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February 4, 1999

Interested Members
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Washington, DC 20544

Re: Proposed Changes in Federal Rules of Criminal Procedure Applicable to Criminal Forfeitures: Agenda Item at March 15, 1999, Meeting of Judicial Conference

Dear Interested Member of the Federal Judiciary:

The National Association of Criminal Defense Lawyers writes to ask that you request that the proposed changes in the Federal Rules of Criminal Procedure governing criminal forfeitures be removed from the consent calendar and put down for discussion on the agenda of the Judicial Conference meeting on March 15. NACDL, as you may know, is a 40-year-old, well-respected specialized bar association of private and public criminal defense lawyers; we have more than 10,000 national members, and our 80 affiliates in all 50 states enjoy a total membership of some 28,000. While we believe that the Conference, after full study and discussion, would have to reject these changes on their merits, we cannot and do not expect more at this stage of the process than for the proposal to be sent back for republication and more fuller consideration of the very serious objections we have raised to the present, revised draft.

NACDL submitted written comments opposing an earlier version of these changes to the Criminal Rules Advisory Committee in February 1998; the Department of Justice responded to our comments, and we in turn provided a written reply. We were then invited to present live testimony before the Advisory Committee in April. The principal focus of our opposition at that time was the then-proposed abolition of the time-honored right to jury trial in criminal forfeiture matters, although we addressed many other issues in our written submission. While the Advisory Committee approved the proposal last spring, the Standing Committee voted it down. We thought then that we had seen the end of this ill-conceived effort by the Department of Justice to misuse the Rules Committee in furtherance of a substantive legislative agenda for expansion of the government's forfeiture powers that Congress has refused to endorse. Just before Christmas, however, to our surprise, we fortuitously

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learned that the Advisory Committee, at its October meeting, had considered a substantially revised proposal. The latest revision contains not only reconstructed versions of all the objectionable features of the 1997 proposal except the total abolition of jury trial, but also entirely new and equally controversial provisions that had never been circulated for public comment. We also learned that the Advisory Committee had passed this proposal on to the Standing Committee without even recommending republication, albeit by only a 4-3 margin, and with the inaccurate assertion that many of these provisions had received no public opposition. In fact, NACDL had adamantly opposed them, in writing, giving detailed reasons, as had the appropriate ABA committee and others. We managed to put our objections in writing before the Standing Committee in January, but the proposal was approved, with only a slight revision to be made in one part of the Committee Note.

The current proposal to amend the Criminal Rules (specifically, Rules 7(c), 31(e), and 32(b)) regarding forfeitures continues to be fundamentally flawed in numerous particulars. In key respects, the proposal is inconsistent with governing statutory provisions. It also appears to breach the Rules Enabling Act wall between permissible "procedural" reform and prohibited effect on "substantive rights." 28 U.S.C. § 2072(b).

In the past, the Department of Justice has managed occasionally to bypass and even to defeat the Judicial Conference's deliberative and rational rule-making processes by steering amendments through Congress to reject or avoid thoughtful Standing Committee decisions. Here, ironically, the Department is attempting to get the Conference to do its bidding after failing in Congress. NACDL has opposed these efforts on both fronts, and will continue to do so. For the reasons elaborated in this letter, the Conference should reject these ill-advised changes outright. At the very least, the Conference should take them off the consent calendar and send them back for publication and a new comment period.

A. The Amended Proposal Would Make a Substantive Change in the Role of the Jury in All Criminal Forfeiture Cases, Would Turn Over Private Property of Innocent Persons to the Government Without any Statutory Basis, and Would Abolish an Existing Right to Jury Trial of a Forfeiture Allegation When a Defendant Pleads Guilty to the Underlying Offense.

The present proposal properly retreats from the original, radical 1996 proposal of the Department of Justice, published for comment in 1997, that would have abolished entirely the jury trial right presently guaranteed by Fed.R.Crim.P. 31(e). But the revised, 1998 version now passed by the Standing Committee would adopt an entirely new statement of what issue would be triable to the jury -- a rule that is inconsistent with all the statutes creating the forfeiture penalty and with the essential nature of

criminal forfeiture -- and eliminates the existing right of a defendant to demand a trial by jury of a contested forfeiture allegation, despite having pleaded guilty to one or more offenses contained in the indictment. Worst of all, the net result of the new procedure established by this Rule would be a totally unauthorized transfer to the government of complete title to private property in which a convicted defendant is alleged to have had any sort of interest, whenever innocent third parties are too frightened, too ignorant, too poor, or too poorly represented to prove that property seized by the government in fact belongs, at least in part, to them. Not a single persuasive reason has been offered, nor does any exist, for restricting the jury trial right presently guaranteed by Fed.R.Crim.P. 31(e), or for so expanding the government's power to appropriate citizens' private property.

By eliminating the requirement for a determination of the "extent" of the defendant's forfeitable property or interest in property, the presumption and default outcome under the proposed revision would be 100% forfeiture of any tainted property in which the defendant had any interest at all -- which is contrary not only to the statutory scheme but also to the very nature of criminal forfeiture, as compare with civil forfeitures. In civil forfeiture the property itself is treated as the defendant; that is what is meant by "in rem." In criminal forfeiture, by contrast, it is the convicted defendant's personal interest in the property to which the government may succeed, which may or may not be 100% ownership. The present rule, or something very like it, is therefore necessary to comply with the statutory scheme, which calls for forfeiture not of an item of property, per se, but rather of "the person's property" that has been misused in specified ways, see, e.g., 21 U.S.C. § 853(a), meaning, of course, the convicted person's interest in any item of property only.

Coupled with the proposed elimination of the specific charging requirement from Rule 7(c), as discussed under Point B of these comments, the result would be devastating to the property rights of convicted defendants and innocent third parties alike, particularly where, due to fear or ignorance, to failures of notice, or to unavailability of legal resources, no third party files a claim.

