

OFFICERS**PRESIDENT**

Gerald B. Lefcourt
New York, NY

PRESIDENT ELECT

Larry S. Pozner
Denver, CO

FIRST VICE PRESIDENT

William B. Moffitt
Washington, DC

SECOND VICE PRESIDENT

Edward A. Mallett
Houston, TX

TREASURER

Irwin H. Schwartz
Seattle, WA

SECRETARY

Lawrence S. Goldman
New York, NY

PARLIAMENTARIAN

E. E. Edwards, III
Nashville, TN

IMMEDIATE**PAST PRESIDENT**

Judy Clarke
Spokane, WA

DIRECTORS

Julie B. Aimen
Chicago, IL

Henry W. Asbill
Washington, DC

Barbara Ellen Bergman
Albuquerque, NM

Stephen B. Bright
Atlanta, GA

Juanita R. Brooks
San Diego, CA

David Z. Chesnoff
Las Vegas, NV

Mary E. Conn
Bellaire, TX

Richard A. Cremer
Roseburg, OR

Charles W. Daniels
Albuquerque, NM

Drew Findling
Atlanta, GA

John P. Flannery, II
Leesburg, VA

David Dean Fussell
Orlando, FL

Gary G. Guichard
Atlanta, GA

M. Cristina Gutierrez
Baltimore, MD

John Wesley Hall, Jr.
Little Rock, AR

Patricia B. Harvey
Rockville, MD

Milton Hirsch
Miami, FL

Frank Jackson
Dallas, TX

Richard Kammen
Indianapolis, IN

Jim E. Lavine
Houston, TX

Helen Leiner
Fairfax, VA

Shaun McCrea
Eugene, OR

Jeralyn E. Merritt
Denver, CO

Marvin D. Miller
Alexandria, VA

Daniel E. Monnat
Wichita, KS

George H. Newman
Philadelphia, PA

Martin S. Pinales
Cincinnati, OH

Dennis Roberts
Oakland, CA

David S. Rudolf
Chapel Hill, NC

Kent A. Schaffer
Houston, TX

Natman Schaye
Tucson, AZ

Barry C. Scheck
New York, NY

Elisabeth Semel
Washington, DC

Gail Shifman
San Francisco, CA

Burton H. Shostak
St. Louis, MO

Theodore Simon
Philadelphia, PA

Richard J. Troberman
Seattle, WA

Lawrence A. Vogelman
Exeter, NH

Martin G. Weinberg
Boston, MA

EXECUTIVE DIRECTOR

Stuart M. Statler



February 15, 1998

Peter G. McCabe, Secretary
Standing Committee on Rules of Prac. and Proc.
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:
Request for Comments Issued September 1997**

Dear Mr. McCabe:

The National Association of Criminal Defense Lawyers is pleased to submit the following comments with respect to the proposed changes in the Federal Rules of Criminal Procedure governing criminal forfeitures, on behalf of the 9600 members of our association, and its 80 affiliates in all 50 states, with a total membership of almost 28,000.

NACDL stands adamantly opposed to the continuing efforts of the administration to abolish the right to jury trial on government claims for criminal forfeiture, and to undermine other procedural rights associated with such claims. The current proposal to amend the Criminal Rules regarding forfeitures is undemocratic, disrespectful of our legal culture and history, and flawed in numerous particulars. In certain respects, the proposal appears to breach the Rules Enabling Act wall between permissible "procedural" reform and prohibited effect on "substantive rights." 28 U.S.C. § 2072(b). The Advisory Committee should reject these ill-advised changes almost completely.

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 proposing legislative amendments to reject thoughtful Committee decisions. Here, ironically, the Department is attempting to get the Conference to do its

1025 Connecticut Avenue NW, Suite 901 Washington, DC 20036

Tel: (202) 872-8600

E-mail: assist@nacdl.com

Fax: (202) 872-8690

Website: www.criminaljustice.org

bidding after failing in Congress. NACDL has opposed these efforts on both fronts, and will continue to do so.

