

FORFEITURE, RESTITUTION, & PRETRIAL RELEASE

— DISTRICT UPDATE —

Lisa Hay, Federal Public Defender
Portland, Oregon
February 22, 2017

Specific Case Plea Language Creating Money Judgment

- Money Judgment: By signing this agreement, defendant knowingly and voluntarily forfeits all right, title, and interest in and to a **\$15,000.00 money judgment** pursuant to 21 U.S. C. § 853, which defendant admits are proceeds obtained directly or indirectly as a result of said violations as set forth in Count 1 of the Superseding Indictment.

US ATTORNEY'S OFFICE

Katie de Villiers (used to be Katie Lorenz)

Chief, Asset Recovery & Money Laundering Division

Forfeiture Counsel: Steve Mygrant, Amy Potter

Financial Litigation Unit: Kathleen Bickers, Jeri Duarte (paralegal)



U.S. Department of Justice Equitable Sharing Program

Thank you for your interest in becoming a participant of the Department of Justice Equitable Sharing Program (Program). Through this Program, the Department of Justice distributes an equitable share of forfeited property and proceeds to participating state and local law enforcement agencies that directly participate in an investigation or prosecution that result in a federal forfeiture. The Equitable Sharing Program is governed by the policy set forth in the *Guide to Equitable Sharing for State and Local Law Enforcement Agencies* (April 2009), updated interim guidance, and all *Equitable Sharing Wires*. An electronic copy of the *Guide*, along with the other policy updates are available on AFMLS public website (www.justice.gov/criminal-afmls/equitable-sharing-program).

Asset Forfeiture Actions By USAO FY15

Table 16 (Continued)

District	Civil Cases		Criminal Cases		Civil	Criminal	Asset Forfeiture	Non-Forfeited Assets		Forfeited Assets	
	Pending	Completed	Pending	Completed	Forfeiture	Forfeiture	Fund Deposits	Equitable Sharing	Applied to Victim	Applied to Victim	
					Amount	Amount	Amount	Amount	Compensation	Compensation	
Kentucky, Western	24	26	51	43	\$8,177,263.00	\$1,465,125.00	\$7,697,042.00	\$1,588,406.00	\$0.00	\$0.00	
Louisiana, Eastern	5	0	16	19	\$0.00	\$3,121,033.00	\$3,177,911.00	\$266,439.00	\$0.00	\$8,871.00	
Louisiana, Middle	2	1	32	26	\$18,842.00	\$2,106,958.00	\$524,384.00	\$0.00	\$0.00	\$871,413.00	
Louisiana, Western	1	1	13	17	\$5,666.00	\$109,032.00	\$825,308.00	\$1,167,850.00	\$0.00	\$204,935.00	
Maine	3	4	12	17	\$103,601.00	\$520,643.00	\$559,926.00	\$127,884.00	\$0.00	\$144,402.00	
Maryland	87	52	72	38	\$9,432,907.00	\$8,649,621.00	\$15,354,951.00	\$3,582,706.00	\$0.00	\$21,500.00	
Massachusetts	26	16	143	71	\$3,068,794.00	\$5,053,588.00	\$5,588,380.00	\$2,273,975.00	\$0.00	\$427,813.00	
Michigan, Eastern	80	36	110	38	\$4,733,601.00	\$934,844.00	\$5,556,078.00	\$1,498,106.00	\$1,906,347.00	\$782,689.00	
Michigan, Western	1	2	25	31	\$16,414.00	\$1,800,347.00	\$764,265.00	\$521,605.00	\$40,000.00	\$365,894.00	
Minnesota	18	10	103	95	\$880,025.00	\$2,317,921.00	\$3,666,812.00	\$868,700.00	\$0.00	\$12,334,753.00	
Mississippi, Northern	7	2	6	3	\$46,607.00	\$1,411,297.00	\$329,769.00	\$275,937.00	\$0.00	\$5,534,961.00	
Mississippi, Southern	5	6	28	49	\$304,348.00	\$1,003,410.00	\$750,658.00	\$313,845.00	\$0.00	\$0.00	
Missouri, Eastern	35	7	36	31	\$476,215.00	\$4,591,633.00	\$5,603,424.00	\$395,154.00	\$0.00	\$1,869,807.00	
Missouri, Western	23	12	76	74	\$6,166,651.00	\$5,914,955.00	\$10,301,613.00	\$604,477.00	\$0.00	\$815,323.00	
Montana	6	3	24	28	\$254,367.00	\$113,168.00	\$364,048.00	\$270,136.00	\$0.00	\$0.00	