1. Asking the Factfinder the Wrong Questions.

Proposed amended Rule 32.2(b) would eliminate the present requirement of Rule 31(e) requiring a factfinder's determination of the "extent of the interest or property subject to forfeiture." Instead, in a case where "specific property is sought to be forfeited," the jury (or judge if a jury trial was not invoked) would be asked to determine "whether the government has established the requisite nexus between the property and the offense." That is the key issue for in rem (civil) forfeiture, but an affirmative answer to that question will not, by itself, support an in personam (criminal)

forfeiture. See United States v. Bajakajian, 524 U.S. --, 141 L.Ed.2d 314, 326-29, 118 S.Ct. 2028 (1998) (discussing essential differences between civil and criminal forfeitures). Alternatively, if "the government seeks a personal money judgment against the defendant," then the issue would be "the amount of money that the defendant will be ordered to pay." Prop. R. 32.2(b)(1). (The notion of a forfeiture claim's leading to entry of a "personal money judgment" is discussed under Point C below.) The court would then simply would order forfeited "whatever interest each defendant may have in the property, without determining what that interest is." Indeed, under this proposed radical revision of the process, no determination of the defendant's forfeitable interest would ever be made; instead, the government would eventually gain ownership of whatever property or rights to property are found to have that "requisite nexus" and which are not successfully claimed by a third party, apparently premised on a legal fiction that the unclaimed residuum must be the defendant's.

The present rule requires the jury to determine "the extent of the interest or property subject to forfeiture, if any." As the Court correctly held in United States v. Ham, 58 F.3d 78 (4th Cir. 1995), Rule 31(e) presently assigns to the jury the task of determining the extent of the defendant's forfeitable interest, if any, in the allegedly forfeitable property. The proposed new Note cites no authority to the contrary; there is no ambiguity here to resolve by amendment.

Eliminating any provision for determining the extent of the defendant's interest in the property also has the effect of blocking enforcement of the Supreme Court's recent decisions holding that a statutorily-mandated forfeiture may nevertheless be constitutionally impermissible under the Eighth Amendment's Excessive Fines Clause. Bajakajian, supra; Alexander v. United States, 509 U.S. 544 (1993). It is rather difficult to see how the district court is to make an excessiveness determination without knowing the extent, and thus the value, of the defendant's statutorily-forfeitable interest.

In addition, under this proposal, the identity and extent of the property to be forfeited from the defendant would not be capable of specific description as of the time of sentencing. Thus, even though the amended Rule would continue the present practice of making the criminal forfeiture part of the judgment of sentence, Rule 32.2(b)(3), the result under this proposal, unlike present practice, would be a criminal judgment that was not definite and "final" in the sense required by 28 U.S.C. § 1291 and Fed.R.App.P. 4(b). An order providing for the forfeiture of a defendant's interest "whatever it may be" in certain property is more akin to a verdict on liability before damages are assessed. Confusing new issues of appealability of the entire criminal case would arise. See also United States v. Daugherty, 296 U.S. 360, 363 (1926) ("Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehension by those who must execute them."). An indefinite criminal forfeiture order, such as this Rule would generate, cannot be executed; it would also resemble an unconstitutional "forfeiture of estate." See Art. III, cl. 3, § 2.

The proposed Committee Note, copied essentially verbatim from the DOJ's "Explanation" of its 1996 submission, identifies the determination of "extent" as a "problem" with the current Rule 31(e) (*ll.* 138, 164). Far from being a "problem," the present language accurately reflects both the historical role of the common law jury in this process and the present statutory scheme. It should not be eliminated.

2. Diminution of Third-Party Rights and Unauthorized Government Property-Grab.

The fundamental structural flaw in the latest version of this proposal is revealed in the Note's expressed theory that the statutes' provision for an ancillary hearing makes the present Rule an "unnecessary anachronism," as DOJ's Explanation, repeated in the proposed Note (*ll.* 205-06), puts it. Contrary to the elaborate but wholly misleading summary of current practice for determining criminal forfeitures set forth by the DOJ and unfortunately adopted in the proposed Note, the extent of a defendant's interest in allegedly forfeitable property is not litigated (even indirectly) in the third-party "ancillary proceedings." In fact, the applicable statutes prohibit the defendant from participating in those proceedings to litigate the extent of the defendant's own interest. 18 U.S.C. § 1963(l)(2); 21 U.S.C. § 853(n)(2); see also 18 U.S.C. § 1963(l)(4); 21 U.S.C. § 853(n)(4) (prohibiting consolidation of proceedings to resolve third parties' claims with any petition by defendant). Thus, the procedure set forth in proposed Rule 32.2 would eliminate any determination at all of the identity, measure or scope of the defendant's interest -- even though that is what the statutory law makes forfeitable. The judge would order forfeiture of "the defendant's interest" in the charged property, without further specification, whatever that might be; then, after the ancillary hearing (or when the time to file third party claims had expired) the government would obtain title to any and all of the property not determined to belong to someone else.

This change would give the government a huge and substantively unauthorized windfall in those cases where the third party does not come forward for whatever reason -- lack of notice, fear of possible criminal or civil liability, ignorance, confusion and turmoil due to a family member's recent conviction, lack of funds to hire counsel, or whatever. Take the following, for example. Suppose the lessee of a small gift shop in the basement concourse of a big-city office building is using the shop to occasionally sell a few grams of crack cocaine. He is indicted. The government gives notice to the defendant that it will seek criminal forfeiture as part of his sentence (which, of course, includes the defendant's legal interest in the gift shop which was used to facilitate the offense, although under the part of this proposal dealing with notice under Rule 7, the indictment would no longer have to say so, despite the minimum Due Process requirement of fair notice). Under current law, the most the government could ever get is the

defendant's leasehold interest. Under the proposed revision, the defendant would have no clear forum to question, for example, whether the unsold, legal inventory of the shop, or the money in the cash register, was forfeitable. The defendant must be allowed a forum to litigate the question of taint, yet how is he or she even to know what particular property is at risk? And if a bill of particulars were filed identifying "the defendant's interest, if any, in the property located at X address," and the owners of the building did not appreciate the significance of the notice inviting them to file a third party claim, the government would gain clear title not only to the lease, which is the only property which by law was forfeitable, but to the entire building.

This example, while dramatic, is not farfetched. The proposed change will unjustly enrich the government whenever a third party owner fails to file a claim, even if the defendant had only a 1% interest in the property or a non-ownership interest. One of our committee members is presently defending a case in which the defendant had a leasehold interest in real property that was used to grow marijuana. The government knew at the time it returned the indictment that someone else owned the property, but it nevertheless claimed criminal forfeiture of the property. Fortunately, the owners filed a third party claim -- at their own considerable expense -- and established their superior interest. The government then commenced a separate civil forfeiture action against the property, forcing the third party to litigate the same matter again under a different set of legal rules and a different standard.

