

THE MONEY LAUNDERING FORFEITURE STATUTES
18 U.S.C. §§ 981 and 982
31 U.S.C. § 5317(c)(1) and (2)

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I. INTRODUCTION

A. Why do forfeiture?

There are lots of reasons to invest the time to do an asset forfeiture case

- the Supreme Court listed some of them in *Kaley*
 - *Kaley v. United States*, ___ U.S. ___, 134 S. Ct. 1090 (2014) (forfeiture serves to punish the wrong-doer, deter future illegality, lessen the economic power of criminal enterprises, compensate victims, improve conditions in crime-damaged communities, and support law enforcement activities such as police training);

1. Punish the wrongdoer

- don't just put him jail; take away the fruits of the crime
- in a money laundering case, it makes no sense to convict the defendant of money laundering but allow him to keep the money
 - *United States v. Peters*, 732 F.3d 93, 98-99,101 (2nd Cir. 2013) (the purpose of forfeiture is punishment; that is what distinguishes forfeiture from restitution and other remedial tools; restitution puts the defendant and the victim back in the position they were in before the crime occurred; forfeiture punishes the defendant by forcing him to pay the gross receipts of the crime, not just his net profit);

2. Deter other wrongdoers

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- the point of committing the crime was to make money
- if the defendant does not get to keep the money, there is less incentive for the next person to commit the same offense
 - *United States v. Martin*, 662 F.3d 301, 309 (4th Cir. 2011) (Criminal forfeiture is part of the defendant’s sentence; its purpose is “to deprive criminals of the fruits of their illegal acts and deter future crimes”);

3. Take away the tools of the trade and the economic resources

- we don’t want drug dealers to keep the airplane so they can use it again, or the land that where they can grow another marijuana crop
- figuring out how terrorism is financed, and taking away the money before it can be used, is a critical part of the anti-terrorism effort

4. Disrupt the organization

- money is the glue that holds organized criminal enterprises together; they have to recycle the money to keep the scheme going
- it is harder for a drug organization to replace the money than to replace the drugs
- taking the money does more to interrupt the cycle than any number of buy/bust arrests

5. Get money back to the victim

- forfeiture is a more effective way of recovering money for victims than ordering the defendant to pay restitution
 - *United States v. Blackman*, 746 F.3d 137, 143 (4th Cir. 2014) (“The Government’s ability to collect on a [forfeiture] judgment often far surpasses that of an untutored or impecunious victim of crime . . . Realistically, a victim’s hope of getting paid may rest on the Government’s superior ability to collect and liquidate a defendant’s assets” under the forfeiture laws);

6. Protect the community

- shutting down the crack house or meth lab removes a hazard to public health and safety
- it gives us the opportunity to convince the community that we're not letting the bad guys profit from their crimes
- and it lets us make sure that the playing field is level, so that people trying to run businesses honestly don't have to compete with capital from illegal sources

7. Recycle the money

- forfeited funds can be shared with state & local law enforcement and used to fund law enforcement programs.
- and some forfeited property can be put into official use or handed over to community organizations

So in a drug case, we want to seize the drug proceeds, but we also want to take away the guns, the airplanes, and the cars with concealed compartments that can be used to commit the crime over again

- we want to take the farm, lab or stash house or the business that was used as a front for laundering the money
- we want to seize the money that was raised to finance terrorism
- we want to take the computers, printers, and other electronic devices used in kiddie porn, counterfeiting, and identification fraud cases
- we want to close down the business used to commit insurance fraud, telemarketing fraud or to run a Ponzi scheme, and use the money we get from selling the fancy houses to reimburse the victims

B. What can we forfeit?

The forfeiture statutes for money laundering are very broad

There are three sets of statutes that authorize forfeiture in money laundering cases:

- 18 U.S.C. §§ 982(a)(1) and 981(a)(1)(A) authorize criminal and civil forfeiture, respectively, in title 18 cases
- 31 U.S.C. § 5317(c)(1) and (2) authorize criminal and civil forfeiture, respectively, in title 31 cases
- And 31 U.S.C. §§ 5332(b) and (c) authorize criminal and civil forfeiture, respectively, for bulk cash smuggling

The most important thing to appreciate is how broad these statutes are

- all of these statutes authorize the forfeiture of “all property involved in” the money laundering offense

In contrast, most forfeiture statutes allow the forfeiture of only *the proceeds* of the offense

- *see, e.g.*, 18 U.S.C. § 981(a)(1)(C) (authorizing the forfeiture of the proceeds of most federal crimes)
- some statutes authorize the forfeiture of *facilitating property*, which is property used to commit the offense
 - *see, e.g.*, 21 U.S.C. § 853(a)(2) (forfeiture of facilitating property in drug cases)
- but the money laundering statute is not limited to the criminal proceeds being laundered, or even to the property used to commit the offense
- it authorizes the forfeiture of all property *involved in* the offense, which as we’ll see, includes commingled property that is part of the money laundering transaction

Only the RICO and terrorism statutes are arguably as powerful as the forfeiture statutes for money laundering

- 18 U.S.C. § 1963(a) (authorizing forfeiture of all property “affording a source of influence” over a RICO enterprise)

- 18 U.S.C. § 981(a)(1)(G) (forfeiture of “all assets” of person engaged in terrorism);

So when the defendant in a drug case or fraud case, who is also charged with money laundering, complains that we’re taking more than the proceeds of his crime

- we say, “you’re right; yes we are”; that’s what the statute allows us to do
 - *United States v. Hawkey*, 148 F.3d 920 (8th Cir. 1998) (when defendant is convicted of both § 1957 and the underlying SUA, forfeiture is properly imposed under the broader money laundering statute, § 982(a)(1), and is not limited to the forfeiture of “proceeds” under § 982(a)(2));
 - *United States v. \$688,670.42 Seized From Regions Bank Account*, 449 Fed. Appx. 871, 877 (11th Cir. 2011) (when forfeiture is based on a proceeds theory under § 981(a)(1)(C), the forfeiture is limited to the property traceable to the offense; if the Government wants to forfeit commingled property it must rely on a money laundering theory under § 981(a)(1)(A));
 - *United States v. Coffman*, 859 F. Supp. 2d 871, 875 (E.D. Ky. 2012) (“Money laundering forfeiture pursuant to § 982(a)(1) applies to a larger class of property than proceeds forfeiture under § 981(a)(1)(C) because it applies to more than just the laundered property or proceeds from the laundered property.”), *aff’d*, 574 Fed. Appx. 541 (6th Cir. 2014);
 - *United States v. Clarkson Auto Elec., Inc.*, 2012 WL 345911, *6 (W.D.N.Y. Feb. 1, 2012) (denying request to release funds to pay for defense counsel, even though they contained untainted funds commingled with fraud proceeds, because money laundering forfeiture allows the forfeiture of such funds);

There is a public policy reason why the forfeiture statutes for money laundering are as broad as they are

- Congress wanted to keep tainted money out of the stream of commerce
- if you ever need a good quote on that, there is excellent language in *Seher*
 - *United States v. Seher*, 686 F. Supp. 2d 1323, 1330 (N.D. Ga. 2010) (forfeiture directed against third parties such as merchants who sell goods to drug dealers punishes the third parties for compromising “the integrity of the United States financial system by providing an avenue for ill-gotten gains to enter the legitimate stream of commerce undetected”);

C. Criminal and Civil Forfeiture

The forfeiture provisions for money laundering can be used in both civil and criminal cases

Criminal forfeiture is part of the defendant's sentence and is mandatory if the defendant is convicted of an offense giving rise to forfeiture

- *United States v. Monsanto*, 491 U.S. 600, 607 (1989) (“Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied...”);
 - *United States v. Hernandez*, ___ F.3d ___, 2015 WL 6118332 (11th Cir. Oct. 19, 2015) (explaining why criminal forfeiture is mandatory under § 2461(c) if defendant is convicted of an offense for which civil forfeiture is authorized under § 981(a)(1)(C));
 - *United States v. Blackman*, 746 F.3d 137, 143 (4th Cir. 2014) (§ 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.”);
- the key feature of criminal forfeiture is that if the property involved in the offense cannot be located, the Government is entitled to a money judgment and the forfeiture of substitute assets

Civil forfeiture is a separate action in which the property is named as the “defendant” and anyone wishing to contest the forfeiture must intervene in the case as a “claimant”

- *Via Mat International South America, Ltd. v. United States*, 446 F.3d 1258, 1264 (11th Cir. 2006) (a civil forfeiture proceeding is not an action against the claimant but rather is an in rem action against the property);
 - *United States v. All Funds in Account Nos. 747.034/278 (Banco Espanol de Credito)*, 295 F.3d 23, 25 (D.C. Cir. 2002) (“Civil forfeiture actions are brought against property, not people. The owner of the property may intervene to protect his interest.”);
- it is typically used where there is no criminal case and there is therefore no other way to recover the property
- it is for this reason that civil forfeiture is an essential law enforcement tool

When would you use civil forfeiture?

