

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

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UNITED STATES OF AMERICA :
 :
 v. :
 :
 JOSEPH L. BRUNO, :
 :
 Defendant. :
 :
----- X

09-CR-29 (GLS)
SPEEDY TRIAL EXCLUSION:
18 U.S.C. § 3161(h)(1)(D)
RETURN DATE:

**MOTION OF JOSEPH L. BRUNO TO
STRIKE THE FORFEITURE ALLEGATIONS**

PLEASE TAKE NOTICE that, upon the accompanying Memorandum of Law in Support of Joseph L. Bruno’s Motion to Strike the Forfeiture Allegations, defendant Joseph L. Bruno, through undersigned counsel, hereby moves the Court, pursuant to Federal Rule of Criminal Procedure 7(c)(2), for an order striking the forfeiture allegations set forth in Paragraphs 67 and 68 of the Indictment. The grounds for this motion are set forth in the accompanying memorandum of law.

Respectfully submitted,

DATED: May 1, 2009

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Attorneys for Defendant Joseph L. Bruno

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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2009, I electronically filed the foregoing with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to the following:

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**DEFENDANT JOSEPH L. BRUNO’S MEMORANDUM OF LAW IN
SUPPORT OF HIS MOTION TO STRIKE THE FORFEITURE ALLEGATIONS**

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Pursuant to Federal Rule of Criminal Procedure 7(c)(2), defendant Joseph L. Bruno submits this Memorandum of Law in Support of his Motion to Strike the Forfeiture Allegations from the Indictment.

INTRODUCTION

In Paragraphs 67 and 68 of the Indictment, the government has asserted a claim for forfeiture of Mr. Bruno's property subsequent to conviction. This claim is deficient, however, because it fails to identify the specific property that the government believes is subject to forfeiture. The Indictment's failure to identify the specific property subject to forfeiture violates due process and Fed. R. Crim. P. 7(c)(2). For these reasons, and the ones set forth below, this Court should dismiss the forfeiture allegations in the Indictment.

THE INDICTMENT

In addition to re-alleging that Mr. Bruno used mailings and wire communications in furtherance of a scheme to defraud, Paragraphs 67 and 68 of the Indictment charge:

As a result of committing one or more of the offenses charged in Counts One through Eight of this Indictment, if convicted, the defendant, JOSEPH L. BRUNO shall forfeit to the United States . . . his interest in any and all property, real or personal, which constitutes or is derived from proceeds traceable to the violations . . . alleged in Counts One through Eight.

Indictment at ¶¶ 67–68. Paragraph 68 further states, “The intent of the United States of America to forfeit such property includes a money judgment representing the total dollar amount derived from said violations.” Indictment at ¶ 68. The Indictment does not provide any further notice with respect to the specific property the government intends to pursue through forfeiture in the event of conviction. Nor does the Indictment allege that Mr. Bruno has an interest in property that is subject to forfeiture. Accordingly, the Indictment provides inadequate notice under Fed. R. Crim. P. 7(c)(2) and, therefore, deprives Mr. Bruno of due process.

ARGUMENT

Federal Rule of Criminal Procedure 7(c)(2) provides, “No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.” Fed. R. Crim. P. 7(c)(2). Implicit in Rule 7(c)(2) is the requirement that the government specifically identify any property that it intends to seek through forfeiture. The clear purpose of the rule is to provide the defendant with notice that the government intends to take control of his property through forfeiture so that he may marshal a defense of that property. Without an itemized list of the property subject to forfeiture, Mr. Bruno is left in the untenable position of having no insight into what property he has to defend. Consequently, Mr. Bruno is deprived of an opportunity to assemble evidence establishing that the property at issue was acquired through legitimate means.