Instead of instituting reforms to stave off such abuses, the current proposal would make them routine. It was in connection with a forfeiture case, after all, that the Supreme Court pointed out that fairness in the adversarial process "is of particular importance ... where the Government has a direct pecuniary interest in the outcome of the proceeding." United States v. Good Real Property, 510 U.S. 43, 126 L.Ed.2d 490, 504 (1993). Likewise, "it makes sense to scrutinize governmental action more closely when the State stands to benefit." Id. at 505, quoting Harmelin v. Michigan, 501 U.S. 957, 978 n.9 (1991) (Scalia, J., concurring). Far from "streamlining" the process so as to facilitate such a result, the Judicial Conference should be scrutinizing the process for ways to increase procedural fairness. If the goal is to avoid any possibility of two hearings on the same issue, which is the ostensible motivation for the entire fundamental restructuring of criminal forfeiture procedure that this Rule would create, the solution is to let the defendant appear in the ancillary hearing and to allow a jury trial there. Unfortunately tracking the Department's single-minded advocacy, the proposed Committee Note (*ll.* 421-27, 447-49) states that the court would still have to make a finding that at least one of the defendants had a "legal or possessory interest" in the property, even if no one files a claim in the ancillary hearing. This is a meaningless "safeguard." It is not apparent when or in what proceeding that determination would be made under this proposal; the proposed rule nowhere calls for it. Any such finding,

under the procedure defined by the proposal, would be a mere ex parte determination. In any event, it would be a rare case in which at least one of the defendants did not have at least a possessory interest in the property, yet a mere possessory interest, under the law, provides no basis at all for forfeiture.

The explanation offered in the notes as to why the extent of the defendant's interest need not be determined at the time the preliminary order of forfeiture is entered not only fails to justify the change, but it ignores the significant consequence and unfair effect of the change. Precisely because defendants do not have any interest in opposing the forfeiture of property that is not actually theirs -- or may understandably be focused on protecting their liberty, even at the possible expense of their property -- there needs to be a determination made by the jury or judge of the nature, identity and extent of the defendant's interest. Otherwise, the property of third parties will always be at risk of erroneously being forfeited without any restriction. If a jury has determined that a particular interest in property is the defendant's, then there is at least some justification for requiring a third party to come forward, make a contrary claim, and perhaps even to bear a burden of proof to overcome that special criminal verdict.

But under this proposal, property in excess of that which is legally forfeitable in a criminal case -- that is, property which is not the defendant's, and which is certainly not the government's -- will routinely be included in "preliminary" orders of forfeiture. The failure to specify and determine the extent of the defendant's interest thus has the effect of requiring third party ancillary hearings that would be unnecessary if the extent of the defendant's interest were specified. The government then gets to keep the innocent third parties's property, as well as an indeterminate portion of the defendant's property, unless the third party comes forward and meets its burden at an ancillary hearing. The failure to specify the defendant's interest also gives the government an unfair advantage in the ancillary proceeding because the third party must make his or her claim without knowing the extent of the property the government is able to show belongs to the defendant -- which is the only property that legally should be at risk in the criminal case.

In her Sept. 14, 1998, letter to her fellow subcommittee members, a copy of which is attached, Professor Kate Stith of Yale Law School makes our central point with admirable succintness. As Professor Stith incisively shows, this rule revision would create a presumption that property used in, or constituting proceeds of a crime belonged to any person convicted of that crime. Not only is this presumption of dubious factual validity, it constitutes a major substantive change in the law not appropriately achieved by a change in the Rules of Criminal Procedure.

3. Changing the Quality and Burden of Proof.

Rule 32.2(b)(1), as proposed, would allow the court's determination of forfeitability to be based on "evidence or information" presented by the parties. The

term "information," as used here, obviously means something other than "evidence." As a result, the rule would allow a shocking departure -- perhaps even an unconstitutional one -- from the present requirement that a criminal forfeiture be established under the same rules of evidence that apply in the guilt phase of a criminal trial. A criminal forfeiture cannot be based on rank hearsay and proffers.[1] This proposed revision of the Rule must be rejected for this reason alone.

The proposed Committee Note also errs in repeating the DOJ's fundamentally misleading claim about the burden of proof for criminal forfeiture being a preponderance of the evidence. First, the burden of proof is a legislative or constitutional matter, involving the striking of a balance between individual rights and government power. It is not one of mere "practice and procedure" but rather affects a "substantive right." 28 U.S.C. § 2702(b). If a Rule or Note must allude to or implicitly resolve such a question, however, the Judicial Conference position should be based on a thoughtful and balanced assessment of the case law, historical tradition, and Congressional intent. Moreover, it has been our observation that when the Rules propose to resolve a point on which there is a disparity of views in the case law, the Note will say so candidly, not argumentatively. These high standards are not met here.

NACDL believes that both the Sixth Amendment and Congressional intent impose a burden of proof beyond a reasonable doubt in all federal criminal forfeiture cases. The proposed Committee Note selectively cites a handful of incorrectly decided cases (again copied from the DOJ "Explanation") to the contrary, all of which simply ignore Congress' clear requirement of proof beyond a reasonable doubt. The case law under RICO, citing legislative history that is crystal-clear, strongly establishes that the burden of proof is beyond a reasonable doubt for criminal forfeiture. See United States v. Pelullo, 14 F.3d 881, 902-06 (3d Cir. 1994) (criminal RICO forfeiture requires proof beyond a reasonable doubt); United States v. Pryba, 674 F.Supp. 1518, 1520-21 (E.D.Va. 1987), aff'd, 900 F.2d 748 (4th Cir.), cert. denied, 498 U.S. 924 (1990) (same); United States v. Cauble, 706 F.2d 1322, 1347 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984) (same). See also 18 U.S.C. § 1467(c)(1) (beyond-a-reasonable-doubt burden for criminal forfeiture in obscenity prosecutions). None of these authorities is mentioned in the Note.

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[1] Tending to confirm our alarm at this language is the proposed Note's indirect suggestion, offered by way of contrast to the ancillary hearing, that the Federal Rules of Evidence are not thought applicable to the forfeiture phase of a criminal trial. (Note, at *ll.* 464-66). To the contrary, it is commonly understood under present practice that the Rules do apply, and this should not be changed -- certainly not without input from the Evidence Rules Advisory Committee.

