D.C. district court denies government's motion to compel disclosure of witnesses interviewed by claimant's counsel as privileged work product. The government moved to compel Claimant Lazarenko to provide a supplementary response to one of its interrogatories. The dispute revolved around two interrogatories. Interrogatory 9 asked Claimant to identify, among other things, all persons with knowledge of the facts set forth in Claimant's responses to Plaintiff's previous interrogatories and the basis for their knowledge. The government claimed the response directly or indirectly referred to hundreds of individuals. Thus, in Interrogatory 10, the subject of the dispute between the parties, it asked to identify all persons Claimant interviewed or from whom he obtained statements or documents in relation to the facts and allegations of the Amended Complaint, standing of any party or claimant, or defenses to forfeiture. The court held that the government is free to ask for names of persons with knowledge of the facts, but it is not entitled, through Claimant, to the identification of who among such knowledgeable individuals have been interviewed by counsel. To grant such a request would be to reveal to Claimant's adversary in the litigation how Claimant and his counsel chose to prepare their case, the efforts they undertook, and the people they interviewed – all information that falls within the scope of the work-product doctrine. Moreover, the information the government sought from Claimant was far more than just a list, since it was asking Claimant to narrow a list of several hundred individuals Claimant identified as knowledgeable about the facts of this case by identifying those individuals his counsel determined were worth interviewing. Such a request called for counsel to reveal their legal theories and strategic decisions regarding who to interview in preparation for trial based on the information available to them. Requiring such a disclosure would run contrary to the Supreme Court's determination that proper preparation of a client's case demands that counsel assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. Accordingly, the court denied the government's request for an order compelling Claimant to disclose the identities of the individuals counsel interviewed in this matter. *United States v. All Assets Held at Bank Julius Baer & Co., Ltd.*, No. CV 04-798 (PLF/GMH), 2017 WL 4075154 (D.D.C. Sept. 13, 2017).

Tennessee district court denies intervention by county tax collector for failure to file timely claim. The government brought this civil forfeiture action against two properties in Tennessee, alleging that Leslie Janous purchased them with $647,698 in criminal proceeds, which she unlawfully obtained through acts of wire fraud. Three lienholder claimants came forward and asserted an interest. Recognizing their interests, the government reached an agreement with them which provided the government with the right to sell the properties and use the proceeds to meet the claimants' interests, but as it prepared to sell them, a dialogue began between it and Knox County, Tennessee, which, though it was not a party to the consent order, apparently contacted the government Attorney's Office and maintained that it also had an interest in the properties in the form of liens for the payment of back taxes. A dispute then arose with the government contending that the County was entitled to collect taxes that had accumulated only prior to entry of the order, not after it. In an effort to resolve their dispute, the government acknowledged the County's lien as valid and purported to have waived the requirement that the County must file a verified claim of interest in the Defendant Properties. Together, they moved the court to hold the proceeds from the properties' sale in escrow until the court could determine the extent of the County's liens. Although the court granted the parties' motion, the County soon afterwards moved for relief from the Consent Order altogether, seeking an order "declaring all proceedings, orders, and judgments ... void and of no effect." The court denied that motion, and the County appealed its decision. The Sixth Circuit dismissed the appeal for lack of subject matter jurisdiction because the County had never properly become a party to the lawsuit in the first place. The Circuit noted that because a civil forfeiture action is in rem, a third party with an interest in the property has to intervene in the case before it can protect that interest, by filing a verified claim or a motion to intervene under FRCP 24, or by requesting the Circuit's permission to intervene in a post-judgment capacity for purposes of appeal. The County thus later reappeared in district court with a Rule 24 motion to intervene in hand, asking the Court to acknowledge it as a party to the proceeding. Although the County did not expressly say so, it appeared to be requesting intervention as a matter of right under Rule 24(a). The fact that the case was in post-judgment did not in and of itself preclude a party from achieving intervention. But even before the court weighed the issue of timeliness, it said intervention was first and foremost a matter of standing, which the court could raise sua sponte because it is a prerequisite for subject matter jurisdiction, Statutory standing requires a third party to assert that interest by filing a verified claim under Rule G(5), without which he cannot attain statutory standing and become a litigant in the forfeiture proceeding in rem. The County had not filed a verified claim—timely or otherwise. Instead, it asked the court to waive Rule G(5)'s requirement of a duly filed verified claim, requesting the district court to interpret its prior pleadings and the motion to intervene as a "claim" since it set out all of the necessary elements of its claim. However, the County filed no prior pleadings in this action, only motions, and the requirement of a verified claim is not some mindless technicality, but a congressional requirement. The mere fact the government purported to have recognized the valid lien without requiring the County to file a claim was meaningless since the filing of a verified claim under Rule G(5) was an antecedent to standing, without which the Court did not have subject matter jurisdiction over the County's cause. A court's analysis of timeliness under Rule G(5) is not open-ended, unlike under Rule 24(a), but hemmed in by strict compliance. Because of the inconsistencies between Rule 24(a) and Rule G(5), a third party's motion to intervene under Rule 24(a) in a forfeiture action must conform to Rule G's strictures. Thus, the County's motion did not comply with Rule G(5) and it had no standing to intervene in the action. *United States v. Real Prop. Located at 1308 Selby Lane, Knoxville, Tennessee 37922*, No. 3:10-CV-423, 2017 WL 4158918 (E.D. Tenn. Sept. 19, 2017).

