

USING THE FORFEITURE LAWS TO PROTECT CULTURAL HERITAGE

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Stefan D. Cassella
Asset Forfeiture Law, LLC

Cassella@AssetForfeitureLaw.us / www.AssetForfeitureLaw.us

I. INTRODUCTION

We're here to talk about how to use the asset forfeiture laws to recover cultural property, punish the wrongdoer, and return the property to its rightful owners.

- forfeiture is commonly used in drug cases, money laundering cases, fraud cases and in many other cases routinely prosecuted in federal court
- many prosecutors do not realize, however, that there are also forfeiture provisions in some of the less commonly used statutes, like the Archaeological Resources Protection Act (ARPA), the Endangered Species Act and the Cultural Property Implementation Act
- or that we can use the forfeiture provisions in statutes that are normally used in other contexts, like the National Stolen Property Act or the Customs laws, to recover cultural property.

We're here to talk about how to do that.

First, you have to know a little bit about how forfeiture works and what some of the terms mean

- so I will give you a brief introduction to the three most important procedures: administrative forfeiture, civil forfeiture and criminal forfeiture
- and talk a bit about when to use which and how to do so

Then I'll deliver the bad news:

- there isn't 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's a different forfeiture provision for ARPA, for CPIA, for the Endangered Species Act, for a Customs violation, and so forth
- for every violation, you have to find the statute, see what Congress said we are entitled to forfeit, and see which of the procedures apply
- in some cases, you can forfeit only the cultural property itself while in others you can forfeit property used to commit the offense or property traceable to it
- and in some cases, criminal forfeiture is the only option; in others, civil, criminal and administrative forfeiture are all available

So after we are comfortable with the concepts, I'll take you through each of the major cultural property protection statutes and tell you what you can forfeit and what procedures are available

- and in doing so, I'll give you some examples from some cases I handled and citations to other cases that illustrate each of these alternatives.

Finally, in the second half, I will go over the steps that a federal prosecutor should take to make sure forfeiture is made a part of the defendant's sentence in a criminal case.

II. A QUICK INTRODUCTION TO FORFEITURE PROCEDURE

Three types of forfeiture

Forfeiture comes in 3 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

- *if administrative forfeiture is authorized*, the forfeiture can be completed without there being any civil or criminal proceeding filed 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; real property cannot be forfeited administratively
- the vast majority of all forfeitures are uncontested administrative forfeitures
- if administrative forfeiture is authorized for the offense under investigation, you definitely want to encourage the agency to pursue administrative forfeiture, if it has the authority to do so
- some agencies lack administrative forfeiture authority but can ask the FBI or another agency to do the forfeiture administratively

If someone does contest the administrative forfeiture, or the property is not eligible for administrative forfeiture, or the agency doesn't 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's why they have funny names

- the important thing to know about civil forfeiture is that it doesn't require a conviction or even a criminal case, and it doesn't matter who the owner of the property is
- we are bringing the case to confiscate the property because it was derived from or used to commit a crime
- the idea is that the Government names the property as the "defendant" in the case, gives everyone with an interest in the property a chance to oppose the forfeiture action, establishes the forfeitability of the property by a preponderance of the evidence, and opposes any attempt by the claimant to establish an innocent owner defense
- if the Government prevails in the civil forfeiture case, it has good title to the property against the world, even though there has been no criminal conviction

How is this done?

- every US Attorney’s Office has at least one civil forfeiture expert who would handle a case like this if it had to be done civilly
- there is a statute, 18 U.S.C. § 983, and a Rule, Supplemental Rule G, FRCivP, that govern civil forfeiture practice
- there has to be notice given, a complaint filed, followed by a claim and answer
- then civil discovery and finally either summary judgment or a civil trial

Any person with an interest in the property, including a third party who purchased the property from the wrongdoer, can assert a claim

- that person is called the claimant
- the claimant can oppose the forfeiture by contesting the underlying facts or by asserting what’s called the innocent owner defense, 18 U.S.C. § 983(d)
- this says that even if the Government proves that a crime was committed and that the property was derived from or used to commit the crime, it cannot be forfeited if the owner of the property was unaware of the criminal activity or was a bona fide purchaser for value
- this applies to all civil forfeiture cases *except those filed under the Customs laws in title 19*
- for cases filed under the Customs laws, there is no innocent owner defense
 - 18 U.S.C. § 983(l) (exempting forfeitures under title 19 from the innocent owner defense and other procedures in CAFRA)
 - *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);

- 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 recognizes that there are some things even an innocent owner should not be able to recover
- like contraband or 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
- one of the changes that should be made to CAFRA is to expand that list of property exempted from the innocent owner defense to include human remains and other things that no one should have a right to retain even if they didn't realize it had been taken in violation of the law when they bought it

If civil forfeiture is so wonderful, why don't we have the forfeiture expert forfeit everything civilly instead of having to include it in our criminal case?

- first, it's a lot of extra work for something that can be done easily if there is a criminal case
- also, civil forfeiture has a serious limitation
- because it is an *in rem* action against specific property, there are no substitute assets or money judgments in civil forfeiture cases
- so civil forfeiture should be reserved for cases where the criminal forfeiture is not possible, or where a criminal case is not ready to indict

For example, we might use a parallel civil forfeiture to

- tie up property pre-indictment,
- take care of third party interests that cannot be forfeited in a criminal case
- forfeit property involved in crimes other than the one to which the defendant pleads guilty
- forfeit the property if the defendant dies (Ken Lay) or becomes a fugitive
- forfeit property where there is no criminal case because the interests of justice do not require a conviction
- forfeit property where there is no federal criminal case because the defendant has already been convicted in a State or foreign or tribal court, or the statute of limitations has run
- Forfeit property where the wrongdoer cannot be identified but the property can be recovered

Criminal forfeiture follows conviction and is part of the defendant's sentence for committing a federal crime

- 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
- and criminal forfeiture allows us to get a forfeiture order in the form of a money judgment if the proceeds of the crime are long gone by the time the defendant is convicted; and then forfeit substitute assets to satisfy the judgment

We're going to spend much of the latter part of this session talking about criminal forfeiture procedure, so I won't go into it now.

Basically, criminal forfeiture proceeds as follows:

- 1) include a forfeiture notice in the indictment;
 - this is required by Rule 32.2(a) of the F.R.Crim.P. but can easily be satisfied by tracking the language of the forfeiture statute;

- generally, you'll name the forfeitable property in the indictment, but you can do it separately in a bill of particulars if you prefer

2) include the forfeiture in any plea agreement

- if the defendant pleads guilty, he can agree to the forfeiture of his property as part of the plea

3) the criminal trial is bifurcated

- if the case goes to trial, the forfeiture will be set aside until the defendant is convicted
- then there is a separate forfeiture trial 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; 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

4) the court issues a preliminary order of forfeiture

- pursuant to Rule 32.2(b)(2), the court issues what's called a preliminary order of forfeiture terminating the defendant's interest in the property
- the order become final as to the defendant at sentencing, and must be included in the judgment; Rule 32.2(b)(4)

5) take care of third parties

- because third parties have been excluded from the criminal trial, property belonging to third parties cannot be forfeited in a criminal case
- as we'll see, that's one of the reasons to do the forfeiture civilly

- to be sure we're not forfeiting property of third parties, we must give them a post-trial hearing – it's called an ancillary proceeding – 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 artifact from the defendant
- under the statute, 21 U.S.C. § 853(n), the third party can win in that situation only if he was a bona fide purchaser for value without reason to know that the property was subject to forfeiture

So, for example, you might 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
- or 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
- the court would issue a preliminary order of forfeiture directing the defendant to forfeit the assets and make it part of his sentence
- and we would make sure no third parties are offended in the ancillary proceeding

But criminal forfeiture is not always available:

- there has to be a conviction for the offense giving rise to the property
- so criminal forfeiture is of no use if there is no criminal case, or the defendant is charged with some other crime, but not the one that supports the forfeiture
- it's also of no use if the defendant dies or becomes a fugitive
- it's of no use if the defendant is prosecuted in state court or in a foreign court instead of federal court under federal law

- and criminal forfeiture is of no use if the property belongs to a third party who is not charged in the criminal case

When any of those issues are present, we need to use civil forfeiture.

