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# FEDERAL CRIMINAL FORFEITURE: A ROYAL PAIN IN THE ASSETS

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## I. INTRODUCTION

Until 1970, American law did not often use the concept of “criminal forfeiture.”<sup>1</sup> A lot can change in forty years. Today, federal prosecutors make criminal forfeiture a routine part of criminal law enforcement in federal cases.<sup>2</sup> Previously, forfeitures largely took place in civil proceedings in an *in rem* action against the property.<sup>3</sup> *In rem* is, literally, Latin for “against the thing”<sup>4</sup> and a civil forfeiture is an action against the thing, the inanimate property, rather than an action against the person.<sup>5</sup> *In rem* actions regard the property as the offender, without regard to the owner’s conduct.<sup>6</sup> With *in rem* forfeitures, the property owner’s culpability is irrelevant in deciding whether property should be forfeited.<sup>7</sup> In contrast, the key objective of criminal forfeiture is to punish the property owner.<sup>8</sup>

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<sup>1</sup> 1 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 126 (3d ed. 1998); see also *United States v. Delco Wire & Cable Co.*, 772 F. Supp. 1511, 1514 (E.D. Pa. 1991) (noting that criminal forfeiture was infrequently employed in the United States prior to 1970); *United States v. Bajakajian*, 524 U.S. 321, 332 (1998) (noting that while *in personam* criminal forfeitures were well established in England at the time of the founding, they were rejected altogether in the laws of America until very recently).

<sup>2</sup> Stefan D. Cassella, *Criminal Forfeiture Procedure: An Analysis of Developments in the Law Regarding the Inclusion of a Forfeiture Judgment in the Sentence Imposed in a Criminal Case*, 32 AM. J. CRIM. L. 55, 56 (2004) [hereinafter Cassella 2004].

<sup>3</sup> See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679–87 (1974) (examining historic United States Supreme Court precedent concerning forfeiture).

<sup>4</sup> BLACK’S LAW DICTIONARY 809 (8th ed. 2004).

<sup>5</sup> LEONARD W. LEVY, A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY 22 (1996).

<sup>6</sup> *Id.*

<sup>7</sup> *United States v. Cherry*, 330 F.3d 658, 669 n.16 (4th Cir. 2003).

<sup>8</sup> *Id.*

Criminal forfeiture had all but disappeared from American jurisprudence until the 1970s when Congress looked for the first time to forfeiture as an anti-crime initiative.<sup>9</sup> This new approach started with the Racketeer Influence and Corrupt Organization Act of 1970 (“RICO”) and parallel provisions in 21 U.S.C. § 853, the Comprehensive Drug Abuse Prevention and Control Act of 1970, which were the first modern federal statutes to impose forfeiture as a criminal sanction directly on an individual defendant.<sup>10</sup> The 1970’s version of RICO stated that a convicted defendant forfeited to the government any interest acquired through racketeering activity and any property right obtained through RICO’s prohibited activities.<sup>11</sup> In so doing, the statute imposed *in personam* (against the person)<sup>12</sup> forfeiture as a penalty against the criminal defendant, as opposed to an *in rem* (against the thing) civil forfeiture against the property.<sup>13</sup> RICO was innovative not because it imposed forfeiture as a consequence of criminal activity, but because it imposed forfeiture directly on an individual (*in personam*) as part of a criminal prosecution rather than on the “guilty” property (*in rem*).<sup>14</sup>

The RICO legislation of the 1970s authorizing criminal forfeiture was followed by additional federal and state statutes authorizing criminal forfeiture as a punishment for various crimes.<sup>15</sup> Currently, criminal forfeiture accounts for nearly 50 percent of all contested forfeiture actions in the federal courts.<sup>16</sup> The result has been an explosion of cases addressing procedural and substantive forfeiture issues.<sup>17</sup> With the steady increase in the use of criminal forfeiture, criminal forfeiture is an area of the law that is “extremely volatile.”<sup>18</sup> The government, defendants, and third parties with an interest in potentially forfeitable property find themselves in an area of

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<sup>9</sup> See HOWARD E. WILLIAMS, ASSET FORFEITURE: A LAW ENFORCEMENT PERSPECTIVE 11 (2002); WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 26.6(d) (3d ed. 2000); see also *United States v. Schmalfeldt*, 657 F. Supp. 385, 387 (W.D. Mich. 1987) (noting that prior to RICO, criminal forfeiture had actually been prohibited in the United States).

<sup>10</sup> WRIGHT ET AL., *supra* note 1, at § 126; *United States v. Delco Wire and Cable Co.*, 772 F. Supp. 1511, 1515 (E.D. Pa. 1991).

<sup>11</sup> 18 U.S.C. § 1963(a) (1976).

<sup>12</sup> BLACK’S, *supra* note 4, at 807.

<sup>13</sup> *Delco Wire*, 772 F. Supp. at 1515, (citing *United States v. Long*, 654 F.2d 911, 916 (3d Cir. 1981)).

<sup>14</sup> *United States v. Huber*, 603 F.2d 387, 396 (2d Cir. 1979).

<sup>15</sup> LAFAVE ET AL., *supra* note 9.

<sup>16</sup> Cassella 2004, *supra* note 2.

<sup>17</sup> *Id.*

<sup>18</sup> Stefan D. Cassella, *Criminal Forfeiture Procedure in 2006: A Survey of Developments in the Case Law*, 42 CRIM. L. BULL. 515, 563 (2006) [hereinafter Cassella 2006].

the law that is unsettled and, therefore, unsettling.<sup>19</sup> This article highlights the confusing and inconsistent application of federal criminal forfeiture law and the need to stabilize it because clearly, its use and resulting explosion of case law are not expected to slow down any time soon.<sup>20</sup>

From statutory authorization to pre-trial procedures to the protection of third party interests, criminal forfeiture is complex and contradictory. This article examines federal criminal forfeiture from statutory authorization to application, highlighting troublesome areas along the way. The article does not attempt to outline every inconsistency or criticism involved in criminal forfeiture. Part II introduces criminal forfeiture and examines its statutory authorizations and procedures.<sup>21</sup> Part III introduces the concept of substitute assets and discusses the different treatment that substitute assets receive in different jurisdictions.<sup>22</sup> Part IV discusses the role third parties play in criminal forfeitures and identifies the varying rights afforded to third parties, depending on the various jurisdictions where they are located.<sup>23</sup> Part V provides a brief summary conclusion, suggesting a uniform system of criminal forfeiture that is based on its primarily punitive purpose: allowing criminal forfeiture to be more easily charged and defended.<sup>24</sup>

## II. THE PURPOSE, AUTHORITY AND PROCEDURE OF CRIMINAL FORFEITURE

Criminal forfeiture and civil forfeiture are fundamentally different; criminal forfeiture is part of the guilty defendant's punishment, while civil forfeiture is the forfeiture of "guilty" property.<sup>25</sup> In a criminal forfeiture case, the loss of property follows as a penalty imposed after conviction.<sup>26</sup> Indeed, the prime objective of criminal forfeiture is to punish the defen-

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<sup>19</sup> See, e.g., *United States v. Thompson*, No. 02-CR-116, 2002 WL 31667859, at \*1-2 (N.D.N.Y. Nov. 26, 2002) (revealing the confusion regarding what statutes authorize criminal forfeiture and what procedures apply); *United States v. Schlesinger*, 396 F. Supp. 2d 267, 275 (E.D.N.Y. Oct. 7, 2005) (illustrating the confusing nature of the application of criminal forfeiture by disagreeing with *United States v. Thompson*). Compare *In Re Billman*, 915 F.2d 916, 920 (4th Cir. 1990) (permitting the pre-trial restraint of substitute assets), with *United States v. Lee*, 232 F.3d 556, 560 (7th Cir. 2000) (refusing to permit criminal forfeiture of substitute property owned by spouses as tenants in the entirety). See also *infra* text accompanying notes 73-304.

<sup>20</sup> Cassella 2006, *supra* note 18.

<sup>21</sup> See discussion *infra* Part II.

<sup>22</sup> See discussion *infra* Part III.

<sup>23</sup> See discussion *infra* Part IV.

<sup>24</sup> See discussion *infra* Part V.

<sup>25</sup> See *United States v. Bajakajian*, 524 U.S. 321, 333-35 (1998); see also *United States v. Delco Wire and Cable Co.*, 772 F. Supp. 1511, 1514-15 (E.D. Pa. 1991).

<sup>26</sup> LEVY, *supra* note 5, at 22.

dant.<sup>27</sup> In contrast to a civil forfeiture, which is *in rem*, a criminal forfeiture is an *in personam* criminal remedy, targeted primarily at the defendant who committed the criminal offense.<sup>28</sup> As such, forfeited property need not have a relationship to the crime.<sup>29</sup> A judgment of criminal forfeiture is not a separate conviction, but rather part of the defendant's sentence who has already been convicted of a crime.<sup>30</sup> The government, therefore, may seek criminal forfeiture only as part of a criminal prosecution and may not order a criminal forfeiture until the defendant is convicted of a crime that specifically authorizes forfeiture.<sup>31</sup>

#### A. STATUTORY OBLIGATION

No single law authorizes federal criminal forfeiture.<sup>32</sup> Rather, for each federal crime that authorizes criminal forfeiture, there is a separate forfeiture statute authorizing the criminal forfeiture of property.<sup>33</sup> These statutes are complicated and require a review of the law relating to a specific criminal offense to determine if criminal forfeiture is authorized as punishment for that specific offense.<sup>34</sup> Criminal forfeiture requires that numerous concurrent statutory schemes be read in tandem and “with equal measure.”<sup>35</sup> This is no mean feat, as the relevant statutory schemes are “labyrinthine.”<sup>36</sup>

<sup>27</sup> United States v. Cherry, 330 F.3d 658, 669 n.16 (4th Cir. 2003).

<sup>28</sup> United States v. Saccoccia, 354 F.3d 9, 15 (1st Cir. 2003).

<sup>29</sup> LEVY, *supra* note 5.

<sup>30</sup> *Cherry*, 330 F.3d at 669.

<sup>31</sup> WILLIAMS, *supra* note 9, at 56.

<sup>32</sup> STEFAN D. CASSELLA, ASSET FORFEITURE LAW IN THE UNITED STATES 742–43 (2007).

<sup>33</sup> *Id.* at 743. Criminal forfeitures are also allowed by a section in the Civil Asset Forfeiture Reform Act (CAFRA) authorizing criminal forfeiture as punishment for “any act for which civil forfeiture is authorized.” 18 U.S.C. §§ 983, 985 (2006); 28 U.S.C. §§ 2461(c), 2466, 2477. CAFRA does not authorize pretrial restraint of forfeitable assets and does not incorporate pretrial-restraint provisions used in criminal forfeitures. 21 U.S.C. § 853(e); 28 U.S.C. § 2461(c); United States v. Razmilovic, 419 F.3d 134, 137 (2d Cir. 2005).

<sup>34</sup> See Lisa H. Nicholson, *The Culture of Under-Enforcement: Buried Treasure, Sarbanes-Oxley and the Corporate Pirate*, 5 DEPAUL BUS. & COM. L.J. 321, 372 (2007); see also CASSELLA, *supra* note 32, at 742–43. Compare 18 U.S.C. § 371 (providing no authority for forfeiture for a violation of the general conspiracy statute), with 21 U.S.C. § 846 (authorizing forfeiture for violations of the drug conspiracy statute).

<sup>35</sup> United States v. Salvagno, No. 502-CR-051 (LEK/RFT), 2006 WL 2546477, at \*7 (N.D.N.Y. Aug. 28, 2006).

<sup>36</sup> United States v. Day, 416 F. Supp. 2d 79, 83 (D.D.C. 2006), *overruled in part*, 524 F.3d 1361, 1375 (D.C. Cir. 2008) (overruling, ironically, the district court's interpretation of what federal forfeiture statutes apply to certain crimes and noting that the determination of whether forfeiture applies “involves unraveling a series of tangled statutes”).

