

Colorado district court holds that Claimant was not deprived of his due process rights applying the government's preponderance of the evidence standard of proof in a civil forfeiture case. The claimant moved to dismiss a civil forfeiture action, arguing the basis for forfeiture violated his Due Process rights. Claimant's theory was based on a concurrence by Justice Thomas in *Leonard v. Texas*, 137 S.Ct. 847 (2017), and urged a higher standard of proof. Claimant argued that civil forfeiture essentially acts as a punishment. The court first noted that case law has long recognized that in rem civil forfeiture is a remedial civil sanction, distinct from potentially punitive in personam civil penalties such as fines, and does not constitute a punishment for double jeopardy purposes. It added that the Supreme Court has clearly determined that the beyond a reasonable doubt is a standard reserved for criminal cases. Also, in *Leonard*, Justice Thomas commented on Texas' forfeiture statute as opposed to CAFRA, which differ in terms of their afforded rights and procedures; while Thomas' comments perhaps condemned the broad modern forfeiture practices, they were neither a holding or *dicta*. The court further stated that the government has a significant interest in deterring the drug trade by forfeiting illegal proceeds, in making such behavior unprofitable, dismantling criminal organizations, and deterring others who may see that criminal conduct is not always lucrative. Although the rights of individuals to hold and maintain their property free of government interference is firmly established and due process is clearly required before an individual may be divested of property, individuals have no right to drug proceeds. In the hide and seek world of drug proceeds, it would be hard for the government to prove the origin of particular funds beyond a reasonable doubt or even by a clear and convincing standard. Thus, it is not unreasonable nor a due process violation to apportion the risk of an erroneous finding at the preponderance level. Also, the cumulative safeguards in civil forfeiture procedure are adequate to protect claimants' due process rights. Thus, the court did not find a significant benefit would derive to society by heightening the standard of proof. Congress has clearly spoken and set the burden of proof in civil forfeitures at a preponderance standard, and when combined with the significant protections provided under CAFRA, Claimant was not deprived of his due process rights with that standard of proof. *United States v. \$114,700.00 in United States Currency*, No. 17-CV-452-CMA-GPG, 2017 WL 6205529 (D. Colo. Dec. 8, 2017).

New York district court denies victim petitioner's request that forfeited property be used for restitution because victim failed to file petition under 21 U.S.C. §853(n). A jury found Afriyie guilty of one count each of securities and wire fraud based on an insider trading scheme he carried out as an analyst at MSD. Afriyie had accessed, from MSD's confidential database, information about a plan by a private equity company to buy security company ADT Corporation. He then purchased exotic call options for ADT in a TD Ameritrade brokerage account he had opened in his mother's name; the options cost Afriyie less than \$25,000 but, when the plan was disclosed, resulted in illicit profits for Afriyie of \$1.53 million. The government's proposed preliminary order of forfeiture provided that the TD Ameritrade account and Afriyie's separate savings account at Bank of America were derived from the proceeds of Afriyie's offenses. Afriyie filed a letter objecting to the proposed order, but MSD, whose counsel had monitored the trial and a number of whose employees had testified at trial, did not raise any objection. The court entered the Preliminary Order of Forfeiture with a criminal money judgment in the amount of \$2,780,720.02, representing the total proceeds Afriyie had derived from the offenses, and ordered forfeiture of his interest in the two specific properties covered by

the jury's special verdict—\$2,632,893.39 in the T.D. Ameritrade account, and \$15,969.07 in the Bank of America account. Because the value of the specific properties was less than the amount of the money judgment embodied in the forfeiture order, the government filed a motion for a preliminary order of forfeiture as to certain substitute assets. Again, Afriyie opposed the proposed order but MSD did not object. Each of the preliminary forfeiture orders was publicized, and the court eventually entered final orders of forfeiture. In its sentencing submission, the government argued that MSD was entitled to restitution for the necessary legal fees and expenses it had incurred in assisting in the investigation and prosecution of Afriyie's insider trading. The day before sentencing, MSD made its first submission to the court, emailing a letter setting forth the fees and expenses it had incurred. At sentencing, the court issued a bench ruling agreeing MSD was entitled to restitution. The government filed the proposed order of restitution, seeking \$663,028.92 in restitution for MSD, which then moved to vacate the existing order of forfeiture and order instead that the specific property ordered forfeited be paid towards the restitution because Afriyie lacked assets sufficient to satisfy his restitution obligation, and DOJ had denied MSD's restoration request because the types of costs covered in the restitution order – attorney's fees and costs – were not compensable under the regulations governing restoration and remission. The court first held that because of Afriyie's pending appeal, it lacked jurisdiction to decide MSD's motion. In the interest of judicial economy, it nevertheless explained that, even if jurisdiction were proper, it would deny MSD's motion, because MSD did not raise an objection or request that the court prioritize restitution over forfeiture. Its new request came too late and by means of an improper vehicle, since MSD did not at any point seek a 21 U.S.C. §853(n)(2) hearing, and it first filed its motion some six months after the final order of forfeiture issued. *United States v. Afriyie*, No. 16-CR-377 (PAE), 2017 WL 6375781 (S.D.N.Y. Dec. 11, 2017).