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's *United States v. Miscellaneous Artifacts* it's a civil case;
- if it's *United States v. Jones*, it's a criminal case

For most cultural property offenses, we have both civil and criminal forfeiture authority

- but for a variety of reasons, and as you'll see from the citations to the cases, most cultural property cases are civil forfeiture cases
- generally that's because there is no criminal case and we are focused solely on getting the property back
- e.g., if a painting was stolen by the Nazis in World War II, or stuff was 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.

III. WHAT CAN WE FORFEIT?

Convention on Cultural Property Implementation Act (CPIA)

One way of recovering property illegally brought into the United States from another country is to invoke the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("the Convention on Cultural Property")

- Congress implemented the Convention by enacting 19 U.S.C. § 2606, 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

- 19 U.S.C. § 2609 authorizes the forfeiture of any ethnological material imported into the United States in violation of Section 2606
- the forfeiture can be done administratively (assuming the seizing agency has administrative forfeiture authority), civilly or criminally (if someone is prosecuted for the offense)

When I was in the Eastern District of Virginia, we 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

- a copy of the complaint is attached to this outline
 - *United States v. Eighteenth Century Peruvian Oil on Canvas*, 597 F. Supp.2d 618, 623 (E.D. Va. 2009) (religious oil paintings imported from Peru in violation of the Conventional on Cultural Property Implementation Act are subject to forfeiture under 19 U.S.C. § 2609);

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 area around Cuzco (straddling the modern-day border between Peru and Bolivia)

- they 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
- both Peru and Bolivia are on the list of countries that have bilateral agreements with the U.S. under the Convention
- 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 our motion for summary judgment in the civil forfeiture case, it did not matter

- all we 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

We then left it to AFMLS to decide how (and to whom) to repatriate the paintings.

Ancient Coins Case

More recently, in Baltimore, we had a case involving ancient Cypriot and Chinese coins imported into the United States

- Customs agents seized the coins in 2009 on the ground that they were being imported in violation of the Cultural Property Implementation Act
- Plaintiff, 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 Act, that State did not exceed its statutory authority to issue regulations under the Act, and that banning the importation of the coins did not violate the Guild's rights under the First Amendment.

With respect to the forfeiture issues, the court held that the deadlines in CAFRA for filing a forfeiture complaint do not apply to the CPIA

- *Ancient Coin Collector's Guild v. U.S. Customs & Border Prot.*, 801 F. Supp. 2d 383, 417-18 (D. Md. 2011) (the 90-day deadline does not apply to forfeitures under the Cultural Property Implementation Act because it is codified in Title 19);
- The decision was affirmed by the Fourth Circuit, which also laid out the procedure for commencing a civil forfeiture case under the CPIA
- *Ancient Coin Collector's Guild v. Customs and Border Protection*, 698 F.3d 171, 185 (4th Cir. 2012) (under the CPIA, the Government has the initial burden of showing that the description of the property covered by the Act is sufficient to give fair notice that importation of the defendant property is prohibited; the claimant then has the burden of proving that the property is not subject to forfeiture);

This case, by the way, is also a good illustration of when civil forfeiture is the appropriate vehicle

- 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 US from 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 way to do that

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:

- it is a crime to:

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

The forfeiture provision of ARPA, 16 U.S.C. § 470gg(b), provides for the forfeiture of all archaeological resources, and all **vehicles and equipment** in the possession of any person, involved in any of those three violations

- so, 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’s good that the Government can use the forfeiture law to recover the looted artifact
- and it’s good that the forfeiture is not limited to the artifact itself, 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’s 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? No it is 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

Most serious, with respect to the excavated 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, or property traceable to the illegally-procured artifact, 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 now let’s talk about how you might use the forfeiture statutes to recover property 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, 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 way for the investigative agency to handle the forfeiture administratively even if there is no one contesting it
- this means that we have to make a “federal case” out of everything, when it is totally unnecessary to do so

Criminal forfeiture under ARPA is fairly straightforward

- you would follow the steps outlined above
- but there is one problem with criminal forfeiture under ARPA that doesn't come up under any other forfeiture statute:
- unlike almost every other criminal forfeiture provision ARPA appears to make the forfeiture discretionary rather than mandatory
- 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 wants to

Criminal forfeiture under ARPA, however, is also governed by 28 U.S.C. § 2461(c), which expressly makes criminal forfeiture mandatory

- *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.”);
- How the courts will resolve this conflict between the two statutes remains to be seen

For examples of criminal ARPA cases that involved a forfeiture order see the following:

- *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 all events, if there is no criminal case or criminal forfeiture is not feasible, the Government can file a civil forfeiture action against the artifact itself, or against the vehicle or equipment

- 18 U.S.C. § 470gg(b)(3)
 - Forfeiture under that statute, however, is unquestionably discretionary, and the innocent owner defense would apply

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 proof of intent
 - *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 them to a flight attendant to transport, but she did not declare them upon arrival at JFK Airport

- the Government seized them for forfeiture under § 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 (E.D.N.Y. 1997), citing *Bennis v. Michigan*, 516 U.S. 442, 446 (1996);

Customs Laws: 19 U.S.C. § 1595a

One Lucite Ball

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*”

- 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
 - *United States v. One Lucite Ball Containing Lunar Material*, 252 F. Supp. 2d 1367 (S.D. Fla. 2003);

In *One Lucite Ball*, 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 gave 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 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 brought 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

- 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, 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 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 1367, 1378 (S.D. Fla. 2003)

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) when renders the property subject to forfeiture

In *Painting Known as "Hannibal"*, the claimant arranged to have two works of art imported into the United States for sale through a broker in New York

- 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 § 542, and thus was subject to forfeiture under § 1595a(c)
- the Government then 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), Claimant was an innocent owner
- the court rejected both arguments

The “dramatic understatements of the values” of the defendant property were material 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)

- that the underlying “law” to which the importation was “contrary” was a provision in title 18, the court said, was irrelevant
- the exemption for Customs cases in Section 983(i) applies whenever the forfeiture action is brought pursuant to a provision of title 19 regardless of what other violations of law might be involved

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

- *United States v. Broadening-Info Enterprises*, 462 Fed. Appx.93, 96-97 (2d Cir. 2012) (stating value of million-dollar painting to be \$100 is a material misrepresentation in violation of § 542, so importation was “contrary to law”, but for property to be forfeited under § 1595a, court must also find it was ‘stolen, smuggled or clandestinely imported’), aff’g *United States v. The Painting Known as “Hannibal”*, 2010 WL 2102484 (S.D.N.Y. May 18, 2010) but remanding for determination of the “smuggling” issue);
- *United States v. The Painting Known as Hannibal*, 2013 WL 1890220 (S.D.N.Y. Apr. 25, 2013) (holding on remand that grossly understating the value of imported merchandise on shipping documents, and failing to accurately describe its nature, constitutes “smuggling” for purposes of the forfeiture provision in 19 U.S.C. § 1595a(c));