Each statute determines the property subject to forfeiture and prescribes the required nexus between the property and the criminal activity.<sup>37</sup> Property subject to criminal forfeiture is, in general, “tainted” property, that is, property derived from a statutory violation.<sup>38</sup> The required connection between the crime and the property is often characterized as “proceeds” of a crime or property used to “facilitate” a criminal activity.<sup>39</sup> The individual statutes also determine the government’s burden for criminal forfeiture.<sup>40</sup>

The most comprehensive statute for criminal forfeiture is 18 U.S.C. § 982, which authorizes the court to impose a forfeiture of any property involved or traceable to any offense violating § 1956 or § 1957 (money laundering statutes) as part of the sentence. Section 982 also lists numerous additional criminal statutes, the violation of which results in the forfeiture of proceeds that were derived from, or are the gross receipts obtained as a result of, the criminal offense.<sup>41</sup> These crimes include, but are not limited to, various types of bribes, embezzlement, false statement, counterfeiting, smuggling, unauthorized use of explosives, identity theft, computer fraud, and mail and wire fraud that affect a financial institution.<sup>42</sup> Not all crimes are covered by § 982; many criminal statutes have forfeiture provisions of their own, including all federal drug felonies,<sup>43</sup> certain crimes involving child pornography,<sup>44</sup> and, as previously stated, activities prohibited by RICO.<sup>45</sup>

Section 982 farms out the governance of criminal forfeiture to 21 U.S.C. § 853.<sup>46</sup> Section 853 is incorporated in 18 U.S.C. § 982(b)(1), which specifically states that property subject to forfeiture under this section, “shall be governed by the provisions of section 413 (other than subsection (d) of that section) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. [§] 853).”<sup>47</sup>

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<sup>37</sup> LAFAVE, *supra* note 9.

<sup>38</sup> 21 U.S.C. § 853(a) (2006); *see also* United States v. Saccoccia, 354 F.3d 9, 12 (1st Cir. 2003).

<sup>39</sup> *See, e.g.*, 18 U.S.C. § 1963 (2006) (permitting forfeiture for “any property constituting, or derived from, any proceeds which the person obtained”); 18 U.S.C. § 982 (permitted forfeiture of property “involved in [the] offense”); 21 U.S.C. § 853 (permitting forfeiture to proceeds of criminal activity).

<sup>40</sup> CASSELLA, *supra* note 32, at 388.

<sup>41</sup> 18 U.S.C. § 982(a)(2), (3).

<sup>42</sup> *Id.*

<sup>43</sup> 21 U.S.C. § 853(a).

<sup>44</sup> 18 U.S.C. § 2253(a)(3).

<sup>45</sup> In 1984, the Comprehensive Crime Control Act of 1984 amended the criminal forfeiture provisions of RICO “to enhance the use of forfeiture, and in particular, the sanction of criminal forfeiture, as a law enforcement tool.” United States v. Delco Wire & Cable Co., 772 F. Supp. 1511, 1515 (E.D. Pa. 1991).

<sup>46</sup> 18 U.S.C. § 982(b)(1).

<sup>47</sup> *Id.*

## B. RULES GOVERNING PROCEDURE

The procedures for criminal forfeiture are proscribed by Federal Rule of Criminal Procedure 32.2.<sup>48</sup> Rule 32.2(a) is derived from Rule 7(c)(2), which is designed to provide the defendant with adequate notice that criminal forfeiture is being sought.<sup>49</sup> Criminal Rule 7 outlines what is required in an indictment, with the purpose of giving effect to the Fifth Amendment of the Constitution of the United States, which states, “No person shall be held to answer for a capital, or otherwise infamous crime, unless on . . . indictment of a Grand Jury . . . .”<sup>50</sup> Inclusion in the indictment of a criminal forfeiture count reflects the grand jury's finding of probable cause to believe that upon the conviction of criminal charge, the property identified will be subject to forfeiture under the applicable statute.<sup>51</sup> The probable cause requirement for criminal forfeitures is the same as the requirement for civil forfeitures.<sup>52</sup> The government must show that the defendant used or obtained the property in violation of a statute that has a criminal forfeiture provision.<sup>53</sup> Rule 7 originally caused some confusion about its applicability to *in rem* and *in personam* forfeiture proceedings.<sup>54</sup> That confusion, however, was made clear in 1979 with an amendment stating Rule 7(c)(2) applies to criminal forfeitures where the forfeiture was part of the punishment imposed by a criminal statute.<sup>55</sup>

Rule 7 and Rule 32.2 each require notice.<sup>56</sup> This notice need not describe the property subject to forfeiture in detail; rather, it requires only that the indictment “contain[] notice to the defendant that the government will

<sup>48</sup> FED. R. CRIM. P. 32.2.

<sup>49</sup> FED. R. CRIM. P. 32.2(a) advisory committee's note; FED. R. CRIM. P. 7(c)(2); *United States v. Grammatikos*, 633 F.2d 1013, 1024 (2d Cir. 1980).

<sup>50</sup> U.S. CONST. amend. V; FED. R. CRIM. P. 7 advisory committee's note.

<sup>51</sup> *United States v. Wingerter*, 369 F. Supp. 2d 799, 803 (E.D. Va. 2005) (noting that the inclusion in the Indictment of a criminal forfeiture count reflected “the grand jury's finding of probable cause to believe that upon the conviction of defendants on the conspiracy and immigration fraud and money laundering charges,” the named property will be subject to forfeiture as proceeds of those offenses); *United States v. Nichols*, 841 F.2d 1485, 1505 (10th Cir. 1988) (stating that “an indictment in a forfeiture case contains a determination by a grand jury not only that there is probable cause for an immediate arrest but also that ‘the described property is subject to forfeiture’”).

<sup>52</sup> WILLIAMS, *supra* note 9, at 57.

<sup>53</sup> *Id.*

<sup>54</sup> FED. R. CRIM. P. 32.2(a) advisory committee's note; FED. R. CRIM. P. 7(c)(2); *Grammatikos*, 633 F.2d at 1024.

<sup>55</sup> WRIGHT ET AL., *supra* note 1, at § 126; FED. R. CRIM. P. 7 advisory committee's note.

<sup>56</sup> FED. R. CRIM. P. 7(c)(2) (stating that “[n]o judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute”). *See also* FED. R. CRIM. P. 32.2(a).

seek the forfeiture of property as part of any sentence in accordance with the applicable statute.”<sup>57</sup> The Advisory Committee Notes of Rule 32.2 state that the rule “is not intended to require that an itemized list of the property to be forfeited appear in the indictment or information itself.”<sup>58</sup> The notice need not be provided in the indictment itself, but will be sufficient if provided in a bill of particulars or a special verdict form in advance of the forfeiture phase of the trial.<sup>59</sup> The notice also need not describe the defendant’s interest in the property.<sup>60</sup> The notice requirement is for the limited purpose of putting the defendant on notice that any property interest will be forfeited if the defendant is convicted of the indicted offense.<sup>61</sup> Because the notice requirement’s purpose is to allow a defendant to challenge the underlying charge upon which forfeiture is based, the assets’ specific identity simply does not matter for notice purposes.<sup>62</sup> The indictment, therefore, need not include the specific assets, or substitute assets, that are subject to forfeiture.<sup>63</sup>

Generally, the jury in a criminal case is responsible for determining whether the government proved the allegations in the forfeiture count.<sup>64</sup> When a jury returns a guilty verdict, it then must determine in a special verdict whether the government established the requisite nexus between the property and the defendant’s crime.<sup>65</sup> In the 1990s, courts were split on whether bifurcation was required.<sup>66</sup> Eventually, the courts formed a consensus that bifurcation of the criminal trial is preferred because it prevents the jury from hearing the forfeiture issues until after the defendant has been convicted on a predicate forfeiture charge.<sup>67</sup> To avoid forfeiture as a consideration in the jury’s determination of guilt or innocence, the forfeiture is

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<sup>57</sup> FED. R. CRIM. P. 32.2(a).

<sup>58</sup> FED. R. CRIM. P. 32.2(a) advisory committee’s note.

<sup>59</sup> Cassella 2004, *supra* note 2, at 60.

<sup>60</sup> *Id.* at 60–61; *see also* United States v. Fisk, 255 F. Supp. 2d 694, 705 (E.D. Mich. 2003) (rejecting defendant’s argument that the indictment failed to give the requisite notice because it failed to specify the extent or nature of defendant’s interest in the forfeited property).

<sup>61</sup> United States v. Cauble, 706 F.2d 1322, 1347 (5th Cir. 1983) (stating that a notice of forfeiture is required to inform the defendant that the government seeks forfeiture as a remedy); *see also* Cassella 2004, *supra* note 2, at 61.

<sup>62</sup> *See* United States v. Hatcher, 323 F.3d 666, 673 (8th Cir. 2003); *see also* United States v. Bollin, 264 F.3d 391, 422 n.21 (4th Cir. 2001).

<sup>63</sup> *See Hatcher*, 323 F.3d at 673.

<sup>64</sup> WILLIAMS, *supra* note 9, at 59; *see also* CASSELLA, *supra* note 32, at 539 (stating that if a defendant is convicted by a jury, the defendant is entitled to retain or waive the jury for the forfeiture proceedings).

<sup>65</sup> FED. R. CRIM. P. 32.2(b)(4).

<sup>66</sup> CASSELLA, *supra* note 32, at 540.

<sup>67</sup> *Id.*; *see also* United States v. Jenkins, 904 F.2d 549, 558–59 (10th Cir. 1990).

reserved until after the jury has returned a general verdict.<sup>68</sup> This solution to the split in the circuits was solidified by the adoption of Rule 32.2, which now mandates a bifurcation between the guilt and forfeiture phases of the trial.<sup>69</sup> A bifurcated trial—where the jury hears evidence of the defendant’s guilt for the underlying crime separately from hearing evidence about forfeiture—is fairer to the defendant, and it prevents the jury from considering the possibility of a large forfeiture in considering a defendant’s guilt.<sup>70</sup>

As soon as practicable after a guilty verdict, the jury or the court in cases without a jury or where a party waives the jury for the forfeiture phase must determine whether the government has established the requisite nexus between the property and the offense.<sup>71</sup> Once it is determined that the property is subject to forfeiture, the court must enter a preliminary order for forfeiture, directing the forfeiture of specific property without regard to any third party’s interest in the property.<sup>72</sup> This order authorizes the Attorney General to seize the property subject to forfeiture, conduct the necessary discovery to identify, locate and dispose of the property, and to start proceedings consistent with the rights of third parties.<sup>73</sup>

### III. SUBSTITUTE PROPERTY

Criminal forfeiture statutes and rules provide the basis and procedure for the forfeiture of tainted property—whether it was “proceeds of” or “traceable to” the crime giving rise to forfeiture.<sup>74</sup> But what if the proceeds are gone—is the possibility of forfeiture gone too? The answer is no, but the application of that answer is long and varied.

If tracing the directly forfeitable asset is impossible, the government may seek forfeiture of other property as a substitute asset.<sup>75</sup> If the forfeitable assets are unavailable at the time of conviction, the court may enter an

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<sup>68</sup> WILLIAMS, *supra* note 9, at 59–60.

<sup>69</sup> FED. R. CRIM. P. 32.2.

<sup>70</sup> *Jenkins*, 904 F.2d at 558–59; WILLIAMS, *supra* note 9, at 60.

<sup>71</sup> FED. R. CRIM. P. 32.2(b)(1), (4).

<sup>72</sup> FED. R. CRIM. P. 32.2(b)(2).

<sup>73</sup> FED. R. CRIM. P. 32.2(b)(3).