73

\$2,158,017.00

\$3,303,200.00

\$2,393,506.00

\$1,171,413.00

\$0.00

\$211,648.00

New Mexico	31	33	26	37	\$1,665,430.00	\$2,048,746.00	\$1,946,543.00	\$531,425.00	\$0.00	\$17,781.00
New York, Eastern	53	41	195	115	\$24,979,598.00	\$50,604,190.00	\$71,778,569.00	\$3,657,547.00	\$0.00	\$14,365,161.00
New York, Northern	11	17	55	50	\$6,061,170.00	\$1,945,577.00	\$7,331,610.00	\$7,862,873.00	\$0.00	\$0.00
New York, Southern	52	28	271	137	\$37,073,088.00	\$3,903,304,864.00	\$4,334,109,356.00	\$4,420,397.00	\$0.00	\$16,472,211.00
New York, Western	38	52	91	58	\$4,121,719.00	\$7,597,654.00	\$7,059,248.00	\$3,571,183.00	\$0.00	\$2,088,347.00
North Carolina, Eastern	49	46	43	59	\$1,690,366.00	\$6,611,617.00	\$3,915,736.00	\$548,797.00	\$2,400.00	\$496,441.00
North Carolina, Middle	19	23	18	14	\$5,784,371.00	\$1,871,466.00	\$2,670,402.00	\$669,558.00	\$0.00	\$0.00
North Carolina, Western	24	13	186	147	\$2,276,562.00	\$12,414,731.00	\$10,704,331.00	\$693,530.00	\$235,620,039.00	\$1,268,676.00
North Dakota	6	1	48	43	\$2,600,000.00	\$176,092.00	\$1,553,717.00	\$37,967.00	\$0.00	\$0.00
Northern Mariana Islands	1	0	0	0	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Ohio, Northern	30	26	43	37	\$1,386,808.00	\$8,676,695.00	\$9,910,128.00	\$515,855.00	\$5,000.00	\$180,170.00
Ohio, Southern	27	19	107	130	\$543,521.00	\$16,712,682.00	\$16,459,788.00	\$897,525.00	\$0.00	\$535,677.00
Oklahoma, Eastern	2	0	2	4	\$0.00	\$64,814.00	\$171,306.00	\$1,137.00	\$0.00	\$139,692.00
Oklahoma, Northern	8	3	29	59	\$126,589.00	\$2,215,297.00	\$1,875,227.00	\$383,724.00	\$0.00	\$1,234,034.00
Oklahoma, Western	19	11	45	50	\$7,288,240.00	\$23,974,204.00	\$31,409,570.00	\$468,535.00	\$0.00	\$428,809.00
Oregon	27	28	74	73	\$2,158,017.00	\$3,303,200.00	\$2,393,506.00	\$1,171,413.00	\$0.00	\$211,648.00

Philosophy

Crime does not pay

Create parity between defendants by individualized money judgments

Apportion forfeiture or restitution among co-defendants based on who is being most cooperative, who can afford to pay back, who spent the most, other factors

EVIDENCE

- Law allows forfeiture of gross proceeds, not net.
 - Bank deposits at time of sale = gross proceeds, easy to prove.
 - Price of drug x informant's claim of number of sales
 - Money laundering = any deposited money

USAO Will be “conservative” when using circumstantial evidence

STATUTES

- CIVIL FORFEITURE: 18 U.S.C. § 981(a)
- CRIMINAL FORFEITURE: 18 U.S.C. § 982
- DRUG CASE FORFEITURE: 21 U.S.C. § 853

STATUTES

- AND: **28 USC 2461:**
- If a person is charged in a criminal case with a violation of an Act of Congress for which the civil or criminal forfeiture of property is authorized, the Government may include notice of the forfeiture in the indictment or information pursuant to the Federal Rules of Criminal Procedure. If the defendant is convicted of the offense giving rise to the forfeiture, the court shall order the forfeiture of the property as part of the sentence in the criminal case pursuant to the Federal Rules of Criminal Procedure and [section 3554 of title 18](#), United States Code. The procedures in section 413 of the Controlled Substances Act ([21 U.S.C. 853](#)) apply to all stages of a criminal forfeiture proceeding, except that subsection (d) of such section applies only in cases in which the defendant is convicted of a violation of such Act.

CASE LAW

- *United States v. Newman*, 659 F.3d 1235, 1241 (9th Cir. 2011):
“Criminal forfeiture is ... separate from restitution, which serves an entirely different purpose.”
- *United States v. Lo*, 839 F.3d 777, 789–90 (9th Cir. 2016):
An appeal waiver can validly waive the right to appeal a forfeiture order issued as part of the sentence regardless of whether the plea agreement provides the defendant with a reasonably accurate estimate of the amount of forfeiture or whether the defendant was given adequate notice before a district court determined that amount.

