

USING THE FORFEITURE LAWS TO PROTECT CULTURAL HERITAGE

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I. INTRODUCTION

Most prosecutors, who think of asset forfeiture as a tool used to recover property in drug, money laundering, or fraud cases, do not realize that it can also be used to recover cultural property. In fact, the Archaeological Resources Protection Act (ARPA), the Cultural Property Implementation Act (CPIA), and other less well-known statutes contain forfeiture provisions of their own, and the forfeiture provisions in statutes that are normally used in other contexts, like the National Stolen Property Act or the Customs laws, may be used to recover cultural property as well.

This article discusses how to use those statutes.

First, we have to know a little bit about how forfeiture works and what some of the terms mean, so I will begin with a brief introduction to the three most important forfeiture procedures: administrative forfeiture, civil forfeiture and criminal forfeiture, and talk a little bit about the appropriate time to use each one and how to do so.

Then I will deliver the bad news: there is no one generic forfeiture statute that applies to all violations of federal law. Every crime has its own forfeiture provision (or may have no forfeiture provision at all): there is a different forfeiture provision for ARPA, for CPIA, for a Customs violation, and so forth, and each involves its own procedures and describes a different set of assets that are subject to the forfeiture laws. Thus, for every violation, we have to find the applicable statute, see what Congress said we are entitled to forfeit, and see which of the procedures apply.

In some cases, we can forfeit only the cultural property itself while in others we can forfeit property used to commit the offense or property traceable to it; and

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in some cases, criminal forfeiture is the only option, while in others we may be able to do the forfeiture civilly, or either civilly or administratively, as well. There is no rhyme or reason to this: it is the result of the forfeiture laws for different offenses being enacted at different times after being drafted by different committees of Congress.

So after I have introduced the concepts, I will take you through each of the major cultural property protection statutes and tell you what you can forfeit and what procedures are available in each case, using examples from real cases to illustrate how it is done and what may be recovered if it is done properly.

II. A QUICK INTRODUCTION TO FORFEITURE PROCEDURE

Asset forfeiture comes in three flavors: administrative, civil and criminal.

Administrative forfeiture is basically an abandonment proceeding: a law enforcement agency seizes the property, sends notice to everyone who appears to have an interest in it, and if no one files a claim, declares the property forfeited to the United States. Its obvious virtue is that the forfeiture can be completed without the need to file any civil or criminal proceeding in the district court, unless someone files a claim.

Property eligible for administrative forfeiture generally includes currency in any amount, or personal property up to \$500,000 in value. 19 U.S.C. § 1607. Real property, however, cannot be forfeited administratively. 18 U.S.C. § 985(a).

Because the vast majority of all forfeitures are uncontested, the vast majority of all forfeitures are administrative forfeitures. It is an efficient way of recovering property while respecting the due process rights of any property owner who wants to file a claim. Accordingly, if administrative forfeiture is authorized for the offense under investigation, you definitely want to encourage the agency to pursue administrative forfeiture.

On the other hand, if someone does contest the administrative forfeiture, or the property is not eligible for administrative forfeiture, or the investigating agency does not have administrative forfeiture authority, we have to commence a civil or criminal forfeiture proceeding in the district court.

Civil forfeiture cases are *in rem* actions against the property; that is why they have funny names, like *United States v. Eighteenth Century Peruvian Oil on*

Canvas, 597 F. Supp.2d 618, 622 (E.D. Va. 2009), or *United States v. 323 Quintales of Green Coffee Beans*, 21 F. Supp.3d 122, 128 (D.P.R. 2013). Naming the property as the defendant does not mean that the property has done something wrong. Rather, civil forfeiture is just a procedural device that allows the court to adjudicate all of the competing claims to the property in one case, at one time, in a single forum. See *United States v. Ursery*, 518 U.S. 267, 295-96 (1996) (Kennedy, J. concurring).

The important thing to know about civil forfeiture is that it does not require a conviction or the filing of a criminal charge. True, the Government files the civil forfeiture action to confiscate the property because it was derived from or used to commit a crime, but it may do that even if it is unable, for any reason, to bring a criminal case, or chooses not to do so. All that is required is the existence of a federal statute authorizing civil forfeiture and proof that the property was derived from or used to commit the relevant offense. See *United States v. \$6,190.00 in U.S. Currency*, 581 F.3d 881, 885 (9th Cir. 2009).

Civil forfeiture has become controversial because of its unfortunate association with currency seizures during highway stops, but there is nothing wrong with civil forfeiture; it is just a procedural device for resolving everyone's interest in the property at the same time when there is no criminal case. The Government still has to prove that a crime was committed and that the property was involved in that crime; it just doesn't have to obtain a criminal conviction.