<sup>74</sup> See *supra* notes 37–46 and accompanying text; see, e.g., 18 U.S.C. § 1963 (2006) (permitting forfeiture for “any property constituting, or derived from, any proceeds which the person obtained”); 18 U.S.C. § 982 (permitted forfeiture of property “involved in [the] offense”); 18 U.S.C. § 853 (permitting forfeiture to proceeds of criminal activity); 21 U.S.C. § 881(a)(4) (permitting forfeiture of all aircraft used to transport controlled substances in violation of federal narcotics laws).

<sup>75</sup> CASSELLA, *supra* note 32, at 389, 742; *United States v. Candelaria-Silva*, 166 F.3d 19, 42 (1st Cir. 1999).



order forfeiting substitute assets up to an equivalent value.<sup>76</sup> In seeking forfeiture of substitute property, the government must show that the directly forfeitable property is unavailable due to an act or omission of the defendant.<sup>77</sup> The ability of the government to forfeit substitute assets is grafted into both 21 U.S.C. § 853 and RICO 21 U.S.C. § 853(p)(1) provides:

(p) Forfeiture of substitute property

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

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

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

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

(D) has been substantially diminished in value; or

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

RICO's similar provision is found in 18 U.S.C. § 1963(m).<sup>78</sup>

Accordingly, if the tainted property is unavailable due to an act of the defendant, the court “shall order the forfeiture of any other property of the defendant, up to the value” of any property that is to be forfeited.<sup>79</sup> In practice, this requires the government to charge a crime that authorizes criminal forfeiture, then charge separate criminal forfeiture allegations under 18 U.S.C. § 982(a)(1), seeking forfeiture of certain property either as “involved in” or “traceable to” the defendant’s money laundering activity, or as substitute assets under 21 U.S.C. § 853(p), which is incorporated in 18 U.S.C. § 982(b)(1).<sup>80</sup> In practice, this is similar to *United States v.*

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<sup>76</sup> WILLIAMS, *supra* note 9, at 60 & n. 23 (citing the statutory authority for the forfeiture of substitute assets: 18 U.S.C. §§ 982(b)(1), 1467(n), 1963(m), 2253(o) (2006), and 21 U.S.C. § 853(n) (2006)); *see also* *United States v. Soreide*, 461 F.3d 1351, 1352–53 (11th Cir. 2006) (finding that because the proceeds of the crime were unavailable, the government could forfeit as substitute property the defendant’s interest in proceeds of an insurance policy and his interest in the proceeds of the sale of real property).

<sup>77</sup> 21 U.S.C. § 853(p). Note that forfeiture of a substitute asset is not required when the forfeiture sought is an amount of money. WILLIAMS, *supra* note 9, at 60. Because criminal forfeiture is *in personam*, the government does not have to trace the amount of money to identifiable assets to be forfeited. *Id.*; FED. R. CRIM. P. 32.2(c) (stating that the court does not have to hold an ancillary hearing to determine third party rights in the forfeited property where the forfeiture consists of a money judgment).

<sup>78</sup> 18 U.S.C. § 1963(m); *United States v. Saccoccia*, 354 F.3d 9, 12 n.2 (1st Cir. 2003) (citing RICO law but explaining that the analogy is the same); CASSELLA, *supra* note 32, at 742.

<sup>79</sup> 21 U.S.C. § 853(p)(2).

<sup>80</sup> *United States v. Voigt*, 89 F.3d 1050, 1082 (3d Cir. 1996).

*Floyd*,<sup>81</sup> where the government charged defendant with violating numerous statutes, including 18 U.S.C. § 215, prohibiting bribery of a bank official; 18 U.S.C. § 1005, regulating bank entries; 18 U.S.C. § 656, misappropriation of bank funds; and with money laundering in violation of 18 U.S.C. § 1957.<sup>82</sup> Criminal forfeiture as a penalty for the violation of each of these statutes is governed by 18 U.S.C. § 982, which in turn is governed by 21 U.S.C. § 853.<sup>83</sup> Because *Floyd* addressed defendant's substitute assets (untainted funds), the court specifically looked to the language of § 853(p)(1).<sup>84</sup>

There is no defense to the forfeiture of a substitute asset, because that property naturally has no nexus to the crime.<sup>85</sup> The only grounds on which a defendant may oppose the forfeiture of substitute assets are (1) the value of the substitute asset exceeds the amount the defendant must forfeit, or (2) the unavailability of the property traceable to, or used to commit, the offense is not the defendant's fault.<sup>86</sup>

The majority of circuits hold that the government's interest in substitute property, property that is neither the fruit of nor connected to the crime, is to be treated differently than the government's interest in tainted property.<sup>87</sup> All of the circuits have reached their conclusions based on the statutory language authorizing the forfeiture of substitute property. While the statutory language examined by the various circuits is the same, the outcomes are not.<sup>88</sup>

Analysis of the government's pre-trial interest in substitute property started with the Fourth Circuit decision in *In re Billman*,<sup>89</sup> where the court determined that substitute property is subject to pre-trial restraint.<sup>90</sup> *Billman* and its progeny hold that the pre-trial restraint provision of the forfeiture statutes permit the restraint of substitute assets under pending resolu-

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<sup>81</sup> United States v. Floyd, 992 F.2d 498 (5th Cir. 1993)

<sup>82</sup> *Id.* at 499 & n.1.

<sup>83</sup> 18 U.S.C. § 982(a), (b)(1); *Floyd*, 992 F.2d at 499.

<sup>84</sup> *Floyd*, 992 F.2d at 498-502.

<sup>85</sup> Cassella 2004, *supra* note 2, at 61.

<sup>86</sup> *Id.* at 62.

<sup>87</sup> See, e.g., sources cited *infra* notes 88-315; see also United States v. Jarvis, 499 F.3d 1196, 1203 (10th Cir. 2007).

<sup>88</sup> See sources cited *infra* notes 89-315. Examination of the forfeiture of substitute assets under the Comprehensive Forfeiture Act of 1984, 21 U.S.C. § 853(e)(1), are nearly identical to examination of the forfeiture of substitute assets under RICO, 18 U.S.C. § 1963(d)(1), as the substantive terms are in material part identical. *In re Assets of Martin*, 1 F.3d 1351, 1358 (3d Cir. 1993).

<sup>89</sup> 915 F.2d 916 (4th Cir. 1990).

<sup>90</sup> *Id.* at 920 (examining RICO, 21 U.S.C. § 1963(m)).

tion of the defendant's case.<sup>91</sup> Now, nearly twenty years after its decision in *Billman*, it is well settled in the Fourth Circuit that substitute assets are subject to pretrial restraint.<sup>92</sup> This holding is at odds with the other circuits' holdings on the issue.<sup>93</sup> Noting that it is the sole circuit to permit the pretrial restraint of substitute assets, the Fourth Circuit permitted it again recently in *United States v. Bromwell*,<sup>94</sup> where it described the circuit's "broad" view that the criminal forfeiture statutes permit the pretrial restraint of substitute assets.<sup>95</sup>

In *In re Assets of Martin*,<sup>96</sup> the Third Circuit looked at the same issue and held that substitute assets may not be restrained pre-conviction or pre-indictment.<sup>97</sup> In coming to this conclusion, the court reviewed the statutory language as well as the Congressional history to conclude that "Congress clearly intended to exclude substitute assets from property subject to preliminary restraints."<sup>98</sup> The rationale and holding of this case remains the law in the Third Circuit.<sup>99</sup>

The Fifth Circuit in *United States v. Floyd*<sup>100</sup> also faced the question of whether substitute assets were subject to pretrial restraint.<sup>101</sup> The Fifth

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<sup>91</sup> *United States v. Bollin*, 264 F.3d 391, 421 (4th Cir. 2001) (noting the holding for substitute assets criminally forfeitable under the RICO statutes, 18 U.S.C. § 1963 et al., and finding the same to be true for assets criminally forfeited under 21 U.S.C. § 853).

<sup>92</sup> *In re Restraint of Bowman Gaskinks Fin. Group*, 345 F. Supp. 2d 613, 622 n.18 (E.D. Va. 2004).

<sup>93</sup> Compare *Billman*, 915 F.2d at 921 (holding that 18 U.S.C. § 1963(d)(1)(A) should be construed to authorize pretrial restraint of specified assets), and *United States v. Bromwell*, 222 Fed. App'x 307, 311 (4th Cir. 2007) (holding that 18 U.S.C. § 1963(d)(1) authorizes the pretrial restraint of substitute assets), with *United States v. Pantelidis*, 335 F.3d 226, 234 (3d Cir. 2003) (affirming the holding that in criminal forfeiture, the government is not entitled to pretrial restraint of substitute assets), *United States v. Gotti*, 155 F.3d 144, 149–50 (2d Cir. 1998) (holding that the "unambiguous language" of 18 U.S.C. § 1963(d)(1)(A) does not authorize pretrial restraint of substitute assets), *United States v. Riley*, 78 F.3d 367, 371 (8th Cir. 1996) (holding the same), *United States v. Ripinsky*, 20 F.3d 359, 362 (9th Cir. 1994) (holding that substitute assets are not subject to pretrial restraint under the criminal forfeiture provision of the Controlled Substances Act, 21 U.S.C. § 853), and *United States v. Floyd*, 992 F.2d 498, 501–02 (5th Cir. 1993) (holding the same).

<sup>94</sup> 222 Fed. App'x 307 (4th Cir. 2007).

<sup>95</sup> *Id.* at 311 n.2. While the Fourth Circuit is the only Circuit to permit the pretrial restraint of substitute assets, this view has been adopted by the District Court in Wisconsin. *United States v. Schmitz*, 153 F.R.D. 136, 140 (E.D. Wis. 1994) (finding that statutory language and design support the use of the prior restraint or seizure to assure the availability of all assets subject to forfeiture, including substitute assets).

<sup>96</sup> 1 F.3d 1351 (3d Cir. 1993).

<sup>97</sup> *Id.* at 1357–58 (examining 18 U.S.C. § 1963(m), the substitute asset provision in RICO).

<sup>98</sup> *Id.* at 1360.

<sup>99</sup> See, e.g., *United States v. Pantelidis*, 335 F.3d 226, 233–34 (3d Cir. 2003) (affirming the holding that in criminal forfeiture, the government is not entitled to pretrial restraint of substitute assets).

<sup>100</sup> 992 F.2d 498 (5th Cir. 1993).

<sup>101</sup> *Id.* at 499.

Circuit found that the specific language of § 853 plainly states what property may be restrained before trial and that it does not include substitute assets.<sup>102</sup> The Ninth Circuit similarly held that the government is not permitted to restrain property pretrial where a defendant is charged with offenses that would subject property to criminal forfeiture upon conviction.<sup>103</sup> In *United States v. Field*,<sup>104</sup> the Eighth Circuit looked to the plain statutory language and also held that the pretrial restraint of substitute assets is not authorized.<sup>105</sup>

Before *United States v. Gotti*,<sup>106</sup> there was confusion in the Second Circuit on the issue of the pretrial restraint of substitute assets.<sup>107</sup> However, in *Gotti*, the Second Circuit made it clear that the criminal-forfeiture statute is plain on its face and does not authorize the pretrial restraint of substitute assets.<sup>108</sup>

In the Sixth Circuit, not only is the government not permitted to pretrial restraint of substitute assets, but such a restraint requires the government to pay the defendant interest earned on the wrongly held funds.<sup>109</sup> In *United States v. Ford*,<sup>110</sup> the government (through the IRS) seized the defendant's bank accounts totaling \$1,349,694.10.<sup>111</sup> It later indicted him on thirty-six counts relating to illegal gambling and money laundering in connection with the seized funds.<sup>112</sup> After a criminal trial, the jury found the

<sup>102</sup> *Id.* at 502.

<sup>103</sup> *United States v. Ripinsky*, 20 F.3d 359, 362–63 (9th Cir. 1994) (interpreting the criminal forfeiture authorizing language of 21 U.S.C. § 853(e)).

<sup>104</sup> 62 F.3d 246 (8th Cir. 1995).

