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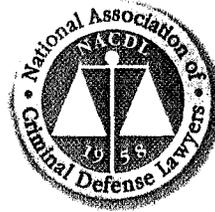
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CELEBRATING 40 YEARS
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March 9, 1999

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 16, 1999, Meeting of the Judicial Conference**

Mr. Chief Justice and Members of the Judicial Conference:

The National Association of Criminal Defense Lawyers asks that the proposed changes in the Federal Rules of Criminal Procedure governing criminal forfeitures not be approved at this time, but rather that they be returned to the Standing Committee with instructions to resubmit them for public comment. NACDL, as you may know, is a 40-year-old, 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.

It is true that revisions to the rules governing criminal forfeiture have been under consideration for almost three years. The present proposal is significantly different from any that has been published, however. In the original proposal, the Department of Justice sought to have the Criminal Rules amended to eliminate the present right to trial of a criminal forfeiture allegation to the full extent it thought constitutionally possible after Libretti v. United States, 516 U.S. 29 (1995), including a total elimination of the jury's role -- and to make half a dozen or more other important changes in the process at the same time. Rebuffed by the Standing Committee on the jury trial issue, the advisory committee returned with a different, new proposal. The latest revision contains not only reconstructed versions of all the objectionable features of the original 1997 proposal except the total abolition of jury trial, but also entirely new and equally controversial provisions that have never been submitted for public comment.

The current proposal to amend the Criminal Rules (specifically, Rules 7(c), 31(e), and 32(b)) regarding forfeitures, substituting an entirely new Rule 32.2, continues to be fundamentally flawed in numerous particulars. In key respects, the proposal is inconsistent with governing statutory provisions. It also

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appears to breach the Rules Enabling Act wall between permissible "procedural" reform and prohibited effect on "substantive rights." 28 U.S.C. § 2072(b). This letter does not repeat all (or even most) of our objections to this proposal, or to the fairness of its accompanying proposed Advisory Committee Note; these are available from the Committee staff. While NACDL believes 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 fuller consideration of the very serious objections we have raised to the present, newly revised draft.

1. The Present Proposal Is Fundamentally Different From Any that Has Been Published for Comment in at Least Four Significant Respects, Some of Them Substantive not Procedural.

There are at least four major aspects of the current proposal that are different from that circulated for comment, any or all of which would justify recommittal of this proposal to the Standing Committee for republication. These are, first, the substitution of a highly circumscribed right of jury trial for the present, full right, where the published proposal was for total elimination of the right. Second is the deferral in many cases of any specification of what the defendant will be required to forfeit until long after sentencing, raising new questions about the finality of the criminal judgment. Third, the new version changes the proposed rule's notice provision in a way which makes it inconsistent with the statutory provisions on restraining orders. Fourth, the rule would codify the notion of a "personal money judgment" as a form of criminal forfeiture, which has no apparent statutory basis, and as to which even the limited, restored right to jury trial would be inapplicable. None of these aspects of the current draft have been published for comment.

(a) Criminal forfeiture statutes differ from the civil forfeiture laws by making forfeitable not a misused item of property, but rather a particular person's interest in such property. Compare 18 U.S.C. §§ 982 and 1963, and 21 U.S.C. § 853, with 18 U.S.C. § 981 and 21 U.S.C. § 881. That is, criminal forfeiture is in personam, while civil forfeiture operates in rem. Under the present draft of new rule 32.2, for the first time, it is proposed that the criminal trial jury not decide what forfeitable interest the defendant might have in property, but rather only whether some item of property (or, under this rule, for the first time and without statutory basis, an amount of money) has a connection to a criminal offense which renders it forfeitable. Rule 32.2(b)(4). 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, 2034-36 (1998) (discussing essential differences between civil and criminal forfeitures). The proposed

rule's definition of what is to be tried to the jury is thus not only a new proposal, but also substantive not procedural in nature.

The present rule, or something very like it, is 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. In direct opposition to current practice, the defendant would never be permitted under proposed new Rule 32.2(c)(2) to litigate any issue about the nature or extent of his or her forfeitable interest, a change which is manifestly substantive in nature. That issue would instead be decided by default: whatever a third party does not later successfully claim would be presumed to be the defendant's, and on that basis alone would be forfeited to the government. The revised rule thus assumes that the taint cannot extend to less than 100% of the defendant's interest in the property (a substantive point, and often untrue as to interests in businesses in RICO cases, and as to bank accounts and real estate). If no third party claim is made, the existence of a tainted interest is to be ascertained in an entirely undefined, post-judgment procedure ("if the court finds that the defendant ... had an interest in the property") under Rule 32.2(c)(2), another provision that was not part of the rule when circulated for comment.

The net result of the new process 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 (often meaning the defendant's spouse or parents) 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. It ignores the all-too-common problems of third parties' lack of notice, fear of possible criminal or civil liability, ignorance, confusion and turmoil due to a family member's recent conviction.

Under present practice, the government must first have proven to the jury, in a trial-like proceeding at which the rules of evidence were applied,¹ while the defendant was represented by counsel, that the defendant had some particular interest in property which is forfeitable. Instead, 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"

¹ 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 bold departure 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.

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.

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, other than the suggestion that under Libretti it would not violate the Sixth Amendment's jury clause to do so. This provision of the proposal has never been subject to comment.