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
- *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);
 - *See also 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 an “product of Burma”);

Stolen Property Act

The Stolen Property Act, 18 U.S.C. §§ 2314-15, is an independent basis for the forfeiture of any stolen property that moves in interstate or foreign commerce

- In such cases, the property is regarded as the “proceeds” of the offense, and is therefore forfeitable under 18 U.S.C. § 981(a)(1)(C)
- This works whether the property was stolen overseas or in the United States

- So if you can show that the property was stolen in violation of a foreign or domestic theft statute, and moved in interstate commerce, you can recover the property through criminal forfeiture by prosecuting the theft offense
- Or civilly under § 981(a)(1)(C)

Two of the most recent cases relied not only on the Customs violation but on the allegation that the property was stolen

- *United States v. A 10th Century Cambodian Sandstone Sculpture*, 2013 WL 1290515 (S.D.N.Y. Mar. 28, 2013) (complaint adequately alleged forfeiture of stolen Cambodian statue under three theories: proceeds of § 2314; imported in violation of § 545 because it was stolen; and imported and stolen making it forfeitable under § 1595a(c); Government does not have to show that foreign state has ever enforced its antiquities law);
- *United States v. One Tyrannosaurus Bataar Skeleton*, 2012 WL 5834899 (S.D.N.Y. Nov. 14, 2012) (denying motion to dismiss complaint seeking forfeiture of dinosaur fossil under § 2314-15 / 981(a)(1)(C) as property taken in violation of foreign theft statute, § 545 because of false statements on Customs documents relating to the country of origin and the object's value, and § 1595a(c) as property imported contrary to law);

Be aware, however, that forfeiture under § 981(a)(1)(C) is subject to the innocent owner defense.

Customs Laws: 18 U.S.C. § 545

Several of these cases also relied on a second theory based on violations of the smuggling statute, 18 U.S.C. § 545

- the statute makes it an offense to smuggle merchandise into the United States, or otherwise to import merchandise “contrary to law”
- and it provides that any property introduced into the United States in violation of § 545 is subject to forfeiture
- in the 1990s, the Government used this theory to forfeit cultural artifacts illegally brought into the United States, but for reasons that I’ll mention, it is not the preferred theory of forfeiture today

In *United States v. An Antique Platter of Gold*, 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
- the art dealer knew that the Phiale was of Italian/Sicilian origin yet faxed a commercial invoice to a customs broker in New York falsely indicating the Phiale’s country of origin as Switzerland and falsely stating its value as \$250,000
- this invoice was attached to forms submitted by the customs broker to the Customs Service to obtain release of the Phiale prior to its formal entry into the United States
- the art dealer thereafter transported the Phiale to New York, cleared customs, and delivered it to his client

At the request of the Italian Government, the U.S. Attorney filed a civil forfeiture action against the Phiale under two alternative theories

- that the property was imported in violation of § 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 § 542, and
- that the property was imported “contrary to law” within the meaning of § 1595a because it was 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 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

But the claimant also argued that he was entitled to an innocent owner defense when a forfeiture is based on Section 545

- the court held that he was not

- *United States v. An Antique Platter of Gold*, 184 F.3d 131, 138-39 (2d Cir. 1999) (there is no innocent owner defense for violations of section 545; applying *Bennis*);

- but this case was decided in 1999
- CAFRA took effect the next year, making 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*
- so 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

Portrait of Wally

Finally, the Government relied on both theories — Sections 545 and 1595a(c) — in *United States v. Portrait of Wally*

- the theory was that the painting was stolen by the Nazis from a Jewish family during the Holocaust and thus its importation into the United States was “contrary to law” — i.e. the National Stolen Property Act, 18 U.S.C. § 2314

— this case has a long legal history

- *United States v. Portrait of Wally*, 2009 WL 3246991 (S.D.N.Y. Sept. 30, 2009) (*Wally IV*)
- *United States v. Portrait of Wally*, 2002 WL 553532 (S.D.N.Y. 2002) (*Wally III*)
- *United States v. Portrait of Wally*, 2000 WL 1890403 (S.D.N.Y. 2000) (*Wally II*)
- *United States v. Portrait of Wally*, 105 F. Supp. 2d 288 (S.D.N.Y. 2000) (*Wally I*)

Mask of Ka-nefer-nefer

There is one other 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
- the mask 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
- It held 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)

- it 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
- the complaint in *Ka-nefer-nefer* alleged the facts that I just mentioned, but the court held that it was not enough to say that the mask went missing
- it must allege when, where, why and by whom the property was stolen

- *United States v. Mask of Ka-Nefer-Nefer*, 2012 WL 1094658, *3 (E.D. Mo. Mar. 31, 2012) (dismissing forfeiture complaint filed under § 1595a(a) for failure to satisfy Rule G(2)(f); a complaint under § 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), aff'd on procedural grounds 752 F.3d 737 (8th Cir. 2014);

Note: in *Mask of Ka-Nefer-Nefer*, two of the Eighth Circuit judges expressed hostility to the use of the forfeiture laws to recover antiquities from innocent purchases such as museums and collectors, while the third judge noted that Congress exempted the Customs laws from the innocent owner defense, and that museums should be aware that the Government may use the forfeiture laws to combat the illegal trade in cultural property.

- *United States v. Mask of Ka-Nefer-Nefer*, 752 F.3d 737, 745-46 (8th Cir. 2014) (Murphy, J., concurring in the judgment).

IV. CRIMINAL FORFEITURE PROCEDURE

The Supreme Court has held that criminal forfeiture is part of the defendant's sentence.

- *Libretti v. United States*, 516 U.S. 29, 39 (1995) (Criminal forfeiture is an aspect of punishment imposed following conviction of a substantive criminal offense); see Rule 32.2(b)(3) (the order of forfeiture shall be made part of the sentence and included in the judgment);
- *United States v. Christensen*, ___ F.3d ___, 2015 WL 11120665 (9th Cir. 2015) (“forfeiture is an aspect of the sentence, not an element of the underlying crime”; citing *Libretti*);
- *United States v. Smith*, 770 F.3d 628, 637 (7th Cir. 2014) (“Criminal forfeiture is considered to be punishment and therefore is part of the sentencing process;” therefore, the Government's burden at the forfeiture hearing is preponderance of the evidence, and the rules of evidence do not apply);

A number of things flow from that:

- here are a few of the most important points

Because forfeiture is part of the sentence, there is no forfeiture unless the defendant is convicted

- if the conviction is vacated, so is the forfeiture
 - *United States v. Harris*, 666 F.3d 905, 910 (5th Cir. 2012) (reversal of defendants’ money laundering conviction means that \$1.5 million money judgment must be reversed as well);
- which is why it’s useful to have a parallel civil forfeiture case available as an option

Because forfeiture is part of the sentence, the forfeiture is limited to the property connected to the particular crime for which the defendant was convicted