Examples:

- when the property is seized but the forfeiture is unopposed
 - when the wrongdoer is dead or is incompetent to stand trial;
 - when the defendant is a fugitive or a foreign national beyond jurisdiction of the United States;
 - 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;
 - when the evidence is insufficient to prove that the defendant committed the offense beyond a reasonable doubt;
 - and when the defendant uses someone else's property to commit the crime and that person is not an innocent owner.
- the key disadvantage to civil forfeiture is that there is no possibility of obtaining a money judgment or forfeiting substitute assets
- we can only forfeit property that is traceable to the offense

I will return to the substitute assets and tracing issues at the end, after we talk about what we can forfeit in a money laundering case

II. PROPERTY "INVOLVED IN" A MONEY LAUNDERING OFFENSE

A. Currency Reporting Offenses: Title 31

[§ 5317(c)]

First, let's talk about forfeiture for the offenses under the Bank Secrecy Act in Title 31, starting with the currency reporting violations

- there is criminal and civil forfeiture authority in Section 5317(c) for almost all of the offenses that involve reporting violations, including:
 - 31 U.S.C. §§ 5313 and 5324(a) (CTR violations and attempts to evade sections 5325 and 5326),
 - §§ 5316 and 5324(c) (CMIR violations), and
 - § 5324(b) (Form 8300 violations)

Again, criminal forfeiture is under § 5317(c)(1), and civil forfeiture is under § 5317(c)(2)

- both statutes say the same thing: we can forfeit all “property involved” in the currency reporting offense.

The only currency reporting statute not covered is § 5331 (Form 8300 violations committed by the business),

- so to forfeit the property involved, you want to charge the individual who caused the business to fail to file under § 5324(b), not the business itself under § 5331, wherever possible

What property is "involved in" a currency reporting offense?

In a case involving a failure to report a currency transaction, or the filing of a false or incomplete report, we can forfeit the unreported funds (or property traceable thereto) as property “involved in” the offense, as well as any property used to facilitate the offense

- so, for example, if a check casher doesn't file CTRs when cashing checks for more than \$10,000, he is liable to forfeit the entire amount involved in the transaction
- the same would be true if a money service business or the teller in a bank didn't file a CTR on a cash transaction

- in each case, the financial institution would be liable to forfeit the amount that should have been reported
 - *United States v. Castello*, 611 F.3d 116, 118 (2nd Cir. 2010) (§ 5317(c)(1) is mandatory; the court must order the forfeiture of all property involved in check casher's failure to file a CTR and all property traceable thereto, reduced only by the minimum necessary to avoid an Eighth Amendment violation);
 - *United States v. Varrone*, 554 F.3d 327, 330 (2d Cir. 2009) (section 5317(c) is not limited to instrumentalities; it authorizes the forfeiture of all property involved in the offense, which includes, in a CTR case, all of the unreported currency);

It may also be possible in a currency reporting case to forfeit “facilitating property” as property involved in the offense

- for example, in *Seher*, a jeweler convicted of failing to file Form 8300s was ordered to forfeit untainted inventory and funds in bank account that was used to create a facade of legitimacy as he converted drug money into jewelry for drug dealers without filing currency transaction reports
 - *United States v. Seher*, 562 F.3d 1344 (11th Cir. 2009) (the scope of the forfeiture authority in section 5317(c) is the same as it is for title 18 offenses under 18 U.S.C. § 982(a)(1); thus, the authority to forfeit all property involved in a currency reporting offense means that the Government may forfeit not only the unreported currency, but also any other property used to facilitate the offense);

Structuring

[STRUCTURING SLIDE]

In a structuring case, we can seize and forfeit the structured funds (or property traceable thereto)

- so if the defendant structures \$100,000, we can forfeit the \$100,000
- and if he uses the \$100,000 to buy a boat, we can forfeit the boat
 - *United States v. Ahmad*, 213 F.3d 805 (4th Cir. 2000) (amount directly traceable to structured deposits is forfeitable);
 - *Bloom v. U.S. Dept. of Treasury*, 2013 WL 5314362 (D. Ariz. Sept. 20, 2013) (Rolls Royce purchased with structured money orders forfeited as property traceable to the structuring offense);

- *United States v. \$25,846.96 and \$6,000 Seized From Bank of Vernon*, 928 F. Supp.2d 1296, 1300 (N.D. Ala. 2013) (proceeds of sale of merchandise purchased with funds involved in structured withdrawals are forfeitable when found in the account from which the structured funds were withdrawn);

It is not necessary to show any connection between the structuring and another crime

- structuring is the crime giving rise to the forfeiture, so all property involved in the structuring offense is subject to forfeiture regardless of the source of the money or the defendant's motive in committing the offense
 - *United States v. Aunspaugh*, 792 F.3d 1302 (11th Cir. 2015) (structuring conviction was unaffected by decision to vacate conviction for honest services fraud; whether defendant used the structured cash to pay a kickback as the Government contended, or to pay for services rendered, she was still guilty of structuring);
 - *United States v. MacPherson*, 424 F.3d 183, 193 (2d Cir. 2005) (§ 5324 makes no reference to the source of the money or to the defendant's motive; its "singular focus is on the method employed" to evade the filing requirement);
 - *United States v. Maduka*, ___ Fed. Appx. ___, 2015 WL 6501209 (5th Cir. Oct. 28, 2015) (rejecting defendant's claim that Congress did not intend for a person to be convicted of structuring absent a nexus to another crime; the motive for evading the reporting requirement is irrelevant);

Under current policy, however, prosecutors will generally not bring structuring charges unless there is some indication that there was a nexus to another crime, including tax evasion, drug trafficking, public corruption, international money laundering, fraud and terrorist financing

- for example, if money is being structured into a U.S. bank account by unknown persons in what appears to be part of a BMPE scheme:
 - *United States v. \$77,670.00 Previously Contained in Bank of America Account*, 2014 WL 1669929 (D.N.J. Apr. 28, 2014) (Government files civil forfeiture against funds deposited into exporter's bank account by third parties as part of BMPE scheme; that Government does not know identity of third parties does not bar it from seeking forfeiture);
- in such cases, the evidence of the other crime is admissible to show that the defendant acted consciously to evade the reporting requirement, and not out of some benign motive, even if the evidence is not sufficient to prove the other criminal offense

- *United States v. MacPherson*, 424 F.3d 183, 193 (2d Cir. 2005) (it is not necessary to establish a nexus between the structured funds and another crime; but the criminal origin of the funds, to the extent it provides a motive for concealment, may constitute additional circumstantial evidence of defendant's knowledge and intent);
- *United States v. Young*, 2014 WL 494576 (W.D. Pa. Feb. 6, 2014) (evidence that the defendant was engaged in drug trafficking was admitted in his structuring trial to show he had a motive to evade the currency reporting requirements);
- *United States v. \$61,900.00 Seized from Account Number XXXXXX4429*, 802 F. Supp. 2d 451, 469-71 (E.D.N.Y. 2011) (acknowledging that the Government is not required to establish a motive, but holding that the Government's failure to show that claimant was engaged in tax evasion left it with little evidence to overcome claimant's benign explanation for the pattern of structured deposits);

The property involved in a structuring offense could also include facilitating property, as long as there is a "substantial connection" between the property and the structuring offense

- *United States v. Shanholtzer*, 492 Fed. Appx. 798, 799 (9th Cir. 2012) (truck used to transport currency to multiple banks where structuring offense took place is forfeitable as property involved);

We may also be able to forfeit funds that were *commingled* with the structured funds when the structuring occurred:

- for example, if the defendant commingles checks with his structured cash, he may be required to forfeit both the checks and the cash as property involved in the offense
 - *United States v. Elfgeeh*, 515 F.3d 100, 138-39 (2d Cir. 2008) (defendants who commingled cash and checks, depositing them into 12 different bank accounts so that the cash never exceeded \$10,000 in one account on the same day, must pay a forfeiture money judgment equal to the total amount, including the amount of the checks, because they were involved in the offense);
- but we may not be able to forfeit "clean" money that happened to be in the account at the time the deposits were made
- it's the structured money, and not all money in the account, that is subject to forfeiture

- *United States v. All Funds on Deposit (Great Eastern Bank)*, 804 F. Supp. 444, 447 (E.D.N.Y. 1992) (legitimate funds in bank account do not facilitate structuring; account itself is not subject to forfeiture; cases involving facilitation of section 1956 or 1957 offenses distinguished);

This raises the substitute asset and tracing issues that I will return to later

CMIR Forfeitures

We can also forfeit the currency that a traveler brings into the United States but fails to report to the Customs Service on the CMIR form, in violation of 31 U.S.C. §§ 5316 and 5324(c)