A. There Is No Good Reason to Abolish the Historically-Grouped Right to Jury Trial of Criminal Forfeiture Allegations.

Not a single persuasive reason has been offered, nor does any exist, for abolishing the jury trial right presently guaranteed by Fed.R.Crim.P. 31(e). In Libretti v. United States, 516 U.S. 29 (1995), the Supreme Court -- incorrectly, we believe -- held that there is no constitutional right to a jury verdict on a criminal forfeiture claim. But Libretti says nothing about the policy question presented by the proposed rule change, and a belief that changes restricting individual rights against government action would not be unconstitutional is hardly a sufficient justification for action.

The important Sixth Amendment issue of the right to a jury determination of criminal forfeiture claims was not among the questions formally presented in Libretti. The Court decided it in an offhand, almost cavalier manner that completely ignored the ample historical evidence to the contrary presented by Professor Sara Sun Beale in Libretti's brief.¹ Indeed, Britain's elimination of the colonists' right as Englishmen to jury trial in forfeiture matters was one of the expressed complaints that led to the American Revolution. See Declaration of Independence (13th count, cl. 5).² Even accepting the Supreme Court's unex-

¹ Professor Beale, of Duke University School of Law, is a distinguished scholar in criminal law and procedure, and a former Assistant to the Solicitor General. We have attached to this submission the pertinent pages from Professor Beale's excellent opening brief, which discusses the historical evidence. The Solicitor General's brief in Libretti contained nothing to the contrary.

² "He [i.e., King George III] has combined with others [i.e., Parliament] to subject us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws; giving his Assent to their Acts of pretended Legislation: ... For depriving us, in many Cases, of the Benefits of Trial by Jury" The "pretended Legislation" at issue in this clause of the Declaration was the Admiralty Acts, and the "many Cases" referred to involved forfeitures.

plained conclusion that the Sixth Amendment was not intended to carry forward the traditional common law right to a jury verdict on any claim by the Sovereign for criminal forfeiture, the judiciary should take a close look at this evidence before scrapping the wisdom of more than three centuries.

1. Eliminating juries will not "streamline" the process.

The proposed advisory committee note (taken verbatim from the DOJ's 1996 "Explanation of Rule 32.2" as submitted for the committee's consideration) states:

Traditionally, juries do not have a role in sentencing other than in capital cases, and elimination of that role in criminal forfeiture cases would streamline criminal trials.

This statement simply ignores all the historical evidence collected in the Libretti briefs that criminal forfeiture has not traditionally been viewed as just another form of statutory punishment. In personam forfeiture is sui generis -- a process in which the jury did indeed have a central role, regardless of the jury's function in other aspects of sentencing.³

The proposed "committee note" (that is, the DOJ) also does not explain just how the proposal would "streamline" criminal trials. What the amended rule would require, in lieu of the bifurcated forfeiture phase of a jury trial, is "a post trial hearing," Rule 32.2(b), to be held "[a]s soon as practicable after entering a guilty verdict or accepting a plea of guilty or nolo contendere on any count in the indictment or information for which criminal forfeiture is alleged" At this "hearing," the court would "determine what property is subject to forfeiture because it is related to the offense" and "enter a preliminary order directing the forfeiture of whatever interest each defendant may have in the property, without determining what that interest is." It is by no means apparent that convening and conducting this new and separate type of proceeding will be any more "streamlined" than the typically brief forfeiture phase of a criminal jury trial.

³ Moreover, six or seven states (including Virginia) allow juries to sentence defendants in all felony cases, not merely capital cases, and in many more jury sentencing was formerly common.

Of course, it is literally true that elimination of any non-constitutional procedural safeguard has potential for "streamlining" the process, but the real issue is whether any gain in efficiency would outweigh the loss in fairness. We hope the committee would not agree with the DOJ's apparent assumption that judges do not need to hear as much evidence as a jury to make the same factual determinations. Or perhaps the unstated but highly significant implication is that under this amendment the "post trial hearing" conducted by the judge alone to determine what property interests are subject to forfeiture would be in the nature of a guidelines sentencing hearing rather than a bench trial. The language of proposed Rule 32.2(b) suggests that this may be what is intended; in other words, the defendant would be denied not only the existing right to a jury trial, but also the right to a trial of any kind on the factual issues underlying the indictment's criminal forfeiture allegations.