- if you convict the defendant of Crime A, you can only forfeit the property connected to Crime A
- it doesn’t matter that the defendant *could have been convicted* of Crimes B and C
 - *United States v. Capoccia*, 503 F.3d 103, 110, 114 (2nd Cir. 2007) (notwithstanding prefatory language in the indictment stating that the defendant’s acts were part of a larger scheme, defendant who was convicted of an ITSP offense under’ 2314 may be made to forfeit only the proceeds of the specific acts alleged in the indictment; if the Government wants to forfeit property involved in other acts that were part of the scheme (but not alleged because of venue issues) it should have charged a conspiracy or another offense of which a scheme is an element);
- one way around this is to charge a conspiracy or a “scheme to defraud”
 - *United States v. Venturella*, 585 F.3d 1013, 1015, 1016-17 (7th Cir. 2009) (forfeiture in a mail fraud case is not limited to the amount of the particular mailing but extends to the entire scheme;@

Because forfeiture is part of sentencing, it’s an *in personam* punishment

- the punishment is directed against the defendant, not his property
- which means we are not limited, as we are in civil forfeiture cases, to the traceable property
- we can get a forfeiture order in the form of a money judgment, and we can forfeit substitute assets

- *United States v. Vampire Nation*, 451 F.3d 189, 202 (3d Cir. 2006) (a criminal forfeiture order is a judgment *in personam* against the defendant; this distinguishes the forfeiture judgment in a criminal case from the *in rem* judgment in a civil forfeiture case);
- *United States v. Lazarenko*, 476 F.3d 642, 647 (9th Cir. 2007) (criminal forfeiture operates *in personam* against a defendant; it is part of his punishment following conviction);
- *United States v. Roberts*, 696 F. Supp.2d 263, 270 (E.D.N.Y. 2010) (forfeiture order may take the form of a money judgment because the forfeiture order is an *in personam* judgment);

The criminal forfeiture statutes allow the court to order the forfeiture of any property derived from or used to commit the offense, but because third parties are excluded from the criminal case, facilitating property that belongs to third parties cannot be forfeited

— this is the flip side to the *in personam* nature of criminal forfeiture

— We don't have to prove the property belonged to the defendant; we only have to prove the nexus to the offense

- *De Almeida v. United States*, 459 F.3d 377, 381 (2d Cir. 2006) (criminal forfeiture is not limited to property owned by the defendant; it reaches *any* property that is involved in the offense; but the ancillary proceeding serves to ensure that property belonging to third parties who have been excluded from the criminal proceeding is not inadvertently forfeited);
- *United States v. Watts*, 477 Fed. Appx. 816, 817-18 (2d Cir. 2012) (following *De Almeida*; property may be forfeited based on its nexus to the offense, regardless of ownership; the purpose of the ancillary proceeding is to allow third parties to challenge the forfeiture on ownership grounds);
- *United States v. Dupree*, 919 F. Supp.2d 254, 274-275 (E.D.N.Y. 2013) (criminal forfeiture is not limited to property of the defendant; it reaches any property derived from or used to commit the offense; in the case of proceeds, the *in personam* nature of forfeiture is satisfied if the property is the proceeds of the crime the defendant committed; older cases such as *O'Dell* and *Gilbert* were based on former Rule 31(e) which was replaced by Rule 32.2 and are no longer good law);
- *United States v. Molina-Sanchez*, 298 F.R.D. 311, 312-13 (W.D.N.C. 2014) (same);

- But if it turns out that the property that was used to commit the offense belonged to a third party, it cannot be forfeited in the criminal case
- this is the major *disadvantage* to criminal forfeiture
- there is, of course, a procedure for forfeiting the property of third parties who knowingly allowed their property to be used to commit a crime
- it's called civil forfeiture

OK, so how do we make sure we forfeit the property in a criminal case

- Criminal AUSAs are always saying the process is too complicated
- I'm here to tell you that it's not; just follow these steps

1. Include Forfeiture in the Indictment.

Rule 32.2(a) says that a notice of forfeiture must be included in the indictment.

- the forfeiture should not be designated as a count in the indictment, and the property need not be itemized
- all you have to do is track the language of the applicable forfeiture statute
 - *United States v. Hampton*, 732 F.3d 687, 690 (6th Cir. 2013) (it was proper, under Rule 32.2(a), for the indictment to say that the Government was seeking a money judgment and not to identify any specific assets subject to forfeiture);
 - *United States v. Lazarenko*, 504 F. Supp. 2d 791, 796-97 (N.D. Cal. 2007) (Rule 32.2(a) requires only that the indictment give the defendant notice of the forfeiture in generic terms; that the Government did not itemize the property subject to forfeiture until much later was of no moment; older cases like *Gilbert*, holding that property had to be listed in the indictment, are no longer good law);
 - *United States v. Galestro*, 2008 WL 2783360, at *10-11 (E.D.N.Y. 2008) (Rule 32.2(a) does not require an itemized list of the property subject to forfeiture; older cases requiring such an itemization appear to reflect an outmoded, minority view);
 - *United States v. Woods*, 730 F. Supp.2d 1354, 1372-73 (S.D. Ga. 2010) (forfeiture notice that tracks the language of 2253 is sufficient to give defendant notice of what property will be forfeited if he is convicted of a child pornography offense);

- *United States v. Clemens*, 2011 WL 1540150, *4 (D. Mass. Apr. 22, 2011) (declining to dismiss forfeiture notice on the ground that it did not itemize the property subject to forfeiture; such placeholders are neither improper nor prejudicial);

2. Preserve the Property Pending Trial.

Often the property will already be in the Government's possession when the indictment is returned, but if not, ask for a pre-trial restraining order or seizure warrant.

— the Government simply files an *ex parte* application stating that an indictment has been returned and that the property in question will be subject to forfeiture if the defendant is convicted

- *United States v. Holy Land Foundation for Relief and Development*, 493 F.3d 469, 475 (5th Cir. 2007) (*en banc*) (“a court may issue a restraining order without prior notice and a hearing”);

Restraining orders are limited to directly forfeitable property

— only the Fourth Circuit permits the pretrial restraint of substitute assets

— if you're in the Fourth Circuit, or if you are restraining the substitute property under 18 U.S.C. § 1345, you have to worry about the Supreme Court's decision in *Luis v. United States*, which exempts substitute assets needed to retain counsel from pre-trial restraining orders

- *Luis v. United States*, 578 U.S. ___, 136 S. Ct. 1083 (Mar. 30, 2016) (not questioning the Government's authority seek the restraint of substitute assets under § 1345, but creating a Sixth Amendment exception);
- *United States v. Chamberlain*, 2016 WL 2899255 (E.D.N.C. May 17, 2016) (*Luis* does not change Fourth Circuit law permitting the pre-trial restraint of substitute assets, it only creates an exemption if the property is needed to retain counsel; because defendant did not allege that he needed the property to retain counsel, there was no occasion to determine what procedure to apply under *Luis* if he had done so);

3. Plea Agreements

The defendant should agree to the forfeiture in the plea agreement, which should be as specific as possible in naming the property.

- Your office’s model plea agreement should have forfeiture language that may need to be modified to fit the facts of the case.
- it should spell out what the defendant is agreeing to forfeit, say that he is waiving all of his rights under the federal rules, and provide a factual basis for the forfeiture
 - *United States v. Beltramea*, 785 F.3d 287 (8th Cir. 2015) (defendant’s consent to the entry of a forfeiture order without a factual stipulation does not relieve the Government of its obligation to establish the nexus between the property and the offense of conviction; without any factual support in the records, forfeiture order vacated as plain error);

If criminal forfeiture is impossible, the defendant can be required to agree not to contest a parallel civil forfeiture.