- *United States v. \$59,400 in U.S. Currency*, 2008 WL 2697179 (E.D. Mich. July 3, 2008) (forfeiture of \$59,400 in travelers checks when traveler files false CMIR; lack of fluency in English is not a defense);
 - *United States v. \$93,110 in U.S. Currency*, No. 2-08-cv-1499 (D. Ariz. Nov. 20, 2008) (court enters judgment on the pleadings where claimant admits she smuggled currency into the U.S. without filing a CMIR form);
 - *United States v. \$23,090.00 in U.S. Currency*, 377 F. Supp. 2d 1223, 1232 (S.D. Fla. 2005) (ordering forfeiture of \$17,000 that claimant divided into three smaller amounts and gave to three couriers to carry to Haiti with the express intent of avoiding the CMIR requirement as property involved in violation of both sections 5316 and 5324(c));
 - *United States v. \$1,790,021 in U.S. Currency*, 261 F. Supp. 2d 310, 318 (M.D. Pa. 2003) (when courier denies any knowledge of \$1.7 million in currency concealed in his truck, and states that he was on his way to Mexico, it is clear that *someone* was attempting to cause the courier to fail to file a CMIR, making the money forfeitable as property involved in a violation of section 5324(c));
- property involved in a CMIR offense may include a vehicle or other property in addition to the currency:
- *United States v. Hoi Yan Ho*, 2009 WL 67431, at *11 (W.D.N.Y. Jan. 9, 2009) (Government had probable cause to seize vehicle for forfeiture under sections 5317(c) and 5324(c) where defendant used vehicle to distribute currency to multiple individuals in furtherance of an attempt to structure it to avoid the CMIR report as they crossed the border from U.S. to Canada);
- again, as in structuring cases and other failure to report cases, there is no requirement of a nexus to another crime:

- *United States v. \$78,882.00 in U.S. Currency*, 2011 WL 864808, at *3 (S.D. Tex. Mar. 10, 2011) (forfeiture under § 5317(c) of property involved in a CMIR violation does not require any showing that the currency was derived from criminal activity), following *United States v. O'Banion*, 943 F.2d 1422, 1432 (5th Cir. 1991);

B. Application of the Excessive Fines Clause

If all that mattered was that the forfeiture was authorized by a forfeiture statute, this would be very simple;

- but finding that the property is subject to forfeiture under the relevant forfeiture statute is not the end of the inquiry
- in every case, the court must determine whether the forfeiture, even though it is authorized by statute, would nevertheless violate the Excessive Fines Clause of the Eighth Amendment
 - *United States v. Bajakajian*, 524 U.S. 321 (1998) (full forfeiture of unreported currency in a CMIR case would be “grossly disproportional to the gravity of the offense” unless the currency was involved in some other criminal activity);
 - *United States v. Ahmad*, 213 F.3d 805 (4th Cir. 2000) (*Bajakajian* applies equally to criminal forfeitures and to civil forfeitures of non-instrumentalities);

In *Bajakajian*, the Supreme Court held that because a CMIR offense is not a very serious crime, the full forfeiture of the unreported currency in such a case would be “grossly disproportional to the gravity of the offense,” *unless the currency was involved in some other criminal activity*;

- therefore, in every CMIR case or other failure to report case, you will want to determine if there is a connection between the undeclared currency and another crime
 - *United States v. U.S. Currency in the Amount of \$898,719.00*, 2003 WL 21544283 (W.D. Mo. 2003) (*Bajakajian* does not bar full forfeiture under section 5317(c) of drug money transported into the United States without filing a CMIR);
 - *United States v. Six Negotiable Checks*, 389 F. Supp. 2d 813 (E.D. Mich. 2005) (forfeiture of \$200,000 in negotiable instruments was not grossly disproportional to CMIR offense where reporting violation was related to unlawful tax-avoidance activity that “lies with the core concerns of the reporting statute”; that the forfeiture is several

times the fine under the sentencing guidelines does not make it grossly disproportional);

The claimant has the burden of showing the absence of a link to another offense:

- *United States v. An Interest in . . . 2101 Lincoln Blvd.*, 2011 WL 672620 (C.D. Cal. Jan. 14, 2011) (claimant's failure to show that the money was not linked to another crime, combined with jury's rejection of their innocent owner defense, supports forfeiture of most of the structured funds, but the absence of direct evidence of a nexus to another crime allows for reducing the forfeiture to 75 percent);
- in cases where the money was not involved in another crime, the courts are divided as to how much is forfeitable
 - *United States v. Castello*, 611 F.3d 116, 123-24 (2nd Cir. 2010) (defendant convicted of failing to file CTRs on check-cashing transactions exceeding \$10,000 ordered to forfeit 100 percent of commissions earned (\$12 million) despite maximum fine of \$250,000 per transaction; distinguishing *Bajakajian* as a one-time offense; here, defendant clearly falls within the category of persons at whom the statute was directed), *superseding United States v. Varrone*, 554 F.3d 327, 332 (2d Cir. 2009), and reversing *United States v. Castello*, 2009 WL 1505271 (E.D.N.Y. May 21, 2009);
 - *United States v. Jose*, 499 F.3d 105, 113 n.8 (1st Cir. 2007) (affirming forfeiture of 100 percent of the unreported currency under the bulk cash smuggling statute, but noting that "even if we were measuring forfeiture by section 5316, the cash reporting requirement, we would still find no violation of the Excessive Fines Clause");
 - *United States v. \$78,882.00 in U.S. Currency*, 464 Fed. Appx. 382, 384 (5th Cir. 2012) (forfeiture of 100% of the undeclared currency in a CMIR case does not violate the Eighth Amendment where the amount is only \$78,882; distinguishing *Bajakajian* solely on the basis of the amount involved);
 - *But see United States v. \$59,000 in U.S. Currency*, 282 Fed. Appx. 785, 789-90 (11th Cir. 2008) (district court found all but \$10,000 of the amount not reported on CMIR form forfeitable, but case remanded because district court failed to take the suggested fine under the sentencing guidelines into account), on remand *United States v. \$59,000 in U.S. Currency*, 2009 WL 4893165, *3 (S.D. Fla. Dec. 10, 2009) (forfeiture limited to \$10,000);

Structuring cases are different

Bajakajian applies equally to the failure to file a CTR or a Form 8300

- but does *Bajakajian* apply to structuring cases?

As the Fourth Circuit held in *Ahmad*, even if *Bajakajian* applies to structuring, the forfeiture of structured funds is not excessive

- that's because structuring is not simply a reporting violation: it is inherently more serious
 - it involves repeated, affirmative conduct, not a one-time omission;
 - it involves an innocent intermediary (the bank);
 - and it causes harm to a third party, if the defendant is in fact structuring a third party's money, because by committing the offense, the defendant has exposed the third party's money to forfeiture.
- *United States v. Malewicka*, 664 F.3d 1099, 1103-08 (7th Cir. 2011) (structuring is a more serious offense than a one-time reporting violation because it involves repeated, planned conduct and implicates the bank by causing it to fail to comply with its reporting obligation; forfeiture of 100 % of the structured funds is not excessive; following *Ahmad*, distinguishing *Bajakajian* and declining to follow *Ramirez*);
 - *United States v. Ahmad*, 213 F.3d 805, 817 (4th Cir. 2000) (structuring is inherently more serious than a failure to report offense; it involves repeated, affirmative conduct, not a one-time omission; and it involves an innocent intermediary (the bank); therefore full forfeiture of the structured funds is not excessive under *Bajakajian*);
 - *United States v. \$134,750.00 in U.S. Currency*, 535 Fed. Appx. 232, 240-41 (4th Cir. 2013) (affirming forfeiture of 100 percent of structured funds because the forfeiture of \$134,750 is much less than the \$500,000 authorized for structuring more than \$100,000 in a 12-month period; the conduct falls precisely within the scope of the anti-structuring statute, even if there is no connection to another offense, because it deprives the Government of information Congress considered necessary to criminal and tax investigations; and because structuring harms banks by interfering with their reporting obligations);
 - *United States v. Strelski*, 523 Fed. Appx. 704, 707-08 (11th Cir. 2013) (making 19 structured deposits into three different banks over two months is a more serious offense than the one-time reporting violation in *Bajakajian*; forfeiture of 100 percent of structured funds affirmed; that there was no connection to another crime does not matter, as defendants still violated the law);

- *United States v. Deskins*, 2014 WL 670910, *3-4 (W.D. Va. Feb. 20, 2014) (following *Ahmad* and \$134,750.00; entering money judgment for \$103,305 – the full amount involved in structuring – and allowing the Government to enforce the judgment against defendants’ house, their only asset -- did not violate the Eighth Amendment);
- *United States v. Sperrazza*, 2013 WL 5937980, *1 (M.D. Ga. Nov. 5, 2013) (following *Strelski*; money judgment for 100 percent of the value of the structured funds is not excessive);
- *United States v. Haleamau*, 2012 WL 3394952, *13 (D. Hawaii Aug. 1, 2012) (following *Ahmad* and *Castello*; structuring is a far more serious offense than the one-time reporting violation in *Bajakajian* because it involves repeated conduct);
- *But see United States v. Abair*, 746 F.3d 260 (7th Cir. 2014) (distinguishing *Malewicka* and expressing doubt that a one-time lump-sum structuring of only \$67,000 with no connection to another crime could result in the forfeiture of defendant residence);

Moreover, as courts have noted, structuring is not a victimless crime

- *United States v. Malewicka*, 664 F.3d 1109, 1107-08 (7th Cir. Dec. 2011) (rejecting defendant’s argument that structuring causes no harm; it deprives the Government of the information it needs to detect tax evasion, fraud and other crimes);
- *United States v. Haleamau*, 2012 WL 3394952, *16 (D. Hawaii Aug. 1, 2012) (structuring causes harm in that it deprives the Government of information needed to track and monitor criminal activities);
- *Cf. United States v. Strelski*, 523 Fed. Appx. 704, 708 (11th Cir. 2013) (in setting the maximum fines and periods of incarceration in the statute and in the sentencing guidelines, Congress signaled that structuring is a serious offense, and it is not for the courts to second-guess that judgment based on their estimation of what harm the Government may or may not have suffered);

So, in the Fourth and Seventh Circuits at least, we can forfeit any amount of structured funds without having to worry about an 8th Amendment violation.