So when would you use civil forfeiture? Most often it is when the wrongdoer is dead or is a fugitive; when the statute of limitations has run on the criminal case; when we have recovered the property but do not know who committed the crime giving rise to the forfeiture; when the defendant pleads guilty to a crime different from the one giving rise to the forfeiture; when there is no federal criminal case because the defendant has already been convicted in a state or foreign or tribal court; when there is no criminal case because the interests of justice do not require a conviction; and when the defendant uses someone else's property to commit the crime.

That last instance is perhaps the most important: we cannot forfeit a third party's property in a criminal case because the third party has had no opportunity to participate in the proceeding. So, for example, if the defendant uses his wife's car to commit a crime, we could not forfeit her car in the criminal case even if she knew all about it and let it happen. But we can forfeit the car in a civil case by naming the car as the property subject to forfeiture and giving the wife the

opportunity to contest the forfeiture either on the merits or by asserting an innocent owner defense.

How is this done? Every U.S. Attorney's Office has at least one civil forfeiture expert who would handle a case like this if it had to be done civilly, so there is no need for every AUSA to learn civil forfeiture procedure, but in short it works like this: Pursuant to 18 U.S.C. § 983, and Supplemental Rule G, Federal Rules of Civil Procedure, the Government must file a complaint against the property and give notice to all persons with an interest in it that they have the right to intervene by filing a claim to the property and an answer to the complaint. The case then proceeds through civil discovery as in any other civil case, and will most often be resolved on a motion for summary judgment or in a civil trial.

Any person with an interest in the property, including a third party who purchased the property from the wrongdoer (a "bona fide purchaser for value"), can assert a claim. That person is called the claimant. The claimant can oppose the forfeiture by contesting the underlying facts or as I suggested a moment ago, by asserting what is called the innocent owner defense.

Under the innocent owner defense, property cannot be forfeited – even if the Government establishes its connection to a crime -- if the owner of the property was unaware of the criminal activity or was a bona fide purchaser for value. See 18 U.S.C. § 983(d). This applies to all civil forfeiture cases *except those filed under the Customs laws in title 19*. See 18 U.S.C. § 983(i) (exempting forfeitures under title 19 and certain other statutes from most of the provisions of the Civil Asset Forfeiture Reform Act (CAFRA)). For cases filed under the Customs laws in title 19, there is no innocent owner defense. See *United States v. One Lucite Ball*, 252 F. Supp. 2d 1367, 1378 (S.D. Fla. 2003) (innocent owner defense in section 983(d) does not apply to forfeiture under 19 U.S.C. § 1595a); *United States v. The Painting Known as "Hannibal"*, 2010 WL 2102484, *4 (S.D.N.Y. May 18, 2010) (because the forfeiture action was brought pursuant to § 1595a(c), owner of merchandise had no innocent owner defense when importer misstated the value of the merchandise on the Customs documents). As we will see, this "Customs carve-out" turns out to have major implications for forfeitures in cultural property cases.

As a general proposition, however, innocent owners are protected in civil forfeiture cases. So if someone uses my bulldozer to desecrate an Indian mound, but I was totally oblivious, I can oppose the forfeiture and get the bulldozer back, even though, in terms of the statute, it was a vehicle used to

commit the ARPA offense. Fair enough; but should an innocent owner defense apply to human remains or other cultural artifacts that should rightfully belong to a tribe or to the public? The innocent owner defense contains an exception that recognizes that there are some things even an innocent owner should not be able to recover, like contraband or other things that are illegal to possess, such as endangered species of animals taken in violation of wildlife protection laws. The notion is that no one gets to keep the bald eagle that he bought from someone who shot it from an airplane just because he thought it was a turtle dove and didn't realize it was an eagle. See 18 U.S.C. § 983(d)(4). How that exception applies to cultural property, however, is still unclear.

In any event, if civil forfeiture is so wonderful, why not have the forfeiture expert in the U.S. Attorney's Office forfeit everything civilly instead of making the criminal AUSAs include forfeiture as part of their criminal cases when such cases are filed?

First, it is a lot of extra work to file and litigate a civil forfeiture case to achieve a result that could be accomplished easily as part of the defendant's sentence if there is a criminal case. But also, civil forfeiture has a serious limitation: because it is an *in rem* action against specific property, there is (with rare exceptions) no way to forfeit substitute assets or to obtain money judgments in civil forfeiture cases. If we cannot find the actual property derived from or used to commit the crime, there is no "defendant" and hence no civil forfeiture.

So, while there are exceptions to everything, civil forfeiture should be reserved for cases where the criminal forfeiture is not possible, or where a criminal case is not ready to indict. And where we do have good reasons to file parallel civil and criminal matters, the civil case should not be used as a bargaining chip to resolve the criminal case or vice versa. All manner of ethical land mines lie along those roads.