<sup>105</sup> *Id.* at 248–49 (examining the nearly identical substitute asset language in 21 U.S.C. § 853); see also *United States v. Hooper*, 229 F.3d 818, 821 n.7 (9th Cir. 2000) (noting that because 21 U.S.C. § 853 and RICO are substantially identical, courts look to cases and legislative history discussing both in conducting a criminal forfeiture analysis).

<sup>106</sup> 155 F.3d 144, 150 (2d Cir. 1998) (holding that the unambiguous language of 18 U.S.C. § 1963(d)(1)(A) provides no authority for pretrial restraint of substitute assets).

<sup>107</sup> See *United States v. Regan*, 858 F.2d 115, 119 (2d Cir. 1988) (rejecting a defendant's challenge to the pre-trial restraint of his substitute assets); see also *United States v. Bellomo*, No. 96 CR. 430(LAK), 1996 WL 938332, at \*1 (S.D.N.Y. Sept. 16, 1996) (interpreting *Regan* as holding that the pretrial restraint of substitute assets as permissible); *United States v. Gigante*, 948 F. Supp. 279, 281 (S.D.N.Y. 1996) (finding, *inter alia*, that *Regan* was a limited holding and did not interpret the forfeiture statute to allow the pretrial restraint of assets); *United States v. Miller*, 26 F. Supp. 2d 415, 432 (N.D.N.Y. 1998) (noting that until *Gotti*, the Second Circuit's decision in *Regan* received varying interpretations among the district courts).

<sup>108</sup> *Gotti*, 155 F.3d at 148–49 (clearing up the “considerable debate among the district court and various circuit courts” on the issue and holding that the nearly identical provisions in 21 U.S.C. § 853(e)(1) and 18 U.S.C. § 1963(d)(1)(A) do not permit the pretrial restraint of substitute assets).

<sup>109</sup> *United States v. Ford*, 64 Fed. App'x 976, 985 (6th Cir. 2003).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 978.

<sup>112</sup> *Id.*

defendant guilty on certain counts and acquitted him on others.<sup>113</sup> Included in the jury's findings was the conclusion that \$926,202.32, seized and still held by the IRS, was not directly traceable to specified unlawful activity.<sup>114</sup> The district court ordered the IRS to continue to hold this money, identifying the funds as "assets that would likely become forfeitable, subject to third-party claims, as substitute assets."<sup>115</sup> The Sixth Circuit held that the government was not permitted to possess the defendant's substitute property, as it was doing, when the jury found that these assets were not tainted.<sup>116</sup> In ordering these non-tainted assets held by the government, the district court essentially authorized the pretrial restraint of substitute assets, a practice not permitted by the statute.<sup>117</sup> Because the government held the defendant's property when it would not have had the authority to retain it as substitute assets before trial, the government was ordered to pay the defendant the interest accumulated on the improperly retained assets.<sup>118</sup>

The Fourth Circuit's minority view recently found support outside the Fourth Circuit in *United States v. Ayala*,<sup>119</sup> a New Mexico district court opinion holding that the forfeiture statute permitted the pretrial restraint of substitute assets.<sup>120</sup> This opinion, from a district court in the Tenth Circuit, did not last long. The Tenth Circuit held exactly the opposite: that the forfeiture statute does not permit restraint of substitute property until defendant is found guilty.<sup>121</sup> The Tenth Circuit's decision in *United States v. Jarvis*<sup>122</sup> relied on the plain language of the forfeiture statute and determined that it did not authorize the government to "claim any pre-conviction right, title, or interest" in substitute property.<sup>123</sup> The court held the statute did not permit forfeiture of substitute property until after the defendant was found guilty and the court determined that the defendant's act or omission resulted in the court's inability to reach forfeitable assets.<sup>124</sup>

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 977–78.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 982–83; see *United States v. Parrett*, 469 F. Supp. 2d 489, 493 (S.D. Ohio 2007), vacated on other grounds, 530 F.3d 422, 429–31 (6th Cir. 2008) (affirming in part the district court's decision that 21 U.S.C. § 853 does not provide authorization for federal prosecutors to restrain substitute assets prior to a court ordered forfeiture).

<sup>119</sup> No. CRIM. 03-568 WJ, 2003 WL 23509658 (D.N.M. Dec 18, 2003).

<sup>120</sup> *Id.* at \*4.

<sup>121</sup> *United States v. Jarvis*, 499 F.3d 1196, 1204–06 (10th Cir. 2007).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 1204.

<sup>124</sup> *Id.*

The majority of circuits hold that the criminal forfeiture statutes do not authorize pretrial restraint of substitute assets.<sup>125</sup> This view is in line with Congressional history and is arguably due to more than a “glitch in the statute that precludes the pre-trial restraint of substitute property.”<sup>126</sup> The Congressional history states: “It should also be noted that the restraining order provision applies only to [tainted] property. It may not be applied with respect to other assets that may ultimately be ordered forfeited under the substitute assets provision.”<sup>127</sup> The majority’s position also recognizes that criminal forfeiture statutes are decidedly punitive in nature.<sup>128</sup> Given the punitive nature of criminal forfeiture, courts should exercise caution in “construing § 853 liberally.”<sup>129</sup> Blanket permission for the government to restrain any and all of defendant’s property—without a conviction, without a showing that the forfeiture of substitute assets will be authorized, and without regard to any third party interest in the property—does not interpret the statute with the necessary caution.<sup>130</sup> Upon conviction, all of a defendant’s property is not subject to forfeiture, rather, it is the property “used in” or is recognized as “proceeds from” the crime that are subject to forfeiture.<sup>131</sup> The forfeiture may extend to substitute property only after the government shows that the forfeitable assets are unavailable due to defendant’s actions.<sup>132</sup> Restraining property pretrial that is totally unrelated to the crime simply because defendant has an ownership interest in it is akin to making him pay a fine before he goes to his arraignment—on the chance that he may not have any money left when the trial is over. It is also similar to pre-trial detention—on the chance the defendant may decide halfway through the trial to flee the jurisdiction. The criminal justice system has methods to deal with these possibilities, and, at the very least, it requires the government to show the court why, before a conviction, the defendant’s

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<sup>125</sup> See cases cited *supra* notes 87–121; see cases cited *infra* notes 128–315.

<sup>126</sup> Cassella 2004, *supra* note 2, at 68.

<sup>127</sup> See S. REP. NO. 97-520, at 10 n. 18 (1982) (Conf. Rep.).

<sup>128</sup> See, e.g., *United States v. Fruchter*, 411 F.3d 377, 382 & n.6 (2d Cir. 2005).

<sup>129</sup> *United States v. Ripinsky*, 20 F.3d 359, 363 n.5 (citing the Supreme Court’s recognition that these criminal forfeiture statutes are punitive as well as remedial); see also *Alexander v. United States*, 509 U.S. 544, 545 (1993) (noting that 18 U.S.C. § 1963 is “clearly a form of monetary punishment”); *Austin v. United States*, 509 U.S. 602, 610 (1993) (noting that 21 U.S.C. § 853 may serve remedial purposes but that “it can only be explained as serving in part to punish”).

<sup>130</sup> See *United States v. Parrett*, 469 F. Supp. 2d 489, 493 (S.D. Ohio 2007), *vacated on other grounds*, 530 F.3d 422, 429–31 (6th Cir. 2008) (concluding that the plain statutory language reveals Congress’s intent to treat tainted and untainted property differently and that the refusal to permit the pre-trial restraint of substitute assets is held by “all but one of our sister circuits who have addressed this question”).

<sup>131</sup> See *supra* notes 36–44 and accompanying text.

<sup>132</sup> 21 U.S.C. § 853(p) (2006).

rights should be restrained.<sup>133</sup> Finally, the unfettered pre-restraint of property the defendant owns jointly with an innocent third party does not advance justice; rather, it deprives a third party of the lawful use of the property until after the completion of the criminal trial and the subsequent ancillary hearing.<sup>134</sup>

#### IV. THIRD PARTIES

It is black-letter law that only the defendant's interest in property may be forfeited.<sup>135</sup> Common sense dictates this law because the purpose of an *in personam* forfeiture is to punish the defendant.<sup>136</sup> The determination of whether a third party has an interest in the forfeited property, however, is deferred until a third party files a petition in an ancillary proceeding.<sup>137</sup> Third parties claiming an interest in property the government seeks to criminally forfeit cannot intervene in the criminal action against the defendant.<sup>138</sup> Neither can third parties initiate a civil action to determine the validity of their interest after criminal charges have been brought.<sup>139</sup> The third parties must, instead, wait until the court enters a forfeiture order based on the criminal conviction and "then petition the court for a hearing to adjudicate their interest in the property."<sup>140</sup> The rights of third parties in criminally forfeited property is a controversial area of the law and is one that is notably "not always clear."<sup>141</sup> While the determination of third-party rights is an unsettled area of law, the process for asserting such rights is well established by statute.<sup>142</sup>

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<sup>133</sup> See 18 U.S.C. § 3142 (2006) (outlining the procedure for and factors to be considered in the determination of whether a defendant should be detained prior to trial); 21 U.S.C. § 841 (authorizing a fine after conviction of a violation of the Controlled Substances Act); 18 U.S.C. § 1963 (authorizing a fine for a violation of RICO).

<sup>134</sup> See FED. R. CRIM. P. 32.2(b)(2) (stating that if the court finds that property is subject to forfeiture, the court must promptly enter a preliminary order of forfeiture without regard to a third party's interest in the property).

<sup>135</sup> Cassella 2006, *supra* note 18, at 546–47 (noting the distinction between the defendant's interest in property, which may be forfeited, and a third party's interest, which may not be forfeited). A discussion of the government's ability to forfeit proceeds is not a forfeiture of the defendant's interest in property because the defendant never acquires interest in the proceeds of a crime. *Id.* This explanation is consistent with the way in which these terms are used throughout this article.

<sup>136</sup> See *United States v. Gilbert*, 244 F.3d 888, 919 (11th Cir. 2001).

<sup>137</sup> FED. R. CRIM. P. 32.2(b)(2).

<sup>138</sup> See *United States v. Wittig*, 525 F. Supp. 2d 1281, 1287 (D. Kan. 2007).

<sup>139</sup> 21 U.S.C. § 853(k) (2006).

<sup>140</sup> See *Wittig*, 525 F. Supp. 2d at 1287.

<sup>141</sup> Cassella 2004, *supra* note 2, at 82.

<sup>142</sup> 21 U.S.C. § 853(n); FED. R. CRIM. P. 32.2(c).

## A. THIRD-PARTY RIGHTS PROCEDURALLY

The foundation of criminal forfeiture is punishment of the guilty defendant; therefore, only property belonging to the defendant is subject to forfeiture.<sup>143</sup> What is not defendant's property but is the property of a third party is determined in an ancillary hearing.<sup>144</sup> In general, a third party's interest in criminally forfeited property cannot be raised until there has been an adjudication of the merits of the criminal charges and an entry of the preliminary order of forfeiture.<sup>145</sup> The most significant exception to this procedure addresses a third party's right to contest a pretrial restraining order.<sup>146</sup>

Third parties claiming an interest in restrained or potentially restrainable property may "participate in" restraining-order proceedings.<sup>147</sup> Participation includes showing the court that pretrial restriction of the property is "clearly improper" because the property restrained was not actually the property named in the indictment.<sup>148</sup> Participation does not include a determination of the ownership of the forfeitable property and may not challenge the validity of the indictment.<sup>149</sup> For these claims, a third party must wait for the ancillary hearing.<sup>150</sup> The government clearly has statutory authority to obtain a restraining order or injunction before trial to secure tainted property if the defendant is convicted.<sup>151</sup> Whether *substitute assets* are subject to pre-conviction or pre-indictment restraints, however, depends on the circuit.<sup>152</sup>

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<sup>143</sup> 21 U.S.C. § 853(n); FED. R. CRIM.P. 32.2(c).