- *Rodriguez v. United States*, 2004 WL 3035447, *4 (S.D.N.Y. 2004) (defendant who agreed in his plea agreement not to contest a civil forfeiture cannot complain, in a section 2255 petition, that he did not have adequate notice of the civil forfeiture);

In general, it is a bad idea to agree to return property to obtain a guilty plea

- This creates the appearance of buying a guilty plea, undermines the purpose of forfeiture (to punish the defendant by taking away the fruits of the crime) and is devastating to the morale of the agents who worked hard to locate the property
- Moreover, the agreement not to seek forfeiture is *Giglio* material, if the defendant is a cooperator
 - *United States v. Bulger*, 2013 WL 2146202, *6 (D. Mass. May 14, 2013) (Government’s forbearance in not seeking forfeiture from a cooperating co-defendant is a “promise, inducement or reward” that must be disclosed to the defendant as *Giglio* material);

It is equally wrong to agree to a lesser jail sentence for a defendant who is willing to give up property (“buying his way out of jail”)

4. Consent Order of Forfeiture

Rule 32.2(b) says that the preliminary order of forfeiture must be entered as soon as practicable after the conviction or entry of the guilty plea

- *United States v. Marquez*, 685 F.3d 501, 510 (5th Cir. 2012) (failure to enter forfeiture order as soon as practical after guilty plea was error, but caused no prejudice);
- the order of forfeiture then becomes final as to the defendant at sentencing
- the idea is that the defendant is entitled to have all aspects of his sentence imposed at one time -- i.e., as part of a single package
- *United States v. Yeje-Cabrera*, 430 F.3d 1 (1st Cir. 2005) (Rule 32.2(b)(3)'s requirement that the forfeiture be part of the sentence ensures that all aspects of the defendant's sentence are part of a single package that is imposed at one time);
- this means that you can't show up six weeks after the sentencing and say, "oh, now would be a good time to enter an order of forfeiture"
- *United States v. Shakur*, 691 F.3d 979, 988-89 (8th Cir. 2012) (wholesale violation of Rule 32.2(b), including failure to issue preliminary order of forfeiture prior to sentencing, failure to conduct evidentiary hearing and make finding of forfeitability at sentencing, and failure to issue any forfeiture order until 83 days after sentencing, deprived defendant of due process rights and right to appeal all aspects of his sentence at one time; forfeiture order vacated);
 - *United States v. Ferguson*, 385 Fed. Appx. 518, 530 (6th Cir. 2010) (if the Government completely ignores Rule 32.2(b) and forgets about the forfeiture until the criminal case is over, it cannot salvage the forfeiture);

The easiest way to comply is to have the defendant sign a Consent Order at the time of the arraignment.

- there are different versions of the consent order of forfeiture depending on whether the defendant is agreeing to forfeit specific assets, only a money judgment, or a combination

In general, your consent order should say that the defendant is being ordered to forfeit the proceeds of his crime in the form of a money judgment, with credit for the value of any specific assets that have been recovered

- and if there is any facilitating property to be forfeited, it should list that as well

Money Judgments

Sometimes the defendant no longer has the proceeds of his offense, or any property traceable to it, at the time his is convicted criminal forfeiture's claim to fame is that when that happens, we can still get an order of forfeiture in the form of a money judgment

- *United States v. Vampire Nation*, 451 F.3d 189, 202 (3d Cir. 2006) (expressly rejecting the argument that a forfeiture order must order the forfeiture of specific property; as an *in personam* order, it may take the form of a judgment for a sum of money equal to the proceeds the defendant obtained from the offense, even if he no longer has those proceeds, or any other assets, at the time he is sentenced);
- *United States v. Hampton*, 732 F.3d 687, 691-92 (6th Cir. 2013) (following all other circuits and holding that forfeiture being a mandatory part of the defendant's sentence, the court may enter a money judgment in the amount of the proceeds of the offense even though the defendant has dissipated the traceable property and has no other funds with which to satisfy the judgment);

— the entry of a money judgment is mandatory

- *United States v. Viloski*, 814 F.3d 104, 110 n. 11 (2nd Cir. 2016) (“As long as the factual predicate for the application of [the forfeiture statutes] has been satisfied, ... a district court has no discretion not to order forfeiture in the amount sought. The court's only role is to conduct the gross disproportionality inquiry required by *Bajakajian*.”);
- *United States v. Hernandez*, 803 F.3d 1341 (11th Cir. 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.”);
- *United States v. Newman*, 659 F.3d 1235, 1240 (9th Cir. 2011) (When the Government has met the requirements for criminal forfeiture, the district court must impose criminal forfeiture, subject only to statutory and constitutional limits); *id.* (The district court has no discretion to reduce or eliminate mandatory criminal forfeiture; overruling district court's refusal to enter money judgment);

— moreover, pursuant to 21 U.S.C. § 853(p), we can satisfy the money judgment by forfeiting substitute assets

— the forfeiture of substitute assets is mandatory, and can be any property the defendant owns, even though it is not traceable to the offense

- *United States v. Fleet*, 498 F.3d 1225, 1231 (11th Cir. 2007) (Congress chose broad language providing that *any* property of the defendant may be forfeited as a substitute asset; it is not for the courts to strike a balance between the competing interests or to carve out exceptions to the statute; thus, defendant's residence can be forfeited as a substitute asset notwithstanding state homestead and tenancy by the entirety laws);
- *United States v. Carroll*, 346 F.3d 744, 749 (7th Cir. 2003) (defendant may be ordered to forfeit "every last penny" he owns as substitute assets to satisfy a money judgment);
- *United States v. Alamoudi*, 452 F.3d 310, 314 (4th Cir. 2006) ("Section 853(p) is not discretionary...[W]hen the Government cannot reach the property initially subject to forfeiture, federal law requires a court to substitute assets for the unavailable tainted property");
- *United States v. Garza*, 407 Fed. Appx. 322, 324 (10th Cir. 2011) (same; following *Alamoudi*); *United States v. McCrea*, 548 Fed. Appx. 157, 158 (4th Cir. 2014) (same; there is no exception for the defendant's residence);
- *United States v. Weitzman*, 936 F. Supp.2d 218, 221 (S.D.N.Y. 2013) (there is no exception in § 853(p) for the defendant's IRA account; it may be forfeited as a substitute asset);

Calculating the amount of the money judgment is not an exact science:

- *United States v. Roberts*, 660 F.3d 149, 166 (2d Cir. 2011) (because forfeiture is punitive, not restitutive, the calculation of the forfeiture money judgment need not be exact and is not improper if it exceeds what the defendant obtained to some extent); *id.* (in a drug case, the Government need not produce actual sales receipts but may rely on reasonable estimates of the quantity of drugs imported and their value; whether to use retail or wholesale value depends on whether the importer sold the drugs at retail himself or sold them at wholesale to others);
- *United States v. Uddin*, 551 F.3d 176, 180 (2d Cir. 2009) (detailing how the court calculated what percentage of defendant's food stamp redemptions were fraudulent);
- *United States v. Jafari*, 2015 WL 225444, *12 (W.D.N.Y. Jan. 16, 2015) (calculating the money judgment in a case in which the defendant has kept poor records and attempted to disguise the extent of her fraud, the court may extrapolate from the evidence introduced at trial to produce a reasonable estimate of the gross proceeds);

Joint and several liability:

All co-defendants are jointly and severally liable for the full amount obtained by them as a group, without regard to how much was personally obtained by any one of them