Criminal forfeiture is imposed following a conviction and is part of the defendant's sentence for committing a federal crime. *Libretti v. United States*, 516 U.S. 29, 39 (1995). It allows the forfeiture of the property to be wrapped up at the same time as the defendant's sentence and thus saves us from having to file a separate case. Moreover, criminal forfeiture allows us to get a forfeiture order in the form of a money judgment if the proceeds of the crime have been dissipated by the time the defendant is convicted, and to forfeit substitute assets to satisfy the judgment.

Basically, criminal forfeiture proceeds as follows:

1) **Indictment.** A forfeiture notice must be included in the indictment. This is required by Rule 32.2(a) of the Federal Rules of Criminal Procedure and can be satisfied easily by tracking the language of the applicable forfeiture statute. Most often, the grand jury will name the forfeitable property in the indictment, but you can do it separately in a bill of particulars if you prefer.

2) **Plea Agreement.** Forfeiture should be addressed in any plea agreement, which should specify exactly what it is the defendant is agreeing to forfeit, and should provide that the defendant agrees to the entry of a Consent Order of Forfeiture at the change-of-plea hearing.

3) **Trial.** If the case goes to trial, the criminal trial will be bifurcated. That means that the forfeiture will be set aside until the defendant is convicted. At that point there will be a separate forfeiture proceeding at which the Government must establish the forfeitability of the property by a preponderance of the evidence. The defendant can ask to have the jury be retained to determine the forfeiture or he can waive the jury and have the court decide the forfeiture based on evidence already in the trial record or presented at a separate hearing. See Rule 32.2(b)(5). If the case is tried to a jury, they will return a special verdict of forfeiture as to each asset setting forth the ground(s) on which the forfeiture is based.

4) **Preliminary Order of Forfeiture.** Pursuant to Rule 32.2(b)(2), the court must issue a preliminary order of forfeiture terminating the defendant's interest in the property. The order becomes final as to the defendant at sentencing, and must be included in the judgment. See Rule 32.2(b)(4). If a Consent Order of Forfeiture was entered at the time of the defendant's guilty plea, there is no need for a further order, but if the defendant was convicted at trial, or no Consent Order was entered, the court *must* enter the forfeiture order before the defendant is sentenced.

5) **Ancillary Proceeding.** Following the entry of the forfeiture order, the Government must notify any third parties with a potential interest in the forfeited property that they have the right to contest the forfeiture in an ancillary proceeding. See Rule 32.2(c)(1) and 21 U.S.C. § 853(n). This is basically a quiet title action. As mentioned earlier, property belonging to third parties cannot be forfeited in a criminal case -- that is one of the reasons to do the forfeiture civilly -- so to be sure we're not forfeiting property of third parties, the court must

give them a post-trial hearing where they can argue that the property really belongs to them. For example, a collector might file a claim in the ancillary proceeding saying that he purchased the forfeited cultural artifact from the defendant as a bona fide purchaser for value. See 21 U.S.C. § 853(n)(6)(B).

So how would all of this work in a typical cultural property case? You might, for example, indict a defendant for violating ARPA and include a forfeiture notice stating that upon conviction the Government will seek the forfeiture of x, y and z artifacts plus the defendant's truck. The defendant could agree to the forfeiture of those things in a plea agreement, a jury could return a special verdict in the forfeiture phase of the trial, finding that those things were forfeitable in terms of the statute, or the defendant could waive the jury and have the court determine if the property was forfeitable. In all events, the court would issue a preliminary order of forfeiture directing the defendant to forfeit the assets as part of his sentence, and we would make sure no third parties were offended by giving them notice of the forfeiture and conducting an ancillary proceeding if anyone filed a claim.

But criminal forfeiture is not always available: for all of the reasons mentioned earlier, there are times when we need to use civil forfeiture. And those times arise quite frequently in cases involving cultural property.

III. CULTURAL PROPERTY CASES

You can almost always tell a civil forfeiture case from a criminal case by the way the case is captioned: if it is *United States v. Miscellaneous Artifacts* it's a civil case; if it is *United States v. Jones*, it's a criminal case.

For most cultural property offenses, Congress has authorized both civil and criminal forfeiture, but for a variety of reasons, and as you will see from the citations to the cases, most cultural property cases are civil forfeiture cases. Most often that is because there is no criminal case and we are focused solely on getting the property back to the true owner. For example, if a painting was stolen by the Nazis in World War II or looted from an archaeological site, it may not be possible to prosecute the thief but we may be able to recover the property from the museum or collector or auction house where it is found and return it to the family, tribe or country where it belongs.

Archaeological Resources Protection Act (ARPA)

There are 3 crimes set forth in ARPA, 16 U.S.C. § 470ee, which can lead to either criminal or civil forfeiture: in strictly non-technical terms, it is a crime to:

- 1) dig up, remove or damage an “archaeological resource” found on public lands or Indian lands without a permit;
- 2) buy or sell a resource that was removed from the public or Indian land in violation of ARPA (or in violation of any other Federal law such as the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. § 3001 et seq.); or
- 3) buy or sell a resource that was dug up, removed or otherwise taken from public, Indian or private land in violation of state law.

