CIVIL AND CRIMINAL FORFEITURE UPDATES

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Stefan D. Cassella
Asset Forfeiture Law, LLC
www.assetforfeiturelaw.us
Cassella@AssetForfeitureLaw.us[1]

I. INTRODUCTION

This is an update on some hot issues concerning civil and criminal forfeiture

My plan is to talk about a number of recent Supreme Court cases and how they impact on forfeiture investigations and prosecutions

— In particular, I will be talking about the Supreme Court's decision last year in *United States v. Honeycutt* and how it has impacted our ability to recover criminal proceeds in criminal cases

I'll also talk about three other Supreme Court cases

— I will briefly describe a case the court is scheduled to hear in the next few weeks dealing with the requirement that forfeitures not be disproportional to the offense

— And two other cases dealing with the seizures of vehicles on private property and the search of a vehicle during a traffic stop

Finally, as time allows, I will talk about some of the most recent currency seizure cases and the issues that have come up in them.

II. MONEY JUDGMENTS AFTER *HONEYCUTT*

Money Judgments

[1] Stefan D. Cassella is a former Assistant U.S. Attorney who specialized in asset recovery and money laundering prosecutions. His firm, Asset Forfeiture Law, LLC, provides training and legal assistance to state, local, federal, and foreign law enforcement agencies in connection with domestic and international money laundering and asset forfeiture matters.

Criminal forfeiture is part of the defendant's sentence

— Just like a fine or a jail sentence, its purpose is to punish the defendant *personally* for what he did

— Which is why we say that the forfeiture judgment is imposed *in personam*

— Not *in rem,* as in a civil forfeiture case where we're trying to forfeit specific property – a boat, or car, or pile of cash

— But *in personam* against the defendant himself

- *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");
- *United States v. Louthian,* 756 F.3d 295, 307 n.12 (4th Cir. 2014) (criminal and civil forfeiture are "distinct law enforcement tools:" the former is an *in personam* action that requires a conviction, and the latter is an *in rem* action against the property itself);
- *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);

We see this reflected in the way the cases are captioned:

— Civil forfeiture cases are against a thing: *United States v. $100,000 in U.S. Currency*

— Criminal forfeiture cases are against a person: *United States v. Jones*

Why does this matter?

Because it is an *in personam* punishment, the forfeiture order is not limited to specific assets that are directly traceable to the offense

— Instead, it can take the form of a personal money judgment

- *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), aff'd in part, vacated in part by 660 F.3d 149 (2d Cir. 2011) (affirming all aspects of the district court's decision except the forfeiture order, which was vacated and remanded for further fact-finding as to whether to calculate the forfeiture amount using retail or wholesale multiplier);

— If the defendant obtained $100,000 for his offense but he has spent it, or sent it to South Africa, or we just can't figure out where it is, we're entitled to a money judgment for $100,000

- *United States v. Newman*, 659 F.3d 1235, 1242-43 (9th Cir. 2011) (forcing defendants to disgorge their ill-gotten gains, "even those already spent," ensures that defendants do not benefit from their crimes; when the Government seeks a money judgment, the district court's only role, under Rule 32.2(b), is to determine the amount of money that the defendant will be ordered to pay); *United States v. Phillips*, 704 F.3d 754, 771 (9th Cir. 2012) (same);

- *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);

- *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; such a construction of the statute is consistent with the mandatory nature of criminal forfeiture and the provision in section 853 directing courts to liberally construe its provisions to effectuate their remedial purposes);

— And we can satisfy that judgment by forfeiting something else the defendant owns

— Something entirely unrelated to the offense

— What we call a substitute asset.

This is all a matter of good law enforcement policy:

— If the law were otherwise, defendants would have an incentive to dissipate their criminal proceeds as quickly as possible

- *United States v. Peithman,* 2017 WL 1682778 (D. Neb. May 1, 2017) ("The term 'money judgment' is a short-hand way of describing the defendant's continuing obligation to forfeit the money derived from or used to commit his criminal offense whether he has retained the actual dollars in his possession or not," quoting *Asset Forfeiture Law in the United States* (2d ed. 2013), § 19-4(c));

Limits on money judgments

There are some limits on this, however

One is that the money judgment must be limited to the property involved in or derived from the offense for which the defendant was convicted

- *United States v. Juluke*, 426 F.3d 323, 328-29 (5th Cir. 2005) (the Government must prove that the property subject to forfeiture was the proceeds of the drug activity that formed the basis for the defendant's conviction, not of the defendant's drug trafficking generally);

- *United States v. Garcia-Guizar*, 160 F.3d 511, 524-25 (9th Cir. 1998) (where defendant is charged with selling $5,000 worth of drugs but $43,000 is seized from his locker, only the amount traceable to the offenses for which defendant is convicted can be forfeited in the criminal case; same for conspiracy count if it is limited to commission of the substantive offense);

— If the defendant is convicted of robbing a bank and stealing $25,000; we get a forfeiture order for $25,000

--- that he robbed three other banks and stole $25,000 each time – <u>but he wasn't convicted of those offenses</u> – does not mean that we get a judgment for $100,000

--- we only get a judgment for the money he obtained from the particular crime(s) for which he was convicted

— Unlike some other countries, we don't have the concept of extended confiscation where once you convict the defendant of one crime you can recover the proceeds of all the other crimes he committed whether he has been convicted of those or not

The way around this is to convict the defendant of a scheme or conspiracy, in which case you can recover the proceeds of the entire scheme or conspiracy

- *United States v. Hasson,* 333 F.3d 1264, 1279 n.19 (11th Cir. 2003) (the court in a money laundering case may not impose a forfeiture order based on a money laundering offense with which defendant was not charged or for which he was acquitted, but if he is convicted of a conspiracy, the forfeiture may be based on amounts defendant conspired to launder, including amounts derived from uncharged substantive conduct, or substantive counts for which he has been acquitted);