- *United States v. Beecroft*, 825 F.3d 991 (9th Cir. 2016) (applying *Pinkerton* and holding that all conspirators in a mortgage fraud scheme are jointly and severally liable for the loan proceeds obtained by the conspiracy, but limiting the defendant's liability under the Eighth Amendment);
- *United States v. Honeycutt*, 816 F.3d 362 (6th Cir. 2016) (applying *Corrado*: if there is joint and several liability under RICO, there must be under § 853 as well; no need to consider the D.C. Circuit's reasoning in *Cano-Flores*); *United States v. Wolford*, ___ Fed. Appx. ___, 2016 WL 3878213 (6th Cir. July 18, 2016) (following *Honeycutt* and *Corrado*);
- *United States v. Nagin*, 810 F.3d 348 (5th Cir. 2016) ("As a general matter, co-conspirators subject to criminal forfeiture are held jointly and severally liable for the full amount of the proceeds of the conspiracy");
- *But see United States v. Cano-Flores*, 796 F.3d 83 (D.C. Cir. 2015) (declining to follow all other circuits and holding that neither rationale for joint and several liability – *Pinkerton* liability and the language authorizing forfeiture of property obtained "indirectly" – justifies holding a defendant liable for more than the amount of money he obtained personally);
- *United States v. Honeycutt*, 816 F.3d 362 (6th Cir. 2016) (Moore, J., concurring) (urging the Sixth Circuit to grant rehearing *en banc* and to follow *Cano-Flores*);

Is it worth the effort?

- There is a difference of opinion among AUSAs nationally as to whether it makes sense to get a money judgment in every criminal case
- Some believe that it is a waste of time to get a money judgment when there is little likelihood that the defendant will ever be able to pay it
- Others believe that the Government should not discount the possibility that the defendant has concealed assets, or that he might obtain some money later in life
- *United States v. Encinares*, 2015 WL 507530, *3 (N.D. Ill. Feb. 5, 2015) (Government might want to negotiate a realistic money judgment based on defendant's ability to pay, but it is not required to do so; Government "may be unwilling to discount the possibility that a defendant may strike it rich someday");

A recent study by the USMS revealed that there are 30+ inmates in the BOP who were convicted in Maryland and who have a total of \$500,000 in funds in their BOP accounts

- But in none of those cases could the money be forfeited because the Government did not ask for a money judgment
- In other cases, however, the Government has recovered money from inmate accounts
 - *United States v. Napoli*, (E.D. Pa. July 17, 2015) (Rule 32.2(e) motion to forfeit \$10,537 in Defendant's inmate trust account as a substitute asset to satisfy, in part, an outstanding \$6 million criminal forfeiture money judgment), aff'd ___ Fed. Appx. ___, 2016 WL 4446065 (3rd Cir. Aug. 24, 2016);

My view is that as long as there are victims, and the amount recovered is insufficient to satisfy the restitution order, there should be a forfeiture money judgment that allows the Government to confiscate other assets wherever or whenever found so that they can be applied to restitution.

- If the victim's loss is forever, so should be the defendant's forfeiture liability

5. Special Verdict / Jury Instructions

If the case goes to trial, the forfeiture does not come up until the jury has returned a verdict, at which point there is a post-verdict forfeiture hearing.

- there is no constitutional right to a jury in the forfeiture phase of the trial:
 - *Libretti v. United States*, 516 U.S. 29, 49 (1995) (“the nature of criminal forfeiture as an aspect of sentencing compels the conclusion that the right to a jury verdict on forfeitability does not fall within the Sixth Amendment’s constitutional protection”);
 - *United States v. Valdez*, 726 F.3d 684, 699 (5th Cir. 2013) (“There is no constitutional right to a jury determination of forfeiture,” following *Libretti*);
- but Rule 32.2(b)(5) creates a statutory right to have the jury determine the forfeiture if the Government is seeking specific assets

If the jury is retained, we must prepare jury instructions and special verdict forms. We can provide these, but please give us as much advance notice as possible.

- the form should have an entry for each item you want to forfeit:
- Q. Has the Government established by a preponderance of the evidence that the 2001 Lexus automobile was used to facilitate the offense alleged in Count 7 of the Indictment? Yes or No.
 - *United States v. Armstrong*, 2007 WL 809508, *2 (E.D. La. Mar. 14, 2007) (noting that the special verdict form required the jury to make detailed findings as to whether the property was forfeitable as facilitating property or proceeds and as property involved in a money laundering offense);

There is no right to have the jury retained if we are only asking for a money judgment.

- *United States v. Phillips*, 704 F.3d 754, 771 (9th Cir. 2012) (there is no statutory right to a jury under Rule 32.2(b)(5) when the Government is seeking only a money judgment);
- *United States v. Curbelo*, 726 F.3d 1260, 1277, 1278 n. 10 (11th Cir. 2013) (the right to a jury under Rule 32.2(b)(5) applies only to specific property, not to the amount of a money judgment; the rule does not infringe on defendant's Sixth Amendment rights because there is no right to a jury under *Libretti*);
- *United States v. Tedder*, 403 F.3d 836, 841 (7th Cir. 2005) (the defendant's right under Rule 32.2(b)[5] is to have the jury determine if the Government has established the required nexus between the property and his crime; the rule does not give the defendant the right to have the jury determine the amount of a money judgment);
- *United States v. Gregoire*, 638 F.3d 962, 972 (8th Cir. 2011) (following *Tedder*, there is no right to a jury if the Government announces that it is abandoning its request to forfeit specific assets and is seeking only a money judgment; but in that case the Government cannot use the money judgment to recover the value of specific assets traceable to the offense that are available for forfeiture);

6. Sentencing

Rule 32.2(b)(4) says that the forfeiture *must* be included in the oral announcement of the sentence and included in the judgment.

- as mentioned earlier, this means that the court has to enter the forfeiture order no later than the date of sentencing

- if the defendant is pleading guilty, the easiest way to avoid having a problem is to have the defendant agree to a Consent Order of Forfeiture and have the court enter it at the time of the guilty plea

If the court entered a consent order at the arraignment, it will become final by its own terms at sentencing

- if the court forgets to include it in the judgment, we can correct the judgment later as a clerical error

- *United States v. Smith*, 656 F.3d 821, 828 (8th Cir. 2011) (district court's failure to make the previously-entered preliminary order of forfeiture part of the judgment until two weeks after sentencing was a clerical error that may be corrected under Rule 36);
- *United States v. Holder*, 2010 WL 478369, *3 (M.D. Tenn. Feb. 4, 2010) (under new Rule 32.2(b)(4), the court's failure to make the order of forfeiture part of the judgment at sentencing may be corrected at any time as a clerical error, as long as the defendant was aware at sentencing that forfeiture would be part of his sentence);

- but if there was no consent order the court *MUST* issue an order at sentencing.

7. Third Parties

Per Rule 32.2(b)(1), the forfeiture order must be entered without regard to the ownership of the property. Determining the ownership of the property is deferred to the ancillary proceeding.

Give a copy of your order of forfeiture to the paralegals in the Forfeiture Unit to publish and send to potential third party claimants. If a claim is filed, they will assist you in responding to the claim in the ancillary proceeding.

CRIMINAL FORFEITURE CHECK LIST

Follow these steps to make forfeiture part of the defendant's sentence.

1. Include Forfeiture in the Indictment.

Rule 32.2(a) says that a notice of forfeiture must be included in the indictment. The notice does not have to list the property, but it must at least track the applicable forfeiture statute.