<sup>144</sup> 21 U.S.C. § 853(n)(2); *see also* Cassella 2004, *supra* note 2, at 83.

<sup>145</sup> 21 U.S.C. § 853(k), (n); *see also* United States v. Real Property in Waterboro, 64 F.3d 752, 755 (1st Cir. 1995) (referring to § 853(n) as a "wait-and-see provision" and quoting § 853's language which requires that the United States, "following the entry of an order of forfeiture," to publish notice of the order to interested third parties, and that after such notice, any person asserting a legal interest in property that has been ordered forfeited may petition the court for a hearing to adjudicate the validity of his alleged interest in the property).

<sup>146</sup> Cassella 2004, *supra* note 2, at 87.

<sup>147</sup> *Real Property in Waterboro*, 64 F.3d at 756–57.

<sup>148</sup> *Id.* at 756.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *See* 21 U.S.C. 853(3) (2006); *see also* *Real Property in Waterboro*, 64 F.3d at 756 (seeking to criminally forfeit real estate purchased with proceeds of the crime pursuant to 21 U.S.C. § 853); United States v. Jarvis, 499 F.3d 1196, 1203 (10th Cir. 2007); United States v. Siegal, 974 F. Supp. 55, 56 (D. Mass. 1997) (seeking to forfeit monies that were allegedly proceeds of the money laundering crime, pursuant to 18 U.S.C. § 1963).

<sup>152</sup> *See* *Siegal*, 974 F. Supp. at 60 n.5.



## B. THIRD PARTIES AND THE ANCILLARY PROCEEDING

An ancillary hearing is a procedural device used to ensure that the property forfeited in a criminal case does not belong to a third party who, until the ancillary proceeding, has no opportunity to contest the forfeiture.<sup>153</sup> Once a defendant has been found guilty of a crime and the property sought to be criminally forfeited is unavailable due to an act or omission of the defendant, the government may forfeit substitute assets.<sup>154</sup> A third party with an interest in these assets may be heard at the ancillary hearing.<sup>155</sup>

A succinct overview of the process is provided in *United States v. Gilbert*.<sup>156</sup> First, at the criminal proceeding, the government establishes the defendant's interest in the forfeitable property.<sup>157</sup> Second, the forfeiture order effectively puts the government in defendant's shoes, and the government succeeds to any interest the defendant had in the property.<sup>158</sup> Third, the ancillary hearing is conducted to provide third parties the opportunity to file claims and establish their interest in the forfeited property.<sup>159</sup> If a third party is successful, the court releases those interests and amends its order of forfeiture accordingly.<sup>160</sup>

Procedurally, the third party's rights in an ancillary hearing are clear.<sup>161</sup> Third parties have no right to object to forfeiture until after conviction.<sup>162</sup> Third parties desiring to assert a legal interest in property that has been ordered forfeited may, within thirty days, petition for a hearing to adjudicate the validity of their alleged interest in the property.<sup>163</sup> After the petition is filed, the court must conduct an ancillary hearing.<sup>164</sup> This hearing is in front of the court only and does not include a jury.<sup>165</sup> Parties may conduct discovery if the court determines discovery is necessary to resolve

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<sup>153</sup> Cassella 2004, *supra* note 2, at 93.

<sup>154</sup> 21 U.S.C. § 853(p); FED. R. CRIM. P. 32.2(e).

<sup>155</sup> 21 U.S.C. § 853(n); FED. R. CRIM. P. 32.2(c).

<sup>156</sup> 244 F.3d 888 (11th Cir. 2001).

<sup>157</sup> *Id.* at 911.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> 21 U.S.C. § 853(n); FED. R. CRIM. P. 32.2(c).

<sup>162</sup> *United States v. Ivanchukov*, 405 F. Supp. 2d 708, 714 n.12 (E.D. Va. 2005) (contesting a criminal forfeiture—whether of directly forfeitable assets or substitute assets—may only be done in the ancillary hearing).

<sup>163</sup> 21 U.S.C. § 853(n)(2).

<sup>164</sup> FED. R. CRIM. P. 32.2(c)(1).

<sup>165</sup> 21 U.S.C. § 853(n)(2).

factual issues.<sup>166</sup> The third-party petitioners have the burden of proving their interest in the forfeited property.<sup>167</sup>

There are only two ways a third party can be successful at an ancillary hearing.<sup>168</sup> The third party (petitioner) must demonstrate by a preponderance of the evidence that:

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

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section.<sup>169</sup>

If a petitioner proves either (A) or (B), the court shall amend the order of forfeiture in accordance with its determination.<sup>170</sup>

The statute protects a petitioner whose legal interest in the criminally forfeited property vested in the petitioner rather than the defendant or was superior to any interest of the defendant at the time of the acts giving rise to forfeiture.<sup>171</sup> It is necessary, therefore to determine when title vests. Title vests in the government when the crime is committed.<sup>172</sup> According to § 853(c):

All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing

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<sup>166</sup> FED. R. CRIM. P. 32.2.(c)(1)(B).

<sup>167</sup> See *United States v. Gilbert*, 244 F.3d 888, 911 (11th Cir. 2001).

<sup>168</sup> 21 U.S.C. § 853(n)(6); see also *United States v. Watkins*, 320 F.3d 1279, 1282 (11th Cir. 2003) (stating that "a third party claimant must make one of two showings in order to successfully assert an interest in property that is subject to criminal forfeiture.")

<sup>169</sup> 21 U.S.C. § 853(n)(6).

<sup>170</sup> *Id.*

<sup>171</sup> 21 U.S.C. § 853(n)(6)(A).

<sup>172</sup> See *United States v. Hooper*, 229 F.3d 818, 822 (9th Cir. 2000) (21 U.S.C. § 853(c), states that the property interest in criminal proceeds instantaneously vest in the government. A spouse has no marital interest in property until it is obtained and criminal proceeds are obtained through a criminal act, which is what vests the government's interest in property); see also *United States v. Nava*, 404 F.3d 1119, 1124 (9th Cir. 2005) (citing 21 U.S.C. §853(a)).

pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of the purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.<sup>173</sup>

This is known as the “relation back” doctrine and exists to prevent defendants from escaping the impact of forfeiture by giving their assets to third parties.<sup>174</sup> Because the defendant has no title in the proceeds of a crime, the defendant cannot pass the title of the proceeds to a third party unless the third party is a bona fide purchaser for value without notice.<sup>175</sup>

The relation back doctrine clearly vests title to proceeds in the government upon the commission of the crime.<sup>176</sup> In *United States v. Martinez*,<sup>177</sup> the defendant used proceeds of his RICO crimes to purchase property, and the land was forfeited as a result of his RICO convictions.<sup>178</sup> Defendant’s wife filed a petition arguing that she had a property interest in the forfeited assets based on Texas’ community property law.<sup>179</sup> The court held that because the petitioner’s interest is derived from her husband’s, and the husband never had an interest in the property as title to the property vested with the government the moment it was purchased, the petitioner did not have any interest in the property.<sup>180</sup> The relation back doctrine operated to vest title in the government to the proceeds of her husband’s criminal activities when he engaged in those illegal activities.<sup>181</sup> Therefore, according to the relation back doctrine, the proceeds, and any property purchased with the proceeds, always belonged to the government.<sup>182</sup> Application of the relation back doctrine is clear when dealing with proceeds, but it becomes murky with the introduction of substitute assets.<sup>183</sup>

In the Fourth Circuit, the relation back doctrine applies not only to proceeds of the crime but also to substitute assets.<sup>184</sup> Therefore, all of a de-

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<sup>173</sup> 21 U.S.C. § 853(c).

<sup>174</sup> *United States v. McHan*, 345 F.3d 262, 268 (4th Cir. 2003).

<sup>175</sup> *Hooper*, 229 F.3d at 822.

<sup>176</sup> 21 U.S.C. § 853(c).

<sup>177</sup> 228 F.3d 587 (5th Cir. 2000).

<sup>178</sup> *Id.* at 590; *see also* *United States v. Wahlen*, 459 F. Supp. 2d 800, 813–14 (E.D. Wis. 2006) (holding that title vested in the government when the defendant committed his crimes; therefore, the property purchased with tainted funds were directly forfeitable).

<sup>179</sup> *Martinez*, 228 F.3d at 588–89.

<sup>180</sup> *Id.* at 590.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *See infra* text accompanying notes 184–304

<sup>184</sup> *See* *United States v. McHan*, 345 F.3d 262, 271–72 (4th Cir. 2003); *see also* *In re Bryson*, 406 F.3d 284 (4th Cir. 2005) (holding that land in which defendant had an interest could be forfeited as substitute assets).

defendant's property owned at the time of the commission of the crime, regardless of its origin, is subject to criminal forfeiture.<sup>185</sup> The same is not true for defendants in the First Circuit<sup>186</sup> or in the district courts of New York.<sup>187</sup>

The same plain language of the statute is used to justify contradicting conclusions.<sup>188</sup> Courts in favor of the relation back doctrine's applicability to substitute property note that the statute "does not preclude the application of the relation back principle to substitute property."<sup>189</sup> The lack of statutory language is also relied on by courts that hold substitute assets are not subject to the relation back doctrine, basing their decisions on the fact that the statute "does not contain any 'relation back' provision."<sup>190</sup> Without statutory authority authorizing the relation back doctrine's applicability to substitute assets, those courts hold that an asset does not become forfeitable as substitute assets unless and until a court determines that the directly forfeitable assets are not available: which is the procedure required by the statute.<sup>191</sup>

At least one district court refused to decide whether the relation back doctrine applied to substitute assets, deciding instead that even if the Government's interest in substitute assets did not relate back to the time of the crime, it was not unfair to relate back to the date of public notice of the Government's intent to forfeit the substitute property.<sup>192</sup>

If it can be determined what property is available for forfeiture, questions remain about jointly held property: (1) how much is the defendant's

<sup>185</sup> See *McHan*, 345 F.3d at 272 (holding that forfeiture of substitute property pursuant to 21 U.S.C. § 853(p) relates back to the date of the commission of the crime under 21 U.S.C. § 853).

<sup>186</sup> See *United States v. Saccoccia*, 354 F.3d 9, 15 (1st Cir. 2003).

<sup>187</sup> See *United States v. Kramer*, No. 1:06-cr-200-ENV-CLP, 2006 WL 3545026, at \*8 (E.D.N.Y. Dec. 8, 2006) (holding that the relation back principle does not apply to substitute assets because § 1963(c) only refers to § 1963(a) forfeited property); *United States v. Jennings*, No. 5:98-CR-418, 2007 WL 1834651, at \*3 (N.D.N.Y. June 25, 2007) (noting that the Second Circuit would likely find, based on *United States v. Gotti*, 155 F.3d 144 (2d Cir. 1998)); *United States v. Salvagno*, No. 502-CR-051 (LEK/RFT), 2006 WL 2546477, at \*19 (N.D.N.Y. Aug. 28, 2006) (noting that the First and Fourth Circuits hold "diametrically opposite views on this legal axiom").

<sup>188</sup> *McHan*, 345 F.3d at 271.

<sup>189</sup> *Id.*

<sup>190</sup> *United States v. Saccoccia*, 165 F. Supp. 2d 103, 110–13 (D.R.I. 2001), *aff'd in part, reversed in part on other grounds*, 354 F.3d 9 (1st Cir. 2003).

<sup>191</sup> *Id.* at 113. Note that *McHan* analyzes substitute property under 21 U.S.C. § 853 and *Saccoccia* analyzes it under 18 U.S.C. § 1963. Because the statutes are virtually identical, courts rely on the interpretation of either when looking at the statutes. See *In re Billman*, 915 F.2d 916, 921 (4th Cir. 1990) (stating that 21 U.S.C. § 853 and RICO forfeiture statutes should be similarly construed).