- *United States v. Lo,* 839 F.3d 777 (9th Cir. 2016)(following *Venturella* and *Hasson;* forfeiture in a mail or wire fraud case is not limited to the executions of the scheme on which defendant was convicted, but includes the proceeds of the

entire scheme, "including additional executions of the scheme that were not specifically charged or on which the defendant was acquitted"; distinguishing *Garcia-Guizar*);

- *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;" defendant's guilty plea to one substantive count involving $477 rendered her liable for money judgment of $114,000);

Calculating the amount of the money judgment

A second limit is that the burden is on the Government to prove, by a preponderance of the evidence, the amount of the proceeds that the defendant obtained

— The amount of the money judgment is determined by the court, not the jury, even if the defendant invokes Rule 32.2(b)(5) and asks for the jury to determine the forfeiture

The calculation does not require mathematical precision

— The court is permitted to make a fair estimate based on the facts of the case

— For example, in a drug case, the court might estimate the defendant's gross proceeds from the quantity of drugs he sold, the time period in which he sold them, and the price in the market at the relevant time

- *United States v. Bogdanov*, 863 F.3d 630 (7th Cir. 2017) (to calculate the amount realized from the sale of stolen goods, the Government need not trace all items sold on eBay to stolen property, but may rely on circumstantial evidence and calculation by victim's investigator who applied "reasonable methodology");

- *United States v. Ayika,* 837 F.3d 460 (5th Cir. 2016) (affirming amount of money judgment in a health care fraud case based on accountant's review of representative sample of submitted claims);

- *United States v. Alexander*, 714 F.3d 1085,1092-93 (8th Cir. 2013) (district court may rely on the quantities and prices of the drugs sold, the frequency of sales, and the length of the conspiracy to calculate the amount of the money judgment);

- *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);

— As the Sixth Circuit held in *Corrado,* the district court cannot simply throw up its hands and say, "this is too complicated"

- *United States v. Corrado*, 227 F.3d 543, 555 (6th Cir. 2000) (*Corrado* I) (district court erred in refusing to impose a forfeiture judgment on the ground that the amount subject to forfeiture was not sufficiently quantifiable; the court is required to make a reasonable approximation, based on the evidence in the record, of the amount derived from the offense and enter a money judgment accordingly);

Multiple Defendants / Joint and Several Liability

All of this is straightforward in a single-defendant case

— There may be some difficulty in calculating the value of the proceeds, but whatever proceeds were obtained, the defendant – if he acted alone – is the one who obtained them

— But what if the crime was committed by more than one person, acting in concert or as co-conspirators?

— Who is liable for what part of the proceeds of the offense?

This brings us to the third limitation on money judgments in criminal forfeiture cases.

For 45 years – from when the first criminal forfeiture statute was enacted in 1970 – the answer was that all defendants were jointly and severally liable

— Just as co-conspirators are liable for the acts of the other members of the conspiracy: *Pinkerton* liability

— The courts all held that each member of a conspiracy – or each person complicit in committing the same act – was liable for the consequences of that act – including the forfeiture of the proceeds

So, if 9 people, acting together, stole $10 million in a fraud scheme, or sold $10 million in illegal drugs, they each were liable to forfeit the full amount, regardless of how much, or how little, of the money any of them personally obtained

- *United States v. Corrado*, 227 F.3d 543, 554-55 (6th Cir. 2000) (*Corrado* I) (all defendants in a RICO case are jointly and severally liable for the total amount derived from the scheme; the Government is not required to show that the defendants shared the proceeds of the offense among themselves, nor to establish how much was distributed to a particular defendant); *United States v. Corrado*, 286

F.3d 934, 938 (6th Cir. 2002) (*Corrado* II) (same; because person who collected the proceeds was able do so because of his participation in a scheme, all members of the scheme are jointly and severally liable);

- *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*), *cert. granted,* 2016 WL 4078900 (U.S. Dec. 9, 2016); *United States v. Wolford,* 656 Fed. Appx. 59 (6th Cir. 2016) (following *Honeycutt* and *Corrado*);

- *United States v. Stivers*, 2010 WL 2365307, *7 (E.D. Ky. June 11, 2010) (following *Corrado*, defendant who received little or nothing personally is jointly and severally liable for the amounts forfeitable for RICO and money laundering conspiracies);

— If the Government proved that that the money was derived from the crime the defendants were convicted of committing – the first limitation – and it proved the amount that they obtained – the second limitation – they each were jointly and severally liable for the full amount.

— There was no requirement that we show how they divided the money, or how much each of them personally obtained

The only exception to this rule applied to a very minor participant who obtained very little or none of the proceeds of the offense for himself

— In that case, the defendant could argue that applying the rule of joint and several liability to him would violate the Excessive Fines Clause of the Eighth Amendment because the forfeiture would be grossly disproportional to the gravity of the offense and his degree of culpability

- *United States v. Jalaram, Inc.*, 599 F.3d 347, 354-56 (4th Cir. 2010) (rejecting the Government's argument that the forfeiture of proceeds can never be disproportional and that an Eighth Amendment analysis is unnecessary; a forfeiture based on joint and several liability could be disproportional if the defendant's role in the offense were truly minor; but holding that given the seriousness of the offense and the defendant's central role over a period of six months, the forfeiture was not excessive);

- *United States v. Bonventre,* 646 Fed. Appx. 73 (2nd Cir. 2016) (implicitly acknowledging that forfeiture based on joint and several liability could be excessive if applied to a minor player, but holding that a person who provided technical support vital to the success of a fraud scheme is not such a minor player, even if he was not at the core of the scheme);