Instead, under this proposal, the government could apparently establish its forfeiture case as it would any sentencing issue -- by proffer, by affidavit, or by other means that a court might find to have merely "sufficient indicia of reliability," USSG § 6A1.3(a). And by eliminating the Evidence Rules' current ambiguity on the point (which NACDL has attempted unsuccessfully to call to the attention of the Evidence Advisory Committee), the amendment would plainly have the effect of making the Federal Rules of Evidence inapplicable to these proceedings. See Fed.R.Evid. 1101(d)(3). Personal knowledge of the facts would be unnecessary. To effectuate so radical a change by unstated implication is mind-boggling -- a powerful threat to the property rights of convicted persons and innocent third parties alike.

2. Juries need not be "confused" by varying standards of proof, since all criminal forfeitures should be proven beyond a reasonable doubt.

Continuing to copy almost verbatim from the DOJ's 1996 "Explanation of Rule 32.2," the proposed Committee Note goes on as follows:

Undoubtedly it may be confusing for a jury to be instructed regarding a different standard of proof in the second phase of the trial, and it may be burdensome to have to return to hear additional evidence after what may have been a contentious and

exhausting period of deliberation regarding the defendant's guilt or innocence.

True, jury service may be "burdensome," but it is far more "burdensome" for jurors to be forced to digest and deliberate upon today's 80-count, hundred-page, press-release indictments than to consider the typical forfeiture allegation. The expressed purpose to avoid "burden[ing]" the jury is pure make-weight; it should be stricken from the Note and disregarded in the committee's decisionmaking.⁴

Far more important -- and particularly telling with respect to the one-sided and partisan nature of this proposal -- is the DOJ's casual claim (as repeated uncritically by the Reporter's proposed Note) about the burden of proof. The proposal to eliminate the jury's role is built in part on the assertion that a criminal forfeiture need be proved only by a preponderance of the evidence. That too is incorrect, or at least misleading. Ordinarily, when the Rules propose to resolve a point on which there is a disparity of views in the case law, the Note says so candidly, not argumentatively. NACDL believes that 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). The Committee ought not try to influence it by Rule or Note.⁵ If it does, however, the Judicial Conference position should be based on a thoughtful and balanced assessment of the case law, historical tradition, and Congressional intent.

NACDL believes that both the Sixth Amendment and Congressional intent impose a burden of proof beyond a reasonable doubt

⁴ NACDL also objects to any introduction of the false choice "guilt or innocence" into the Rules or comments. Our criminal justice system determines only whether the government has met its burden of proving the defendant's alleged guilt; if not, the defendant is "not guilty." While the plight of the innocent accused is of deep concern to us, the legal system knows no such category as "innocence."

⁵ Indeed, this would be true even if the right to jury trial were somehow eliminated. A judge sitting alone to adjudicate a criminal forfeiture claim should still apply the statutory beyond-a-reasonable-doubt standard.

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 and CCE 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); Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 2081 (1993) ("It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. ... In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.").

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) repeatedly 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. 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 (12/97 rev.).⁶ In fact, the DOJ language adopted in the proposed Committee Note is a reversal of its position

⁶ 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.

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 Committee 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. For the same reasons, the misleading citations about the government's burden do nothing to justify the proposal to oust the jury from its historical function in determining criminal forfeitures.⁷ In short, the Committee should not weigh in on the burden of proof issue. Since the matter is at best controversial, it cannot serve as a justification for abolishing the right to a jury verdict on a criminal indictment's forfeiture allegations.

3. The jury's collective conscience should be preserved.

In Libretti, the Supreme Court called the right to jury trial of criminal forfeiture allegations "statutory," 516 U.S. at --, 133 L.Ed.2d at 289. Unless by this the Court meant "created by rule 31(e)," which would suggest a remarkably careless use of terminology, the Court presumably meant that the present right to jury trial is implicit in the Congressional language located in the various statutes authorizing criminal forfeiture as a consequence of certain convictions. The considered judgment of Congress in this respect, as expressed over a quarter century in the RICO and CCE (1970), other controlled substance felony (1984), and money laundering contexts (1988) should not be lightly overturned as "anachronistic." In Libretti, the Supreme Court acknowledged "the importance of the right provided by Rule 31(e)," 516 U.S. at --, 133 L.Ed.2d at 289, even while denying its constitutional status. Indeed, NACDL believes the jury trial question as a whole, like the

⁷ 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. The history of the highly contentious struggle in Congress in recent years to reform the federal forfeiture laws is recounted in detail in I D.B. Smith, supra, ¶1.02, at 1-20 to 1-23.

subsidiary issue of burden of proof, is not a mere matter of "practice and procedure" but rather affects a "substantive right" within the meaning of the Enabling Act and so belongs exclusively in the legislative domain.