Again, as in CMIR cases, *Bajakajian* does not apply where the money was from an illegal source or intended for an unlawful purpose:

- *United States v. Hosseini*, 504 F. Supp.2d 376, 382 (N.D. Ill. 2007) (forfeiture of 100 percent of the structured funds, or property traceable thereto, was not disproportionate where the money was drug money being laundered for drug dealers);

Mitigation

If *Bajakajian* applies, and if the full forfeiture of the unreported or structured funds would be “excessive,” the prosecutor’s job is to suggest how the court should mitigate the forfeiture to avoid the 8th Amendment violation

- a finding that full forfeiture would be excessive, in other words, doesn’t mean forfeiture has to be reduced to zero;
- where the forfeiture must be reduced, it should be reduced to the *maximum* amount allowable under the 8th Amendment
 - *United States v. Castello*, 611 F.3d 116, 120-21 (2nd Cir. 2010) (criminal forfeitures are mandatory, limited only by the Excessive Fines Clause of the Eighth Amendment; thus, a court must enter a forfeiture order equal to the maximum authorized by statute, reduced only by the minimum necessary to avoid the Eighth Amendment violation);
- in determining the “gravity of the offense,” the court may look to aggravating factors, such as the defendant’s efforts to conceal or structure the currency, make false statements to law enforcement agents, or otherwise obstruct justice.

C. Bulk Cash Smuggling: 31 U.S.C. § 5332

The bulk cash smuggling statute, 31 U.S.C. § 5332, was enacted in response to *Bajakajian*;

- as mentioned earlier, it has its own criminal and civil forfeiture provisions in subsections (b) and (c).
 - *United States v. Jose*, 499 F.3d 105, 110 (1st Cir. 2007) (reviewing the Findings, Purposes and legislative history of the bulk cash smuggling statute, and noting that it was Congress’s response to *Bajakajian*);
 - *United States v. Del Toro-Barboza*, 673 F.3d 1136, 1154 (9th Cir. 2012) (same; following *Jose*);

The notion is that if we treat the offense as a *smuggling* offense, and not simply as a *reporting violation*, the case law permitting the forfeiture of smuggled goods, not *Bajakajian*, will apply.

- *United States v. \$273,969.04 U.S. Currency*, 164 F.3d 462 (9th Cir. 1999) (19 U.S.C. § 1497 forfeitures for smuggling offenses lie outside scope of excessive fines analysis; *Bajakajian* does not apply);

For the most part, the courts have accepted Congress's rationale and rejected Eighth Amendment challenges to the forfeiture of the entire amount involved in a bulk cash smuggling offense.

- *United States v. Jose*, 499 F.3d 105, 110-11, 113 (1st Cir. 2007) (Congress viewed bulk cash smuggling as more serious than a currency reporting offense, and it intended that the entire amount be forfeiture; its view of the appropriate penalty is entitled to deference in the Eighth Amendment analysis; forfeiture of \$114,000 in concealed currency does not violate the Excessive Fines Clause);
- *United States v. \$132,245.00 in U.S. Currency*, 764 F.3d 1055 (9th Cir. 2014) (same; but also noting that there was a nexus to another crime);
- *United States v. Akinmukomi*, 369 Fed. Appx. 522, 525 (4th Cir. 2010) (rejecting, without discussion, defendant's claim that forfeiture of \$15,561 -- which was 100 percent of the smuggled currency -- was excessive);
- *United States v. Zigetta*, 2007 WL 2564979, *2 (9th Cir. Sept. 6, 2007) (forfeiture of entire \$37,489 did not violate the Eighth Amendment given nature and extent of crimes, available penalties and other illegal activities);
- *see also* "Bulk Cash Smuggling and the Globalization of Crime," Berkeley Journal of International Law, Vol.22, No. 1 (2004), available at http://works.bepress.com/stefan_cassella/.

D. Forfeiture for § 1960 Violations

Sections 981(a)(1)(A) and 982(a)(1) authorize civil and criminal forfeiture of all property involved in a violation of § 1960

- *United States v. Elfgeeh*, 515 F.3d 100, 139 (2d Cir. 2008) (defendants convicted of operating an unlicensed money transmitting business in violation of section 1960 must pay a money judgment equal to the entire amount transmitted);
- *United States v. \$715,031.27 Seized from Wachovia Bank*, 587 F. Supp. 2d 1275, 1277 (N.D. Ga. 2008) (finding that because claimant's business had no purpose other than to transmit money on behalf of foreign nationals without a license, the entire balance in its bank account was forfeitable under section 981(a)(1)(A) as property involved in the section 1960 violation);

- *United States v. \$20,392.00 in U.S. Currency*, 2008 WL 623810 (D.V.I. 2008) (defendant's guilty plea to operating an illegal money transmitting business in violation of section 1960 supports the entry of summary judgment for the Government in a parallel civil forfeiture case against the money she was in the process of transmitting);
- *United States v. \$829,422.42 in U.S. Currency*, 2013 WL 2446486, at *8 (D. Conn. June 5, 2013) (granting summary judgment for forfeiture of all funds in bank accounts through which unlicensed MSB transferred funds from U.S. to Brazil);

E. Forfeiture for 1956 and 1957 Cases

The principal money laundering statutes in title 18 are §§ 1956 and 1957

- Section 1956 makes it a crime to launder the proceeds of certain other offenses, listed in § 1956(c)(7), with the intent to conceal or disguise the source, nature, location, ownership or control of such proceeds, or with the intent to promote the commission of another offense
- Section 1957 is very similar to 1956, with two important differences: the transaction must involve at least \$10,000, and there is no intent requirement

Sections 981(a)(1)(A) and 982(a)(1) authorize civil and criminal forfeiture of all property involved in a violation of §1956 or 1957

What property is involved in a violation of § 1956 or § 1957?

- at the very least, the term "property involved" includes what was forfeitable under the original statute: *the commission earned by the money launderer*.
- so if you have a professional money launderer hired to launder money for someone else, you can forfeit the fee he was paid.

Based on the legislative history, however, the courts have held that "property involved" should be read broadly to include not just the commissions and fees, but the actual money laundered and any property used to facilitate the money laundering offense.

- *United States v. Huber*, 404 F.3d 1047, 1056, 1058 (8th Cir. 2005) ("Forfeiture under section 982(a)(1) in a money laundering case allows the Government to obtain a

money judgment representing the value of all property “involved in” the offense, including the money or other property being laundered [the corpus], and ‘any property used to facilitate the laundering offense’”; the corpus includes untainted, commingled property);

- *In re 650 Fifth Avenue and Related Props.*, 777 F. Supp. 2d 529, 563 (S.D.N.Y. 2011) (collecting cases holding that property used to facilitate the money laundering offense is “involved in” the offense);
- *United States v. Nicolo*, 597 F. Supp. 2d 342, 347-48 (W.D.N.Y. 2009) (“The term ‘involved in’ has consistently been interpreted broadly by courts to include any property involved in, used to commit, or used to facilitate the money laundering offense”);
- *United States v. Reiner*, 397 F. Supp. 2d 101, 112 n.26 (D. Me. 2005) (collecting cases holding that forfeiture in a money laundering case includes the subject matter of the offense, commissions, and facilitating property);
- *United States v. Schlesinger*, 396 F. Supp. 2d 267, 271-72 (E.D.N.Y. 2005) (collecting cases and citing legislative history);

[3 Theories]

If you look at the cases applying this language, you’ll find they break down into four categories.

1. The proceeds of the SUA offense

Any money laundering offense prosecuted under § 1956(a)(1) or § 1957 involves the proceeds of an SUA

- so it follows that the SUA proceeds being laundered are forfeitable in the money laundering case
 - *United States v. Huber*, 404 F.3d 1047 (8th Cir. 2005) (the fraud proceeds obtained by third parties as part of the scheme, and then transferred to defendant as part of money laundering offense, were forfeitable as part of the corpus of the offense);
 - *In re 650 Fifth Ave. and Related Props.*, 777 F. Supp. 2d 529, 570 (S.D.N.Y. 2011) (“Property ‘involved in’ or ‘traceable to’ money laundering includes the funds laundered.”);
- this was more exciting before CAFRA expanded forfeiture to all SUA proceeds

- at that time, charging money laundering was the only way to forfeit the proceeds

Applying the Excessive Fines Clause

What happens to a forfeiture of the SUA proceeds in a money laundering case if we apply the Excessive Fines Clause?

- generally, in 8th Amendment cases, the forfeiture of criminal proceeds is never found to be “grossly disproportional to the gravity of the offense”
 - *United States v. Loe*, 248 F.3d 449 (5th Cir. 2001) (forfeiture of portion of property traceable to laundered SUA proceeds is not disproportional at all, never mind “grossly disproportional”);
 - *United States v. Moyer*, 313 F.3d 1082 (8th Cir. 2002) (forfeiture of amount fraudulently taken from pension plan and then laundered was not grossly disproportional to the offense, even though defendant was lawfully entitled to more than half of the money in the plan);
 - *United States v. Reiner*, 397 F. Supp. 2d 101 (D. Me. 2005) (forfeiture of the total amount laundered is not excessive where the statutory fine could be two times the amount laundered, and defendant was the leader of the illegal business);

2. Property that is the *subject matter* of the money laundering offense

The second group of cases allows us to forfeit whatever property was the **subject matter** of the financial transaction that constitutes the money laundering offense

- we’ve already seen that the SUA proceeds which are distributed as part of a money laundering scheme are forfeitable as property involved in the offense
- in those cases, the SUA proceeds are the subject matter of the offense
- but the term “subject matter” or “corpus” (the term Congress used in the legislative history) is broader than that.