- *United States v. Van Brocklin*, 115 F.3d 587, 602 (8th Cir. 1997) (money judgment equal to entire amount realized as proceeds of bank fraud scheme is excessive as applied to a minor participant who, unlike her codefendants, reaped little benefit personally);

- *United States v. Maddux,* 2017 WL 187156, *5-6 (E.D. Ky. Jan. 17, 2017) (reducing the amount of the money judgment for each of the jointly and severally liable defendants to reflect their role in the offense, as reflected in the maximum fine applicable to each under the sentencing guidelines);

- *United States v. Stivers*, 2010 WL 2365307, *7-9 (E.D. Ky. June 11, 2010) (applying *Jalaram* but rejecting Eighth Amendment challenge because defendant played a major role in the offense, the offense (RICO/money laundering/extortion) was serious and caused great harm, and the maximum fine for RICO and money laundering is limited only by the amount involved in the offense; thus, the fact that defendant obtained little money personally was irrelevant);

In 2015, a court for the first time, held that because the forfeiture statute – or at least the forfeiture statute for drug offenses -- speaks in terms of property "obtained, directly or indirectly, *by the defendant*,"

— Congress meant to limit criminal forfeiture to the amount of money that each defendant personally obtained

- *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);

That 2015 decision came from the Court of Appeals for the District of Columbia

— All other courts had decided the issue differently

— As I said, for 45 years every court, reading the same statute, had held that defendants in drug cases and all other criminal cases were jointly and severally liable

— The Supreme Court granted *cert.* to resolve the split in the circuits, using the Sixth Circuit's decision in a case called *Honeycutt* as the vehicle for doing so.

Honeycutt

In *Honeycutt,* two brothers – one of whom ran an illegal drug operation out of his store, and the other who was his employee -- were convicted of a drug conspiracy.

— The Government sought forfeiture money judgments against each brother in the amount of $269,751, which represented the proceeds of the entire scheme.

— One brother, the store owner, pled guilty and agreed to forfeit $200,000,

— the other was convicted by a jury.

The Government argued that the second brother should be held jointly and severally liable for the entire amount, and thus requested a money judgment for the remaining balance of $69,751, even though the second brother had not personally obtained any of the proceeds of the scheme.

— The Sixth Circuit upheld the forfeiture order as consistent with the doctrine of joint and several liability, which had been applied in criminal forfeiture cases in all circuits but one.

In a unanimous decision by Justice Sotomayor, the Court reversed the Sixth Circuit, holding that the doctrine of joint and several liability is inconsistent with the plain language of the criminal forfeiture statute.

— Section 853(a) authorizes the forfeiture of "proceeds the defendant obtained" as a result of his offense; it means "personally obtained"

— Applying the dictionary definition of the term "obtained," the Court held that the statute applies only to property that a defendant actually acquires; it does not make a defendant liable for the forfeiture of property obtained by someone else.

Accordingly, the Court reversed the judgment of the Court of Appeals and held that because "forfeiture pursuant to § 853(a)(1) is limited to property that the defendant himself actually acquired as the result of the crime,"

— and because the second brother did not personally benefit from the drug sales,

— the second brother was not required to forfeit anything.

- *Honeycutt v. United States,* ___ U.S. ___, 137 S. Ct. 1626 (2017) (application of the doctrine of joint and several liability is inconsistent with statutory language limiting criminal forfeiture to "proceeds the person obtained"; defendant cannot be liable for proceeds obtained by someone else);

Was this necessary?

— Could the court not have applied the Eighth Amendment?

— It is not clear whether the Government argued that point.

The fallout

Where does this leave us?

— In drug cases at least, it is now part of the Government's obligation in the forfeiture phase of the trial to establish, by a preponderance of the evidence, not only the gross proceeds of the offense

— but how the defendants divided the money among themselves

— that is because each defendant is now liable to forfeit only the amount that he or she personally received

This raises a host of questions:

— If the Government can only show the gross amount but cannot show how much each defendant personally realized, what happens then?

— does that mean that there is no forfeiture order at all?

— In a fraud case, does that mean that the victims get nothing from the forfeited funds because the Government could not show how much each defendant was required to pay?

— Does it mean that if there were two defendants, and one is wealthy and has lots of money, but the other got the proceeds of the crime and spent it all, the Government (and the victims) cannot use forfeiture to recover anything (except to get an empty money judgment)?

— The courts are just beginning to answer these questions

Application to Pending Cases

First, the prosecutors will be interested to know that *Honeycutt* does not apply retroactively to closed cases, but does apply to cases that were pending on appeal when it was decided

- *United States v. Filice,* 2018 WL 2326616 (E.D. Ky. May 22, 2018) (analyzing *Honeycutt* under *Teague v. Lane* and holding that it does not state a new rule that applies retroactively); *United States v. O'Neal,* 2018 WL 3543050 (E.D. Tenn. Jul. 23, 2018) (same; following *Filice*);

- *United States v. Alquza,* 2017 WL 4451146 (W.D.N.C. Sept. 20, 2017) (there is no collateral review of criminal forfeiture orders, either to apply *Honeycutt* or for any other purpose), aff'd ___ Fed. Appx. ___, 2018 WL 2278127 (4th Cir. May 18, 2018);

- *United States v. Ball,* 2017 WL 6059298 (E.D. Mich. Dec. 7, 2017) (same; § 2255 applies only to custodial part of sentence);

- *Bangiyev v. United States,* 2017 WL 3599640 (E.D. Va. Aug. 18, 2017) (*Honeycutt* challenge to forfeiture order may not be made pursuant to § 2255);

- *United States v. Javidan*, 2017 WL 3616577, *11 (E.D. Mich. Aug. 23, 2017) (*Honeycutt* does not apply retroactively to cases pending on collateral review);