These provisions focus on the archaeological resources that were taken illegally or that were later bought or sold; the forfeiture provision of ARPA, however, 16 U.S.C. § 470gg(b), provides for the forfeiture not only of the archaeological resources themselves, but also of all **vehicles and equipment** involved in any of the three enumerated violations. Thus, the government can forfeit any artifacts excavated or removed from public or Indian lands and the vehicles and equipment used to excavate, remove or transport those artifacts.

This is a mixture of good news and bad news. It is good that the Government can use the forfeiture laws to recover looted artifacts, and it is good that the forfeiture is not limited to the artifacts themselves, but includes the “equipment and vehicles” used to commit the offense, be they bulldozers, sophisticated spelunking tools, metal detectors, cars and trucks, and perhaps even computers used to keep track of the inventory of stolen objects or records of their sale and distribution. But it is important to be aware of what the statute does not cover.

The ability to forfeit the instruments of the crime is limited to equipment and vehicles. Is an airplane or a boat used to access the archaeological site a “vehicle?” Maybe. Is the house, barn or office building used to store or conceal the artifacts forfeitable? Probably not. How about a business, museum, academic chair, or federal grant that is used as a cover for the purloining of cultural antiquities and their distribution on the black market? No again.

To be as useful a tool as it could be for protecting archaeological resources, the forfeiture provision in ARPA, like the forfeiture provisions for many other federal statutes, ought to apply to more than just vehicles and equipment used to commit the offense. It should apply to any property, real or personal, used to commit or to facilitate the commission of the criminal offense. But at the present time, it does not.

Most serious, with respect to the excavated or stolen artifact, the statute is limited to the artifact itself, and does not permit the forfeiture of any other “proceeds” or property traceable to the offense. So if the Government finds the stolen vase or amulet, it can be recovered through forfeiture; but if the thief has already sold the stolen property and received money in return, *the money cannot be forfeited*, except possibly as a substitute asset in a criminal forfeiture case.

The absence of any authority to confiscate the proceeds of the ARPA offense other than the artifact itself is the statute’s most glaring deficiency, and severely limits the utility of the law when there is no criminal prosecution. This is something that needs to be fixed.

Forfeiture procedure under ARPA

So what procedures apply to forfeiture in an ARPA case? That is, how would we use the forfeiture laws to recover either the artifact itself or the vehicles or equipment used to commit the crime?

The first thing to notice about the forfeiture provision in ARPA is that it does not contain an administrative forfeiture provision. As I said earlier, administrative forfeiture is really an abandonment proceeding; it makes a full-blown federal case unnecessary when no one is contesting the forfeiture of the property.

ARPA, however, provides for only civil or criminal forfeiture; there is no administrative forfeiture provision, and thus no way for the investigative agency to handle the forfeiture administratively even if there is no one contesting it. This means that we actually do have to make a “federal case” out of everything under ARPA, even though it appears totally unnecessary to do so.

Most of the reported ARPA cases that resulted in forfeiture have been criminal cases. See, e.g., *United States v. Brennan*, 526 F. Supp.2d 378 (E.D.N.Y. 2007) (discussing the interplay of forfeiture and restitution); *United States v. Sullivan*, 227 Fed. Appx. 380 (5th Cir. 2007) (no discussion of the

forfeiture issues). In such cases, the forfeiture procedure is fairly straightforward, and the courts have not had much to say about it. Generally, an AUSA would just follow the steps outlined above, making sure that the court issues a forfeiture order at or before sentencing.

But there is one aspect of criminal forfeiture under ARPA that is unique and potentially problematic: unlike virtually every other criminal forfeiture provision in federal law, ARPA's forfeiture provision appears to make the forfeiture discretionary rather than mandatory. See 16 U.S.C. § 470gg(b). So a defendant could conceivably argue that the judge has the discretion to let him keep the looted artifact, or the spade that he used to dig it up, if he or she wanted to do so. But criminal forfeiture under APRA, like all other criminal forfeiture provisions, is also governed by 28 U.S.C. § 2461(c), which expressly makes criminal forfeiture mandatory upon the return of a guilty verdict. See *United States v. Blackman*, 746 F.3d 137, 143 (4th Cir. 2014) (28 U.S.C. § 2461(c) makes criminal forfeiture mandatory in all cases; "The word 'shall' does not convey discretion . . . The plain text of the statute thus indicates that forfeiture is not a discretionary element of sentencing. . . . Insofar as the district court believed that it could withhold forfeiture on the basis of equitable considerations, its reasoning was in error.") How the courts will resolve the conflict between the two statutory provisions remains to be seen.