Although most of the case law now holds that the burden is only a preponderance in money laundering and ordinary drug cases, the Senate Report on the 1984 legislation which included what became 21 U.S.C. § 853 (criminal forfeiture in drug cases, later incorporated by reference for procedural aspects of money laundering forfeiture), S.Rep. 98-225, 98th Cong., 2d Sess. (1984), demonstrates Congress's understanding that the government's overall burden of proof under § 853, as well as under the amended RICO forfeiture provisions, would remain beyond a reasonable doubt. Id. at 209, discussed in Pelullo, 14 F.3d at 905; accord, United States v. Elgersma, 929 F.2d 1538, 1547-48 (11th Cir. 1991) (discussing legislative history), overruled, 971 F.2d 690 (1992) (in banc). See also H.Rep. No. 845, 98th Cong., 2d Sess. 18, 38 (1984) (adopting Justice Department's request for language that criminal forfeiture must be established by proof beyond a reasonable doubt in both RICO and drug statutes). See 2 David B. Smith, *Prosecution and Defense of Forfeiture Cases* ¶14.03, at 14-39 to -41 (12/98 rev.).[2] In fact, the DOJ language adopted in the proposed Note is a reversal of its position taken when its policy-makers were closer to the legislative history; then, the government conceded that the burden of proof under § 853 is also beyond a reasonable doubt. See United States v. Dunn, 802 F.2d 646, 647 (2d Cir. 1986) (agreeing with government's position that burden of proof is beyond-reasonable-doubt), cert. denied, 480 U.S. 931 (1987).

The Judiciary should not endorse or adopt the improper effort of the Executive Branch to undermine Congressional intent and pertinent case law, by approving this part of the proposed Note. If the Administration thinks the burden of proof for criminal forfeiture should be lowered to a mere preponderance, it should look to Congress, as it has so far unsuccessfully attempted to do.[3] In short, even if some version of this proposal passes, the Conference should not weigh in on the burden of proof issue by including language in the Note that treats this question as simple or settled. The matter is at best controversial.[4]

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[2] The cases selectively cited in the proposed Note are based on a dubious inference from the language of 21 U.S.C. § 853(d), which applies to drug proceeds only. D.B. Smith, id.

[3] The history of the highly contentious struggle in Congress in recent years to reform the federal forfeiture laws is recounted in detail in 1 D.B. Smith, supra, ¶1.02, at 1-20 to 1-23.

[4] The Department's partisan position further taints the proposed Note at lines 447-62, which gratuitously advances the DOJ's bald assertion that co-defendants are jointly and severally liable for any forfeiture even where the government is able to determine precisely how much each benefited from a scheme. This is a

4. Restriction of the Right to Jury Trial

Although abolition of the right to jury trial in criminal forfeiture matters caused this proposal to be defeated by the Standing Committee in June, the jury trial right as preserved in the current, revised proposal is merely the rump of the present right. First, it would only apply in a case in which the finding of guilt was made by a jury. Presently, a defendant can plead guilty to criminal charges and still demand a jury trial on the forfeiture aspect of the case -- although that rarely happens. Why should a defendant (or the judge) be forced to go through a jury trial on the issue of guilt just to preserve his or her right to a jury trial on a contested allegation of forfeiture? Neither the jury nor the judge determines the extent of the defendant's interest in the property during the guilt phase of the criminal trial, nor is that a necessary aspect of any plea colloquy.

The rump jury trial right would also not be applicable when the government seeks a "personal money judgment" against the defendant. In Point C below, NACDL disputes whether there is any such form of criminal forfeiture. But certainly there is no special reason to leave this type of forfeiture judgment up to the judge. A jury is just as capable of determining the amount of proceeds received by a defendant or group of defendants, or the amount of funds involved in money laundering, or which the defendant failed to declare at the border, or which were structured, or the like, and such issues are no less likely to be factually contested than any other.

The only real reason that the government opposes jury determinations is that juries sometimes refuse to forfeit homesteads or personal property. The jury, the government supposes, is more likely to harbor doubt about the defendant's culpable ownership or to reject a perceived overreaching by prosecutors, or even occasionally to act on sympathy for the defendant's family's plight. The government considers such displays of humanity and common sense -- which are entirely consistent with the jury's historic function as the conscience of the community, shielding the citizen in particular cases from the law's harshness or the prosecutor's zeal -- an intolerable interference with its profitable forfeiture program. The current proposal has nothing to do with procedural reform or improving the fairness of the process; it has only to do with an unchecked desire by the DOJ to win and to punish.

If the English Crown could tolerate the occasional, case-specific display of moderation, conscience, or humanity by English and colonial juries, so can the mighty United States Government in the late twentieth century. Indeed, if the government fails to win the criminal forfeiture, and feels that justice has not been served, it can

_____(footnote continued)

substantive issue, on which the Judicial Conference, as such, could not have a view.

always pursue a civil remedy in addition. See United States v. Ursery, 518 U.S. 267 (1996) (no double jeopardy bar).

B. Proposed Amendment to Rule 7(c): Averment in the Indictment of the Specific Property Subject to Forfeiture.

Proposed Rule 32.2(a) would further devastate the fairness of the criminal forfeiture process by destroying the grand jury's function. This proposal would replace current Rule 7(c)(2), which requires that the indictment or information allege "the extent of the interest or property subject to forfeiture," with a requirement that the charging instrument merely aver "that a defendant has a possessory or legal interest in property that is subject to forfeiture." Although the courts have generally held that Rule 7(c)(2) does not require that an indictment or information itemize the property alleged to be subject to forfeiture, NACDL believes a specification requirement is plainly implicit in Rule 7(c)(2)'s current "extent" language. Far from undermining this minimal protection, any amended Rule ought to require such averments expressly. Otherwise, the grand jury cannot serve as a check on the prosecutor's power to restrain or seize property without probable cause.

The present language of Rule 7(c) barely suffices to satisfy the due process requirement that an accused person receive notice of the penalty s/he faces. See BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 1598 (1996). The pleading requirement of present Rule 7(c) cannot be further watered down and survive constitutional attack.