- *United States v. Yancey,* 707 Fed. Appx. 342 (6th Cir. 2017) (defendant who agreed to joint and several liability in his plea agreement and did not appeal cannot raise *Honeycutt* on collateral review);

— So, there have been a lot of remands to determine how the forfeiture judgment should be apportioned among the defendants

- *United States v. Pickel,* 863 F.3d 1240 (10th Cir. 2017) (for forfeiture judgments pending on appeal when *Honeycutt* was decided, remedy is remand to determine amount defendant personally obtained);

- *United States v. Gjeli,* 867 F.3d 418 (3rd Cir. 2017) (*Honeycutt* applies to cases pending on appeal when it was decided even if the defendant did not object to the forfeiture in the district court; remedy is remand to reconsider the forfeiture);

- *United States v. Papas,* ___ Fed. Appx. ___, 2018 WL 1391519 (2nd Cir. Mar. 20, 2018) (remanding case that was pending on appeal for determination of amount for which defendant is personally liable); *United States v. Williams,* ___ Fed. Appx. ___, 2018 WL 3006263 (4th Cir. Jun. 15, 2018) (same);

- *United States v. Brown,* 694 Fed. Appx. 57 (3rd Cir. 2017) (remanding to correct forfeiture, but limiting remand to the forfeiture issues and not for resentencing on other grounds; where a co-defendant's appeal is also pending, district court may wait for remand in the related case to resolve the cases together);

But how are the courts resolving the issue

— And what are the lessons going forward?

United States v. Lobo

In *United States v. Lobo,* the son of the President of Honduras and four others were convicted of conspiring with the Cachiros, a Honduran drug trafficking organization, to import hundreds of kilograms of cocaine into the United States.

— their role was to provide "security and logistical support" for the Cachiros in connection with two of the cocaine shipments.

— The Government initially sought a forfeiture money judgment against Defendant in the amount of $13.1 million, reflecting Defendant's joint and several liability for the gross proceeds of the conspiracy.

— Following *Honeycutt,* however, the court held that Defendant would be liable only for the amount that he personally obtained, and ordered rebriefing on the forfeiture issue.

The evidence showed that the defendant was one of five individuals who received, as a group, a total of $300,000 in payments for assisting the Cachiros' in laundering their drug proceeds.

— the Government reasoned that the defendant – as one of five people to receive the $300,000 – should be liable to forfeit one-fifth of that amount

— so, it asked the court to order him to forfeit $60,000.

— But the court held that the Government's burden was to establish by a preponderance of the evidence the amount, if any, that Defendant actually received.

— Because it could not show how the $300,000 in kickbacks was divided among the five individuals, the Government could not hold Defendant liable for any of it.

- *United States v. Lobo*, 2017 WL 2838187, *6 (S.D.N.Y. June 30, 2017) (defendant, one of five individuals who received a $300,000 kickback as part of a money laundering scheme, is not liable for the forfeiture of any part of the money unless the Government can prove how the kickback was divided among the conspirators);

Notice the key point here:

— Because the Government could not show what part of the $300,000 the defendant received, he was not required to forfeit *any of it*

United States v. Bogdanov

The next case to raise the issue presented an even more problematic set of facts:

In *United States v. Bogdanov,* the defendant and his wife and daughter engaged in a 10-year conspiracy to shoplift millions of dollars in consumer goods and sell them on eBay.

— The defendant pleaded guilty to a conspiracy to violate 18 U.S.C. § 2314 but disputed the Government's calculation of the amount of money he was required to forfeit.

— The Seventh Circuit focused on the question we discussed earlier: how you calculate the value of the property subject to forfeiture, *i.e.,* the value of the stolen goods

— But the court left hanging the question raised by *Honeycutt*

The Government, the court said, had not shown how the proceeds of the crime were divided among the Defendant and his wife and daughter, as *Honeycutt* seems to require.

— The Defendant, however, did not raise this argument.

— Accordingly, the court held that "we must save for another day the possible application of this principle to an arrangement such as this one."

But how would such a case ever be resolved?

— Does it matter that only the father was prosecuted and convicted?

— If so, does that mean that he is liable only for the proceeds that he personally received, while the wife and daughter, who were not prosecuted, get to keep their share?

— More fundamentally, why should matter how members of a family divided up the criminal proceeds?

— the doctrine of joint and several liability, among its many virtues, made it unnecessary to decide, for example, how a husband and wife (or in this case, husband, wife and child) divided the criminal proceeds among themselves:

— very simply, they were jointly and severally liable for the full amount without regard to who received and spent what part of it on a new car for dad, jewelry for mom, or a family trip to Disneyworld.

— it would be bizarre indeed if the Government were unable to recover any of the money through forfeiture because – as occurred in *Lobo* – it could not show how the money was divided among the co-conspirators in this situation.

- *United States v. Bogdanov*, 863 F.3d 630 (7th Cir. 2017) (saving "for another day" the application of *Honeycutt* to proceeds received by family members who acted jointly in committing an offense);

Leaders of an organization and defendants who acted in concert

The good news is that some of the courts are beginning to realize that reading *Honeycutt* too broadly would have a lot of unintended consequences, and that it has to be read sensibly to avoid giving criminals a get-out-of-forfeiture-free card in cases like these

— And notwithstanding *Lobo,* some of the best case law is coming from right here in New York

In a securities fraud case, the Second Circuit held that *Honeycutt* is limited to cases involving "incidental figures"

--- like the brother who worked in the shop but didn't get any of the drug money

— And does not apply to the leader of the criminal organization or a person with control over how the money was distributed

- *S.E.C. v. Metter,* 706 Fed. Appx. 699, 702 n.2 (2nd Cir. 2017) (*Honeycutt* is limited to cases involving "incidental figures" whose role in the offense does not justify joint and several liability and does not apply to a person with a controlling interest who determined how the proceeds of the offense were distributed);

In another case, *United States v. McIntosh*, the defendant was the leader of a gang that perpetrated a "spree of violent robberies" that netted $75,000 in proceeds

— He divided the robbery proceeds among the other defendants and used his portion to buy a BMW 525 automobile.