Including a boilerplate forfeiture notice preserves the forfeiture option. If you later decide to seek forfeiture, you can identify the assets in a bill of particulars. If you omit the forfeiture notice, forfeiture is not possible unless the defendant waives the notice requirement.

If you do list the property in the indictment, ask the grand jury to find probable cause to believe that the listed property is subject to forfeiture. The form indictments for the most commonly-charged crimes contain model forfeiture language, but call us if you need a go-by.

Check with your agent about the status of any administrative forfeiture proceeding. If the property has already been forfeited administratively, there is no need to include it in the indictment. If someone has filed a claim, you have 90 days to include the property in the indictment, file a civil forfeiture action, or ask for an extension of time.

Including the property in the indictment avoids having to supersede later if someone files a claim.

2. Preserve the Property Pending Trial.

Often the property will already be in the Government's possession when the indictment is returned, but if not, ask for a pre-indictment restraining order or seizure warrant. Both directly forfeitable property and substitute assets may be seized or restrained.

3. Plea Agreements

The defendant should agree to the forfeiture in the plea agreement, which should be as specific as possible in naming the property. The model plea agreement has forfeiture language that may need to be modified to fit the facts of the case.

In general, it is a bad idea to agree to return property to obtain a guilty plea, or to offer a more lenient plea if the defendant will agree to forfeiture. We *may not* agree to return property that has already been administratively forfeited.

The plea agreement can state that the Office will *recommend* that any forfeited property be used to satisfy a restitution order, but it cannot bind the Attorney General. Recommendations have to be approved by Main Justice.

4. Consent Order of Forfeiture

Rule 32.2(b) says that the court must enter a preliminary order of forfeiture prior to sentencing. The easiest way to comply is to have the defendant sign a "Consent Order" at the time of the arraignment. There are model consent orders available from the forfeiture paralegals. Do not wait until the day of sentencing to get the forfeiture order. Case law says this may be reversible error.

5. Special Verdict / Jury Instructions

If the case goes to trial, the forfeiture does not come up until the jury has returned a verdict, at which point there is a post-verdict forfeiture hearing. Per Rule 32.2(b)(5), the court must ask the parties, before the jury begins to deliberate, if they will waive the jury or ask that the jury be retained to determine the forfeiture.

If the jury is waived, the court may postpone the forfeiture hearing to a later date. If the jury is retained, we must prepare jury instructions and special verdict forms. We can provide these, but please give us as much advance notice as possible.

There is no right to have the jury retained if we are only asking for a money judgment, but we cannot deprive the defendant of his right to a jury by asking only for a money judgment if we have his property in our possession, and then ask to forfeit it as a substitute asset.

6. Sentencing

Rule 32.2(b)(4) says that the forfeiture *must* be included in the oral announcement of the sentence and included in the judgment. The court's failure to issue a forfeiture order at or before sentencing *is fatal*. If the court entered a consent order at the arraignment, it will become final by its own terms at sentencing, but if there was no consent order the court *MUST* issue an order at sentencing.

If there are victims, we generally want to have both a forfeiture order *and* a restitution order, even if we are agreeing to recommend that the forfeited funds be applied to restitution. This is because the forfeiture laws have provisions for recovering assets that the restitution laws do not.

The one exception to this rule applies if the property that would be forfeited is cash, and it is sufficient to satisfy the restitution order but not sufficient to satisfy a forfeiture order as well. In that case, a forfeiture order is probably unnecessary.

7. Third Parties

Per Rule 32.2(b)(1), the forfeiture order must be entered without regard to the ownership of the property. Determining the ownership of the property is deferred to the ancillary proceeding.

Give a copy of your order of forfeiture to the forfeiture paralegals to publish and send to potential third party claimants. If a claim is filed, we will assist you in responding to the claim in the ancillary proceeding.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) Civil No. 1:08 CV
)
 EIGHTEENTH CENTURY PERUVIAN)
 OIL ON CANVAS PAINTING OF THE)
 "DOBLE TRINIDAD" OR)
 "SAGRADA FAMILIA CON ESPIRITU)
 SANTO Y DIOS PADRE",)
)
 and)
)
 SEVENTEENTH CENTURY PERUVIAN)
 OIL ON CANVAS PAINTING OF)
 "SAN ANTONIO DE PADUA" AND)
 "SANTA ROSA DE LIMA",)
)
 Defendants.)

VERIFIED COMPLAINT *IN REM*

Plaintiff, United States of America, by its undersigned attorneys, Chuck Rosenberg, United States Attorney for the Eastern District of Virginia, and Stefan D. Cassella, Special Assistant United States Attorney, brings this complaint and alleges as follows in accordance with Supplemental Rule G(2) of the Federal Rules of Civil Procedure:

NATURE OF THE ACTION

17. This is a Verified Complaint for Forfeiture *In Rem* brought pursuant to the Convention on Cultural Property Implementation Act, Title 19, United States Code, Section 2609 for seizure and forfeiture of one eighteenth century Peruvian oil on canvas painting of the “Doble Trinidad” or “Sagrada Familia Con Espiritu Santo y Dios Padre”, and one seventeenth century Peruvian oil on canvas painting of “San Antonio De Padua” and “Santa Rosa De Lima” (defendant paintings).

THE DEFENDANTS *IN REM*

18. The defendant properties consist of the following: (a) one eighteenth century Peruvian oil on canvas painting of the “Doble Trinidad” or “Sagrada Familia Con Espiritu Santo y Dios Padre”, and (b) one seventeenth century Peruvian oil on canvas painting of “San Antonio de Padua” and “Santa Rosa de Lima”, that were seized by the Federal Bureau of Investigation on November 1, 2007, at Providence Forge, Virginia, within the Eastern District of Virginia.

JURISDICTION AND VENUE

3. Plaintiff brings this action *in rem* in its own right to forfeit the defendant properties. This Court has jurisdiction over an action commenced by the United States under 28 U.S.C. § 1345, and it has jurisdiction over this action in particular under 28 U.S.C. §§ 1355(a) and 2461(a) and 19 U.S.C. § 2609.

4. This Court has *in rem* jurisdiction over the defendant properties under 18 U.S.C. § 1355(b). Upon filing of this complaint, the plaintiff requests that the Clerk issue an arrest warrant *in rem* pursuant to Supplemental Rule G(3)(b), which the plaintiff will

execute upon the property pursuant to 28 U.S.C. § 1355(d) and Supplemental Rule G(3)(c).

5. Venue is proper in this district pursuant to 28 U.S.C. §§ 1355 and 1395 because the defendant properties are located in this district.

6. The defendant paintings as described above are now, and during the pendency of this action will be, in the jurisdiction of this Court and located in the Eastern District of Virginia

BASIS FOR FORFEITURE

7. 19 U.S.C. § 2609(a) provides for the forfeiture of “any designated . . . ethnological material . . . which is imported in the United States in violation of [19 U.S.C. § 2606].”

8. 19 U.S.C. § 2606(a) provides that it is unlawful to import into the United States “any designated . . . ethnological material” that has been exported from a “State Party” unless the State Party “issues a certification or other documentation which certifies that such exportation was not in violation of the laws of the State Party.”

9. 19 U.S.C. § 2601 defines the following terms, as they are used in Sections 2606 and 2609:

- Sections 2601(5) and (9) define “State Party” to mean a country that is a Party to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“the UNESCO Convention”). Peru is a Party to the UNESCO Convention. See 19 C.F.R. § 12.104b.