Due process has two components: the right to adequate notice and a meaningful opportunity to be heard. This proposal attacks both components of due process. The proposal would amend Rule 7(c)(2) to abolish the requirement that the indictment specifically allege the "extent" of the property subject to forfeiture, replacing it under Rule 32.2(a) with a meaningless averment that would add little or nothing to the "notice" already afforded by the criminal statutes themselves. DOJ apparently reasons that because some courts have ignored the clear language of the Rule, the Rule should be changed to conform to those court decisions. (In this regard, the Note [again, tendentiously] cites only United States v. DeFries, 129 F.3d 1293 (D.C.Cir. 1997), virtually ignoring the unanimous judgment of other courts that specific notice, at least through a bill of particulars or discovery, is required.[5]) NACDL disagrees that Rule

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[5] The proposed Advisory Committee Note (*ll.* 125-30) obliquely cites United States v. Moffitt, Zwerling & Kemler, P.C., 83 F.3d 660, 665 (4th Cir. 1996), a case arising out of a third-party ancillary proceeding, in which the comment about the

7(c) now permits less than itemized notice, as did the Supreme Court in Caplin & Drysdale, Chtd. v. United States, 491 U.S. 617, 632 n.10 (1989) (noting Rule 7(c)(2)'s requirement that "any assets which the Government wishes to have forfeited must be specified in the indictment").[6]

Most critical in regard to the proposed evisceration of Rule 7(c) is the inter-relationship of this rule and the restraining order provisions of the statutes. The criminal forfeiture statutes authorize the government to restrain or seize property (other than as "substitute assets") upon the return of an indictment alleging that specific property is subject to forfeiture. The only check on the prosecutor's already awesome power to seize or restrain defendants' assets when they are most in need of them to defend themselves is the grand jury.

Rebuffed by the courts under the current statutes, the DOJ has recently asked Congress to expand its criminal forfeiture powers vastly by allowing it to restrain or seize "substitute" (i.e., untainted) assets, again based solely on the return of an indictment against the defendant alleging forfeiture. Although the requirement that the grand jury pass on each item of property allegedly subject to forfeiture is a totally inadequate safeguard for property rights, it is the only safeguard in the current statutory scheme. That is why the DOJ is now trying to get the Judicial Conference to abolish it, essentially making the judge a rubber-stamp for what would turn into an administrative forfeiture scheme only nominally labelled as "criminal," but stripped of any of the protections that adhere to the criminal process. If Rule 7(c)(2) is undercut, the whole theory behind the restraining order provisions of the statutes falls apart.

Even if notice given through a bill of particulars or less formal means satisfies the due process standard recognized in the BMW case, notice outside the indictment clearly does not establish probable cause. Thus, there could be no justification for issuing a restraining order without a hearing. Rule 7 thus cannot be amended and replaced with proposed Rule 32.2(a) unless Congress first amends the restraining order provisions, or

_____(footnote continued)

sufficiency of the bill of particulars was therefore dictum, and in which the indictment did, in any event, mention $168,000 in currency, which the government later claimed had been used to pay the firm's fee. The Note also mentions the discussion in United States v. Voigt, 89 F.3d 1050 (3d Cir. 1997), about substitute assets (while misspelling the name of the case), an entirely different subject (see Point D below).

[6] Some of the dictum in this footnote was disavowed in Libretti v. United States, 516 U.S. 29 (1995), but not Caplin & Drysdale's reading of Rule 7(c)(2)'s plain meaning.

the Committee adds a due process hearing protection to be invoked before a restraining order can be issued. See 2 D.B. Smith, supra, ¶14.01, at 14-3 to 14-4.

Rather than adopt the proposed amendment, the Standing Committee should instruct the Advisory Committee to clarify the Rule's longstanding language. Despite some judicial decisions to the contrary, the Rule must provide that only property or interests in property specifically named in the indictment may be forfeited criminally, and then only to the "extent" (that is, up to the value in dollars or other measure of the interest) alleged in the indictment. Likewise, where the statute in question authorizes forfeiture of property "derived from" or which "represents" the primary forfeitable asset, and the government relies on that theory, the indictment should be required to advance those averments as well. This is because the jury, not the judge, is to make the factual determination of what particular property has been exchanged for the property that bore the original tainted relationship to the criminal offense.

C. Endorsement of the Non-Statutory Concept of a "Personal Money Judgment" as a Form of Criminal Forfeiture.

One of the most radical substantive changes that this rule would create -- entirely new in this version of the proposal and never submitted for public comment -- is the apparent endorsement of the notion that a court can impose a "personal money judgment" as a form of criminal forfeiture. Prop. R. 32.2(b)(1). Notwithstanding certain erroneously-decided cases, there is no statutory authority for this concept, which the Conference should not allow the Department of Justice to slip into the Rules. While we appreciate that in response to our objection on this point the Standing Committee directed the Reporter to draft language to add to the Note that would disavow endorsement of the substantive concept, we believe that implication will be unavoidable, and that the revised Rule would necessarily give unwarranted support to a wholly invalid legal concept.

Congress has never authorized the forfeiture of simple dollar amounts; no statute directs imposition of a money judgment equal to the amount of illegal proceeds or laundered funds, for example. By their terms, and by their nature, the forfeiture statutes allow seizure only of specific real or personal property that has been the subject of a special verdict under Fed.R.Crim.P. 31(e) determining the identity and extent (when amount is in issue) of the condemned property. For example, the money laundering forfeiture statute provides, in pertinent part:

> The Court, in imposing sentence on a person convicted of a [covered] offense ... shall order that the person forfeit to the United States any property, real or personal, **involved** in such offense or any property **traceable** to such property.

18 U.S.C. § 982(a)(1) (emphasis added). This statute authorizes only the forfeiture of a guilty "res" or (in its absence) specific property traceable to it; forfeiture of an amount of money is not authorized.

The Senate Report concerning this language explains "property involved" as follows:

> [T]he term "property involved" is intended to include the money or other property being laundered (the corpus), any commissions or fees paid to the launderer, and any property used to facilitate the laundering offense.

134 Cong.Rec. S17365 (Nov. 10, 1988). Under this definition, an arithmetic amount (as opposed to currency as a physical object) cannot be "the money or other property" subject to a forfeiture verdict or judgment under § 982(a)(1). To the extent that a forfeiture order is based on the contrary premise, it is completely invalid. The idea of a "money judgment" as a form of forfeiture is also inconsistent with the existence of statutory provisions for forfeiture of substitute assets. Substitute forfeiture is allowed when "property involved" in the money laundering, for example, or that is "traceable to such property" cannot be located or seized. See 21 U.S.C. § 853(p), as well as 18 U.S.C. § 982(b)(1)(A), which incorporates it.