<sup>192</sup> *United States v. Norton*, No. 2:99CR10078, 2002 WL 31039138, at \*4 n.7 (W.D. Va. Sept. 3, 2002).

and may be forfeited, and (2) how much belongs to a third party. As previously outlined by the forfeiture statute, if a third party's interest in the property vested *before* the Government's, the property cannot be forfeited.<sup>193</sup> Additionally, if the third party's interest was superior to the defendant's *at the time* of the crime, the third party will prevail.<sup>194</sup>

With jointly-held property, the proper answer to "when" is critical to the purpose of criminal forfeiture, which seeks to punish only the defendant.<sup>195</sup> If the forfeiture statute reached beyond the portion of the property owned by a defendant to property that was vested in a third party, the forfeiture would become *in rem*, against the property, and not *in personam*, against the defendant.<sup>196</sup> Criminal forfeiture seeks to separate only the defendant from his criminal gains while leaving undisturbed the innocent third party's interest, which is beyond the jurisdiction of the court.<sup>197</sup>

The importance of forfeiting only the defendant's interest in jointly held property is illustrated in *United States v. Gilbert*,<sup>198</sup> where defendants were part owners of a legal card club.<sup>199</sup> The Government took over the club after many, but not all, of the club's owners were convicted on criminal RICO counts and a jury forfeited the club as "proceeds of racketeering" activity.<sup>200</sup> As a result of unclear verdict forms in the forfeiture phase of the trial, the government had only an *unspecified* interest in the forfeited property and the question on appeal was what the government could do with that interest.<sup>201</sup> The answer was "nothing."<sup>202</sup> In reaching this conclusion, the court went into great detail describing how only the defendant's tainted interest in the club was subject to forfeiture and not the entire club.<sup>203</sup> A forfeited unspecified property interest gave the government a piece of property as opposed to the "defendants' limited ownership interest" in the property.<sup>204</sup> Criminal forfeiture is *in personam* and forfeiture,

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<sup>193</sup> 21 U.S.C. § 853(n)(6)(A); *see also* *United States v. Hooper*, 229 F.3d 818, 821–22 (9th Cir. 2000) (holding only bona fide purchasers are protected where property was transferred after the crime); *United States v. Brooks*, 112 F. Supp. 2d 1035, 1039 (D. Haw. 2000) (holding that a third party's interest must have vested before the commission of the crime).

<sup>194</sup> *See* sources cited *supra* note 193. .

<sup>195</sup> *United States v. Gilbert*, 244 F.3d 888, 919 (11th Cir. 2001).

<sup>196</sup> *Id.* at 919–20.

<sup>197</sup> *Id.* at 920.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 894, 917 (referencing California quiet title law to establish the defendants' interest in a trust).

<sup>200</sup> *Id.* at 894 n.5, 920–21.

<sup>201</sup> *Id.* at 914.

<sup>202</sup> *Id.* at 923.

<sup>203</sup> *Id.* at 920–23.

<sup>204</sup> *Id.* at 921.

therefore, can reach only a specific defendant's or defendants' interest in the property.<sup>205</sup> Therefore, by failing to allow the jury to forfeit the specific *defendants' interest* in the property, the government held an invalid verdict of forfeiture.<sup>206</sup>

In most jurisdictions, state law governs the property rights of the petitioner.<sup>207</sup> The court's first inquiry, therefore, in the ancillary hearing is into the law of the jurisdiction that created the property right to determine what interest the petitioner has in the property.<sup>208</sup> If petitioner has no right under state law, then the inquiry is at an end.<sup>209</sup> If, on the other hand, the petitioner has a property interest under state law and therefore has standing, then the hearing proceeds on the merits.<sup>210</sup>

The use of state law to identify a petitioner's right in the forfeited property has produced different results in different jurisdictions and is not without its critics.<sup>211</sup> The Sixth Circuit relied on state law to determine the interest of a third party in *United States v. Certain Real Property Located at 2525 Leroy Lane, West Bloomfield, Michigan*.<sup>212</sup> Justifying its use of state law, the majority noted that property interests have "long been acquired and defined by state law" and it was with that consideration in mind that Congress drafted the forfeiture statutes.<sup>213</sup> The defendant in *Certain Real Property Located at 2525 Leroy Lane* was convicted of conspiracy to distribute cocaine, and the property at 2525 Leroy Lane was forfeited be-

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<sup>205</sup> *Id.* at 921–22; see also *United States v. Marion*, No. 2:06-cr-88-FtM-29SPC, 2008 WL 151863, at \*2, \*4–5 (M.D. Fla. Jan. 16, 2008) (holding that without knowing the extent of defendant's interest in the subject property, the government cannot forfeit the property).

<sup>206</sup> See sources cited *supra* note 205.

<sup>207</sup> See, e.g., *United States v. Nava*, 404 F.3d 1119, 1128–29 (9th Cir. 2005) (refusing to follow the minority holding of the Fourth Circuit and determining instead that federal law determines what interests are subject to forfeiture and state property law defines what the property interests); see also *Marion*, 2008 WL 151863, at \*6 (citing *United States v. Kennedy*, 201 F.3d 1324, 1334 (11th Cir. 2000) (using state law to determine petitioner's property interest then federal law to determine whether that interest was protected by the statute)).

<sup>208</sup> See *United States v. Lester*, 85 F.3d 1409, 1415 (9th Cir. 1996); *United States v. Speed Joyeros, S.A.*, 410 F. Supp. 2d 121, 125 (E.D.N.Y. 2006).

<sup>209</sup> CASSELLA, *supra* note 32, at 678.

<sup>210</sup> *Id.* at 695; 21 U.S.C. § 853(n)(6). The scope of this article does not address property rights that were created by foreign law, which requires the court to look at the law of the foreign jurisdiction. See *Speed Joyeros, S.A.*, 410 F. Supp. 2d at 125.

<sup>211</sup> See *United States v. Certain Real Prop. Located at 2525 Leroy Lane, W. Bloomfield, Mich.*, 910 F.2d 343, 353–54 (6th Cir. 1990) (Krupanksy, J., dissenting) (discussion regarding different outcomes).

<sup>212</sup> *Id.* at 348. As shown in the following discussion, there is no "innocent spouse" exception in criminal forfeiture. See *infra* text accompanying notes 213–245. The term "innocent spouse" is not used here as a protected category of third party litigants, rather, it is used to demonstrate the third party's connection to the property, that is, through marriage, and to the crime, of which there is none.

<sup>213</sup> *Certain Real Prop. Located at 2525 Leroy Lane*, at 348.

cause it was used to commit his crime.<sup>214</sup> Defendant's wife, who the Government agreed was unaware of her husband's crimes, filed a petition for a determination of her interest in the property.<sup>215</sup> In analyzing her claim, the Sixth Circuit looked to Michigan law, which provided that spouses own property as tenants by the entirety, so neither the husband nor the wife acting alone can alienate any interest in the property.<sup>216</sup> Tenants by the entirety hold a single title with right of survivorship, which entitles a wife to sole ownership of property upon the death of her husband.<sup>217</sup> Due to the property's tenancy by the entirety status, neither spouse acting alone could alienate any interest in the property, nor could the creditors of one spouse levy on the property.<sup>218</sup>

The court found that this right of survivorship was a legal interest in the forfeited real property that vested in the wife "rather than the defendant" for the purpose of 21 U.S.C. § 853(n)(6)(A) and that she had standing to contest the forfeiture.<sup>219</sup> The court rejected both the Government's argument that all of the property vested in the Government at the commission of the crime and the district court's finding that all of the property vested in the wife because of the forfeiture.<sup>220</sup> The Sixth Circuit held, instead, that because the defendant and his wife were still married, their tenancy by the entirety was intact under state law and the government could obtain only the *defendant's* interest in the property.<sup>221</sup> The Government, however, could not actually obtain the defendant's interest until the wife predeceased the defendant or the entireties estate was otherwise terminated.<sup>222</sup> Practically, this would permit the wife to live on the property during the duration of the tenancy and the Government would have a lien on the property to the extent of the defendant's interest.<sup>223</sup>

The dissent in *Certain Real Property Located at 2525 Leroy Lane* argued that applying state law in each criminal forfeiture case lacked uniformity in federal forfeitures and therefore, a federal common law should

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<sup>214</sup> *Id.* at 345.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 346.

<sup>217</sup> *Id.* at 346–47.

<sup>218</sup> *Id.* at 346.

<sup>219</sup> *Id.* at 347.

<sup>220</sup> *Id.* at 350–51.

<sup>221</sup> *Id.* at 351.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*; see also *Christunas v. United States*, 61 F. Supp. 2d 642, 646 (E.D. Mich. 1999) (holding that under the Sixth Circuit's application of Michigan property law, entirety of property may properly be the subject of a criminal forfeiture only when both spouses acting together are guilty of some criminal misconduct).

be developed to define the rights resulting from the defendant spouse's conviction with "certainty, immediacy, and some degree of spontaneous penal force."<sup>224</sup> A federal common law has not been developed, and, as the case law demonstrates, neither has a system for criminal forfeiture that establishes an innocent spouse's interest with anything close to certainty.<sup>225</sup>

Applying the state law's tenancy by the entirety in *Certain Real Property Located at 2525 Leroy Lane* accomplished the goals of criminal forfeiture: punishing the wrongdoer and protecting an innocent owner.<sup>226</sup> Applying the principles of tenancy by the entirety to an innocent spouse in the Eleventh Circuit resulted in a similar outcome for the government but on a case with markedly different facts regarding the spouses.<sup>227</sup> In *United States v. Kennedy*,<sup>228</sup> the fact that the innocent spouse repaid her husband for the money he initially put down as the down payment and that she paid the majority of the mortgage and maintenance costs, did not affect the government's ability to forfeit a portion of the property as part of her ex-husband's sentence.<sup>229</sup> Because the property was held by the couple as tenants by the entirety, each spouse had an "indivisible right to own . . . the property," and criminal forfeiture entitled the government to the defendant's portion of that right.<sup>230</sup>

In sharp contrast, Florida's tenancy by the entirety principles, when applied by the Seventh Circuit, spared *any* interest in the jointly-owned property from forfeiture.<sup>231</sup> In *United States v. Lee*,<sup>232</sup> the defendant husband was convicted of numerous federal criminal offenses, and, as a result, his interest in the family home was forfeited as a substitute asset.<sup>233</sup> The district allowed the government to become the innocent spouse's co-tenant

<sup>224</sup> *Certain Real Prop. Located at 2525 Leroy Lane*, 910 F.2d at 355 (Krupansky, J., dissenting).

<sup>225</sup> See *infra* text accompanying notes 226–255.

<sup>226</sup> *Certain Real Prop. Located at 2525 Leroy Lane*, 910 F.2d at 349.

<sup>227</sup> *United States v. Kennedy*, 201 F.3d 1324, 1333–35 (11th Cir. 2000).

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 1330–35.

<sup>230</sup> *Id.* at 1330 & n.12 (noting that if the spouse wanted to hold the property as a single owner, she could have had her husband transfer his interest to her by quitclaim deed immediately after she repaid him for the down payment); see also *United States v. Jimerson*, 5 F.3d 1453, 1454–55 (11th Cir. 1993) (finding that forfeiture against one tenant by the entireties did not affect the remaining tenant's interest in residence—other tenant continued to hold indivisible one-half interest in entire property).

<sup>231</sup> See *United States v. Lee*, 232 F.3d 556, 560 (7th Cir. 2000). But see *United States v. Fleet*, 498 F.3d 1225, 1231–32 (11th Cir. 2007) (permitting the government to forfeit the defendant spouses' interest in property held as tenancy by the entirety with his innocent spouse and noting the inconsistency of this holding with *United States v. Lee*).

<sup>232</sup> 232 F.3d 556 (7th Cir. 2000).

