing suggested language for advisements). (Asset Forfeiture Policy Manual (2013).)

26.08 ADDITIONAL CONSIDERATIONS

26.08 [1] Due Process

The Supreme Court has, on multiple occasions, addressed the issue whether forfeiture of property from a wholly innocent owner is consistent with due process. In ***Calero-Toledo v. Pearson Yacht Leasing Co.***, 416 U.S. 663 (1974), the Court upheld the forfeiture at issue against a due process challenge, but noted in dicta that "it would be difficult to reject the constitutional claim . . . of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive." *Id.* at 689-90.

Later, in ***Bennis v. Michigan***, 516 U.S. 442 (1996), the Court squarely addressed the issue whether forfeiture of property of an innocent owner violates due process. The forfeited property, a vehicle, was jointly owned by the petitioner and her husband; the petitioner's husband used the car as the location for a sexual act with a prostitute, without the petitioner's knowledge. *Id.* at 444-45. The petitioner based her argument on the Court's statement (quoted above) in ***Calero-Toledo***, but the Court rejected this statement as dicta, and held that forfeiture of the vehicle without an offset for petitioner's interest was consistent with due process. *Id.* at 449-50.

Following ***Bennis***, Congress, as part of CAFRA, enacted a statutory innocent owner defense, which largely codified the ***Calero-Toledo*** dicta. *See* 18 U.S.C. § 983(d). This statutory innocent owner defense applies to forfeitures under all federal statutes except those exempted from CAFRA by 18 U.S.C. § 983(i). These exemptions include the forfeiture provisions of the Internal Revenue Code. *See supra*, Section 26.05[1].

The Supreme Court has also addressed whether due process entitles a property owner to a hearing before property is seized for forfeiture. In ***Calero-Toledo***, the Court

held that due process did not require pre-seizure notice and opportunity to be heard for the owner of a boat, because, *inter alia*, seizure before notice enables the government to secure the property in question before the owner can conceal, move, or destroy the property. 416 U.S. at 679. However, in ***James Daniel Good Real Property***, 510 U.S. 43, the Court limited ***Calero-Toledo***, and held that, absent exigent circumstances, pre-seizure notice and an opportunity to be heard are necessary for the seizure of real property. 510 U.S. at 56-59. The Court reasoned that real property, unlike the boat at issue in ***Calero-Toledo***, could not readily be moved, concealed, or destroyed, so the government could protect its interest in preserving the property for forfeiture by obtaining a restraining order or filing a *lis pendens*. 510 U.S. at 58. The hearing requirements for seizure of real property set forth in ***James Daniel Good*** were codified when CAFRA was enacted. *See* 18 U.S.C. § 985.

In ***Mullane***, 339 U.S. 306, the Supreme Court held that due process required that notice of the pendency of a forfeiture action be "reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314-15.

Later, in ***Dunsenberry***, 534 U.S. 161, the Supreme Court considered the issue whether mailing notice to known potential claimants was sufficient to satisfy the ***Mullane*** due process standard or whether the government had a further due process obligation to ensure actual receipt of the notice. The ***Dunsenberry*** Court held that no actual verification was required, notwithstanding that the petitioner was incarcerated at the time the notice was sent: mailing notice to the prison, which had a routine mail delivery system, was sufficient. *Id.* at 170.

Due process considerations are also implicated when there is a delay between the time the government seizes property and the time it commences a forfeiture action. *See supra*, Section 26.05[2], for discussion of this topic.

26.08 [2] Eighth Amendment

In ***Austin v. United States***, 509 U.S. 602 (1993), the Supreme Court considered whether civil forfeitures can be subject to limitation under the Excessive Fines Clause of the Eighth Amendment. The Court held that some civil forfeitures are subject to the Eighth Amendment limitation on excessive fines, provided that the purpose of the forfeiture, at least in part, is punitive, and not merely remedial. *Id.* at 610-11. The Court

then held that the particular forfeiture provisions at issue – 21 U.S.C. §§ 881(a)(4) and (a)(7), providing for forfeiture of conveyances and real property, respectively – were at least partially punitive, and thus subject to limitation under the Excessive Fines Clause. *Id.* at 621-22. The Court declined, however, to adopt a particular standard for determining whether a civil forfeiture was excessive under the Eighth Amendment. *Id.* at 622-23.