— He argued that under *Honeycutt* he was liable to forfeit only the fraction of the money that he personally received.

— But a district court in New York held that when defendants act in concert, jointly acquiring proceeds and dividing them among themselves by joint decision, they each remain liable to forfeit the total proceeds

- *United States v. McIntosh,* 2017 WL 3396429 (S.D.N.Y. Aug. 8, 2017) (applying *Contorinis* and holding that it was not overruled by *Honeycutt*);

In another district court case, this one from Michigan, *United States v. Ward*, the Defendant was the leader of a large marijuana conspiracy.

— He grew the marijuana on his farm and sold it through retail outlets, supervising his employees and making all hiring and firing decisions.

— When the defendant entered his guilty plea, the Government sought a forfeiture money judgment in the amount of $475,000, representing the gross proceeds of the offense

— citing *Honeycutt,* he argued that the forfeiture should be limited to the amount of money that he personally obtained

— The court held, however, that the leader of a drug organization "obtains" all of the proceeds of the sale of the illegal drugs, even if those proceeds do not come personally into his hands.

— *Honeycutt* holds that a defendant cannot be held liable for proceeds that he does not obtain at all, but it does not preclude holding a defendant liable for proceeds that he obtains "indirectly."

— Proceeds that are delivered to the hands of a defendant's employees are proceeds that he obtains "indirectly."

- *United States v. Ward*, 2017 WL 4051753 (W.D. Mich. Aug. 24, 2017);

These are good cases from the law enforcement point of view, but it remains to be seen how the appellate courts will rule on that question

- *United States v. Djibo*, ___ Fed. Appx. ___, 2018 WL 1801715 (2nd Cir. Apr. 17, 2018) (remanding forfeiture order holding ringleader of heroin conspiracy jointly and severally liable for the wholesale value of the drugs seized from his co-conspirators);

Is *Honeycutt* limited to drug cases?

The most important unanswered question is whether *Honeycutt* applies to all criminal forfeiture cases or only to drug cases

— the courts are split on that question

Recall that *Honeycutt* was a drug case in which the forfeiture was based on § 853(a)

— The Supreme Court in that case focused on the language of the statute

— It says that a person convicted of a drug offense must forfeit "any proceeds the person obtained, directly or indirectly, as the result of the offense"

— The words the Court thought most important were *proceeds the person obtained*

There are other forfeiture statutes that contain similar language (unlike other countries, the US does not have one generally-applicable forfeiture statute but instead has different forfeiture statutes that apply to different crimes)

— Section 982(a)(2), for example, mirrors the drug statute in limiting the forfeiture to the proceeds that "the person obtained"

—In such cases, *Honeycutt* is going to apply

- *United States v. Chittenden*, ___ F.3d ___, 2018 WL 3559227 (4th Cir. July 25, 2018) (*Honeycutt* applies to forfeiture in a bank fraud case where the applicable statute is § 982(a)(2), which contains the same limitation to property the defendant "obtained" as § 853);

- *United States v. Brown,* 694 Fed. Appx. 57 (3rd Cir. 2017)(*Honeycutt* applies to forfeiture for mortgage fraud under § 982(a)(2)); *United States v. Brown,* ___ Fed. Appx. ___, 2018 WL 1151785 (3rd Cir. Mar. 5, 2018) (same case; different defendant; same holding);

— Other forfeiture statutes, however, are worded differently

Money laundering: 18 U.S.C. § 982(a)(1)

For example, 18 U.S.C. § 982(a)(1), the forfeiture statute for money laundering says the defendant must forfeit "any property . . . involved in" the money laundering offense

— It makes no reference to property obtained by the defendant

— Indeed, § 982(b) expressly provides for a money laundering defendant to forfeit property that he handled as an intermediary but *did not* retain for himself

— Based on the difference in the statutory language, at least one court has held that *Honeycutt* does not apply in money laundering cases

- *United States v. Alquza,* 2017 WL 4451146 (W.D.N.C. Sept. 20, 2017) (questioning whether *Honeycutt* applies to forfeitures under § 982(a)(1), which authorizes the forfeiture of all property "involved in" a money laundering offense and is not limited to the proceeds obtained by the defendant), aff'd ___ Fed. Appx. ___, 2018 WL 2278127 (4th Cir. May 18, 2018);

— I understand that the US Attorney in this district takes the same view and does not believe that *Honeycutt* applies in money laundering cases

Most important, 18 U.S.C. § 981(a)(1)(C), which is the default criminal forfeiture statute for crimes that do not have a forfeiture statute of their own

— Which includes most white collar offenses like mail fraud, wire fraud and bank fraud

— Says only that "any property . . . which constitutes or is derived from proceeds" of the offense is subject to forfeiture

— Again, there is no reference in the statute to property "obtained" by the defendant

The courts are split on whether this makes any difference

In *United States v. Gjeli*, the Third Circuit held that *Honeycutt* applies equally to forfeitures under § 981(a)(1)(C)

- *United States v. Gjeli,* 867 F.3d 418 (3rd Cir. 2017) (*Honeycutt* applies with equal force to the forfeiture of proceeds in a RICO case under § 1963(a)(3) and to the forfeiture of extortion proceeds under § 981(a)(1)(C));
- *United States v. Sanjar,* 876 F.3d 725 (5th Cir. 2017) (*Honeycutt* applies to forfeiture of gross proceeds of health care fraud under § 982(a)(7); following *Gjeli*);
- *United States v. Carlyle*, 712 Fed. Appx. 862 (11th Cir. 2017) (citing *Gjeli* and assuming without deciding that *Honeycutt* applies to forfeitures pursuant to § 981(a)(1)(C), and remanding the case to the district court);

But in *United States v. Sexton,* the Sixth Circuit said the opposite

In that case, a defendant in Kentucky secured loans for his businesses by making misrepresentations about the businesses' assets and the identity of the true borrowers.