District courts in the Second Circuit have generally held that the government need not identify specific property in the indictment to satisfy Rule 7(c)(2)’s notice requirement. United States v. Peters, No. 03-CR-211S, 2009 WL 763384, at *4 (W.D.N.Y. March 19, 2009) (“Indictments containing no more than a tracking of language in the applicable forfeiture statutes are therefore sufficient.”); United States v. Rigas, 281 F. Supp. 2d 660, 672 (S.D.N.Y. 2003) (“The notice provision ‘is not intended to require that an itemized list of the property to be forfeited appear in the indictment.’”); United States v. Grammatikos, 633 F.2d 1013, 1024–1025 (2d Cir. 1980) (holding that Rule 7(c)(2) does not require that the indictment allege the property subject to forfeiture). But although the Second Circuit has not yet required the government to provide notice of the specific property subject to forfeiture in its indictment, such notice is implicit in Rule 7(c)(2) and is fundamental to preserving a defendant’s due process rights. In

recognition of this fact, federal courts in other circuits have routinely held that Rule 7(c)(2) requires that “property for which the government seeks criminal forfeiture must be stated in the indictment.” United States v. Parrett, 530 F.3d 422, 426 n.3 (6th Cir. 2008); see United States v. Puma, 937 F.2d 151, 156 (5th Cir. 1991) (“The designation of property subject to forfeiture is sufficiently specific if it ‘puts the defendant on notice that the government seeks forfeiture and identifies the assets with sufficient specificity to permit the defendant to marshal evidence in their defense.’”) (quoting United States v. Cauble, 706 F.2d 1322, 1347 (5th Cir. 1983)); United States v. Hatcher, 323 F.3d 666, 673 (8th Cir. 2003) (“[T]o plead a forfeiture adequately, the government must set forth the property subject to forfeiture with enough particularity for the defendant to marshal evidence in his defense. Thus, the indictment must usually identify the specific instrumentalities or proceeds of crime that the government alleges are forfeitable . . .” (internal citation omitted)). The decisions from the Fifth, Sixth, and Eighth Circuits reflect an understanding that an indictment seeking forfeiture must identify the specific property subject to forfeiture to afford the defendant an opportunity to prepare a defense of that property.

In the present case, the forfeiture allegations fail to set forth the specific property that the government alleges is subject to forfeiture. In fact, the government has not affirmatively alleged that any of Mr. Bruno’s property is subject to forfeiture. Instead, the Indictment states that the government is seeking forfeiture of “any and all property, real or personal, which constitutes or is derived from proceeds traceable to the violations.” Indictment at ¶ 68. This phrase is so ambiguous that it could feasibly encompass all of Mr. Bruno’s property or none of it. Clearly, such ambiguity precludes Mr. Bruno from preparing a defense to the forfeiture allegations. Thus, the Indictment fails to provide Mr. Bruno with any notice as to whether the government believes that there is even property subject to forfeiture, much less what that property might be.

The government's failure to specify whether there is any property that is subject to forfeiture and to identify such property in the Indictment violates Rule 7(c)(2)'s notice requirement and the due process principles that the rule embodies.¹ In addition, the ambiguous forfeiture allegations create the very real prospect of variance between the facts alleged in the Indictment and the proof adduced at trial. See Dunn v. United States, 442 U.S. 100, 105 (1979) ("A variance arises when the evidence adduced at trial establishes facts different from those alleged in an indictment."). In fact, any proof relating to specific property subject to forfeiture would constitute variance because the Indictment fails to even allege that Mr. Bruno has property subject to forfeiture. Moreover, absent any allegation that there is any asset subject to forfeiture, the forfeiture allegations are merely a hypothetical exercise and there is no actual case or controversy, which is necessary for this Court to have jurisdiction over any such claim under Article III of the Constitution. See, e.g., Davis v. FEC, 128 S. Ct. 2759, 2678–2680 (2008) (holding that the Cases and Controversies Clause requires that there be an actual controversy for jurisdiction to exist). Because the forfeiture allegations fail to provide the specificity required by both the Constitution and the Federal Rules of Criminal Procedure, this Court should dismiss those allegations.

CONCLUSION

For all of the foregoing reasons, Joseph L. Bruno respectfully requests that the Court grant his motion to strike the forfeiture allegations from the Indictment.

¹ At the very least, the government should be required to particularize that which it claims are proceeds from criminal activity so that (a) a defense can be made and (b) it cannot vary its theory as time goes on.

Respectfully Submitted,

DATED: May 1, 2009

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