Property that is the subject of a purchase, sale or exchange is obviously “involved in” the purchase, sale or exchange

- for example, if the defendant commits a money laundering offense by using criminal proceeds to buy a car, a ranch, a motor home or an airplane, you can forfeit the item that was purchased:
 - *United States v. Nektalov*, 461 F.3d 309 (2d Cir. 2006) (diamonds that were to be exchanged for drug money in a sting case were forfeitable as the “corpus” of the money laundering offense);
 - *United States v. Kennedy*, 201 F.3d 1324, 1326 (11th Cir. 2000) (equity defendant acquired when he used SUA proceeds to buy a residence is forfeitable as property involved in a violation of section 1957);
 - *In re 650 Fifth Ave. and Related Props.*, 777 F. Supp. 2d 529, 557, 566 n.11 (S.D.N.Y. 2011) (if using criminally-derived funds to maintain and improve a building is a money laundering offense, the building itself is “property involved” in that offense);
 - *United States v. Coffman*, 859 F. Supp. 2d 871, 881 (E.D. Ky. 2012) (condo that defendant purchased with proceeds of securities fraud is forfeitable both as proceeds under § 981(a)(1)(C) and as the subject of a money laundering offense);
 - *United States v. Overstreet*, 2012 WL 5969643 (D. Idaho Nov. 29, 2012) (Mexican resort that defendant built with commingled funds from night club and illegal gambling business, using third party names in violation of § 1956(a)(2)(B)(i), was “involved in” the money laundering offense);
 - *United States v. Hailey*, 887 F. Supp. 2d 649, 654 (D. Md. 2012) (the cars and jewelry purchased with fraud proceeds in violation of § 1957 were each forfeitable as property involved in the money laundering offense);

Commingled property

Why is calling something the subject matter of the money laundering transaction better than calling property traceable to the proceeds of the SUA?

- it would make no difference if the property were *traceable in its entirety* to the underlying crime
- but often, only part of the property is traceable, and under a proceeds theory, we’d be limited to forfeiting the traceable part
- so if we want to forfeit the whole thing, we have to use the money laundering theory
 - *United States v. \$688,670.42 Seized From Regions Bank Account*, 449 Fed.

Appx. 871, 874-75 (11th Cir. 2011) (when forfeiture is based on a proceeds theory under § 981(a)(1)(C), the forfeiture is limited to the property traceable to the offense; if the Government wants to forfeit commingled property it must rely on a money laundering theory under § 981(a)(1)(A));

The point is that it is not necessary for all of the money involved in the money laundering transaction to be dirty

- if the money laundering transaction involves commingled money, can we forfeit the clean money along with the dirty money
 - *United States v. Kivanc*, 714 F.3d 782, 794-95 (4th Cir. 2013) (residence in which fraud proceeds were invested is subject to forfeiture in its entirety as property involved in a money laundering offense, even though legitimate funds were also invested in the property);
 - *United States v. Coffman*, 859 F. Supp. 2d 871, 881 (E.D. Ky. 2012) (where half of the \$900,000 down payment on a yacht was fraud proceeds, the yacht was forfeitable in its entirety as the subject of a money laundering offense);
 - *United States v. Odom*, 2007 WL 2433957, at *8 (S.D. Miss. 2007) (if the purchase of real property is charged as the money laundering offense, the property is forfeitable in its entirety as the subject matter, or corpus, of the offense, even though the purchase money included tainted and untainted funds; following *Huber*);
 - *United States v. Real Prop. Known as 1700 Duncanville Rd.*, 90 F. Supp. 2d 737, 741 (N.D. Tex. 2000), aff'd, 250 F.3d 738 (5th Cir. 2001) (Table) (where less than half of money used to buy real property was proceeds of food stamp fraud, property was forfeitable in its entirety because the purchase was a violation of section 1957);

A good illustration of this comes from *United States v. Real Property Known as 1700 Duncanville Road*

[Duncanville Road Slide]

- in that case, some of the money used to buy real property was proceeds of food stamp fraud; the balance was legitimately derived funds
- but the purchase of the real property was alleged as the money laundering offense
- the court held that the real property was forfeitable in its entirety because the purchase itself was a violation of section 1957, and the property was obviously “involved in” that violation

- the defendant argued strenuously that the forfeiture should be limited to the portion of the real property that was traceable to the food stamp fraud offense -- as it would be if the forfeiture were based on a “proceeds” theory
- but on appeal, the 5th Circuit had no problem sustaining the forfeiture of the entire parcel

For the same reason, if the financial transaction is simply the movement of a commingled sum of money from Point A to Point B, the entire sum is forfeitable as the subject matter of the offense

- the best case on this point is the Eighth Circuit’s decision in *Huber*
- *Huber* committed a massive crop insurance fraud and commingled the fraud proceeds with the proceeds of selling legitimate crops, like wheat
- he argued that even if he was convicted of laundering the commingled funds, the forfeiture should be limited to the value of the SUA proceeds
- but the court disagreed:

“Forfeiture under 982(a)(1) in a money laundering case allows the Government to obtain a money judgment representing the value of all property ‘involved in’ the offense,” the court said. “[W]e can find no basis to conclude that the crop-sales proceeds, although lawfully obtained, were not also laundered in violation of the statute when they were part of the money laundering transactions. As funds [Defendant] conspired to launder, they were properly included in the forfeiture judgment as part of the corpus of the money laundering offense.”

- *United States v. Huber*, 404 F.3d 1047 (8th Cir. 2005) (the SUA proceeds involved in a financial transaction, as well as any clean money commingled with it, constitute the corpus of the money laundering transaction; both are subject to forfeiture);
- *United States v. Funds on Deposit at Bank One, Indiana*, 2010 WL 909091, *8 (N.D. Ind. Mar. 9, 2010) (following *Huber*; when defendant commingled drug proceeds with other funds in a bank account, and transferred the commingled funds to another account, and commingled them yet again before making a third transfer, all of the funds involved in the last transfer were forfeitable as property involved in violations of Sections 1956 and 1957);
- *United States v. Coffman*, 859 F. Supp. 2d 871, 877 (E.D. Ky. 2012) (following *Huber* and *Bank One*; explaining that untainted funds may be forfeitable either as the

subject of a money laundering transaction or as facilitating property; when commingled funds are transferred in their entirety to another bank account, all of the funds are forfeitable as the subject of the transaction);

- *United States v. Overstreet*, 2012 WL 5969643 (D. Idaho Nov. 29, 2012) (commingled funds from illegal gambling business and defendant's night club were forfeitable as the corpus of the money laundering transaction);

[Continuum diagram]

To summarize, forfeitures in money laundering cases fall along a continuum, with straight "proceeds" cases at one end, cases involving commingled funds in the middle, and cases involving "facilitating property" at the other end

- in *Huber*, the court held that the Government doesn't need to rely on the facilitation theory if the untainted property was part of the *corpus* of the money laundering transaction
 - *United States v. Huber*, 404 F.3d 1047 (8th Cir. 2005) (facilitating property in a money laundering case is property that was not part of the money laundering transaction; property that is commingled with the SUA proceeds when the transaction took place is forfeitable not as facilitating property but as the subject matter or corpus of the transaction);

Limits: the substantial connection requirement and the Excessive Fines Clause

There are limitations to all of this? Yes

First, the connection between the property and the money laundering offense must be "substantial"

- 18 U.S.C. § 983(c)(3)
- so if the fraction of the money laundering involved in the financial transaction was *de minimus*, the connection may not be sufficient to support the forfeiture of the entire amount
 - *United States v. Arthur*, 2006 WL 2992865, at *5 (E.D. Wis. 2006) (real property is not "involved in" a money laundering offense just because mortgage payments were money laundering offenses; increase in equity must be more than *de minimus*);
 - *United States v. \$256,245.97 in Proceeds from Universal Life Ins. Policy*, 691 F. Supp. 2d 932, 943 (N.D. Iowa 2010) (rejecting Government's argument that subject

matter property is automatically “substantially connected” just because the purchase of the property violated § 1957);

Also, if the amount is *de minimus*, the court may decline to order the forfeiture of the entire asset on Eighth Amendment grounds

- *United States v. Stanford*, 2014 WL 7013987, *4-6 (W.D. La. Dec. 12, 2014) (declining to forfeit residence on Eighth Amendment grounds when defendant pays down mortgage with commingled funds in violation of § 1957 even though property was involved in the money laundering offense because the SUA proceeds were a small portion of the commingled funds);

But the courts have generally held that for Eighth Amendment purposes, money laundering is considered a serious offense:

- *United States v. Acuna*, 313 Fed. Appx. 283, 299 (11th Cir. 2009) (forfeiture of \$642 million laundered by gambling operation not excessive; “each unlawful money laundering transaction harms society by impeding law enforcement’s efforts to track ill-gotten gains”);
 - *United States v. Chaplin’s, Inc.*, 646 F.3d 846, 854-55 (11th Cir. 2011) (jeweler convicted of money laundering and failing to file Form 8300s fails to show that forfeiture of all jewelry in his inventory as property involved in money laundering is grossly disproportional; a merchant’s accepting drug money from a drug dealer is a serious offense that falls squarely within the category of conduct Congress intended to proscribe);
- this is true even if the money laundering offense was part of an undercover sting initiated by the Government
- *United States v. Seher*, 686 F. Supp.2d 1323, 1329 (N.D. Ga. 2010) (money laundering is no less serious because conviction is for § 1956(a)(3) where the undercover sales were part of long-standing practice of selling merchandise to drug dealers);
 - *United States v. Riedl*, 164 F. Supp. 2d 1196, 1202 (D. Haw. 2001) (“the fact that the instant offense was the result of a ‘sting’ operation does not lessen the gravity of the offense”), *aff’d*, 82 Fed. Appx. 538 (9th Cir. 2003);
- so we have not had any real problem with defending money laundering forfeitures against Eighth Amendment challenges
- but as *Stanford* indicates, this is an issue to watch out for

International money laundering

Another illustration of the “subject matter” theory come from the international money laundering cases under Section 1956(a)(2)

- Section 1956(a)(2)(A) does not require proof that the property transported or transferred to or from the United States was SUA proceeds
- it's enough that it was transported or transferred with the intent to promote such an offense
- if all we could forfeit in a money laundering case were the SUA proceeds, there would be nothing to forfeit in a § 1956(a)(2)(A) case
- but because we can forfeit all property involved in the violation, in a § 1956(a)(2)(A) case we can forfeit the untainted funds that are transferred or transported to the United States for some unlawful purpose
 - *United States v. All Assets Held at Bank Julius Baer & Co.*, 571 F. Supp. 2d 1, 11 (D.D.C. 2008) (using section 981(a)(1)(A) to forfeit money that moved from one foreign country to another, through an intermediary U.S. bank, in violation of sections 1956(a)(1), 1956(a)(2) and 1957);
 - *United States v. \$795,623.33 in Funds*, 2014 WL 6749118, *3 (D.S.C. Dec. 1, 2014) (complaint alleging that funds transferred from China to U.S. to support scheme to defraud U.S. manufacturers of luxury cars by having straw buyers falsely represent that the cars would not be exported adequately pled that the money was property involved in a violation of § 1956(a)(2)(A)); *United States v. Various Vehicles*, 2014 WL 6604057 (D.S.C. Nov. 20, 2014) (same; related case);
 - *United States v. All Funds on Deposit at Old Mutual of Bermuda, Ltd.*, 2014 WL 1689939 (S.D. Tex. Mar. 19, 2014) (Report and Recommendation) (denying motion to dismiss complaint alleging violation of § 1956 involving transfer of proceeds of foreign public corruption from Mexico to Bermuda via U.S. bank account), adopted by the district court 2014 WL 4101215 (S.D. Tex. Aug. 18, 2014);

[3 Theories]

3. Facilitating property

So far, we've talked about two theories of forfeiture:

- 1) SUA proceeds; and 2) property that was the subject of the money laundering offense itself
- next, the courts hold that "property involved in" a financial transaction includes property used to facilitate the transaction.

Facilitating property is generally defined as property that was not part of the money laundering transaction itself but makes the offense easier to commit, or harder to detect.

- *United States v. Wyly*, 193 F.3d 289, 302 (5th Cir. 1999) (forfeiture under the facilitation theory is not limited to commingled money; facilitating property is anything that makes the money laundering offense less difficult or more or less free from obstruction or hindrance);
- *United States v. Aguasvivas-Castillo*, 668 F.3d 7, 17 (1st Cir. 2012) (untainted property may be forfeited in a money laundering case "if the legitimate funds were somehow involved in the offense, such as by helping to conceal the illegal funds");
- as the Eighth Circuit said in *Huber*, this means property that is external to the money laundering transaction, not the subject matter of the transaction
 - *United States v. Huber*, 404 F.3d 1047, 1061 n.11 (8th Cir. 2005) (facilitating property in a money laundering case is property that was not part of the money laundering transaction; property that is commingled with the SUA proceeds when the transaction took place is forfeitable not as facilitating property but as the subject matter or corpus of the transaction);

Some folks have tried to forfeit property under a facilitation theory where the property is only tangentially related to the offense

- *e.g.*, the car used to drive to the place where the money laundering offense was committed
- that generally doesn't work, because such property isn't substantially connected to the financial transaction
 - *United States v. Seher*, 562 F.3d 1344 (11th Cir. 2009) (clean money in bank account jeweler used to launder drug dealer's money was forfeitable as facilitating property, but money in other bank accounts did not pass the substantial connection test);

- *United States v. Iacaboni*, 221 F. Supp. 2d 104 (D. Mass. 2002) (house that was merely place where codefendants dropped off cash was only incidentally connected to the money laundering offense; failure to establish a substantial connection bars forfeiture);
- *United States v. Nicolo*, 597 F. Supp. 2d 342, 356 (W.D.N.Y. 2009) (house where defendant sent invoices and received payments in the course of his fraud scheme was too tangentially related to the money laundering offense to satisfy the substantial connection test);
- *United States v. Coffman*, 859 F. Supp. 2d 871, 880-81 (E.D. Ky. 2012) (following *Nicolo*; the connection between the money laundering offense and a house that was merely the address of a corporation used to commit the offense was too incidental and insubstantial to support forfeiture);
- *United States v. One 1989 Jaguar XJ6*, 1993 WL 157630 (N.D. Ill. 1993) (automobile used to drive to/from site of money laundering offense is not substantially connected).
- see 18 U.S.C. § 983(c)(3) (the Government must prove that property involved in an offense was “substantially connected” to the offense)

Facilitating property therefore is something that is not part of the subject matter of the money laundering transaction itself, but not something that is so removed from the transaction that it fails the “substantial connection” test.

- what would that be in a money laundering case?

Property used to conceal or disguise

The notion of forfeiting facilitating property comes from drug cases like *United States v. Rivera*, 884 F.2d 544 (11th Cir. 1989), where livestock on a ranch used as a cover for a drug operation was forfeited because it facilitated the drug offense by making the ranch appear to be something that it was not.

- the same is true in money laundering cases; where the defendant conducts a transaction with intent to conceal or disguise, he often needs to use legitimate property to make the illegal property, and the transaction itself, appear to be something that it is not.

What are some examples of types of property that could be used to facilitate a money laundering offense?

1. bank accounts:

[Tencer slide]

- if defendant conceals or disguises source, location, nature, ownership or control by commingling dirty money with clean money, then clean money is "involved in" the money laundering offense and is forfeitable
- in *United States v. Tencer*, the defendant commingled half a million dollars in health care fraud proceeds with an equal amount of money from other sources in an effort to conceal or disguise the fraud proceeds
- the Government was successful in forfeiting the entire million dollars
 - *United States v. Tencer*, 107 F.3d 1120, 1135 (5th Cir. 1997) (entire bank account balance is forfeitable even though less than half the balance was criminal proceeds if the purpose of the deposit was to conceal or disguise proceeds among legitimate funds; distinguishing cases where commingling of SUA proceeds with untainted funds was merely fortuitous);
 - *United States v. Puche*, 350 F.3d 1137 (11th Cir. 2003) (following *Tencer*; clean money in money remitter's bank account was used to conceal or "cover" the sting money that the remitter thought he was laundering for undercover agents; money judgment for amount facilitating property affirmed);
 - *United States v. Aguasvivas-Castillo*, 668 F.3d 7, 17 (1st Cir. 2012) (retailer who commingled \$4.4 million in food stamp fraud proceeds with legitimate funds "to shield the fraud" ordered to forfeit \$20 million; following *McGauley* and *Bornfield*);
 - *United States v. Seher*, 562 F.3d 1344 (11th Cir. 2009) (clean money in bank account into which jeweler deposited money from drug dealers as part of concealment money laundering offense was forfeitable because it gave the transaction a facade of legitimacy);
 - *United States v. McGauley*, 279 F.3d 62, 77 (1st Cir. 2002) (withdrawal of \$243,000 from various bank accounts that contained commingled funds, of which only \$55,000 was fraud proceeds, supported forfeiture of entire amount because the clean money was used to conceal or disguise the tainted funds);
 - *United States v. Coffman*, 574 Fed. Appx. 541 (6th Cir. 2014) (following *Puche* and *McGauley*; commingled funds are forfeitable under a facilitation theory if the Government shows that the defendant commingled the funds to facilitate his offense);