— He was convicted of conspiracy to commit bank fraud and was ordered to forfeit $2.5 million in proceeds pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c).

— He appealed, arguing that under *Honeycutt,* the forfeiture judgment should have been limited to the amount that Defendant personally obtained, and should not have held him jointly and severally liable for the amounts obtained by his co-conspirators.

— And he cited the Third Circuit's decision in *Gjeli* in support

— But the court held that *Gjeli* was wrong and that because of the difference in the statutory language, *Honeycutt* does not apply to forfeitures under § 981(a)(1)(C)

— To the contrary, the court said, "as long as the property is connected to the crime, a defendant can be liable for property that his codefendant acquired."

- *United States v. Sexton,* ___ F.3d ___, 2018 WL 3293471 (6th Cir. Jul. 5, 2018) (rejecting *Gjeli;* the "linchpin" of the *Honeycutt* decision was the phrase "proceeds the person obtained;" because § 981(a)(1)(C) contains no such limitation, *Honeycutt* does not apply; so, as long as the property is connected to the crime, the defendant can be made to forfeit proceeds obtained by a co-defendant);

- *United States v. Shelton*, 2018 WL _____ (W.D. Ark. Sep. 25, 2018) (following *Sexton* and rejecting *Gjeli* and *Carlyle*; the difference in the statutory language between § 853(a) and § 981(a)(1)(C) means that *Honeycutt* does not apply to the latter; that § 2461(c) incorporates the proceeds in § 853 does not matter because the definition of what is forfeitable is not a procedure);

- *United States v. McIntosh,* 2017 WL 3396429 (S.D.N.Y. Aug. 8, 2017) (*Honeycutt* was limited to Section 853(a); it does not mention and does not apply to forfeitures under § 981(a)(1)(C) which is not limited by property obtained *by a particular person*);

- *United States v. Lasher,* 2018 WL 3979596 (S.D.N.Y. Aug. 20, 2018) (following *McIntosh* and holding that until and unless the Second Circuit overrules pre-*Honeycutt* precedent applying joint and several liability to § 981(a)(1)(C), lower courts are bound by precedent);

- *Pierce v. United States,* 2018 WL 4179055 (S.D.N.Y. Aug. 31, 2018) (following *McIntosh* and denying § 2255 petition; until the Second Circuit rules otherwise, *Honeycutt* is limited to drug cases under § 853(a) and does not apply to forfeiture for bank fraud under §§ 981, 982);

- *See also United States v. Chittenden,* ___ F.3d ___, ___ n.2, 2018 WL 3559227 (4th Cir. July 25, 2018) (leaving open the possibility that forfeitures under § 981(a)(1)(C) might fall outside of *Honeycutt*, but holding that the Government cannot rely on that statute when there is a more specific statute such as § 982(a)(2) applicable to the offense, as is the case for bank fraud);

Guidance going forward

So, we're in for quite a ride as the courts try to sort through all of this and decide how and when to apply *Honeycutt*

— What does that mean for agents and prosecutors investigating cases right now?

First, I think we have to assume the worst: that *Honeycutt* is going to apply, and that the court will want us to show how the defendants divided the money among themselves

— So as difficult as that may be, determining how much money each defendant personally obtained should be part of every investigation involving multiple defendants

Second, I think that there is a good chance – particularly here in the Second Circuit – that the courts will accept the argument that the leader of a criminal organization "obtains" all of the money, even though it is later divided among his subordinates

— What the leader obtains are the gross proceeds of the offense

— The disbursements to his people are expenses that he is not entitled to deduct

— So, showing who was the leader and who decided how the money should be divided will be important

Similarly, when criminals act jointly – act in concert with each other – deciding jointly how to divide the money, there is a strong argument that, like the leader himself, they all obtained the money

— The prosecutors should press that argument, relying on the SEC case and *McIntosh*,

— And agents should look for any evidence of the decision-making process regarding how the money was divided among the defendants

Finally, as a matter of prosecution strategy, the Government should rely whenever it can on the forfeiture provisions in the money laundering statute and in § 981(a)(1)(C), and avoid statutes that are limited to property obtained by the defendant

III. OTHER SUPREME COURT CASES

There are three other Supreme Court cases relating to forfeiture that you should know about.

Two I'll mention just briefly, and the third will lead into a summary of some of the most recent cases on the seizure of currency during traffic stops and airport encounters

Timbs

First, the Supreme Court has agreed to hear a case this fall on the application of the Excessive Fines Clause of the Eighth Amendment.

— the case is *Timbs v. Indiana*, ___ S. Ct. ___, 2018 WL 706832 (U.S. Jun. 18, 2018).

More than 20 years ago in *United States v. Bajakajian,* the Supreme Court held that a forfeiture cannot be grossly disproportional to the gravity of the underlying offense

— We can't forfeit any entire apartment building because someone smoked a marijuana cigarette one day on the 3rd floor

— Such a forfeiture would violate the Excessive Fines Clause of the Eighth Amendment

We all understand that that rule – the gross disproportionality test – applies to all forfeitures, civil and criminal, processed under federal law

The question the Court wants to answer in *Timbs* is whether the same rule applies to a purely state forfeiture -- that is, a forfeiture brought under state law in state court

— In lawyer's language, the question is, does the Eighth Amendment apply to the states

— The Supreme Court has to resolve the issue because the appellate courts have been split on that question

So, the case shouldn't have anything to do with whether the particular forfeiture in that case was excessive or not

— The only question is whether the State of Indiana is required to play by the same rules as the federal law enforcement agencies do

— But the facts should not be a problem, even if the court reaches them

In *Timbs,* the defendant was a drug dealer who used his 2012 Land Rover to buy and sell heroin.