In all events, if there is no criminal case or criminal forfeiture is not feasible for any of the reasons discussed above, the Government can file a civil forfeiture action against the artifact itself, or against the vehicle or equipment, and forfeit the property civilly under Section 470gg(b)(3). Forfeiture under that statute, however, is unquestionably discretionary, and the innocent owner defense would apply.

Convention on Cultural Property Implementation Act (CPIA)

ARPA applies to archaeological resources found within the United States. Cultural property, however, is often brought into the United States illegally from abroad. One way of recovering property in that situation is to invoke the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which is commonly known as the "Convention on Cultural Property."

Congress implemented the Convention by enacting 19 U.S.C. § 2606, *et seq.* ("the Cultural Property Implementation Act (CPIA)"), which makes it unlawful

to import “ethnological material” (defined in great detail in the regulations) into the United States without the permission of the country of origin. The forfeiture provision, 19 U.S.C. § 2609, authorizes the forfeiture of any ethnological material imported into the United States in violation of Section 2606.

Forfeitures under Section 2609 can be done administratively (assuming the seizing agency has administrative forfeiture authority), civilly, or criminally, but criminal forfeitures under the statute are relatively rare. Criminal forfeiture requires a conviction, and it is often the case that while the illegally imported material can be found, the importer cannot: he or she is either unknown, or is overseas beyond the jurisdiction of the court.

For example, in *United States v. Eighteenth Century Peruvian Oil on Canvas*, 597 F. Supp.2d 618, 623 (E.D. Va. 2009), the Government used Section 2609 to file a civil forfeiture action to recover two oil paintings that had been stolen from churches in Peru or Bolivia and imported to the United States for sale. The facts were straightforward.

A man named Ortiz brought two oil paintings into National Airport in Washington from Bolivia: one was called the *Doble Trinidad* and the other was *San Antonio De Padua and Santa Rosa De Lima*. They were rolled up in cardboard tubes and had been cut from their frames with a razor.

No one could link them to a particular theft from a particular church -- indeed it wasn't clear if they were from Peru or Bolivia -- and there was no proof that Ortiz was involved in the theft, but art experts provided affidavits saying that they were a product of the Cuzco School in 17th and 18th Centuries in the Andean region around Cuzco (straddling the modern-day border between Peru and Bolivia).

The paintings fit the definition of “ethnological material” in that they were “the product of a tribal or nonindustrial society,” “used for religious evangelism” and thus “important to the cultural heritage” of the people of that region, and neither Peru nor Bolivia had given permission for the paintings to be exported out of either country. Thus, even though there was no criminal investigation or prosecution, there were grounds to recover the paintings through civil forfeiture.

There was a lot of arguing about whether the paintings came from Peru or from Bolivia, but for purposes of the Government's motion for summary judgment in the civil forfeiture case, it did not matter. All that the Government had to do

was to show by a preponderance of the evidence that the paintings fit the definition of ethnological material and that they came from some country that was a party to the Convention and that had not given permission for them to be exported. The court granted summary judgment for the Government and left it to the Attorney General to decide how (and to whom) to repatriate the paintings.

More recently, in Baltimore, we had a case involving ancient Cypriot and Chinese coins imported into the United States by coin collectors. Customs agents seized the coins on the ground that they were being imported in violation of the CPIA, and the Government filed a civil forfeiture action against them.

Why civil forfeiture? Because the coins were of limited commercial value, this wasn't the type of case in which anyone thought a criminal prosecution would be appropriate; nevertheless, to honor our obligation as a signatory to the Convention to prevent the United States' becoming a market for antiquities that are part of the cultural heritage of other countries, the Government needed to show that it was prepared to enforce the law. Civil forfeiture was the appropriate vehicle.

The claimant, the Ancient Coin Collectors Guild, opposed the seizure on a number of statutory and constitutional grounds. The gravamen of the Guild's complaint was that the CPIA limited the rights of its members to collect ancient coins, but the court rejected each of its challenges to the CPIA on the merits. Among other things, the court held that it did not have jurisdiction to review the State Department's procedure for including the coins on the list of archaeological materials covered by the CPIA, that State did not exceed its statutory authority to issue regulations under the CPIA, and that banning the importation of the coins did not violate the Guild's rights under the First Amendment. *Ancient Coin Collector's Guild v. Customs and Border Protection*, 698 F.3d 171, 185 (4th Cir. 2012).

In the same case, a district court held that the burden of proof provisions and the deadlines for filing a forfeiture complaint in CAFRA (codified mainly in 18 U.S.C. § 983) do not apply to the CPIA because the CPIA is codified in title 19 and thus falls within the Customs carve-out. *See Ancient Coin Collector's Guild v. Customs and Border Protection*, 801 F. Supp. 2d 383, 399 n.11, 417-18 (D. Md. 2011). As discussed below, the same rule will apply if the coin collectors attempt to assert an innocent owner defense to the forfeiture under 18 U.S.C. § 983(d).