Sixth Circuit holds that County tax authority had standing to file ancillary petition regarding tax lien, but affirmed denial of interlocutory sale of property to enforce lien. The question on appeal was whether Knox County, Tennessee has standing to file a claim in district court asserting its undisputed right to collect delinquent property taxes on real property subject to criminal forfeiture, and whether the district court abused its discretion in denying the County's motion for an interlocutory sale of the property. Because Knox County has a legally cognizable interest in the property in the form of a tax lien, the district court erred in dismissing for lack of standing Knox County's claim. The Court also affirmed the denial of the motion for interlocutory sale. The Court found that the County's claim alleged it held a first lien, superior to all other interests, securing its right to receive payment of property taxes assessed against each parcel of real property. The Court then held the tax lien constituted a legally cognizable interest in the seized property, and the County had constitutional standing to file a petition under 21 U.S.C. §853(n). The district court had reached the opposite conclusion by evaluating the extent of the alleged interest, determining that the government had already promised to pay the County the full amount that it was due, and concluding the County lacked standing to file a claim because it was guaranteed to receive all that it was legally owed, and it lacked a legally cognizable interest in pursuing anything more. The appeals court held that the district court improperly transformed a question on the merits– (what was the full extent of the County's interest in the seized properties?) – into a question of jurisdiction. The district court had no need to inquire, for the purposes of assessing standing, into the validity of the County's alleged interest in securing tax revenue after entry of the final order of forfeiture because the County adequately stated an

interest in securing the tax revenue that accrued up until the final entry of forfeiture, an interest that would be injured if the property were forfeited to the U.S. government without compensating the County for the value of its lien. The court also erred in determining that any injury the County would suffer by virtue of the forfeiture could not be redressed by a court order, since any number of court orders would likely have redressed the injury the County would have suffered if its tax lien were not satisfied. Rather than resolving this case at the jurisdictional stage, the district court should have followed the procedures set forth in §853(n). As for the motion for an interlocutory sale, however, the County failed to identify any interests in favor of an interlocutory sale and the district court clearly identified interests that would or could be harmed by ordering such a sale. *United States v. Hall*, 877 F.3d 676 (6th Cir. 2017).

California district court strikes civil forfeiture claim for failure to adequately respond to special interrogatory, but notes that where standing is not reasonably in dispute, failure to respond to such interrogatories does not, in itself, warrant striking his claim. The government initiated a civil forfeiture action against currency, and after Browne filed a claim the government served him with Special Interrogatories pursuant to Rule G(6) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions regarding his identity, criminal history, and his relationship with the claimed asset. After Browne failed to provide responses, the government filed a motion to strike his claim. The court issued a conditional order that Mr. Browne's claim be stricken unless within 30 days he served full and complete narrative responses. Browne served responses, the government sent him a letter requesting that he provide an adequate answer to Special Interrogatory 3. After Browne did not respond the government filed a second motion to strike claim based on his failure to comply with the Court's prior order. The court held that Special Interrogatory 3 was relevant to the issue of standing because it sought information concerning Browne's interest in the seized assets and documentation supporting his potential interest, the identification of sources from which he claimed the assets were derived and of all persons having knowledge of the interest, and the identification of any facts establishing his ownership or any other person's interest in the assets. Although the prior order required Browne to provide a full and complete narrative answer to Special Interrogatory 3, Browne provided a terse and conclusory response, stating that approximately \$16,000 was "loan[ed]" to him "from two [sic] my children mother [sic]," "more than \$4,000" was "loan[ed]" to him by his sister, and that the rest of the money, amount unspecified, came from his "personal funds." Browne's response, however, failed to explain the circumstances under which the loans were made to him, the reason for the loans, and the amount of the loans. His response also failed to specify the amount and source of his personal funds or identify any documents that supported his claim, and failed to provide the addresses of the "contributors" to the funds. Although the Ninth Circuit has held that "where a claimant's Article III and statutory standing are not reasonably in dispute, his failure to respond to Rule G(6) special interrogatories does not, in itself, warrant striking his claim," in that case standing was not reasonably in dispute because the parties agreed that the claimant was the recorded owner of the property, and the claimant filed not only a verified claim but also a motion to stay and an answer raising additional arguments in favor of standing. The Ninth Circuit also found it troubling that the district court in that case did not give the claimant an opportunity to cure his lack of response to the special interrogatories before granting the motion to strike. By contrast, here there was no consensus as to Browne's standing or interest in the property, since his conclusory statements in his response was not sufficient to meet his