The imposition of a "personal money judgment" in lieu of criminal forfeiture of funds might have been an alternative to creation of the substitute asset provisions of the statutes. But far from implying authority to impose such "judgments," the enactment of the substitute asset provisions actually prove that "personal money judgments" are not contemplated. Congress authorized forfeiture of substitute assets because criminal forfeiture by its nature involves specific existing property, but it sometimes happens that a defendant, by his act or omission, causes the loss, transfer or devaluation of that property, as specified in 21 U.S.C. § 853(p). There were a few pre-1986 cases, before the enactment of the substitute assets provisions, which upheld entry of a money judgment to enforce a forfeiture where the actual forfeitable property was unavailable for seizure, and a few others subsequently. David B. Smith, a leading authority, states that this kind of ruling:

> ignores the basic nature of a forfeiture, whether criminal or civil. There simply cannot be a forfeiture without something to forfeit. Although the district court's order was denominated a "forfeiture," it was clearly a personal money judgment against the defendants, as the court of appeals recognized. The court relied on the fact that criminal forfeiture judgments are in personam in nature rather than in rem and that money is fungible. But even in personam forfeitures are still forfeitures; they are not to be confused with fines or other personal money judgments.

2 D.B. Smith, supra, ¶13.02, at 13-36 (12/98 rev.). Accord, United States v. Ripinsky, 20 F.3d 359, 365 n.8 (9th Cir. 1994); United States v. Meyers, 432 F.Supp. 456, 461 (W.D.Pa. 1977). The proposed Note's citation of United States v. Voigt, 89 F.3d 1050 (3d Cir. 1997) (which is misspells, *ll.* 258-59), without any internal pinpoint reference to any holding of that lengthy decision, is inappropriate and misleading, as the Voigt case did not involve a challenge to any such "money judgment" forfeiture. In fact, its analysis actually rejects most of the government's arguments, emphasizing the statutory requirements that any property to be forfeited must satisfy the "involved in" or "traceable to" standard, or else meet the statutory test for substitute assets. See 89 F.3d at 1081-88. As Judge Cowen's opinion states, "we should not be in the business of overlooking the plain terms of a statute in order to implement what we, as federal judges, believe might be better policy." Id. at 1085.

The "money judgment" provisions of proposed amended Rule 32.2 -- which we reiterate have never been circulated for public comment -- perhaps most vividly illustrate the failure of this entire proposal to heed Third Circuit Judge Greenberg's warning, speaking of criminal forfeitures of substitute assets, that "we need to keep prosecutorial zeal for such remedies within particular boundaries." In re Assets of Myles Martin, 1 F.3d 1351, 1360-61 (3d Cir. 1993). See also United States v. One 1985 Mercedes-Benz, 300 SD, 14 F.3d 465, 468 (9th Cir. 1994) ("forfeitures are not favored; they should be enforced only when within both letter and spirit of the law"). On account of its inclusion of these novel, controversial, substantive, and inappropriate provisions, the proposed Rule should be rejected by the Committee.

D. Substitute Assets

NACDL agrees that it may be justifiable to have a different notice rule for substitute assets under the statutes that provide for such substitution. Under the present scheme, a need for substitution is often not apparent until it is no longer practical to obtain a superseding indictment. Once a criminal forfeiture has been determined in accordance with due process, as discussed in the earlier parts of this commentary, we have no objection to a judge's making the determination, on a proper showing by the government and after a fair hearing, that the specific forfeitable property cannot be reached, so that substitution of other property can occur, to the extent authorized by statute.

The rule should not, however, allow substitution of assets "at any time," as proposed. Prop. R. 32.2(e)(1). Whether there is or should be a statute of limitations on such action, or whether the equitable doctrine of laches has a role to play here instead, is a substantive matter that the Rules should not address, and certainly should not purport to decide to the contrary.

Proposed Rule 32.2(e), or any other amended rule addressing the issue of forfeiture of substitute assets, should safeguard the defendant's and interested third parties' rights to be heard on the question of forfeiting substitute property. The present proposal mentions the possibility of an ancillary hearing on a motion for substitution, Prop. R. 32.2(e)(2)(B), but fails to provide any mechanism by which that might come about. NACDL therefore suggests, if the Rule is again returned to the Advisory Committee, that proposed subsection (e)(2) become (e)(3), and that a new (e)(2) be inserted to the effect that: "Notice of any motion for substitution of assets must be served on the defendant and the defendant's last known counsel, as well as on any other person who may reasonably be thought to have an interest in the proposed substitute asset, allowing at least 20 days for the filing of a responsive pleading." Under the proposed draft the prosecutor might think he or she could seek an order forfeiting alleged substitute property based on an ex parte showing, and without any other due process protections. This would surely lead to error and injustice in many cases.

E. Rules for Third-Party Ancillary Proceedings

Proposed Rule 32.2(c) would regulate for the first time the "ancillary proceedings" allowed under 18 U.S.C. § 1963(l) and 21 U.S.C. § 853(n), in which third parties may seek to vindicate their interests in property subjected to criminal forfeiture by a verdict against another. In general, the creation of rules to ensure fairness in such proceedings is an excellent idea. By definition, these third parties have not been criminal defendants; as to their interests, the government is presumptively seeking to deprive them of property and Fifth Amendment due process is necessarily the touchstone. This aspect of the rule should therefore offer protections such as would be allowed any citizen whose property the government seeks to condemn or seize. Their rights should not be less than those of anyone making a claim in a civil forfeiture setting.

The proposed rule would grant the court discretion whether to permit discovery in accordance with the civil rules. Of course, the government in this context has already had the benefit of a criminal investigation, a grand jury inquiry, and often a trial. To save judicial resources and to protect innocent claimants from undue expense and oppression, we agree that the government need not be allowed further discovery. As to any claimant, however, just as the right to discovery would not be questioned in other civil matters, the right to a fair proceeding should not be discretionary. NACDL suggests that the pertinent words read "the court shall permit any claimant to conduct discovery in accordance with the Federal Rules of Civil Procedure where such discovery would be necessary or helpful to narrow or resolve factual issues."