These cases illustrate the utility of the CPIA for repatriating cultural property when it applies, but unfortunately it applies only (1) if the property belonged to one of the countries that have bilateral or multilateral agreements with the U.S., and (2) we can show that the property left that country after the implementation of that agreement. See *United States v. Eighteenth Century Peruvian Oil on Canvas*, 597 F. Supp.2d at 623 (“the Government has the initial burden to show that the Defendant Paintings are designated ethnological material exported from a State that is a party to the UNESCO Convention and a bilateral agreement with the United States;” citing 19 U.S.C. § 2602, 2604 and 2606).

Customs Laws: 19 U.S.C. § 1497

The easiest way to forfeit cultural property being imported into the United States is to show that it was imported in violation of the Customs laws.

19 U.S.C. § 1497 authorizes the forfeiture of “any article” that is not declared on a Customs form upon entry into the United States if such declaration was required. To succeed in a forfeiture action under Section 1497, the Government need only prove that property was brought into the U.S. without the required declaration: the Government bears no burden with respect to the importer’s intent. See *United States v. Various Ukrainian Artifacts*, 1997 WL 793093, *2 (E.D.N.Y. 1997), citing *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972).

In *Various Ukrainian Artifacts*, a buyer in the United States arranged to purchase 123 “religious artifacts” – valued at more than \$20,000 – from a seller in Ukraine. The seller gave the artifacts to a flight attendant to transport, but she did not declare them upon arrival at JFK Airport, and the Government seized them for forfeiture under Section 1497.

The American buyer protested that the seller was the one responsible for complying with U.S. Customs laws and that he, the buyer, was an innocent owner who should not have to suffer the consequences of the forfeiture, but the court held that there is no innocent owner defense for a forfeiture under the Customs laws. *United States v. Various Ukrainian Artifacts*, 1997 WL 793093, *3, citing *Bennis v. Michigan*, 516 U.S. 442, 446 (1996).

Customs Laws: 19 U.S.C. § 1595a

The Customs statute that is used most often to recover cultural property under the forfeiture laws is probably 19 U.S.C. § 1595a. In particular, Section 1595a(c)(1)(A) authorizes the forfeiture of any “merchandise” that is “introduced or attempted to be introduced into the United States *contrary to law*.” So, for example, if property is stolen in a foreign country, introducing it into the United States would be “contrary to law” and thus would subject the property to forfeiture under Section 1595a.

The “moon rock” case

In *United States v. One Lucite Ball Containing Lunar Material*, 252 F. Supp. 2d 1367 (S.D. Fla. 2003), the Claimant met with undercover agents of the Customs Service and attempted to sell them a moon rock that was part of a gift that President Nixon made to the Government of Honduras in 1973. The moon rock had disappeared from the Presidential Palace where it had been displayed in Honduras sometime in the past, and the Claimant had acquired it from a Honduran army officer who had it in his possession.

The agents obtained a warrant for the seizure of the moon rock, and the United States subsequently filed a civil forfeiture action against it, asserting that it was stolen property that was introduced into the United States in violation of 19 U.S.C. § 1595a(c)(1)(A). The district court appointed an expert in Honduran law to conduct research on and to analyze issues of Honduran law as they related to the cultural patrimony of historic artifacts, and particularly as they related to the moon rock and the plaque on which it was mounted, and following a trial on the forfeiture action, the court adopted the expert’s findings and concluded that “the moon rock and plaque became inalienable national property of public use of the Republic of Honduras in 1973, as a result of a completed gift by President Nixon.

Special legislation was necessary to alienate these items, the court said, and no such legislation was enacted; thus, whoever took the items from the Presidential Palace committed larceny, making the rock and plaque stolen property. Accordingly, the court found that the moon rock was subject to forfeiture because it was stolen property that was introduced into the United States contrary to law.

The claimant tried to assert an innocent owner defense, claiming that he did not know the object was stolen, but again the court held that there is no innocent owner defense for forfeitures brought under the Customs laws. *United States v. One Lucite Ball*, 252 F. Supp. 2d at 1378.

Painting Known as Hannibal

Another way of forfeiting property under Section 1595a(c) is to show that someone made a material misstatement of the value of the property on the Customs declaration. Making such a misstatement is a violation of 18 U.S.C. § 542, which means that the importation was “contrary to law” for purposes of Section 1595a(c).

In *United States v. The Painting Known as “Hannibal”*, 2010 WL 2102484 (S.D.N.Y. May 18, 2010), the claimant arranged to have two works of art imported into the United States for sale through a broker in New York. The claimant had purchased the two items two years earlier for \$1 million and \$600,000, respectively, but the documents prepared by the importer and presented to Customs in New York stated their values as only \$100 each.