burden to establish standing. Also, the court gave Browne an additional opportunity to provide adequate responses after his initial incomplete responses. Special Interrogatories are a preliminary step in the determination of these claims, and Browne's repeated failure to provide full and complete answers caused the government to incur significant time, expense, and delay. The court thus struck Browne's claim. *United States v. \$26,742.25 in U.S. Currency*, No. CV17003640CJCSSX, 2017 WL 6389091 (C.D. Cal. Dec. 13, 2017).

Tenth Circuit holds that Fed. R. Crim. P. Rule 32.2 permits a court to amend a preliminary, general forfeiture order once the amount of the money judgment has been calculated. Arnold devised a scheme to defraud individuals out of the rebates paid to them when they purchased new vehicles. They persuaded the victims to turn their rebates over to a charitable trust by falsely representing they would manage the trust to pay off the victims' car loans. Although Arnold made some loan payments from the trust, they eventually stopped and used the remaining rebate funds for their own personal expenses. The victims then either took over the loan payments or relinquished the vehicles to the lenders. The indictment notified Arnold of the government's intent to seek forfeiture of a money judgment in an amount equal to the proceeds obtained as a result of the offenses. He pled guilty to one count each of wire fraud and conspiracy to commit wire fraud, and the district court entered a preliminary order of forfeiture for him to pay a money judgment in an amount to be determined later by the court. At sentencing, the district court entered a final restitution order of \$280,075.15, payable to the victims, but left the amount of forfeiture unresolved. The government later moved under Fed. R. Crim. P. 32.2(e)(1) to amend the preliminary order of forfeiture, which lacked any specified amount, and to impose a \$160,136.50 forfeiture order. Arnold objected, arguing the court lacked jurisdiction to amend the preliminary order after sentencing. The court overruled his objection and adopted the government's proposed forfeiture order. On appeal, Arnold challenged the forfeiture order, arguing the government's failure to establish the amount of forfeiture before sentencing violated Rule 32.2 and thereby deprived the district court of jurisdiction to enter the forfeiture order. The court held Arnold failed to demonstrate a Rule 32.2 violation, since it permits a court to amend a preliminary, general forfeiture order once the amount of the money judgment has been calculated. Ongoing disputes between the parties prevented the district court from calculating the total amount of Arnold's forfeiture order before sentencing. Although these disputes were specifically about restitution, they concerned the amount of proceeds Arnold retained and thus were also relevant to the forfeiture calculation. Resolution of this dispute affected the amount of proceeds Arnold retained, which in turn determined how much he would have to forfeit. After the court settled these disputes and entered restitution, the government moved to amend the preliminary forfeiture order, which the court granted in compliance with Rule 32.2(b)(2)(C). *United States v. Arnold*, No. 17-6038, 2017 WL 6599036 (10th Cir. Dec. 27, 2017).

North Carolina district court compels production of claimants' tax returns since they would provide information as to their profits, and therefore were relevant to issues regarding the source of the defendant currency. The government filed a complaint for forfeiture against \$307,970.00 in U.S. currency seized from Garcia during a traffic stop. Garcia and two others filed claims contesting forfeiture and filed a joint answer. After numerous motions and discovery, the government moved to compel production of claimants' federal income tax returns for the years 2007 through 2012. The court first noted that while the Fourth

Circuit had not developed a clear rule as to the discoverability of tax returns, disclosure of tax returns is disfavored. Here, the government contended that claimants' tax returns provide information as to claimants' business profits, and therefore were relevant to issues regarding the source of the defendant currency. Where claimants' tax returns provided information concerning profits of their farm labor business, the court agreed that some of the tax returns were relevant for discovery purposes. Claimants also argued, however, that information contained in their tax returns was available from other sources already provided to the government, i.e., copies of their filed tax returns, certain deposition testimony, and other financial documentation produced to the government provided the same information contained in their tax returns filed with the IRS. The government argued that these alternative sources were unreliable and inaccurate, since in another, unrelated litigation, claimants produced tax information that was inconsistent with the tax information produced in this case, although Claimants previously provided testimony that the information contained in these documents was accurate. Therefore, to the extent the government sought production of claimants' tax returns for these years, the government's motion to compel was denied. However, the court granted the government's motion to compel other tax returns that had not been produced. *United States v. \$307,970.00 in U.S. Currency*, No. 4:12-CV-00136-FL, 2017 WL 6454019 (E.D.N.C. Dec. 18, 2017).