- *United States v. Lyons*, 870 F. Supp. 2d 281, 285-86, (D. Mass. 2012) (following *Aguasvivas-Castillo* and *McGauley*; untainted funds commingled with gambling proceeds are subject to forfeiture as property “involved” in money laundering);
- *United States v. \$688,670.42 Seized From Regions Bank Account*, 759 F. Supp. 2d 1341, 1346-47 (N.D. Ga. 2010) (following *Seher*; when check casher deposits fraudulently-derived checks in his bank account, all of the commingled funds in the account are subject to forfeiture under § 981(a)(1)(A));
- *United States v. \$70,150.00 in U.S. Currency*, 2009 WL 3614871, *11 (S.D. Ohio Oct. 28, 2009) (following *McGauley*; when Government moves for summary judgment on a money laundering theory, it is irrelevant if some of the money in the bank account came from a legitimate source, because any such untainted funds would be forfeitable as property used to conceal or disguise the tainted funds in the account);
- *United States v. Nicolo*, 597 F. Supp. 2d 342, 353 (W.D.N.Y. 2009) (when defendant transferred proceeds to wife’s bank account, and commingled it with wife’s money, the commingled money became subject to forfeiture as facilitating property);
- *In re 650 Fifth Ave. & Related Props.*, 2014 WL 1516328, *26, *31 (S.D.N.Y. Apr. 18, 2014) (all funds in a bank account are forfeitable under a money laundering theory even if only 89 percent of the deposits were criminal proceeds; following *McGauley*);
- *United States v. All Monies*, 754 F. Supp. 1467, 1475-76 (D. Haw. 1991) (untainted money in account provided “cover” for laundering operation);

Remember, however, that the reason the clean money is forfeitable is because it was in the account when the money laundering offense occurred and was used to facilitate it

- it’s not the account that’s forfeitable but *the money in the account*
- so if the defendant adds money to the account *after* the money laundering offense, you have to prove it was part of his attempt to conceal the money and not just money that happened to be added to the same account at a later time.
 - *United States v. Tedder*, 2003 WL 23204849, at *6 (W.D. Wis. 2003) (commingled funds are forfeitable under the facilitation theory if they conceal or disguise, but not if they are merely present when the transaction occurs);

- *United States v. Stanford*, 2014 WL 7013987, *4-6 (W.D. La. Dec. 12, 2014) (distinguishing cases where commingled property was used to facilitate the money laundering offense from cases where the money was merely present);

2. businesses

If the defendant launders his money through his otherwise legitimate business, e.g., by running the criminal proceeds through the business's operating account, or by using the criminal proceeds to add to the business's inventory, the entire business may be forfeited

- *United States v. Baker*, 227 F.3d 955 (7th Cir. 2000) (all proceeds of business that were used to "bankroll" the money laundering operation, including portions derived from legitimate business activities, and the business itself, as the location from which the money laundering scheme was directed, forfeitable as property used to facilitate the offense);
- *United States v. Garza-Gonzalez*, 512 Fed. Appx. 60, 67 (2d Cir. 2013) (because defendant used his legitimate business to launder drug money, he must pay a money judgment equal to the total revenue from the business);
- *In re 650 Fifth Ave. and Related Props.*, 777 F. Supp. 2d 529, 567 (S.D.N.Y. 2011) (a partnership that was used to manage a building and launder the criminal proceeds generated by it is forfeitable as property involved in the money laundering offense; collecting cases);
- *United States v. Real Property at 7401-7403 South Racine Ave.*, 2010 WL 1286885, *8 (N.D. Ill. Mar. 30, 2010) (real property where claimant operated the grocery store used to commit food stamp fraud is forfeitable in its entirety as property involved in § 1957 violations when claimant conducts financial transactions involving his fraud proceeds on the premises);
- *United States v. Overstreet*, 2012 WL 5969643 (D. Idaho Nov. 29, 2012) (where defendant converted the cash receipts of an illegal gambling business into deposits into his night club's business account by cashing third party checks and installing an ATM machine at the club, the entire business was forfeitable as property involved);

3. real and personal property:

- there are many things other than bank accounts and businesses that may be forfeited as facilitating property as well
 - *United States v. George*, 761 F.3d 42 (1st Cir. 2014) (Lexus where defendant was sitting when he planning the money laundering offense was forfeitable as

facilitating property because defendant met there, rather than in his law office, to be free from “prying eyes and ears”);

- *United States v. Seher*, 562 F.3d 1344 (11th Cir. 2009) (inventory in jeweler’s business forfeitable as facilitating property because it gave drug dealers many jewelry options when they came to convert their drug proceeds to jewelry);
- *United States v. Parenteau*, 805 F. Supp. 2d 438, 449-50 (S.D. Ohio 2011) (life insurance policies were forfeitable in their entirety as property used to facilitate a money laundering offense in that defendant purchased them with commingled funds, used them as collateral for loans, and used the loan money to continue his bank fraud scheme);
- *United States v. Real Property. Located at 6415 N. Harrison Ave.*, 2011 WL 2580335, *5 (E.D. Cal. June 28, 2011) (real property used as the collateral for a home equity line of credit is forfeitable as property “involved” in a money laundering offense when the line of credit is used to conduct the money laundering transactions);

Applying the Eighth Amendment to the Facilitation Theory

The Eighth Amendment applies to facilitating property, just as it applies to other untainted property that is involved in the money laundering offense

- but the courts have generally upheld the forfeiture of facilitating property against Eighth Amendment challenges
 - *United States v. Aguasvivas-Castillo*, 668 F.3d 7, 16-17 (1st Cir. 2012) (the forfeiture of \$20 million, three-fourths of which comprised untainted funds forfeited under the facilitation theory, was not grossly disproportional to the gravity of a \$4.4 million food stamp fraud offense);
 - *United States v. Tencer*, 107 F.3d 1120, 1135 n.7, 1136 (5th Cir. 1997) (forfeiture of both laundered proceeds and commingled clean money under facilitation theory not excessive in light of the amount laundered and duration of the offense);
 - *United States v. Parenteau*, 805 F. Supp. 2d 438, 443-46 (S.D. Ohio 2011) (forfeiture of property used to facilitate a money laundering offense, in combination with a money judgment for the amount laundered, did not violate the Excessive Fines Clause because money laundering is a serious offense, defendant did considerable harm to his victims, and the combined forfeiture of \$38 million was not grossly disproportional to twice the value of the property laundered (\$30 million), which is the maximum fine);

Property that facilitates the underlying SUA but is not involved in money laundering

In some early cases, the Government successfully argued that the court may order the forfeiture not only of property involved in the money laundering offense itself, but also property that was central to the entire scheme of which the money laundering offense was a part

- *United States v. Wyly*, 193 F.3d 289, 302 (5th Cir. 1999) (real property that was central to a bribery/money laundering scheme was therefore forfeitable as facilitating property because without it, there would have been no money laundering offense);

Most courts have rejected this theory, however, holding that the property has to be involved in *the money laundering transaction*, not the underlying SUA

- *United States v. Huber*, 404 F.3d 1047 (8th Cir. 2005) (property involved only in the underlying fraud scheme, but not in the money laundering offense, is not forfeitable under § 982(a)(1));
- *United States v. Nicolo*, 597 F. Supp. 2d 342, 358 (W.D.N.Y. 2009) (to the extent that the house where defendant wrote invoices and received checks facilitated anything, it was the underlying fraud scheme, not the money laundering offense);
- *United States v. Approximately 250 Documents Containing the Handwriting of President John F. Kennedy*, 2008 WL 4129814, at *3 (S.D.N.Y. 2008) (because forged documents used to perpetrate a fraud scheme were involved only in the underlying SUA and not in the subsequent money laundering, they were not forfeitable under section 981(a)(1)(A));
- *In re 650 Fifth Ave. and Related Props.*, 777 F. Supp. 2d 529, 565 (S.D.N.Y. 2011) (following *250 Documents*; building managed in violation of IEEPA may have facilitated or been involved in the underlying SUA, but it was not involved in the money laundering offense);

Forfeiture for a money laundering conspiracy

There is no forfeiture authority for a § 371 conspiracy to commit a title 18 money laundering offense, but because §§ 981(a)(1)(A) and 982(a)(1) authorize forfeiture for *any* violation of § 1956, there is forfeiture authority for a § 1956(h) conspiracy.

- in conspiracy cases, we can forfeit all of the money that the defendant conspired to launder, which in most cases will include money involved in money laundering offenses that were not charged substantively

- *United States v. Huber*, 404 F.3d 1047 (8th Cir. 2005) (if the defendant is convicted of a § 1956(h) conspiracy, he must forfeit the property that he conspired to launder, including commingled clean money);
- in fact, it can include money involved in substantive offenses on which the defendant has been acquitted
- *United States v. Hasson*, 333 F.3d 1264 (11th Cir. 2003) (in calculating the amount involved in a 1956(h) conspiracy to launder fraud proceeds, the jury is not limited to the proceeds derived from substantive offenses charged in the indictment; the amount involved in the conspiracy may include amount derived from both uncharged conduct and conduct on which the defendant has been acquitted);
 - *United States v. Seher*, 562 F.3d 1344 (11th Cir. 2009) (defendant liable for money judgment equal to the \$1.6 million that he conspired to launder);
 - *United States v. Armstrong*, 2007 WL 809508, at *3 (E.D. La. 2007) (because money laundering conspiracy includes a conspiracy to attempt to launder money, \$1.3 million in currency seized from defendant’s residence before he could launder it was involved in the conspiracy);
 - See 31 U.S.C. § 5317(c), authorizing civil and criminal forfeiture for § 371 conspiracy to violate title 31 currency reporting requirements.