Fourth Circuit affirms denial of defendant's request to release substitute assets to pay for appellate counsel because assets had been ordered forfeited and thus title had already vested in government. After Marshall was convicted of various crimes at trial, the government initiated forfeiture of his substitute assets, and the district court entered an order of forfeiture. Marshall then petitioned the court of appeals to release his untainted funds ($59,000 in his credit union account) so that he may hire appellate counsel of his choice for the appeal of his criminal convictions. He argued that the Constitution required the release of substitute assets forfeited by a defendant after conviction if the funds are needed for appellate representation. The court first noted that criminal defendants have no federal constitutional right to an appeal, only a statutory right. Also, indigent defendants have a right to appellate counsel under the Fourteenth Amendment, but not for discretionary appellate review. However, the Supreme Court has never held that defendants enjoy the right to counsel of choice on appeal. Nevertheless, the Supreme Court has plainly foreclosed Marshall's request to use his forfeited funds to hire appellate counsel, holding that the Sixth Amendment does not require the release of forfeited funds to pay for trial counsel postconviction because a defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way the defendant will be able to retain the attorney of his choice. On the other hand, the Court held that the government may not freeze untainted assets (i.e., those assets not connected to the crimes charged) pretrial that a defendant needs to hire counsel of her choice. Applying the principles from those two cases, the court of appeals first noted that the present case involves the restraint of untainted assets postconviction, where the first case addressed the restraint of tainted assets postconviction and the second involved the restraint of untainted assets pretrial. Taken together, the court concluded that Marshall may not use his forfeited assets to hire appellate counsel. The prior cases established that the right to use forfeited funds to pay for counsel hinges upon ownership of the property at issue – here the credit union funds forfeited after conviction as 21 U.S.C. §853(p) substitute assets. In general, if the defendant owns the property, he is entitled to use it for his defense; if he does not own the property, he may not. Title in property connected to the crime of conviction vests in the government when the crime is committed. Conversely, title to substitute property vests in the government upon order by the district court after conviction, at the latest. Thus, title to Marshall's substitute property had vested in the government by the issuance of the district court's forfeiture order following his conviction. Consequently, Marshall did not own the property he sought to use to pay appellate counsel. *United States v. Marshall*, No. 16-4494, 2017 WL 4227960 (4th Cir. Sept. 25, 2017).

Sixth Circuit reverses striking of claims because Rule G(5) requires claimants to do no more than identify themselves and state their interest in the property subject to forfeiture. The district court granted the government's motion to strike the claims to currency seized from each man at the Cleveland Hopkins International Airport. Each man's claim asserted that he owned the currency that had been taken from his suitcase. The district court recited the facts as alleged by the government, found that each claim presented "nothing more than a naked assertion of ownership," and held that they lacked the standing necessary to pursue their claims. On appeal, the court noted that in the two claims the claimants asserted that each claimant was the sole and absolute owner of a separate amount of the seized currency, and was in exclusive possession of those monies, which were forcibly taken from their possession. The claimants each had filed an answer to the forfeiture complaint and the district court held a case management conference, at which the parties agreed upon a deadline for the completion of discovery. Less than a month later the government moved to strike both claims. The district court found pursuant to Rule G(8)(c)(i)(A) that the claimants lacked standing because their claims were nothing more than a naked assertion of ownership. The appeals court analyzed whether the claimants failed to comply with Rule G(5), which establishes "statutory standing." Rule G(5)(a)(i)(B) provides that a claim must identify the claimant and state the claimant's interest in the property. The district court stated that "[b]ecause of the danger of false claims, a claimant cannot satisfy Rule 5(G)(a)(i) with a conclusory statement of ownership." The court held that the claimants complied with the procedural rules, and the government's interpretation of Rule G(5) was incorrect, i.e., the claimants failed to provide any explanation or contextual information regarding their relationship to the defendant U.S. currency found in their luggage. The court said the government and the district court cited to no binding precedent supporting this approach, however, and Rule G does not require a claimant to provide "any explanation or contextual information." Article III standing may require some contextual information for a possessory interest, but even that is distinct from the assertion of an ownership interest. Rule G(5) requires claimants to do no more than identify themselves and state their interest in the property subject to forfeiture. A claimant's ability to proceed under Rule G, called "statutory standing," is satisfied through mere compliance with the rule, and there was no persuasive reason to import a heightened pleading standard that has no basis in the text. Also, Rule G's verification requirement is a built-in preventative measure that limits the danger of false claims. At the pleading stage, a verified claim of ownership is sufficient to satisfy Article III and the procedural requirements of Rule G. Here, where the government alleged that it took a bundle of cash from a claimant's suitcase, and each claimant stated that he owned the cash, there is a clear allegation of ownership that satisfies Article III. And the claimant's making of such a statement is what satisfies Rule G's statutory standing requirement. Therefore, the court reversed, holding that at least at this stage in the litigation, there was no basis on which the district court could strike the claim. *United States v. $31,000.00 in U.S. Currency*, No. 16-4279, 2017 WL 4159178, (6th Cir. Sept. 20, 2017).