- Sections 2601(2)(B) and (ii) define “ethnological material” as “any object of ethnological interest . . . which was first discovered within, and is subject to export control by, the State Party,” and is “the product of a tribal or nonindustrial society, and important to the cultural heritage of a people”
- Section 2601(7) defines “designated . . . ethnological material” as any ethnological material that is i) covered by an agreement that enters into force with respect to the United States, and ii) is listed by regulation pursuant to Section 2604.

10. These definitions are repeated in similar terms in 19 C.F.R. § 12.104(a) and (d). Section 12.104(a) provides that “ethnological material” of a State Party to the UNESCO Convention means “any object of ethnological interest” that is “the product of a tribal or nonindustrial society, and is important to the cultural heritage of a people” And Section 12.104(d) provides that “designated ethnological material” means any ethnological material of a State Party which is covered by an agreement under 19 U.S.C. § 2602 that enters into force with respect to the United States and is listed by regulation under 19 U.S.C. § 2604.

11. The “agreement under 19 U.S.C. § 2602” to which Section 12.104(a) refers is the UNESCO Convention and the 1997 Memorandum of Understanding between the Government of United States of America and the Government of Peru Concerning the Imposition of Import Restrictions on Archaeological Material from the Prehispanic Cultures and Certain Ethnological Material from the Colonial Period of Peru, as well as the 2002 and 2007 Extensions of the Memorandum (collectively “the 1997 MOU”). (Attachments A and B).

12. The “regulation under 19 U.S.C. § 2604” to which Section 12.104(a) refers is 19 C.F.R. § 12.104g, which incorporates, by reference, Treasury Decision 97-50 (“T.D. 97-50”). T.D. 97-50 lists the materials that are covered by the 1997 MOU, and includes the following in Part VII.B: “Objects that were used for religious evangelism among indigenous people,” including Colonial-era paintings depicting Christian religious figures produced by indigenous and mestizo artists with materials provided by Catholic priests who would provide canvases and reproductions of Western religious art to native and mestizo artists, which the artists would interpret by combining images of Christian religious figures with local, indigenous divinities, costumes and other indigenous characteristics. (T.D. 97-50 defines the Colonial era as the period from the 1532 to 1821.) (Attachment C).

13. Finally, 19 C.F.R. § 12.104a(b) reiterates the offense set forth in 19 U.S.C. § 2606(a), incorporating the above-referenced definitions, as follows:

No archaeological or ethnological material designated pursuant to 19 U.S.C. 2604 and listed in § 12.104g, that is exported (whether or not such exportation is to the U.S.) from the State Party after the designation of such material under 19 U.S.C. 2604 may be imported into the U.S. unless the State Party issues a certificate or other documentation which certifies that such exportation was not in violation of the laws of the State Party.

14. In sum, it is an offense under 19 U.S.C. § 2606(a) and its related regulations for any person to import into the United States a Colonial-era painting that was produced in Peru by indigenous people, was used for religious evangelism among such people, and is important to the cultural heritage of such people, unless it can be established that Peru issued a certificate or other documentation certifying that the exportation of the painting from Peru did not violate Peruvian law. Any painting imported into the United

States in violation of Section 2606(a) is subject to forfeiture to the United States pursuant to Section 2609.

FACTS

15. In the late summer or early fall of 2005, the defendant paintings were brought into the United States from Bolivia via Miami International Airport and Reagan Washington National Airport in a suitcase. The defendant paintings were transported to an art gallery in the District of Columbia, and then to an art gallery in Providence Forge, Virginia. The purported owner of the defendant paintings is Exipion Ernesto Ortiz-Espinoza (Ortiz).

16. In February 2007, the Federal Bureau of Investigation sent digital images of the defendant paintings to an art expert at the National Institute of Culture in Lima, Peru. The art expert, Mr. Juan Carlos Rodriguez Toledo, provided the following analysis of the defendant paintings in a memorandum dated February 13, 2007:

“Doble Trinidad” or “Sagrada Familiar con Espiritu Santo y Dios Padre” is a composition of standing figures, clothed in tunic and cloak finished in gold over paint; the Virgin holds the Child’s hand and they look at each other, and Saint Joseph with a white lily observes the onlooker; the Holy Spirit portrayed as a dove is over the Child, and in the upper area, between clouds and flanked by two angels, God the Father, with open arms, glances at his son. The peculiarities present in the shapes of the figures, the faces and the finish, indicate to us that the painting is in the Cusco Baroque style of the XVIII Century.

“San Antonio de Padua” is a composition of a kneeling figure in front of Baby Jesus whom he kisses on the foot; clothed in the Franciscan habit, behind him an angel comforts him and looks at the child; in the upper right angle, two cherubs; below a table with a green cover and an open book on top; and in the lower right side, the image of Saint Rosa de Lima with Dominican habit, crown of roses, ring and palm. The characteristics shown in the style of the figures, faces and color tones make us realize that it is a painting of the South Andean Mannerist style of the XVII Century.

17. The art expert concludes that both paintings “belong to the Peruvian cultural patrimony” and are “from the colonial artistic production of our country,” and that they “left our country illicitly.” Thus, in terms of the Convention on Cultural Property Implementation Act, the United States has a reasonable basis to believe that the defendant paintings were produced by indigenous tribal people in Peru during the 17th and 18th Centuries; that they are important to the cultural heritage of the Peruvian people, and are subject to export control by Peru; and that they are examples of materials used for religious evangelism among indigenous peoples by Catholic priests.

18. The paintings were imported into the United States without any certification from Peru that the exportation of the paintings from Peru was lawful under Peruvian law, as required by the Convention on Cultural Property Implementation Act, 19 U.S.C. § 2606(a). Moreover, over a period of several months, Ortiz failed to provide any ownership documentation for the defendant paintings, as a condition for a consignment sale by the art gallery.

CONCLUSION

19. Based on the foregoing, the defendant paintings were exported from Peru and imported into the United States in violation of the Convention on Cultural Property Implementation Act and federal regulations promulgated thereunder, 19 U.S.C. § 2606(a) and 19 C.F.R. § 12.104 *et seq.*

20. The defendant paintings, therefore are subject to forfeiture pursuant to 19 U.S.C. § 2609.

WHEREFORE, the United States prays that due process issue to enforce the forfeiture of the defendant paintings, that due notice be given to all interested parties to appear and show cause why forfeiture should not be decreed, that the defendant paintings be condemned and forfeited to the United States to be disposed of according to law, and for such other and further relief as this Honorable Court may deem just and proper.

DATED this ____ day of April 2008.

Respectfully submitted,

Chuck Rosenberg
United States Attorney

By: _____
Stefan D. Cassella
Special Assistant U.S. Attorney
Office of the United States Attorney
2100 Jamieson Ave.
Alexandria, VA 22314
Phone: 703 299-3921
Fax: 703 299-3982
Stefan.Cassella@usdoj.gov

VERIFICATION OF COMPLAINT

I, Gregg S. Horner, declare under penalty of perjury that the following is true and correct to the best of my knowledge:

I am a Special Agent with the Federal Bureau of Investigation and am the Art Theft Program Coordinator for the Washington Field Office. I have read the foregoing Complaint For Forfeiture *In Rem* and know its contents. The information contained in the Complaint For Forfeiture *In Rem* has been furnished from official government sources and, based on information and belief, the allegations contained in the Complaint For Forfeiture *In Rem* are true and correct.

GREGG S. HORNER