ICE agents seized the artwork and the Government filed a civil forfeiture action against it, alleging that it was illegally imported into the United States in violation of Section 542, and thus was subject to forfeiture under Section 1595a(c). When the Government moved for summary judgment, the claimant opposed the motion on two grounds: that the misstatement of the artworks’ value was not material, and that because the misstatements were made by a third party (the importer), the claimant was an innocent owner. The court rejected both arguments.

The “dramatic understatements of the values” of the defendant property were material, the court said, because by declaring the two works of art to be worth only \$100 each, the importer ensured that they would qualify for automatic entry into the United States. This avoided the formalities that accompany the importation of items of significant value. And once again the court held that the innocent owner defense is not available when a forfeiture action is brought pursuant to a Customs statute such as 19 U.S.C. § 1595a(c).

The claimant argued that the Customs carve-out did not apply in this case, and that accordingly he was entitled to assert an innocent owner defense, because the underlying “law” to which the importation was “contrary” was a provision in title 18 – namely, 18 U.S.C. § 542. But the court was not persuaded.

The exemption for Customs cases in Section 983(i) applies whenever the forfeiture action is brought pursuant to a forfeiture provision in title 19 regardless

of what other violations of law might be involved. Here, the forfeiture action was brought pursuant to the forfeiture provision in 19 U.S.C. § 1595a(c); for purposes of applying the innocent owner defense, the fact that the underlying crime was a violation of title 18 was irrelevant.

Accordingly, the court granted the Government's motion for summary judgment as to both works of art.

The Painting Known as "Le Marche"

Still another example of a civil forfeiture based on Section 1595a is one involving a painting known as "Le Marche" by Pissarro. The theory was that the painting was imported into the U.S. "contrary to law," because it represented the proceeds of a crime. The cases cited here, however, dealt with procedural issues such as civil discovery and the availability of attorney's fees, not with the merits of the forfeiture action. See *United States v. Painting Known as "Le Marche,"* 2010 WL 2229159 (S.D.N.Y. May 25, 2010); *United States v. Painting Known as "Le Marche,"* 2008 WL 2600659 (S.D.N.Y. 2008).

Three Burmese Statues and Portrait of Wally

Finally, there are two other cases in which the Government relied on Section 1595a(c) to forfeit cultural property that are worth reading. One case involved three statues carved of local materials in Burma in the 18th and 19th Centuries that were forfeited simply on the ground that importing *any* "product of" Burma was "contrary to law." See *United States v. Three Burmese Statues,* 2008 WL 2568151 (W.D.N.C. June 24, 2008) (importing statues from Thailand violated 31 C.F.R. § 537.203, banning the importation of any "product of Burma").

The other case, with a long legal history, involved a painting allegedly stolen by the Nazis from its Jewish owner in Austria during World War II, and imported into the United States by its present owner in the 1990s for display at a museum in New York. The forfeiture action was filed pursuant to 19 U.S.C. § 1595a(c) and 18 U.S.C. § 2314, alleging that the painting was property imported into the United States in violation of law because it was stolen property that could not be imported without violating the National Stolen Property Act, 18 U.S.C. § 2314. The case resulted in four decisions, spanning a decade, and discussing a myriad of issues under forfeiture law. See *United States v. Portrait of Wally,* 105 F. Supp. 2d 288 (S.D.N.Y. 2000) (*Wally I*); *United States v. Portrait of Wally,* 2000 WL 1890403 (S.D.N.Y. 2000)

(*Wally II*); *United States v. Portrait of Wally*, 2002 WL 553532 (S.D.N.Y. 2002) (*Wally III*); *United States v. Portrait of Wally*, 2009 WL 3246991 (S.D.N.Y. Sept. 30, 2009) (*Wally IV*).

Customs Laws: 18 U.S.C. § 545

One alternative to basing a forfeiture on Section 1595a is to use 18 U.S.C. § 545, which makes it an offense to smuggle, “clandestinely introduce,” or otherwise import merchandise “contrary to law.” One advantage to bringing the forfeiture action under Section 545 is that, almost uniquely among forfeiture statutes, it authorizes the civil forfeiture of substitute assets – *i.e.* forfeiture of the *value* of the forfeitable property if the property itself is unavailable. Accordingly, if forfeiture under 19 U.S.C. § 1595a is impossible because the smuggled or illegally imported asset cannot be found, Section 545 may be the way to recover at least the value of the property so that it may be restored to the rightful owner.

In the 1990s, the Government used Section 545 to forfeit cultural artifacts illegally brought into the United States, but for reasons that the astute reader will already have guessed, unless the Government needs to rely on the substitute assets provision, it is not the preferred method of forfeiture today.