<sup>233</sup> *Id.* at 557.



by the entirety.<sup>234</sup> The Seventh Circuit looked to Florida state law to determine whether the defendant's interest in the property was subject to forfeiture.<sup>235</sup> Because the property was owned as a tenancy by the entirety neither spouse could sever or forfeit any part of the estate without consent of the other.<sup>236</sup> This meant that Florida law "clearly prohibited" the forfeiture of the defendant husband's interest in the family home without the innocent spouse's consent.<sup>237</sup> The arrangement ordered by the district court where the innocent spouse would own the home as a co-tenant with the government was dismissed by the appellate court as being impractical and unfair.<sup>238</sup> Such an arrangement would require the innocent spouse to obtain the government's approval for nearly every decision she made regarding the property while leaving her solely liable for the property's expenses, because the government would "not be there with its checkbook" as a spouse normally would.<sup>239</sup> The attributes of a tenancy by the entirety therefore prevented any of the defendant's interest in the family home from being forfeited as a substitute asset.<sup>240</sup>

The Fourth Circuit, in contrast, determines a third party's interest without reference to state law.<sup>241</sup> This approach is also not without its critics.<sup>242</sup> In *United States v. Morgan*,<sup>243</sup> the Fourth Circuit was called on to determine the interest of an innocent spouse in a checking account forfeited as substitute assets after her husband's multiple drug convictions.<sup>244</sup> In holding that the spouse had no interest in the forfeited account, the court held it unnecessary to consider the role of state law and instead applied a dominion-and-control test.<sup>245</sup> Concluding that defendant's spouse was "nothing more than a nominal owner" of the account, the court found that she did not have a vested or superior interest in the account, and was there-

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<sup>234</sup> *Id.* at 560.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 560–61.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 561–62.

<sup>239</sup> *Id.* at 561–62.

<sup>240</sup> *Id.* at 562.

<sup>241</sup> See *United States v. Morgan*, 224 F.3d 339, 342–43 (4th Cir. 2000); *In re Bryson*, 406 F.3d 284, 291 (4th Cir. 2005).

<sup>242</sup> See, e.g., *United States v. Hooper*, 229 F.3d 818, 820 n.5 (9th Cir. 2000); see also *United States v. Nava*, 404 F.3d 1119, 1128 (9th Cir. 2005) (disagreeing with the Fourth Circuit's determination that courts are free to reject state law when determining third parties' interests in criminal forfeitures).

<sup>243</sup> 224 F.3d 339 (4th Cir. 2000).

<sup>244</sup> *Id.* at 341–42.

<sup>245</sup> *Id.* at 342–43.

fore not entitled to any funds in the account.<sup>246</sup> The Fourth Circuit again applied this dominion-and-control test in *In re Bryson*,<sup>247</sup> holding that the defendant's son had no interest in the forfeited property because the defendant, rather than his son, exercised dominion and control over the property.<sup>248</sup>

The Ninth Circuit, however, is not willing to assess a third party's ownership interest without regard to state law.<sup>249</sup> Finding that there is no federal common law governing property interests in forfeiture cases, the Ninth Circuit requires in all cases that the federal court look first to state law to determine a petitioner's property interest and therefore, standing in the ancillary hearing.<sup>250</sup> If the state law provides a property interest to the third party, then the court is directed to look to federal law to determine whether the third party's interest may be forfeited.<sup>251</sup> Applying this principle to an innocent spouse in California, the court noted that because California is a community-property state where spouses have a vested undivided one-half interest in community property, the innocent spouse owns an undivided one-half interest in community property that was criminally forfeited.<sup>252</sup> Whether this interest may be criminally forfeited is a question of federal law.<sup>253</sup> Applying the plain language of the federal-forfeiture statutes, the Ninth Circuit determined that community property owned by an innocent spouse cannot be criminally forfeited as substitute property.<sup>254</sup> This holding, according to the court, is consistent with the purpose of criminal forfeiture, which is to punish the defendant for his crime and not an innocent owner of forfeited property, especially when the property is substitute property and has no relation to the crime.<sup>255</sup> This approach appears to have been adopted by the Eighth Circuit as well.<sup>256</sup>

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<sup>246</sup> *Id.* at 344–45.

<sup>247</sup> 406 F.3d 284 (4th Cir. 2005).

<sup>248</sup> *Id.* at 291.

<sup>249</sup> *United States v. Hooper*, 229 F.3d 818, 820 n.5 (9th Cir. 2000).

<sup>250</sup> *United States v. Nava*, 404 F.3d 1119, 1128–29 (9th Cir. 2005); *see also United States v. Lester*, 85 F.3d 1409, 1412 (9th Cir. 1996) (holding that ownership interests are defined under state law).

<sup>251</sup> *Lester*, 85 F.3d at 1412.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 1413.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 1413–15; *see also United States v. Nava*, 404 F.3d 1119, 1129 (9th Cir. 2005) (applying Montana property law and analysis to a third party's claim of interest in forfeited property).

<sup>256</sup> *See United States v. Totaro*, 345 F.3d 989, 994 (8th Cir. 2003) (holding that where a spouse held title to property forfeited due to her husband's crime, reference to state law was necessary to determine her interest in the forfeited property).

## C. RELATION BACK AND BONA FIDE PURCHASERS

Federal law, as stated in the statute, protects only two categories of persons: those with a preexisting interest at the time of the commission of the crime and bona fide purchasers.<sup>257</sup> Under the relation back doctrine, the government's interest in the property vests at the time of the crime, *unless* the property was thereafter transferred to a bona fide purchaser for value without notice.<sup>258</sup> To show that a petitioner is a bona fide purchaser under § 853(n)(6)(B), the petitioner must show that:

- (1) she gave value in return for the property subject to forfeiture with the expectation she would receive equivalent value in return;
- (2) the exchange of property for value was an arms-length transaction; and
- (3) when the arms-length transaction occurred, she was reasonably without cause to believe that the property was subject to forfeiture.<sup>259</sup>

A bona-fide purchaser is remarkable in that he or she is the only party with a protectable interest in the proceeds of a crime.<sup>260</sup> Rather than the proceeds vesting in the government at the time of the crime, they belong to the bona fide purchaser.<sup>261</sup> Thus, if a third party gives value for the proceeds of a crime to the defendant in an arm's-length transaction without notice that the property is subject to forfeiture, the third party's interest in the property—even if it is criminal proceeds—will prevail.<sup>262</sup> In *United States v. Bouska*,<sup>263</sup> the court found the plaintiff was a good-faith purchaser for value where she held a promissory note and mortgage on the property of her daughter and son-in-law.<sup>264</sup> The property, without the plaintiff's knowledge, was used by her son-in-law for narcotics activity.<sup>265</sup> Because the plaintiff loaned her daughter and son-in-law money and in return re-

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<sup>257</sup> 21 U.S.C. § 853(n)(6)(A); *see also* *United States v. Hooper*, 229 F.3d 818, 821 (9th Cir. 2000) (noting that two categories were permitted to recover under § 853(n), those with a preexisting interest and bona fide purchasers); *United States v. Soreide*, 461 F.3d 1351, 1354–55 (11th Cir. 2006) (holding that a petitioner must prove either a superior interest or status as bona fide purchaser without notice to defeat criminal forfeiture).

<sup>258</sup> CASSELLA, *supra* note 32, at 702.

<sup>259</sup> *United States v. Cox*, No. 3:05CR92, 2006 WL 1431694, at \*5 (W.D.N.C. May 23, 2006).

<sup>260</sup> CASSELLA, *supra* note 32, at 703–06 (noting that if the petitioner acquired interest in the property *after* the act giving rise to forfeiture, which is when the government's interest has already vested, it will be protected if she is a bona fide purchaser for value without reason to know of the forfeiture); *see Cox*, 2006 WL 1431694, at \*5.

<sup>261</sup> CASSELLA, *supra* note 32, at 702.

<sup>262</sup> *See Cox*, 2006 WL 1431694, at \*5.

<sup>263</sup> No. CR 96-2067 MJM, 2001 WL 34024288 (N.D. Iowa Oct. 2, 2001).

<sup>264</sup> *Id.* at \*1–2.

<sup>265</sup> *Id.* at \*1.

ceived a lien on property she did not know was being used in a crime, she was a bona fide purchaser for value and her interest in the property was superior to the government's interest.<sup>266</sup>

Likewise, spouses with a legal interest in property before the occurrence of a crime will retain that interest after the crime.<sup>267</sup> However, if a spouse's interest arose after the crime that interest will be protected only if the spouse is a bona fide purchaser for value without notice of the forfeiture.<sup>268</sup> Courts generally reject spouses' claims that they are bona fide purchasers.<sup>269</sup> A similar general statement cannot be made, however, about divorced spouses.<sup>270</sup>

In *United States v. Cox*,<sup>271</sup> the defendant and his wife were married in 1989 and separated in January 2004.<sup>272</sup> On April 5, 2005, the defendant was indicted and pled guilty to various counts of bank fraud, healthcare fraud, and money laundering.<sup>273</sup> As part of his plea, the defendant agreed to forfeit all of the proceeds from his crime to the government.<sup>274</sup> The forfeiture included \$1,065,541.96 held in a bank account which consisted almost exclusively of the bank-fraud proceeds.<sup>275</sup> One month earlier, on February 24, 2005, an arbitrator had awarded approximately \$812,000 of these funds to the defendant's wife in a judgment for the equitable distribution of property.<sup>276</sup> After all the funds were forfeited as proceeds of the defendant's crime, his wife filed a petition in an ancillary hearing opposing the forfeiture of \$812,000 of those funds, arguing that they belonged to her as a "bona fide purchaser for value and without notice" because she was awarded the funds by an arbitrator during the distribution of the marital es-

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<sup>266</sup> *Id.* at \*2.

<sup>267</sup> See *United States v. Totaro*, 345 F.3d 989, 993 (8th Cir. 2003).

<sup>268</sup> See *United States v. Brown*, 509 F. Supp. 2d 1239, 1245 (M.D. Fla. 2007) (noting there are only two ways in which a third party can show an interest in forfeited property: by having a vested interest superior to the defendant or by being a bona fide purchaser for value without knowledge)

<sup>269</sup> Cassella 2004, *supra* note 2 at 99 n.232 (noting that courts generally reject claims by spouses that are brought under the bona fide purchaser prong of the statute); *United States v. Soreide*, 461 F.3d 1351, 1356 (11th Cir. 2006).

<sup>270</sup> See *infra* text accompanying notes 271–303. Note that the following discussion does not include a review of spouses who assert a vested property interest in forfeited property due to "divorce law" rather than an actual divorce. For a discussion of courts that will not rely solely on state divorce law to provide spouses with an interest in criminally forfeited property, see *Totaro*, 345 F.3d at 997–99 (noting "several courts" that have rejected state divorce law as the only basis for a legal interest in criminally forfeited property).

<sup>271</sup> No. 3:05CR92, 2006 WL 1431694 (W.D.N.C. May 23, 2006).

<sup>272</sup> *Id.* at \*1.