Likewise, as in other civil matters, the parties should be able to move for summary judgment at any time. The proposed rule, as drafted, would instead require

the parties to wait until "discovery ends." Prop. R. 32.2(c)(1)(B). Motions for summary judgment are often based on issues of law or discrete factual points. Under this proposal a court would be powerless to stop the government from exhausting a citizen through expensive, intrusive, and time-consuming discovery, even where it was not necessary. As under FRCP 56(e)-(f), a party who believes that the other side has moved for summary judgment prematurely may say so in opposition to the motion.

We are pleased that the Note asserts (*ll.* 465-66) that the Federal Rules of Evidence will be applied in ancillary hearings. Unfortunately, Fed.R.Evid. 1101(d) is currently uninformative on this subject. The committee should refer an explicit amendment on that subject to the Evidence Rules Advisory Committee.

In addition, there ought to be a provision dealing with the common problem of third parties who do not receive adequate notice. The proposed Committee Note says they have a remedy under FRCP 60(b) (*ll.* 440-45), but that rule has a sharply limited scope and was designed for cases where the party has already fully participated in a course of litigation. Why not address this problem in the Rule itself, after investigating the real circumstances of such cases?

Finally, a third-party claimant is not a criminal defendant; the third party has what amounts to a civil claim. See United States v. Lavin, 942 F.2d 177, 181-82 (3d Cir. 1991) (Becker, J.); Prop. Adv. Comm. Note (*ll.* 393-416). A claimant in a civil forfeiture matter (other than with respect to seizures in admiralty) has a Seventh Amendment right to trial by jury. See 1 D.B. Smith, supra, ¶11.01, at 11-1 through 11-7. The third party claimant against a criminal forfeiture, in our view, thus also enjoys a Seventh Amendment right to jury trial that should be referenced and protected by any amended Rule on this subject. 2 id. ¶14.08, at 14-59 to -60.

The language of the Rule prohibits the finding at trial from determining the extent of the defendant's interest, even though, as we discuss above, the statutes require such a finding, which cannot await the filing of ancillary petitions. Those are filed after entry of judgment, 21 U.S.C. § 853(a),(n), too late to provide any meaningful "safeguard" to the defendant. None of this is any substitute for the statutorily-required determination of the nature and extent of a defendant's forfeitable interest, which in turn defines the lawful outer scope of the criminal forfeiture judgment.

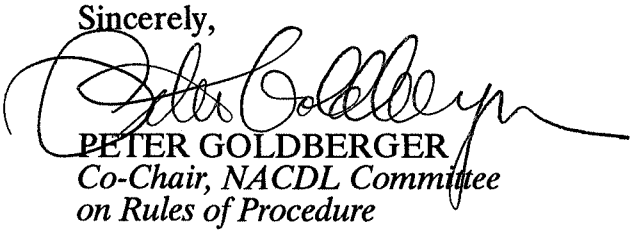
Conclusion

The revised amended Criminal Rule 32.2 makes changes which are impermissibly substantive, not procedural, within the meaning of the Rules Enabling Act. It is ill-conceived, in that its key conceptual notion -- presumptive forfeiture of the entirety of a "tainted" item of property -- is inconsistent with the essence of criminal forfeiture, which focuses on a defendant's identified interest in property. It would aggrandize the govern-

ment's property rights at the expense of innocent third parties, in a manner unauthorized by the forfeiture statutes. It would do all this without even requiring advance notice sufficient to satisfy the minimum requirements of due process, and elimination of the specific pleading requirement of Rule 7(c) would destroy existing limitations on the power to seek and obtain pretrial restraining orders. The Judicial Conference should put this matter on its agenda for discussion and then vote down the Standing Committee's proposal entirely. At least, the present version is too different from that published to be adopted at this time without recirculation for comment. NACDL stands ready to assist the Criminal Rules Advisory Committee in real reform of criminal forfeiture procedure, once the instant, ill-conceived proposal is rejected.

This statement was jointly prepared by NACDL's Committee on Rules of Procedure and our Forfeiture Abuse Task Force.

Sincerely,



PETER GOLDBERGER
Co-Chair, NACDL Committee on Rules of Procedure

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BY FAX

September 14, 1998

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Re: Proposed Criminal Rule 32.2

Dear Subcommittee Members:

Although I like the sleekness of the Department's proposed new Rule 32.2, I am troubled that it leaves out too much. In particular, there is no requirement that the fact-finder (judge or jury) find that the defendant had an interest in the property being forfeited. The proposed rule nicely deals with the **crime-nexus** requirement (the relationship of the property to the crime), but it fails to address the **defendant-nexus** requirement that is the very foundation of the distinction between civil (***in rem***) and criminal (***in personam***) forfeiture.

As we all understand the forfeiture statutes, criminal forfeiture is a punishment of the defendant, and, of course, forfeiting somebody else's property doesn't punish the defendant. The requirement of a defendant-nexus is explicit in the criminal (as opposed to civil) forfeiture statutes. A typical statute provides that: "any person convicted . . .shall forfeit . . . any property constituting . . . any proceeds the person obtained. . . [and] any of the person's property used . . . . to commit . . . such violation." *See* attached statute and typical instructions in attached case excerpt.

It is no answer that the ancillary proceeding (if any) would deal with questions of ownership. Creation of a presumption that property used in, or constituting proceeds of, a crime belongs to any person convicted of that crime (unless someone comes forth with proof to the contrary) is a substantive change in the law and is not appropriately achieved by a change in the Criminal Rules.

Sincerely,

cc: Hon. W. Eugene Davis – 318-262-6664
Professor David A. Schuleter – 210-436-3717

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21 U.S.C. Section 853:

(A) Property subject to criminal forfeiture. Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law –

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

. . . .

UNITED STATES of America, Plaintiff-Appellee,
v.
Dominic SIMONE, Robert "Bosko" Struminikovski, Nicholas Simone, John Peter Suchan, Vasil Struminikovski, Panagiotis "Pete" Pistas, Deborah Cerveny and Lubin Milevski, Defendants-Appellants.

Nos. 88-3412, 88-3479, 88-3480, 88-3513 to 88-3515, 88-3522 and 89-1094.

United States Court of Appeals, Seventh Circuit.

Argued Sept. 14, 1990.

Decided May 3, 1991.
Rehearing and Rehearing En Banc Denied June 5, 1991.