Ninth Circuit reverses jury verdict for plain error in jury instruction because mere intent to facilitate drug transactions is insufficient for forfeiture without proof of some act to effectuate that intent. This appeal was from a civil forfeiture of $11,500 under 21 U.S.C. § 881(a)(6). The claimant and his wife were heroin addicts who had been buying and selling drugs for most of their lives. When the claimant, through a friend, tried to post the $11,500 as bail for his wife, the government seized the cash. At trial, the government had two theories: first, that the money was proceeds from the claimant's drug deals; second, that the claimant used or intended to use the money to facilitate drug transactions. The jury rejected the first "proceeds" theory, but found for the government on the second "facilitation" theory. On appeal, the court reversed, holding that the district court's instructions to the jury on the facilitation theory were plain error because they permitted forfeiture even if the claimant never took any step to use the money to facilitate drug transactions. At trial the claimants argued that the $11,500 came from an insurance settlement and used-car sales. The jury instructions presented alternative legal theories for the forfeiture. The first was the "proceeds theory," on which the government had focused its case, which authorized forfeiture of any money derived from drug sales. The second theory – which the district court called the "facilitation theory" – authorized forfeiture if the money "was used or was intended to be used to facilitate illegal drug activity." Although the district court did not divide the second theory into its two distinct prongs ("used" and "intended to be used"), it broadly instructed the jury that " '[f]acilitating property' includes any property that makes the prohibited conduct 'less difficult or more or less free from obstruction or hindrance.' " The jury instructions on the two theories of forfeiture were derived directly from the controlling statute, § 881(a)(6), and neither party objected to them. In closing, the government spent the vast majority of its time on the proceeds theory, attempting to convince the jury that the money came from heroin sales. But, at a few points, the government also mentioned the facilitation theory, focusing almost exclusively on the "intended to be used" prong. In light of such addiction, it was very likely, the government argued, that the claimants would have used the $11,500 "to keep their habit going." After closing arguments, the district court issued a special verdict form almost identical to one jointly submitted by the parties. The form asked the jury two questions: 1. Has the United States proven by a preponderance of the evidence that the $11,500 is the proceeds of an exchange or exchanges for a controlled substance? 2. Has the United States proven by a preponderance of the evidence that at least a portion of the $11,500 was used or intended to be used to facilitate an exchange or exchanges of a controlled substance? Each juror then voted against the proceeds theory, and six of seven jurors voted in favor of the facilitation theory. The $11,500 was thus forfeited to the government. On appeal, the claimants argued the money was forfeited based on "intent without conduct." These arguments were best characterized as challenges to the jury instructions, which permitted the jury to rule in the government's favor if it found the money "was intended to be used to facilitate illegal drug activity." Since the claimants failed to challenge these instructions or any other relevant ruling at trial, the court reviewed the instructions for plain error. The facilitation theory the jury accepted required one of two distinct findings: (1) that the $11,500 was "used" to facilitate a drug transaction or (2) that it was "intended to be used" to facilitate the same. The court said the special verdict form did not separate the "used" and "intended to be used" prongs, and therefore it could not know for sure whether the jury found that the money actually was used or merely intended to be used to facilitate drug transactions. The record showed no evidence of the claimants using the $11,500 to facilitate their drug operations before the seizure of the funds. Indeed, the government's theory of the case largely ignored the "used" prong. Read as a whole, the government's closing argument presented the jury with two choices: either find that the claimants derived the money from selling drugs (the proceeds theory) or that they intended to use it in the future to facilitate the buying and selling of drugs (the facilitation theory). The government never offered the jury a third option of finding that the $11,500 was not the proceeds of past drug transactions but had been used to facilitate past drug transactions. Even if it had, the court would still have the dilemma of not knowing which path the jury took to reach its verdict. Given the record, the government's arguments, and the fact that the jury found the money was not "proceeds" from past drug transactions, the court was unwilling to assume the jury found that the claimants actually used, as opposed to only intended to use, the $11,500 to facilitate drug transactions. Like their common law antecedents, federal inchoate offenses require that an actor take some step to manifest his bad intent or purpose. These foundational common law principles have been read into the Eighth Amendment, which prohibits "excessive fines" and "cruel and unusual punishments." Accordingly, if the forfeiture at issue were a punishment for the claimants' mere intent to use the $11,500 for bad purposes, it would likely violate the Eighth Amendment. Thus, the court held that §881(a)(6) does not authorize forfeiture based on mere intent to facilitate drug transactions without proof of some act to effectuate that intent. The district court erred by failing to include this limiting principle in its instructions to the jury. *United States v. $11,500.00 in United States Currency*, 869 F.3d 1062 (9th Cir. 2017).