<sup>273</sup> *Id.* at \*2.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at \*1–2.

tate.<sup>277</sup> The court found that the defendant's wife was a bona fide purchaser: she gave value for the funds by relinquishing her right to the marital property, she expected to receive value in return for the rights she relinquished, and the transaction was done at arms-length and without her knowledge that the money was obtained by criminal means.<sup>278</sup> The court found that the defendant's consent to forfeit the money in the account did not expand the court's power to take the property for the "obvious reason that he cannot agree to forfeit property that belongs to someone else."<sup>279</sup>

In contrast, slightly different facts in *United States v. Kennedy*<sup>280</sup> resulted in a drastically different holding. The Kennedys were married for over thirty-one years and had four grown sons before Mrs. Kennedy learned that her husband was a criminal.<sup>281</sup> Mr. Kennedy, a sales representative of high school yearbooks, engaged in a scheme to defraud his employer.<sup>282</sup> In 1995, he was convicted of mail fraud, which resulted in a sentence that included the forfeiture to the extent of \$177,445.05 in a beach house located at 2910 Sunset Way, St. Petersburg, Florida.<sup>283</sup> This was the amount the government alleged was Mr. Kennedy's interest in the Sunset Way property.<sup>284</sup> Years earlier, in June of 1989, the Kennedys had entered into a real-estate contract to buy the Sunset Way house for \$542,500.<sup>285</sup> It was Mrs. Kennedy's dream to buy the home, but Mr. Kennedy did not share her enthusiasm for the property.<sup>286</sup> Mrs. Kennedy had her own resources from her job and an inheritance from her parents, and she intended to use those resources to purchase the property.<sup>287</sup> When it was time to execute the contract, however, Mrs. Kennedy did not have the means in hand.<sup>288</sup> She, therefore, promised to pay Mr. Kennedy back if he would make the \$50,000 earnest-money deposit.<sup>289</sup> At the closing, they paid the sellers a total of \$184,445.05—an amount the jury later determined that Mr. Kennedy, unbeknownst to Mrs. Kennedy, had stolen from his employer.<sup>290</sup>

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<sup>277</sup> *Id.* at \*4.

<sup>278</sup> *Id.* at \*6–9.

<sup>279</sup> *Id.* at \*2 n.2.

<sup>280</sup> 201 F.3d 1324 (11th Cir. 2000).

<sup>281</sup> *Id.* at 1327–28.

<sup>282</sup> *Id.* at 1325–27.

<sup>283</sup> *Id.* at 1325.

<sup>284</sup> *Id.* at 1326.

<sup>285</sup> *Id.* at 1327.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

By March 1991, three months after closing, Mrs. Kennedy had repaid Mr. Kennedy checks totaling \$180,000.<sup>291</sup> Two months later in May 1991, Mrs. Kennedy learned of her husband's fraud.<sup>292</sup> Four years later, on January 27, 1995, a grand jury issued an indictment charging Mr. Kennedy with various counts of mail fraud and money laundering, including a forfeiture count, which alleged that his interest, to the extent of \$177,455.05 in the Sunset Way property, was forfeitable.<sup>293</sup> Two months later, Mrs. Kennedy filed for divorce.<sup>294</sup> In addition to repaying her husband for the down payment of the property, Mrs. Kennedy made 87% of the mortgage payments, paid the property taxes, and funded the majority of the property's maintenance.<sup>295</sup> The state divorce court awarded the Sunset Way property to Mrs. Kennedy in September 1995.<sup>296</sup> One month later, the government forfeited Mr. Kennedy's interest of \$177,445.05 in the Sunset Way property.<sup>297</sup>

Mrs. Kennedy filed a petition asserting that she was bona fide purchaser for value of the forfeited property.<sup>298</sup> In denying her this status, the court held that because the couple took title to the property as tenants by the entirety, an ownership arrangement that is peculiar to marriage, the property was not severable.<sup>299</sup> Had Mrs. Kennedy wanted the property to reflect her individual ownership, the court stated, she should have executed a quitclaim deed after she repaid him the money he put into the property.<sup>300</sup> Because Mrs. Kennedy did not create a legal ownership of the type that recognized her as the sole owner of the property, the court found that the parties did not intend for her to be the sole owner, and there had not been an arms-length transaction that would permit her to prevail as a bona fide purchaser for value.<sup>301</sup>

A bona fide purchaser for value exists only where the innocent spouse purchased the *defendant's interest* in the property without reasonable cause to believe that the property was subject to forfeiture.<sup>302</sup> In *Cox*, the innocent spouse's interest in criminal proceeds was intended to be to the exclu-

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<sup>291</sup> *Id.* at 1328.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 1325.

<sup>294</sup> *Id.* at 1328.

<sup>295</sup> *Id.* at 1328 n.9.

<sup>296</sup> *Id.* at 1328.

<sup>297</sup> *Id.* at 1325, 1328.

<sup>298</sup> *Id.* at 1329.

<sup>299</sup> *Id.* at 1329–31.

<sup>300</sup> *Id.* at 1331 n.12.

<sup>301</sup> *Id.* at 1330–31.

<sup>302</sup> See *United States v. Marion*, No. 2:06-cr-88-FtM-29SPC, 2008 WL 151863, at \*4 (M.D. Fla. Jan. 16, 2008)

sion of her spouse, and the equitable division of property judgment that transferred ownership of those proceeds to her as a bona fide purchaser for value was finalized one month before the defendant was indicted.<sup>303</sup> In *Kennedy*, the innocent spouse filed for divorce two months after the Sunset Way property was listed in the indictment.<sup>304</sup> Was the ruling in *Cox* the result of a “sympathetic court,” or was it based on the purpose of criminal forfeiture, which is to punish the defendant and not a third party?<sup>305</sup> Regardless, in cases regarding criminal forfeiture and bona fide purchasers under § 853(n)(6)(B), similar facts in different courts will result in different conclusions.

## V. CONCLUSION

From the complexity of its statutory authorization through its inconsistent application to third parties, the application of criminal forfeiture is unclear.<sup>306</sup> This lack of clarity has spawned more than three decades of confusing and conflicting decisions. In one jurisdiction, the government may restrain substitute assets before the trial, while in another, it may not forfeit substitute assets even after a conviction.<sup>307</sup> An innocent third party in one jurisdiction can be confident that any property held with an indicted defendant will not be seized, while a similarly situated third party located in a different jurisdiction cannot be so sure.<sup>308</sup> A spouse in the Seventh Circuit, who holds the family home as tenants by the entirety and who knew nothing of the other spouse’s criminal activity can be certain before the conclu-

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<sup>303</sup> *United States v. Cox*, No. 3:05CR92, 2006 WL 1431694, at \*9 (W.D.N.C. May 23, 2006).

<sup>304</sup> *Kennedy*, 201 F.3d at 1328.

<sup>305</sup> *Cf.* Stefan D. Cassella, *Criminal Forfeiture Procedure in 2007: A Survey of Developments in the Case Law*, 43 CRIM. L. BULL. 461 (2007) (questioning whether the court’s findings in *Cox* that the spouse was unaware her award could be criminal proceeds was based on sympathy); *see also* Caplin & Drysdale, *Chartered v. United States*, 491 U.S. 617, 638 n.5 (1989) (noting that criminal forfeiture is penal in nature and that the government’s penal interests are “weakest when the punishment also burdens third parties”) (Blakmun, J., dissenting).

<sup>306</sup> *See* *United States v. Thompson*, No. 02-CR-116, 2002 WL 31667859, at \*1–2 (N.D.N.Y. Nov. 26, 2002) (identifying the government in being confused as to what statutes authorized criminal forfeiture and what procedures applied); *cf.* *United States v. Schlesinger*, 396 F. Supp. 2d 267, 275 (E.D.N.Y. 2005) (illustrating the confusing nature of the application of criminal forfeiture by disagreeing with *United States v. Thompson*).

<sup>307</sup> *Compare In Re Billman*, 915 F.2d 916, 920 (4th Cir. 1990) (permitting the pre-trial restraint of substitute assets), *with* *United States v. Lee*, 232 F.3d 556, 560 (7th Cir. 2000) (refusing to permit criminal forfeiture of substitute property owned by spouses as tenants in the entirety).

<sup>308</sup> *Compare* *United States v. Ripinsky*, 20 F.3d 359, 365 (9th Cir. 1994) (recognizing that the pre-trial restraint of substitute assets can cripple a business and destroy an individual’s livelihood), *and* *United States v. Floyd*, 992 F.2d 498, 499 (5th Cir. 1993) (rejecting the argument that substitute assets were subject to pretrial restraint), *with* *United States v. Bromwell*, 222 Fed. App’x 307, 308 (4th Cir. 2007) (permitting the pre-trial restraint of substitute assets).

sion of a criminal trial that the family home will not be forfeited as a substitute asset.<sup>309</sup> A spouse in the Sixth Circuit in nearly the identical situation can expect to share the family home with the government until he or she sells it or dies.<sup>310</sup> These discrepancies belie the purpose of criminal forfeiture: to punish a convicted criminal, not to confuse litigants.<sup>311</sup>

An appropriate use of forfeiture can destroy criminal organizations, while its inappropriate use can destroy the lives of innocent people.<sup>312</sup> The appropriate use of criminal forfeiture would get a boost from uniform application that is driven by the recognition of criminal forfeiture's putative purpose. In establishing a more uniform criminal forfeiture jurisprudence, courts should be mindful that, at its essence, criminal forfeiture exists to punish a criminal defendant.<sup>313</sup>

It was not until the mid-1990s that case law regarding third-party rights began to emerge; unfortunately, its emergence has shown that third-party rights are little more than an afterthought.<sup>314</sup> Criminal forfeiture should not extend to the interference with the rights of innocent third parties—an effect that is counter to its very objective. Putting the rights of innocent third parties in a predictable light will also give third parties the knowledge they need to protect their rights.<sup>315</sup> A more precise application of criminal forfeiture will also lead to greater deterrence of criminals across the country because the property they own in any state will be subject to the same forfeiture analysis.

This could be accomplished by the establishment of federal common law, a method advocated by the dissent in *2525 Leroy Lane*, which argued that federal common law should be developed to define the rights resulting from a defendant spouse's conviction to achieve certainty within the penal system.<sup>316</sup> Another possibility is for Congress to draft a clear statute au-

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<sup>309</sup> See, e.g., *United States v. Lee*, 232 F.3d 556, 560 (7th Cir. 2000).

<sup>310</sup> See, e.g., *United States v. Certain Real Prop.* Located at 2525 Leroy Lane, W. Bloomfield, Mich., 910 F.2d 343, 351 (6th Cir. 1990).

<sup>311</sup> See *United States v. Totaro*, 345 F.3d 989, 997 (8th Cir. 2003) (noting the purpose of criminal forfeiture is to punish the criminal).

<sup>312</sup> WILLIAMS, *supra* note 9, at 81.

<sup>313</sup> *United States v. Lazarenko*, 504 F. Supp. 2d 791, 800 (N.D. Cal. 2007) (noting that criminal forfeiture is a punitive sanction against the defendant).

<sup>314</sup> Cassella 2004, *supra* note 2, at 82–83, 93.

<sup>315</sup> See *United States v. Ripinsky*, 20 F.3d 359, 365 (9th Cir. 1994) (noting the “extensive powers” criminal forfeiture provides the government).

<sup>316</sup> See *United States v. Certain Real Prop.* Located at 2525 Leroy Lane, W. Bloomfield, Mich., 910 F.2d 343, 355 (6th Cir. 1990).



thorizing and regulating criminal forfeiture.<sup>317</sup> Yet another possibility is that the United States Supreme Court would address the issues in conflict among the circuits.<sup>318</sup>

Regardless of the method used, clarity must be achieved. A cohesive application of criminal forfeiture will provide the government, the defendant, and innocent third parties with the knowledge that, whether their property is held in Nevada or Maine, it is subject to the same forfeiture analysis. Such uniformity will make criminal forfeiture more predictable and transparent, which will, in turn, make it more efficient and fair.

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<sup>317</sup> CASSELLA, *supra* note 32, at 742–43 (stating “[o]ne of the truly lamentable features of federal forfeiture law is that there is no single statute that simply says, ‘the Government may forfeit any property obtained or retained as a consequence of the commission of a criminal offense.’”) Congress’ attempt at such a statute through the adoption of Civil Asset Forfeiture Reform Act of 2000 (CAFRA) has not, as evidenced by commentators and case law, proven to provide the desired clarity.

<sup>318</sup> Sanford Levinson, *Book Review: Strategy, Jurisprudence, and Certiorari: Deciding to Decide: Agenda Setting in the United States Supreme Court*, 79 Va. L. Rev. 717, 726 (1993) (stating that the “‘single most important factor’ for granting certiorari petitions . . . is a split within the circuits that have considered the issue below” (quoting H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 251 (1991))).