Defendants were convicted in the United States District Court for the Northern District of Illinois, Ilana Diamond Rovner, J., of various conspiracy and drug trafficking offenses, and they appealed. The Court of Appeals, Grant, Senior District Judge, sitting by designation, held that: (1) defendants' challenge to indictment charging them with narcotics offenses, based on claim that indictment improperly charged multiple conspiracies on single count, was waived; (2) jury instructions made it sufficiently clear that defendant could not be convicted without knowingly becoming member of conspiracy; (3) defendant was not denied effective assistance of counsel when defense counsel admitted during summation that defendant was a drug dealer; (4) forfeiture instruction was harmless; and (5) evidence was sufficient to establish that defendant was member of single overall narcotics distribution conspiracy charged in indictment.

Affirmed.

[1] INDICTMENT AND INFORMATI⊂⇒196(1)
210k196(1)
Failure to object to alleged defects in indictment before trial constitutes waiver. Fed.Rules Cr.Proc.Rule 12(f), 18 U.S.C.A.

[2] CRIMINAL LAW ⊂⇒1134(3)
110k1134(3)
Appellate court addresses waived claim only if cause is shown that might justify granting of relief from waiver. Fed.Rules Cr.Proc.Rule 12(f), 18 U.S.C.A.

[3] CRIMINAL LAW ⊂⇒1030(1)
110k1030(1)
If there is sufficient cause for relief from waived claim, court evaluates claim under plain error doctrine. Fed.Rules Cr.Proc.Rule 12(f), 18 U.S.C.A.

[4] CRIMINAL LAW ⊂⇒1032(6)
110k1032(6)
Defendants' challenge to indictment charging them with narcotics offenses, based on claim that indictment improperly charged multiple conspiracies on single count, was waived, and would not be considered on appeal, where defendants did not challenge indictment prior to trial, and failed to give any cause to justify relief from waiver. Fed.Rules Cr.Proc.Rules 8(b), 12(f), 18 U.S.C.A.

[4] INDICTMENT AND INFORMATI⊂⇒196(7)
210k196(7)
Defendants' challenge to indictment charging them with narcotics offenses, based on claim that indictment improperly charged multiple conspiracies on single count, was waived, and would not be considered on appeal, where defendants did not challenge indictment prior to trial, and failed to give any cause to justify relief from waiver. Fed.Rules Cr.Proc.Rules 8(b), 12(f), 18 U.S.C.A.

[5] CONSPIRACY ⊂⇒43(6)
91k43(6)
Count of indictment charging defendants with conspiracy to distribute and possess with intent to distribute cocaine and heroin properly alleged single scheme carried out by series of acts and sufficiently informed defendants of nature of charges against them; count described single ongoing drug distribution conspiracy under direction of one defendant, involving core members who bought from and sold to various suppliers and dealers who changed over time. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401(a)(1), as amended, 21 U.S.C.A. § 841(a)(1); Fed.Rules Cr.Proc.Rules 8, 8(a, b), 18 U.S.C.A.

[5] INDICTMENT AND INFORMATI⊂⇒125(5.5)

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104 S.Ct. 2039, 2045 n. 19, 80 L.Ed.2d 657 (1984). Applying that guidance to this case, we recognize that it would have been foolhardy for Bosko's counsel to deny the drug sales so credibly proven by the government. But, rather than concede guilt completely, Mr. Muslin competently challenged the prosecution's proof of the other charges.

[12] We do not approve of a defense counsel's deliberate, explicit admission that a jury should find his client guilty of a charge in the absence of any suggestion that the defendant concurred in the decision to proceed in such a manner. However, in the case before us, Bosko's attorney intentionally stipulated facts and conceded those charges for which there was unrefutable evidence and no mandatory sentences, but forcefully argued Bosko's innocence on the charges with heavier penalties, as part of a trial strategy. It was a reasonable plan that was evident from the beginning of the trial. At no time did the defendant object to it; in fact, we believe he chose or at least condoned the tactics. Our position was reinforced by Bosko's post-trial letter to the sentencing judge which provided ample evidence of his approval of the strategy.

As part of its highly deferential scrutiny, an appellate court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. It was incumbent on the defendant to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " Id., citing Michel v. Louisiana, 350 U.S. 91, 101, 76 S.Ct. 158, 164, 100 L.Ed. 83 (1955). Bosko did not do so. We hold that the defendant Bosko failed to show that the conduct of his trial counsel, in following this reasonably sound strategy, fell below an objective standard of reasonableness. [FN16] Consequently, we will not overturn Bosko's conviction on the basis of his sixth amendment challenge.

> FN16. Since the performance prong of the Strickland standard of ineffective assistance was not met, we need not address the prejudice prong. However, we note that Bosko did not argue that the jury's decision would probably have been different absent his counsel's alleged errors in his closing argument.

V. Forfeiture

[13] Defendants Bosko and Vasil Struminikovski argue that the district court erred during the forfeiture phase of the trial by presenting in its instruction to the jury two burdens of proof with respect to the forfeiture allegations in the indictment, both "preponderance of the evidence" and "beyond a reasonable doubt." They contend that the jury should have been instructed to find that property was forfeitable only if the government had proven it subject to confiscation beyond a reasonable doubt.

The court first reminded the jury that its previous determination of the guilt of Bosko and Vasil was final and conclusive, and that its duty now was to decide whether the defendants must forfeit certain property. The court then began the forfeiture instructions:

> You are instructed that as to each claim of forfeiture, the Government mu *1191 establish beyond a reasonable doubt that:
> 1. The property constituted or was derived from the proceeds obtained, directly or indirectly, as a result of a violation of Title 21 United States Code Sections 841(a)(1), 845b(f), 846 or 848; or
> 2. The property was used or intended to be used in any manner or part to commit or to facilitate the commission of a violation of those statutes; or
> 3. With respect to Bosko Struminikovski, the property constituted an interest in, claim against, or contractual right affording a source of control over the continuing criminal enterprise charged in the indictment.
> You are further instructed with respect to the forfeiture allegations, that if you find that any of the property set out therein is the property of defendants Bosko Struminikovski or Vasil Struminikovski and that the Government has established by a preponderance of the evidence that:
> 1. Such property was acquired by such person during the period of a violation of Title 21 United States Code Sections 841(a)(1), 845b(f), 846, or 848 or within a reasonable time after such period; and
> 2. There was no likely source for such property, other than a violation of Title 21 United States Code Sections 841(a)(1), 845b(f), 846, or 848, then a rebuttable presumption arises that the property is subject to forfeiture.
> Tr. at 5509-5511.

As a preliminary matter we note that no objection

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