Virginia district court dismisses petition by minor's guardians because defendant's revocable trust retained total control over and interest in the trust's assets and reserved the right to revoke or amend the trust during her lifetime. Defendant Deborah Wagner pled guilty to fraud charges related to a scheme that recruited straw purchasers to serve as grantees in fraudulent transfers of timeshare units. The government moved to dismiss and for summary judgment as to the petition filed by the guardians of Wagner's minor child asserting interests in the defendant's home, which was identified in a preliminary order of forfeiture. The government argued the petition, which alleged the home was the subject of a revocable trust in favor of the child, did not state a claim or otherwise comply with 21 U.S.C. § 853(n)(3) because the child's asserted interest was, at best, contingent and inchoate. The petitioner did not dispute or object to the Trust Agreement submitted by the government or otherwise challenge any of the government's factual assertions, but instead advanced a different theory: that "Ms. Wagner, her children, and her parents as a creditor" are entitled to all equity in the property because Defendant had to borrow money from her parents to pay her legal fees and to support her minor child while her assets were subject to the restraining order in this case. The court first found that the petition was facially deficient for failure to state a claim, because it was not signed under penalty of perjury, did not allege the extent of petitioner's interest in the property, and did not state the time and circumstances under which petitioner's interest allegedly arose. It further stated no other facts that - if assumed true - would establish a sufficient interest in the property. It further held that permitting an amendment would be futile because the undisputed facts showed that petitioner could not establish any vested interest in the property that would warrant relief under 21 U.S.C. §853(n). According to the Trust Agreement, Defendant retained total control over and interest in the trust's assets and reserved the right to revoke or amend the trust during her lifetime. Since Defendant was alive, the trust's assets were subject to claims of Defendant's creditors. Since the government's interest in the real property at issue vested by the date the Court entered the agreed Preliminary Order of Forfeiture, and Defendant could have disposed of the property and distributed all proceeds to herself if she so desired, then no right,

title, or interest vested in petitioner rather than Defendant or superior to Defendant's rights, title, and interest in the property. *United States v. Deborah Wagner*, No. 4:15CR28, 2017 WL 6513420 (E.D. Va. Dec. 19, 2017).

Michigan district court dismisses motion to vacate forfeiture order, because although a *Honeycutt* argument may be raised on direct appeal, §2255 does not provide a basis for the defendant's forfeiture attack. The defendant was sentenced in 2015 to a prison term following his guilty plea to drug-trafficking crimes. Prior to sentencing, the court entered a stipulated order of forfeiture under seal that directed the defendant to satisfy a money judgment in the amount of \$150,000, representing the total value of the property subject to forfeiture for the defendant's violations. The order stated the defendant was jointly and severally liable for the money judgment with his co-defendants, and by entering into the stipulation, he expressly waived the requirements of Federal Rules of Criminal Procedure 32.2 and 43(a) regarding pronouncement of forfeiture at sentencing and incorporation of forfeiture in the judgment. At the sentencing hearing, the court granted the government's oral motion to include the stipulated order of forfeiture in the defendant's judgment. The defendant voiced no objections to the sentence at the time and did not file a direct appeal. In 2017, the defendant filed a motion to vacate his sentence under 28 U.S.C. §2255, contesting only the forfeiture portion of his judgment. He argued the money judgment was unlawful because it was based on joint and several liability. The defendant avers that the property he actually acquired as a result of the crime was approximately \$20,000 and that the additional \$130,000 contemplated by the forfeiture order accounted for property obtained solely by his co-conspirators. The defendant cited *Honeycutt v. United States*, where the Supreme Court concluded “[f]orfeiture pursuant to §853(a)(1) is limited to property the defendant himself actually acquired as the result of the crime.” The Court held that section 853, by its plain text, forecloses joint and several liability for co-conspirators. Courts, however, uniformly have held that defendants cannot use section 2255 to attack restitution or forfeiture orders incorporated in their judgments. The custodial limitation embedded in the text of the federal postconviction statutes makes plain that convicted defendants have no right to use those statutes to raise freestanding challenges to the non-custodial components of their sentences, including forfeiture orders. Moreover, at least three courts recently have since denied motions to vacate raising *Honeycutt* arguments under section 2255(a). Although a *Honeycutt* argument may be raised on direct appeal, since section 2255 does not provide a basis for the defendant's forfeiture attack, the defendant's motion to vacate was dismissed. *United States v. Ball*, No. CR 14-20117, 2017 WL 6059298 (E.D. Mich. Dec. 7, 2017).