— On two occasions, he used the vehicle to transport two grams of heroin that he sold to an undercover officer.

— On a third occasion he drove the vehicle intending to make another sale, but he was arrested before the sale occurred.

In the interrogation following his arrest, the defendant admitted that he had driven the vehicle to pick up heroin “several times a week,” and that he had “put a lot of miles” on the vehicle doing so.

— When the defendant pled guilty to selling the two grams to the undercover, the judge refused to order the forfeiture of the vehicle, saying it would be disproportional to the gravity of the offense

— The Government said, wait, you have to look at the entire course of conduct

— The Indiana Supreme Court didn’t resolve that question, however

— It just held that the Eighth Amendment does not apply to the states

— So now the Supreme Court will decide if that is right

The only thing that bothers me about the case is one troubling fact

— In Indiana, unlike other states, civil forfeiture actions are filed by private law firms under a contingency agreement that allows them to retain a portion of the property if the forfeiture is successful.

— Thus, there is an argument that the private law firms have a financial incentive to bring unnecessarily draconian civil forfeiture actions, and that the Eighth Amendment should be vigorously applied in such cases to avoid abuse

— if the Supreme Court gets into the financial incentive issue, it could say something about equitable sharing under the adoptive forfeiture program that might not be helpful

Search and Seizure

The next Supreme Court case is a search and seizure case decided this spring

— the issue was whether a police officer needs a warrant to enter upon private property to inspect or seize a vehicle that is in plain view

Nineteen years ago, in *Florida v. White*, the Supreme Court held that a police officer who has probable cause to believe that a vehicle was used to commit a crime and is therefore subject to forfeiture does not need a warrant to seize the vehicle if it is found on a public street

- *Florida v. White*, 526 U.S. 559, 565-66 (1999)

— On the other hand, if the vehicle is on private property inside a closed garage, the officer needs a warrant before he can enter upon the property, open the garage, and seize the vehicle

— But what if the officer has probable cause to believe the vehicle is subject to forfeiture and he sees it on a driveway in plain view, or it's in an open garage

— Does he need a warrant in that case?

- *United States v. Mendoza*, 438 F.3d 792, 796 (7th Cir. 2006) (police officers who have probable cause to believe that a vehicle is subject to forfeiture, may enter upon private land and seize the vehicle without a warrant if it could be seen in plain view in an unattached, open garage);

- *United States v. Musick*, 291 Fed. Appx. 706, 722 (6th Cir. 2008) (the right to seize a vehicle for forfeiture from a public place without a warrant under *Florida v. White* applied to a vehicle seized from an auto repair shop and to the vehicle the defendant was driving when he arrived at the shop to pick up the first vehicle);

- *See also* the discussion of the use of a writ of entry in this situation in Chap. 1, Sec. III.D. of the *Asset Forfeiture Policy Manual.*

That was the question the court answered in *Collins v. Virginia*

- *Collins v. Virginia*, 138 S. Ct. 1663 (U.S. 2018).

In *Collins,* police officers had probable cause to believe that the defendant was in possession of a stolen motorcycle.

— Observing from the street what appeared to be a motorcycle covered with a tarp parked on the driveway of Defendant's residence, an officer walked onto the driveway, removed the tarp, recorded the license plate and VIN numbers on the motorcycle, replaced the tarp, and departed.

— a subsequent records check revealed that the motorcycle was in fact stolen.

— Collins was convicted of receiving stolen property, and the Virginia Supreme Court rejected his argument that the conviction should be overturned because the search was illegal

— the police, the Virginia court said, did not need a warrant to enter onto the driveway to inspect the vehicle

— But the U.S. Supreme Court said, yes, they did

The problem was that the motorcycle wasn't just on the driveway; it was in a carport adjacent to the defendant's house

— In the Court's view, that was within the "curtilage" where the defendant had an expectation of privacy

— The situation, the Court said, was the same as it would have been if the police had been able to see the vehicle through the window of a closed garage and entered it without a warrant

— So, the police needed a warrant to inspect and seize the vehicle even though they had probable cause and the vehicle could be seen in plain view from the street.

— Important: this ruling applies equally to searching the vehicle and to seizing it

You might be interested to know that Justice Alito, in dissent, argued that there is no reason to apply the Fourth Amendment differently to a vehicle parked on a public street than to one parked a few feet away in plain view on a driveway.

— Echoing Dickens' character Mr. Bumble, he said that an ordinary citizen, told that an officer violated the law because he walked 30 feet up an open driveway to do what he could have done on the street, would say, "if that

is the law then the law is a ass."

— But the other eight justices saw it differently

Now, what if the motorcycle had been at the end of the driveway a few feet from the street instead of in a carport adjacent to the house

— We don't know, but the safest thing would be this:

If there is probable cause to believe the vehicle is subject to forfeiture but it is not on a public street, post someone to make sure it doesn't go anywhere and get a warrant.

Traffic Stops

Let's turn to the traffic stop cases that so often result in the seizure of a pile of money – wrapped in rubber bands in bundles of $1,000 -- from a driver who says that he was carrying the money in case he saw a truck he wanted to buy

— There are a lot of issues that arise in such cases, and one of them ended up in the Supreme Court this year

— The issue in that case was whether a police officer needs probable cause to search a vehicle once he determines that it is a rental car being driven by a person who is not an authorized driver on the rental contract

In ***Byrd v. United States,*** **___ U.S. ___, 138 S. Ct. 1518 (2018)**, the defendant was stopped for a traffic violation while driving a rental car in Pennsylvania.