The Court later revisited the issue of the standard for excessiveness of a forfeiture in ***United States v. Bajakajian***, 524 U.S. 321 (1998). Bajakajian pled guilty to failing to report cash over $10,000 to customs agents when leaving the country, and the government sought criminal forfeiture of the entire $357,144 in cash that Bajakajian had in his luggage when he attempted to leave the country. The Court first held that the forfeiture was punitive, rejecting the government's argument that the forfeiture did not implicate the Eighth Amendment because the money was an "instrumentality" of the criminal offense as the forfeiture was criminal rather than civil. *Id.* at 328-34. The Court then considered the question of the appropriate standard for determining whether a forfeiture constitutes an excessive fine. *Id.* at 334. The Court adopted the rule that "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *Id. at 334-35.* Applying this standard, the Court held that the forfeiture of Bajakajian's $357,144 in cash was unconstitutionally excessive, because the money was the proceeds of legal activity and Bajakajian was otherwise subject under law to only minimal punishment for his failure to report the cash. *Id.* at 337-40.

Shortly after ***Bajakajian*** was decided, Congress enacted CAFRA, which largely mooted the tests developed in that case and in ***Austin*** for whether civil forfeitures are subject to the Excessive Fines Clause. Under CAFRA, all civil forfeitures not exempt from CAFRA were made reviewable for being "constitutionally excessive." 18 U.S.C. § 983(g)(1). CAFRA, moreover, essentially applied the ***Bajakajian*** standard for determining excessiveness of a forfeiture, providing that the reviewing court should "compare the forfeiture to the gravity of the offense giving rise to the forfeiture," 18 U.S.C. § 983(g)(2), and that the court should "reduce or eliminate the forfeiture" if it finds it "grossly disproportional to the offense." 18 U.S.C. § 983(g)(4); *see* ***United States v. Ferro***, 681 F.3d 1105, 1114 (9th Cir. 2012) (holding that, under CAFRA, "forfeitable property is subject to review under the Excessive Fines Clause even if it can be considered an 'instrumentality' of an offense").

Though CAFRA subjected most civil forfeitures to review for constitutional excessiveness, courts have generally found that forfeiture of proceeds of a crime is never disproportional to the crime. *See, e.g.*, ***United States v. Betancourt***, 422 F.3d 240, 250-51 (5th Cir. 2005) ("the Eighth Amendment has no application to the forfeiture of property acquired with proceeds"). Lower courts have also distinguished ***Bajakajian*** in cases involving violations of currency reporting requirements where, unlike ***Bajakajian***, the currency reporting violation was related to another offense, including the offense of tax evasion. *See* ***United States v. Six Negotiable Checks***, 389 F. Supp. 2d 813, 823-24 (E.D. Mich. 2005).

26.08 [3] Double Jeopardy

Following the holding in ***Austin*** that civil forfeiture can be a criminal penalty for Eighth Amendment purposes, some courts of appeal extended this holding to the Double Jeopardy Clause of the Fifth Amendment and held that a civil forfeiture following a related criminal proceeding in which no criminal forfeiture was sought constitutes an unconstitutional double punishment for the same offense. *See* ***United States v. $405,089.23 in U.S. Currency***, 33 F.3d 1210, 1220-21 (9th Cir. 1994); ***United States v. Usery***, 59 F.3d 568 (6th Cir. 1995).

The Supreme Court, however, granted certiorari in ***Usery*** and reversed. 518 U.S. 267 (1996). The Court relied partially on *stare decisis* to justify its holding, noting that Congress had long provided for both *in rem* civil forfeiture actions and related criminal prosecutions. *Id.* at 274. The Court then, following its analysis in ***One Assortment of 89 Firearms***, 465 U.S. 354, looked at two factors to determine whether the particular statutes authorizing forfeiture in the case – 18 U.S.C. § 981(a)(1)(A) and 21 U.S.C. § 881(a)(6) and (a)(7), providing for forfeiture of property involved in money-laundering and federal drug felonies – imposed a criminal punishment on the property owner. *Id.* at 277-79. First, the Court looked at Congress's intent, and concluded that Congress intended the forfeiture to be a civil proceeding, because it provided for an *in rem* proceeding and provided that a civil burden of proof and civil procedures would govern the proceeding. ***Id.*** at 288-92. Second, the Court considered whether the civil forfeiture provisions in question were "so punitive in form and effect as to render them criminal despite Congress' intent to the contrary." *Id.* at 290. The Court found that they were not, because "[r]equiring the forfeiture of property used to commit federal narcotics violations encourages property owners to take care in managing their property and ensures that they

will not permit that property to be used for illegal purposes," and because the provisions "serve[] the additional nonpunitive goal of ensuring that persons do not profit from their illegal acts." *Id.* at 290-91.

With respect to criminal forfeiture, the forfeiture order is part of the defendant's sentence, as explained *supra*, Section 26.06[7]. Accordingly, courts have held that there is no double jeopardy issue with criminal forfeiture because the forfeiture is simply part of the defendant's criminal sentence. *See, e.g.*, ***United States v. Smith***, 656 F.3d 821, 828 (8th Cir. 2011).