RESTITUTION

- **Victim & Witness Protection Act : 18 USC § 3663**

- Crimes under title 18 and drug crimes
- CT may consider defendant's assets in deciding whether to order restitution

- **Mandatory Victim Restitution Act: 18 USC § 3663A**

- Crimes of violence; property crimes under title 18 including those by fraud and deceit; drug crimes. **NOT COVERED**: child pornography, gun possession, bank larceny; money laundering;
- CT cannot reduce amount owed based on defendant's assets but should set a payment schedule based on defendant's assets

Plea Agreement Language Matters

MVRA applies if plea agreement reflects charge bargaining:

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

18 U.S.C.A. § 3663A

Defendant's Assets Do Matter

- (2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of—**
- (A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;**
 - (B) projected earnings and other income of the defendant; and**
 - (C) any financial obligations of the defendant; including obligations to dependents.**

18 U.S.C.A. § 3664

RESTITUTION IN JUDGMENT

SCHEDULE OF PAYMENTS - Probation

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

- A** X Lump sum payment of \$ 79,328.40 due immediately in full.
 ___ not later than ___, or
 X in accordance with **C** X or **D** ___ below; or
- B** ___ Payment to begin immediately (may be combined with **C** ___ or **D** ___ below);
- C** X Payment in monthly installments of not less than \$ 300.00 to commence immediately on the date of this judgment.
- D** ___ The Special instruction regarding the payment of criminal monetary penalties:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment¹ of the total criminal monetary penalties shall be as follows:

- A. Lump sum payment of \$49,459.95 due immediately in full.
 - not later than _____, or
 - in accordance with C, D, or E below; or
- B. Payment to begin immediately (may be combined with C, D, or E below); or
- C. If there is any unpaid balance at the time of defendant's release from custody, it shall be paid in monthly installments of not less than \$50.00, or not less than 10% of the defendant's monthly gross earnings, whichever is greater, until paid in full to commence immediately upon release from imprisonment.
- D. Any balance at the imposition of this sentence shall be paid in monthly installments of not less than \$_____, or not less than 10% of the defendant's monthly gross earnings, whichever is greater, until paid in full to commence immediately.
- E. Special instructions regarding the payment of criminal monetary penalties:

Plea Agreement Language

- a. **Disclosure of Financial Information:** Defendant agrees fully to disclose all assets in which he has any interest or over which the Defendant exercises control, directly or indirectly, including those held by a spouse, nominee or third party. Defendant agrees to truthfully complete the financial statement form provided herein by the earlier of 14 days from defendant's signature on this plea agreement or the date of defendant's entry of a guilty plea, sign it under penalty of perjury and provide it to both the United States Attorney's Office and the United States Probation Office. Defendant agrees to provide updates with any material changes in circumstances, as described in 18 U.S.C. § 3664(k), which occur prior to sentencing, within seven days of the event giving rise to the changed circumstances.

Plea Agreement Language

- Defendant understands and agrees that the total amount of any monetary judgment that the court orders defendant to pay will be due and payable immediately.

Plea Agreement Language

c. Potential Breach: The defendant's failure to timely and accurately complete and sign the financial statement, and any update thereto, may, in addition to any other penalty or remedy, constitute the defendant's failure to accept responsibility under U.S.S.G § 3E1.1 and be deemed a material breach of this agreement.

Plea Agreement Language

- Defendant further understands and agrees that pursuant to Title 18, United States Code, Section 3614, defendant may be **resentenced** to any sentence which might have originally been imposed if the court determines that defendant has knowingly and willfully refused to pay a fine or restitution as ordered or has failed to make sufficient bona fide efforts to pay a fine or restitution.

Plea Agreement Language

- Additionally, defendant understands and agrees that the government may enforce collection of any fine or restitution imposed in this case pursuant to Title 18, United States Code, Sections 3572, 3613 and 3664(m), notwithstanding any initial or subsequently modified payment schedule set by the court.

Plea Agreement Language

- Pursuant to Title 18, United States Code, Section 3612(b)(F) defendant understands and agrees that until a fine or restitution order is paid in full, defendant must notify the United States Attorney's Office of any change in the mailing address or residence address within 30 days of the change.

SUMMARY

- Advise client re forfeiture and restitution; could affect spouse's property, client's life long after sentence is done.
- Assess possible loss to victims and expenses for medical and psychiatric care
- In a drug case, consider asking AUSA if forfeiture counsel involved, include forfeiture in negotiations.
- Review judgment carefully; consider a hearing on client's ability to pay and need to support others

PRE-TRIAL RELEASE

- Meeting with Magistrate Judges; Goal = more pre-trial release
- Oregon release rate: 57%; W. Dist. Washington 74%
 - No difference in failure rates
- Statistics show higher failure rate if low level defendants are kept in custody even 1-2 days before pretrial release
- Oregon releases more high risk offenders than average; detains more low and medium risk offenders