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 -- 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 forfeiture program. This proposal has nothing to do with procedural reform or improving the fairness of the process; it has only to do with an unchecked desire 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 always pursue a civil remedy in addition. See United States v. Ursery, 518 U.S. --, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996) (no double jeopardy bar).

B. Determination of the "Extent" of the Forfeiture.

Proposed amended Rule 32.2(b) would also eliminate the present requirement of Rule 31(e) requiring a factfinder's determination of the "extent of the interest or property subject to forfeiture." Under the proposal, not only would there be no jury, but even the judge would be called upon simply to determine "what property is subject to forfeiture because it is related to the offense,"⁸ and then simply would order forfeited

⁸ In any event, an amended rule should not purport to state (much less mis-state) the substantive standard for forfeiture (i.e., "because it is related to the offense"). If any phrase like this should survive into a revised rule, it should merely refer to property "subject to forfeiture

"whatever interest each defendant may have in the property, without determining what that interest is." Under the proposed radical revision of the process, no determination of the defendant's interest would ever be made; instead, the government would eventually gain ownership of whatever property or rights to property are found to be forfeitable and which are not successfully claimed by a third party.

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 Note cites no authority to the contrary; there is no ambiguity here to resolve by amendment.

The proposed Committee Note, again copying from the DOJ's "Explanation" of its 1996 submission, identifies the determination of "extent" as a "second problem" with the current Rule 31(e), in addition to its preserving a role for the jury. The present language, however, accurately reflects the historical role of the common law jury in this process and should not be eliminated, although perhaps the present wording could benefit from clarification.

The present Rule is no "unnecessary anachronism," as DOJ's Explanation, repeated in the proposed Note, puts it. Contrary to the elaborate but wholly misleading summary of current practice for determining criminal forfeitures set forth in the Note, the extent of a defendant's interest in allegedly forfeitable property is not litigated 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(1)(2); 21 U.S.C. § 853(n)(2); see also 18 U.S.C. § 1963(1)(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 measure or scope of the defendant's interest. The judge would order forfeiture of "the defendant's interest" in the charged property, whatever that might be; then, after the ancillary hearing (or when the

(footnote continued)

under the applicable statute."

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.

The presumption and default outcome under the proposed revision would be 100% forfeiture of any charged item 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, in rem forfeitures. In civil forfeiture the property itself is forfeitable, while in criminal forfeiture it is the convicted defendant's interest in the property, 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, 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 C just below, 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.

C. Proposed Amendment to Rule 7(c): Averment in the Indictment of the 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, as well as the trial jury's. 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 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 Rule 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.

The criminal forfeiture statutes authorize the government to restrain or seize property upon the return of an indictment alleging that specific property is subject to forfeiture (other than as "substitute assets"). The only check on the prosecutor's already awesome power to seize or restrain a defendant's assets when he is most in need of them to defend himself or to support his family is the grand jury. The DOJ is concurrently asking Congress vastly to expand its criminal forfeiture powers 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 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.

Rather than adopt the proposed amendment, the Committee should clarify that, despite judicial decisions to the contrary, 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, and thus require the jury, not the judge, 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.

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 forfeitable property cannot be reached, so that substitution of other property can occur.

The rule should not, however, allow substitution of assets "at any time," as proposed. Whether there is or should be a statute of limitations on such action is a substantive matter that the Rules should not address.

Proposed Rule 32.2(f), or any other amended rule addressing the issue of forfeiture of substitute assets, should safeguard the defendant's and interested third parties' rights to heard on the question of forfeiting substitute property. NACDL therefore suggests that language be added at the end of subparagraph (f) 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. Unless the motion for substitution of property is uncontested, the court must conduct an evidentiary hearing to resolve any genuine issue of material fact." Under the proposed draft it appears that the prosecutor 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 3d party ancillary proceedings

Proposed Rule 32.2(d)(2) would regulate for the first time the "ancillary proceedings" under 18 U.S.C. § 1963(1) 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 in other civil matters the right to discovery would not be questioned, 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 is necessary or helpful to narrow or resolve factual issues."