Jury Instructions

For jury instructions on the theories of forfeiture applicable under 981(a)(1)(A) and 982(a)(1), see the forms on the Asset Forfeiture Online website, and check the recent case law:

- *United States v. Warshak*, 2008 WL 509258 (S.D. Ohio 2008) (district court sets forth, in full, its instruction defining “property involved in a money laundering offense,” to include the subject matter of the financial transaction, commissions and fees, and property used to facilitate the offense);
- *United States v. Cherry*, 330 F.3d 658, 669 n.17 (4th Cir. 2003) (the court properly instructed the jury that it had to find, by a preponderance of the evidence, that the property “fairly represents the property which was involved in, or is traceable to property involved in” the money laundering counts);
- *United States v. Bornfield*, 145 F.3d 1123 (10th Cir. 1998) (preferable that court define “involved in” as including the corpus, commissions, and facilitating property, but not reversible error if court fails to do so);

- *United States v. McGauley*, 279 F.3d 62 (1st Cir. 2002) (approving instruction in which the court said that the commingling of tainted funds with legitimate funds is enough to expose the legitimate funds to forfeiture, if the commingling was done for the purpose of concealing the nature or source of the tainted funds);

Note: the instruction adopted in *Warshak* is virtually identical to the instruction drafted by the Department of Justice based on the summary of the case law in chapter 27 of *Asset Forfeiture Law in the United States*.

III. TRACING AND SUBSTITUTE ASSETS

I said that I would return to the issues raised when the money laundering offense involved a bank account, but it's unclear whether the property involved in the offense is still in the bank account (because the account has had a lot of activity since the money laundering offense occurred)

- part of the Government's burden of proof is to show that we are forfeiting funds that are forfeitable under one of the forfeiture theories but are not attempting to forfeit "clean money"

For example, suppose \$100,000 in cash is deposited into a bank account in a structured fashion, or in violation of § 1957

- if several months go by, how do we prove that the tainted funds are still there, and that the money in the account today isn't some other money that was already in the account when the deposits occurred, or was deposited after the tainted funds were withdrawn

Substitute assets

In a criminal case, the tracing issue is less important

- if the forfeitable money is gone, or if we can't be sure if it's still in the account or not, we can simply get a money judgment for the value of the forfeitable funds or forfeit substitute assets, see 21 U.S.C. § 853(p)
 - *United States v. Sperrazza*, 2014 WL 5310545, *3 (M.D. Ga. Oct. 16, 2014) (money judgment in a criminal structuring case may be based on the total number of dollars involved in the structuring offenses);

Section 982, however, contains a limitation on the Government's ability to forfeit substitute assets in a money laundering case based on Section 1956 or 1957 that is intended to protect minor players in a money laundering scheme

Suppose, for example, a drug dealer gives \$500,000 to a middleman to move to an offshore account, keeping only 5 percent for his services

- Is the middleman liable to forfeit the entire \$500,000?

Under the doctrine of joint and several liability, the answer would be yes

- But Section 982(b)(2) provides that we cannot obtain substitute assets from a “mere intermediary” unless he laundered more than \$100,000 in a 12-month period
 - *United States v. Seher*, 562 F.3d 1344, 1372-73 (11th Cir. 2009) (assuming without deciding that the intermediary exception applies to both money judgments and substitute assets, but holding that defendant who laundered more than \$100,000 in 12-month period did not qualify in any event);
 - *United States v. Bermudez*, 413 F.3d 304, 306 (2d Cir. 2005) (section 982(b)(2) shows that Congress intended money launderers to be liable for forfeiture of the total amount laundered and to forfeit substitute assets in that amount, even if they did not retain the money for themselves, unless the intermediary exception applies);
 - *United States v. Hendrickson*, 22 F.3d 170, 175 (7th Cir. 1994) (gold dealer who retained only \$10,000 profit on sale of gold for \$742,555 in drug proceeds required to forfeit \$742,555 in substitute assets because intermediary exception not applicable);
 - *United States v. Saccoccia*, 823 F. Supp. 994, 1005-06, 1006 n.8 (D.R.I. 1993) (exception not applicable where alleged intermediary was a smurf who was convicted under 31 U.S.C. § 5322(b) for having laundered more than \$100,000 in more than three transactions; leaders of professional money laundering operation are clearly not intermediaries), *aff'd*, 58 F.3d 754 (1st Cir. 1995), *aff'd sub nom. United States v. Hurley*, 63 F.3d 1, 21-22 (1st Cir. 1995) (money launderer is liable to forfeit substitute assets equal to the entire amount laundered even though he held the money only temporarily and retained only a fraction for his fee);

Tracing in civil forfeiture cases

Civil forfeiture cases present a different problem

- There are no money judgments or substitute assets in civil forfeiture cases
- If your forfeiture theory does not allow the forfeiture of the entire bank account, you have to show that the money in the bank account is traceable to the offense giving rise to the forfeiture

The good news is that to *seize* the money – where the standard is probable cause – you probably don't have to worry about strict tracing

- it's enough to show that \$X was deposited into the account in a structured fashion
 - *United States v. Dupree*, 781 F. Supp. 2d 115, 135 (E.D.N.Y. 2011) (there is probable cause for the seizure of funds in a bank account if there is a showing that the value of the criminal proceeds deposited into the account exceeds the current balance in the account or the amount the Government is seeking to seize; the probable cause affidavit does not have to negate the possibility that legitimate funds have replaced the criminal proceeds; that is an issue for trial);

You also don't have to worry about tracing just to file a civil forfeiture complaint

- *United States v. \$79,650 Seized from ... Afework*, 2009 WL 331294, *5 (E.D. Va. Feb. 9, 2009) (it is not necessary to decide, in a pre-trial motion to dismiss the complaint, whether the Government filed its action in time to invoke § 984 because it may turn out, at trial, that the Government can directly trace the property);
 - *United States v. \$40,960.00 in U.S. Currency*, 831 F. Supp. 2d 968, (N.D. Tex. 2011) (the Government's inability to show that the defendant property is traceable to the offense is not a basis for a motion to dismiss; thus, it is not necessary for the Government to allege that it will rely on § 984 to satisfy the pleading requirement in Rule G(2)(f));
 - *United States v. Funds in the Amount of \$193,773.00*, 2011 WL 6181424, *3 (M.D. Fla. Dec. 13, 2011) (whether the forfeiture action was commenced early enough to make § 984 applicable is irrelevant at the pleading stage because the Government does not have to establish the traceability of the property to satisfy the pleading requirement);
- but to forfeit the money at trial in a civil forfeiture case, you're going to have to prove that the money is traceable to a criminal offense

There are several ways to do this:

- the hard way is to use what is called the "lowest intermediate balance rule" or some other accounting trick that allows you to assume that the forfeitable funds are the last funds to leave a bank account
- unless the balance falls to zero along the way

- *United States v. Haleamau*, 2012 WL 3394952, *4-5 (D. Hawaii Aug. 1, 2012) (if the structured funds are in a commingled bank account, the Government may use the lowest intermediate balance rule from *Banco Cafetero* to establish the forfeitability of the funds by a preponderance of the evidence)
- the easy way is to use what is called the fungible property statute, 18 U.S.C. § 984
- in essence, that statute says that if money is deposited into a bank account, any money found in the same bank account within one year is deemed to be the same money, even if there is evidence that the tainted money was withdrawn and replaced by other money
 - *United States v. Funds on Deposit at Bank One, Indiana*, 2010 WL 909091, *7-8 (N.D. Ind. Mar. 9, 2010) (under § 984, when \$335,000 in drug proceeds was deposited in an account and commingled with other funds, the entire \$264,563 remaining in the account within one year of the offense was forfeitable as drug proceeds without having to do any tracing analysis);
 - *United States v. \$79,650 Seized from ... Afework*, 2009 WL 331294, *3 (E.D. Va. Feb. 9, 2009) (§ 984 “loosens the burden on the Government to trace forfeitable property” if the property is fungible property found in the same place or account as the directly forfeitable property, and the action is commenced within one year);

So if you can commence your civil forfeiture case within one year of the offense, you can take advantage of the fungible property statute

- just be aware that the courts don't agree on what “commence” means
- some say it's enough to *seize* the money within one year, but others say we have the *file the forfeiture complaint* within the one year
 - See H. Rep. 102-28, 102d Congress (1991) at 47-48, 1991 WL 42201 (“property is subject to forfeiture [under section 984] if not more than one year has passed between the time the original property subject to forfeiture was so located or maintained and the time the forfeiture action was initiated by seizing the property or filing the complaint”);
 - *But see United States v. \$8,221,877.16 in U.S. Currency*, 330 F.3d 141, 161 (3d Cir. 2003) (forfeiture complaint must be filed within 1 year; seizure within 1 year not sufficient; legislative history not controlling);
 - *United States v. \$303,581.82 in U.S. Currency*, 2010 WL 1657154 (D. Utah Apr. 22, 2010) (following *\$8,221,877.16* on this point); *United States v. Currency, \$300,000*

Seized from Bryant Bank, 2013 WL 1498972 (N.D. Ala. Apr. 9, 2013) (same); *United States v. \$83,274.51 Seized from BBVA Compass Bank Account*, 2013 WL 5524729 (N.D. Ala. Sept. 30, 2013) (same);