In *United States v. An Antique Platter of Gold*, 184 F.3d 131, 138-39 (2d Cir. 1999), a New York art dealer, purchased an ancient Sicilian “Phiale” -- a platter of gold -- from a Swiss art dealer for approximately \$1.2 million on behalf of an American client. Under an Italian “patrimony” law, any archaeological item of Italian origin is presumed to belong to the Italian government unless its possessor can show private ownership prior to 1902. That meant that the Phiale was Italian Government property, but the art dealer, who knew that the Phiale was of Italian/Sicilian origin, attempted to circumvent the Italian law by faxing a commercial invoice to a customs broker in New York falsely indicating that the Phiale’s country of origin was Switzerland and falsely stating its value as \$250,000.

The art dealer thereafter transported the Phiale to New York, and the customs broker used the false invoice to clear the Phiale through customs and deliver it to the client.

When the scheme was discovered, the U.S. Attorney, acting at the request of the Italian Government, filed a civil forfeiture action against the Phiale under two alternative theories: that the property was imported in violation of Section 545

because the false statements made in the invoice concerning the country of origin and the value of the property were material misstatements in violation of Section 542; and that the property was imported “contrary to law” within the meaning of Section 1595a because it constituted stolen property under Italian law and thus could not be imported into the United States under the National Stolen Property Act.

The owner of the Phiale — the client of the New York art dealer — filed a claim, but the district court granted summary judgment for the government on both theories. The Second Circuit later affirmed the forfeiture under 18 U.S.C. § 545 without reaching the alternative theory under 19 U.S.C. § 1595a

The first issue was whether the false statement regarding the country of origin was material; the panel held that it was.

The claimant then argued that he was entitled to an innocent owner defense when a forfeiture is based on Section 545; the panel held that he was not.

At the time the case was decided in 1999, the ruling as to the innocent owner defense was correct: there was no uniform innocent owner defense to forfeitures under title 18 until 2000 when Congress enacted Section 983(d) as part of CAFRA. When CAFRA took effect the next year, it made the innocent owner defense available in all cases except Customs cases brought under *title 19*. Section 545 is a Customs statute, but it is in *title 18*.

If this case were brought today under Section 545, the owner of the property would be entitled to assert an innocent owner defense. That makes Section 1595a the better way to go in future cases, and as we saw in *Lucite Ball* and *Hannibal*, Section 1595a(c) can be used when the basis for the forfeiture is either the false declaration in violation of Section 542 or the fact that the property was stolen in violation of foreign law.

All of this boils down to the following practice note: If you can bring a case under multiple forfeiture statutes, including a Title 19 statute, bring it under the Title 19 statute. You can use other theories as backups, but if you are aware of an innocent owner, you are setting yourself up for discovery and summary judgment motion practice on that issue. Ask yourself if the extra litigation is worth it in your case.

Mask of Ka-nefer-nefer

There is one case that haunts practitioners in this area that must be mentioned. It involved the mask of Ka-nefer-nefer, an Egyptian artifact owned by the St. Louis Art Museum. *United States v. Mask of Ka-Nefer-Nefer*, 2012 WL 1094658, *3 (E.D. Mo. Mar. 31, 2012).

The mask of Ka-nefer-nefer was Egyptian cultural property that had been excavated, registered with the government, transferred to museum storage, logged as it moved about in a box, and eventually, when that box was opened, found to be missing. Egypt had not authorized its transfer or private ownership, yet the district court dismissed the forfeiture complaint, holding that the Government had not pleaded sufficient facts to show that the piece was “stolen, smuggled or clandestinely imported or introduced”.

The problem concerned the district court’s interpretation of Supplemental Rule G(2)(f). The rule provides that a civil forfeiture complaint must set forth sufficient facts to support a reasonable belief that the Government will be able to establish the forfeitability of the property at trial. The complaint in *Ka-nefer-nefer* alleged the facts just mentioned, but the court held that a complaint based on Section 1595a(c) cannot allege simply that property went missing in Egypt and turned up in a U.S. museum; it must allege when, where, why and by whom the property was stolen. The Eighth Circuit later affirmed the dismissal on the ground that the district judge did not abuse his discretion by not allowing the Government to amend its complaint after the case was dismissed. *United States v. Mask of Ka-Nefer-Nefer*, 752 F.3d 737 (8th Cir. 2014).

IV. CONCLUSION

Asset forfeiture is a powerful tool that, used in the right way, can allow the Government to recover property that is part of the cultural heritage of people and countries around the world. It is a vehicle that allows the United States to fulfill its moral, legal and diplomatic obligations to prevent this country from becoming the repository or the market for the world’s cultural artifacts, and to return that property to its rightful owners. And it is a way to punish and deter those in our own country who would desecrate gravesites, the hallowed ground of our battlefields, and other archaeological sites that belong to all of us in the quest for treasure and profit.

With a little understanding of the rudiments of administrative, civil and criminal forfeiture procedure, and an awareness of the potential that the forfeiture statutes provide, a prosecutor handling culture property cases can do much more than simply punish the wrongdoer; he or she can ensure that the heritage of our ancestors is restored to the people to whom it belongs.