In addition, the rule on ancillary hearings must ensure that the Federal Rules of Evidence will be applied. Fed.R.Evid. 1101(d) is currently uninformative on this subject.

Further, 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). 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 criminal third party claimant thus also enjoys a Seventh Amendment right to jury trial that should be referenced and protected by any amended Rule on this subject.

To: Judicial Conf. Standing Committee on Rules
Re: NACDL Comments on Proposed Crim. Forf. Rules

Feb. 15, 1998
p.14

This statement was jointly prepared by NACDL's Committee on Rules of Procedure and our Forfeiture Abuse Task Force. We are looking forward to having our representatives appear and answer questions at the Advisory Committee's meeting in April. Please thank the Committee for extending us this invitation.

Sincerely,

Peter Goldberger
Co-Chair, NACDL Committee
on Rules of Procedure

Please reply to Leslie Hagin, Esq.,
Legislative Director, at the above address
and also to:
Peter Goldberger, Esq.
50 Rittenhouse Pl.
Ardmore, PA 19003

No. 94-7427

In The
Supreme Court of the United States
October Term, 1995

JOSEPH V. LIBRETTI, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF FOR THE PETITIONER

Of Counsel:
PAUL K. SUN, JR.
SMITH HELMS MULLISS
& MOORE, L.L.P.
316 West Edenton Street
Post Office Box 27525
Raleigh, North Carolina
27611
Telephone: 919-755-8720

SARA SUN BEALE
(Appointed by this Court)
Counsel of Record
Duke University School
of Law
Science Drive & Towerview
Road
Post Office Box 90360
Durham, North Carolina
27708-0360
Telephone: 919-613-7091
Counsel for Petitioner

guilty plea nor his plea agreement expressly relinquished that right.

A. At Common Law the Issue of Criminal Forfeiture Was Submitted to the Jury.

Common law juries in both England and the American colonies made findings on criminal forfeiture. Reference works used by English judges and court personnel during the seventeenth and eighteenth centuries record the standard charge to the jury on the issue of forfeiture. For example, in 1799 *The Crown Circuit Companion* instructed that once the jury had finished deliberating, the clerk should advise them as follows:

Look upon the prisoner; you that are sworn, what say you, is he guilty of the felony whereof he stands indicted, or not guilty? If they say Guilty, then the clerk asks them, What lands or tenements, goods or chattels, he (the prisoner) had at the time of the felony committed, or any time since?

Thomas Dogherty, *The Crown Circuit Companion* 21-22 (1799) (emphasis in original). This charge was little changed from the charge recommended more than a century earlier in *The Office of the Clerk of Assize and The Office of the Clerk of the Peace* 71-72 (1676) (microformed in Wing, *Early English Books*, 1641-1700, reel 829).

In his *History of the Pleas of the Crown*, Sir Matthew Hale reports:

The usage was always upon a presentment of homicide before the coroner, or of flight for the same, or upon a conviction of felony by the petit jury, or the finding of a flight for the same, to charge the inquest or jury to enquire, what goods and chattels he hath, and where they are

1 Matthew Hale, *History of the Pleas of the Crown* 363 (1778 ed.). Similarly, in describing what property was subject to forfeiture, William Hawkins reported that the question whether a trust created by the accused was forfeitable "is to be left to a Jury on the whole Circumstances of the Case. and

shall never be presumed by the Court where it is not expressly found." 2 William Hawkins, *Pleas of the Crown 1716-21* 450 (1721 ed.).

The English authorities also suggest that the harsh remedy of forfeiture was not popular with juries, and efforts to nullify forfeiture by a verdict finding no property were common. See *The Crown Circuit Companion*, *supra* p. 42, at 22 (jury commonly found no property); *The Office of the Clerk of the Assize and The Office of the Clerk of the Peace*, *supra* p. 42, at 72 (same); cf. 4 William Blackstone, *Commentaries* *387 (reprinted Dennis & Co. 1965) (St. George Tucker ed., Phila. 1803) (juries would seldom find flight because forfeiture was viewed as too severe a penalty for that offense).