(b) In addition to its failure to address the basis on which the court is to make the new post-sentence "finding" that the defendant has an interest in the allegedly forfeitable property, and its failure to provide a process where the defendant would have a right to be heard at that time, and in addition to its devastating practical impact on third party rights, this newly drafted provision suffers a fatal conceptual flaw: if the criminal forfeiture is "part of the sentence," as affirmed in new Rule 32.2(a), the final order of forfeiture to be entered against the defendant must be made part of the defendant's judgment of sentence; it cannot be determined months after sentencing. Although Rule 32.2(b)(3) asserts that the order "becomes final as to the defendant" at the time of sentencing, under this rule the nature and extent of the property that the defendant is to lose will not have been determined at that time. This proposal, unlike present practice, would produce a criminal judgment that is 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 have been assessed. 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."). Alternatively, if new Rule 32.2(b)(3) is meant to suggest that the defendant's right to appeal the conviction and sentence would continue to arise from the judgment, then the defendant will have to be allowed a second appeal in any criminal case in which the defendant believes he or she is aggrieved by the post-sentence Rule 32.2(c)(2) "finding," such as to challenge the extent of his or her property that is to be forfeited. This novel departure from currently accepted notions of finality

should be circulated for full public discussion and comment.²

(c) Also new in the current proposal and deserving of full public consideration and comment is the revision of the notice rule, 32.2(a), replacing current Rule 7(c)(2). The present language of Rule 7(c) barely suffices to satisfy the due process requirement that an accused person receive notice of the penalty he or she faces. See BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 1598 (1996). As last circulated, the rule would have required an averment that the defendant "has an interest in property that is subject to forfeiture in accordance with" a particular statute. The new proposal, not responding to any concern expressed in the last round of public comment or by the Standing Committee, replaces this with a mere "notice" that "the government will seek the forfeiture of property as part of any sentence." The former language at least implicitly invited specification through a bill of particulars. The new language leaves the mechanism by which the property to be forfeited would be named (and the timing of that disclosure) completely unexplained -- apparently allowing case by case, judge by judge determination of any pretrial notice that would satisfy a minimum due process standard.

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. See 18 U.S.C. § 1963(d)(1); 21 U.S.C. § 853(e)(1). 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. These statutes become either unintelligible or constitutionally unenforceable under the proposed revision of Rule 32.2(a). 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

² 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. Nor is possible to understand how, where, or when the defendant would have the opportunity to litigate that matter.

Congress first amends the restraining order provisions, or the Committee adds a due process hearing protection to be invoked before a restraining order can be issued. See 2 David B. Smith, *Prosecution and Defense of Forfeiture Cases* ¶14.01, at 14-3 to 14-4 (12/98 rev.). We find it hard to imagine that this part of the proposal could not be improved with the benefit of public comment.

(d) Also entirely new in the present version of this proposal is a codification of the notion of a criminal forfeiture of a "personal money judgment." Prop. R. 32.2(b)(1). There is no statutory authority for this concept, which the Conference should not allow to be slipped into the Rules. While we appreciate that in response to our objection on this point the Standing Committee directed the Reporter to add language to the Note disavowing 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, particularly because the Note cites supportive caselaw and disregards the contrary cases.³ Moreover, this draft would deny any role to the jury in connection with such judgments, even where, for example, the amount of proceeds or of funds laundered was factually contested. This provision should be subject to publication and comment.

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 (under the current rule) 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. What the statutes authorize is forfeiture of specific property or interests in property, not an amount of money equal in value to that tainted property.

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 forfei-

³ See, e.g., 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); 2 D.B. Smith, supra, ¶13.02, at 13-36 (12/98 rev.). The proposed Note's citation of United States v. Voigt, 89 F.3d 1050 (3d Cir. 1997), is inapposite in this regard, as the Voigt case did not involve a challenge to any such "money judgment" forfeiture. In fact, its analysis clearly 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.

ture 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 adoption of the substitute asset provisions of the statutes; indeed, the concept appears to originate in cases pre-dating the 1986 statutory amendment that created the notion of "substitute assets." Far from implying authority to impose such "judgments," the enactment of the substitute asset provisions actually proves 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).

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. Good Real Property, 510 U.S. 43 (1993) (procedural fairness "is of particular importance ... where the Government has a direct pecuniary interest in the outcome of the proceeding," *id.* at 55-56; thus, "it makes sense to scrutinize governmental action more closely when the State stands to benefit." *Id.* at 56, quoting Harmelin v. Michigan, 501 U.S. 957, 978 n.9 (1991) (Scalia, J., concurring)); 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 the proposed Rule's inclusion of these novel, controversial, and substantive provisions, the Conference should not approve it without resubmission for public comment.

2. The Proposal Is More Suited to Legislative than to Judicial Action.

Comprehensive proposals for forfeiture reform, both civil and criminal, are and have been before the Congress. It is our understanding that Chairman Hyde now has the matter high on the Judiciary Committee's agenda. 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. When the substantive issues are settled in that more appropriate forum, it will be time for the judiciary to develop fair and even-handed rules of procedure to implement those laws. Until then, the present proposal is too complex, too substantive, and too controversial for Rules Committee action.

To: Members of the Judicial Conference
Re: NACDL Comments on Proposed Crim. Forf. Rules

March 9, 1999
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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 government'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 or to support the statutory remedy of a restraining order. The Judicial Conference should not approve the Standing Committee's proposal. 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 any ongoing efforts to reform criminal forfeiture procedure.

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

Respectfully,


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

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