PTRA

Risk Category	N	%	Risk Score
Category 1	52,677	29	0-4
Category 2	52,653	29	5-6
Category 3	49,920	27	7-8
Category 4	21,779	12	9-10
Category 5	4,710	3	11+

PTRA

FEDERAL PRETRIAL RISK ASSESSMENT INSTRUMENT (PTRA)	
DEFENDANT'S NAME: _____	DATE OF ASSESSMENT: _____
FACTS #: _____	OFFICER: _____ DISTRICT: _____
1.0 CRIMINAL HISTORY & CURRENT OFFENSE:	
1.1. NUMBER OF FELONY CONVICTIONS <input style="width: 30px; height: 20px;" type="text"/>	
0=NONE 1=ONE TO FOUR 2=FIVE OR MORE	
1.2. PRIOR FTAS <input style="width: 30px; height: 20px;" type="text"/>	
0=NONE 1=ONE 2=TWO OR MORE	
1.3. PENDING FELONIES OR MISDEMEANORS <input style="width: 30px; height: 20px;" type="text"/>	
0= NONE 1=ONE OR MORE	
1.4. CURRENT OFFENSE TYPE <input style="width: 30px; height: 20px;" type="text"/>	
0= THEFT/FRAUD, VIOLENT, OTHER 1=DRUG, FIREARMS, OR IMMIGRATION	
1.5. OFFENSE CLASS <input style="width: 30px; height: 20px;" type="text"/>	
0=MISDEMEANOR 1=FELONY	
1.6. AGE AT INTERVIEW <input style="width: 30px; height: 20px;" type="text"/>	
0= 47 OR ABOVE 1=27 TO 46 2=26 OR YOUNGER	
TOTAL CRIMINAL HISTORY <input style="width: 30px; height: 20px;" type="text"/>	

2.0 OTHER FACTORS:	
2.1 HIGHEST EDUCATION <input style="width: 30px; height: 20px;" type="text"/>	
0=COLLEGE DEGREE 1=HIGH SCHOOL DEGREE, VOCATIONAL, SOME COLLEGE 2=LESS THAN HIGH SCHOOL OR GED	
2.2 EMPLOYMENT STATUS <input style="width: 30px; height: 20px;" type="text"/>	
CIRCLE APPROPRIATE ITEM BELOW AND RECORD SCORE IN BOX 0=EMPLOYED FULL TIME 0=EMPLOYED PART TIME 0=DISABLED AND RECEIVING BENEFITS 1=STUDENT/HOMEMAKER 1=UNEMPLOYED 1=RETIRED, ABLE TO WORK	
2.3 RESIDENCE <input style="width: 30px; height: 20px;" type="text"/>	
0=OWN/PURCHASING 1=RENT, NO CONTRIBUTION, OTHER, NO PLACE TO LIVE	
2.4 CURRENT DRUG PROBLEMS <input style="width: 30px; height: 20px;" type="text"/>	
1=YES 0=NO	
2.5 CURRENT ALCOHOL PROBLEMS <input style="width: 30px; height: 20px;" type="text"/>	
A=YES B=NO	
2.6 CITIZENSHIP STATUS <input style="width: 30px; height: 20px;" type="text"/>	
0=US CITIZEN 1=LEGAL OR ILLEGAL ALIEN	
2.7 FOREIGN TIES <input style="width: 30px; height: 20px;" type="text"/>	
A= YES B= NO	
2.7 (A) DOES THE DEFENDANT HAVE ANY OF THE FOLLOWING TIES TO A FOREIGN COUNTRY? <input style="width: 30px; height: 20px;" type="text"/>	
A= YES B= NO	
CIRCLE ALL THAT APPLY FAMILY (PARENTS, SIBLINGS, COUSINS, ETC.) SPOUSE CHILDREN SIGNIFICANT OTHER BUSINESS RELATIONS FRIENDS OTHER NO FOREIGN TIES	
IF YES, WHAT COUNTRY OR COUNTRIES?	
Version 2.0 2	March 1, 2010

Detention Hearing Not Always Allowed

- 18 USC 3142(f)
- (f) Detention Hearing. - The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community -

(1) upon motion of the attorney for the Government, in a case that involves –

(A) a crime of violence, sex trafficking of minors, terrorism,

(B) an offense with a max of life or death penalty

(C) drug offenses with max of at least 10 years

(D) any felony if defendant has 2 convictions for the above

(E) any felony that involves a minor victim or possession or use of a firearm or dangerous weapon, or involves a failure to register,

or

(2) upon motion of the attorney for the Government or upon the judicial officer's own motion in a case, that involves –

(A) a serious risk that such person will flee; or

(B) a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

Other Pre Trial Release Issues

- Don't accept ICE detainer as reason for detention. Two cases for this district by Schatz and Freccero have made great law on this.
- Ask Court to order that AUSA tell ICE not to interfere with its release order.