Although the colonial record is sparse, there is evidence that the common law practice of submitting the issue of forfeiture to the jury was followed in the American colonies, and that colonial juries on occasion employed this authority to prevent unjust forfeitures. Juries in colonial New York heard the prosecutions arising out of the Leisler Rebellion and returned verdicts finding no forfeitable lands, tenements, or chattels for any of those convicted, though forfeitable properties were subsequently identified by a writ of enquiry. Julius Goebel & T. Raymond Naughton, *Law Enforcement in Colonial New York* 713 (1944). In fact, colonial juries in New York "almost invariably reported no lands, tenements, or chattels upon conviction." *Id.* at 715. This was true even in the case of a merchant who was not without means. *Id.* It appears that juries were reluctant to "cast upon the county the support of a convict's wife and family." *Id.* at 717. The New York colonial records also reveal at least one instance where officials brought baseless treason charges to raise revenue by forfeiture.³³

³³ Goebel and Naughton report Lord Cornbury's charge that the treason prosecution of Bayard and Hutchins was brought "in order that the debts of the Province might be satisfied from the forfeitures." Julius Goebel & T. Raymond Naughton, *supra*, at 714. The Order in Council reversed the sentences and subsequent acts of assembly restored the defendants' property. *Id.*

Criminal forfeitures were rare in this country during the first 180 years after adoption of the federal constitution, but there is evidence that the common law practice of trying criminal forfeiture to the jury carried forward into state law. Sitting as circuit justice and applying the Rhode Island constitution, Justice Curtis concluded that in a criminal forfeiture prosecution

the owner would be entitled to a trial by jury, and to have the accusation, relied upon to work the forfeiture, set forth substantially, in accordance with the rule of the common law, so that he could discern its nature and cause.

Greene v. Briggs, 10 F. Cas. 1135, 1142 (C.C. D. R.I. 1852) (No. 5,764).

B. The Sixth Amendment Incorporates the Common Law Right to a Jury Determination of the Property Subject to Criminal Forfeiture.

The purpose of the right to trial by jury is "to prevent oppression by the Government" and to provide a "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968) (footnote omitted). As developed more fully at pp. 27-29, *supra*, the potential for raising enormous revenues by forfeiture naturally gives rise to a danger of governmental overreaching. Historically the jury has served as a safeguard against such governmental oppression.

The standard for determining when a jury trial is required is the common law. As Justice Powell observed, "[t]he reasoning that runs throughout this Court's Sixth Amendment precedents is that, in amending the Constitution to guarantee the right to jury trial, the framers desired to preserve the jury safeguard as it was known to them at common law." *Johnson v. Louisiana*, 406 U.S. 366, 370-71 (1972) (Powell, J., dissenting in Nos. 69-5035 and 69-5046) (footnote omitted). While some of this Court's opinions have departed from the common law precedents in defining the characteristics of trial

by jury,³⁴ this Court has not retreated from the principle that the Sixth Amendment guarantees a jury trial in cases where that safeguard would have been available at common law.

The historical record discussed above makes it clear that the determination of the property subject to criminal forfeiture was submitted to the jury in England and the American colonies, and that jury verdicts finding no property placed an important check on government authority. Accordingly, the determination of the property, if any, that is subject to criminal forfeiture should be recognized to be a part of the criminal prosecution for purposes of the Sixth Amendment, which guarantees the right to a jury trial "in all criminal prosecutions." U.S. Const., amend. VI.

C. Rule 31(e) Supplements the Sixth Amendment By Requiring a Special Jury Verdict on the Nature and Extent of Property Subject to Criminal Forfeiture.

The Sixth Amendment right to a jury determination of criminal forfeiture is supplemented by Fed. R. Crim. P. 31(c), which requires a special jury verdict on "the extent of the interest or property subject to forfeiture, if any." Special verdict provisions are rare in criminal cases. 18 U.S.C. App., Notes of the Advisory Committee on Rules - 1972 Amendment. Indeed, forfeiture is the only matter on which the Federal Rules of Criminal Procedure require a special verdict. As described more fully above, *see supra* pp. 15-21, Rule 31(c) and companion amendments to Rules 7 and 32 reflect the common law tradition that a defendant had the right to notice, trial, and a special jury finding on criminal forfeiture, which the Rules treat as an element of criminal liability.

³⁴ *See, e.g., Williams v. Florida*, 399 U.S. 78, 99 (1970) (since there is no evidence that framers meant to "equate the constitutional and common-law characteristics of the jury," Sixth Amendment does not require jury unanimity).