— When the trooper realized that the defendant was not listed as an authorized driver on the rental agreement, and that there was no one else present in the car, he determined that he did not need probable cause to search the vehicle and proceeded to do so.

— Minutes later, he found 49 bricks of heroin in the trunk of the vehicle and arrested the defendant

— The Government's view was that the because the driver was not authorized to drive the car, he had no expectation of privacy and thus no reason to object to the search

— The Supreme Court -- unanimously – disagreed

"As a general rule," the Court said, "someone in otherwise lawful possession and

control of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver."

— For example, the driver would have an expectation of privacy if he had taken over the driving from an authorized driver who was tired or inebriated.

— On the other hand, the Court also unanimously rejected the defendant's argument the sole occupant of a vehicle *always* has an expectation of privacy based on his possession and control.

— Maybe he's a thief driving a stolen car

— In that case, he would have no expectation of privacy at all

So, what is the rule?

— when does a police officer need probable cause to search a vehicle driven by someone who is not the owner or an authorized driver, and when does he not?

— The answer is, it depends on whether his possession was lawful or unlawful

— If his possession is lawful, he has an expectation of privacy and you need probable cause

— If his possession is unlawful, he has no such expectation and you don't need probable cause

— Just being someone other than the authorized driver on the rental agreement doesn't make your possession unlawful

But there were more facts in this case:

— When the vehicle was rented at New Jersey rental car agency the defendant had a woman go into the agency and rent the vehicle in her name while he waited outside

— She never revealed, of course, that the defendant was going to be the one taking possession of the vehicle

— In essence, the defendant had defrauded the agency into believing that the woman, not the defendant, would be the sole driver when in fact the woman intended all along to give the keys to Defendant and never to take possession of the car.

— The Supreme Court said that that presented an interesting question, and it remanded the case to the lower court to consider if the possession was lawful since that issue hadn't been raised before

The "take away" from this case is that the driver's not being an authorized driver on the rental agreement is not enough to dispense with the probable cause requirement and just search the car

— But probable cause may not be necessary if there is other reason to believe the driver is not in lawful possession of the vehicle.

— The problem, of course, is that the police officer on the scene doesn't know all the circumstances surrounding the rental of the vehicle

— He doesn't know if the defendant defrauded the rental company or not

— So, while that might be helpful after-the-fact in upholding the legality of the search, the officer on the scene has to assume that the rental was legal and proceed with the search only if he has probable cause

Currency Seizures

Let me end by running through the facts of some of the most recent currency seizure cases – all from this year – to see what facts the courts are finding sufficient to support a civil forfeiture

— This is timely, because with all of the attacks on civil forfeiture, it's important to know what the courts are looking for when, for whatever reason, we don't bring a criminal prosecution

$100,000

The first case is *United States v. $100,000 in U.S. Currency*, from Massachusetts

Claimant was outbound from Logan Airport in Boston to Oakland when TSA screeners detected a large quantity of currency in his carry-on bag.

— A search revealed $100,000 in currency in bundles wrapped in carbon paper and covered in gift wrap.

— A drug dog alerted to the currency.

Claimant's story:

— He was on his way to his cousin's graduation in California, that the packages contained books wrapped by his mother as a gift for the cousin, and that he had no idea that they contained money.

— Agents found his mother, and she said Claimant had no cousin in California and that she didn't wrap the currency

The Government filed a civil forfeiture complaint and the court granted summary judgment

— The key factors:

- the dog alert
- the inconsistent stories,
- the quantity of currency and the manner in which it was packaged,
- Claimant's prior arrest in Nebraska for possession of drug paraphernalia,

The court was particularly impressed with the value of the dog sniff:

— an alert by a certified drug dog that is trained to alert only when currency has recently been in proximity to illegal drugs, and not to background contamination on currency, is probative evidence of a connection between the currency and a drug-trafficking offense.

— It also held that the use of carbon paper to package currency is indicative of an attempt to conceal money from the TSA x-ray machine,

- *United States v. $100,000 in U.S. Currency*, ___ F. Supp. 3d ___, 2018 WL 1567615 (D. Mass. Mar. 30, 2018)

But most important, in my view, is that the agents tracked down the mother to check out the story

— And showed that it was completely false

$40,000

Another good dog sniff case is *United States v. $40,000* from North Carolina

In that case, the Claimants were stopped at a TSA security checkpoint when a large sum of currency was detected in their carry-on luggage.

— Each traveler turned out to be carrying $40,000 on an outbound flight from North Carolina to Seattle, Washington.

— a drug dog alerted to the money,

Claimants moved to dismiss the complaint for insufficient evidence,

— but the court held that the following facts were sufficient at least to get in the courthouse door

- the large sum of money;
- the dog alert;
- Claimants' inability to provide any details for their travel plans;
- each Claimant's prior arrest for marijuana distribution; and
- Washington State's status as a source location for marijuana.

Like the court in Massachusetts, the North Carolina court rejected Claimants' argument that the dog alert had no probative value because of the background contamination on currency.

— That argument, the court said, has been successfully rebutted by evidence that properly trained drug dogs "alert not to the drug molecules adhering to the currency itself, but rather to the odor of volatile chemical byproducts of the drugs that evaporate and dissipate quickly after the initial exposure."

- *United States v. $40,000 in U.S. Currency*, 2018 WL 2371098 (E.D.N.C. May 24, 2018)

$36,000

On the same point is a case involving $36,000 seized in California during the search of a residence

— Agents had observed two people leave the residence and go to a stash house where there was a quantity of cocaine

— Executing a warrant at the house the two people came from, agents found a small safe containing $36,000 in currency bundled in rubber bands and a notebook that contained entries resembling ledgers used by drug traffickers to record illegal drug transactions.

— There was nothing else in the safe-- no drugs -- but a dog alerted to it

The case – again, a civil forfeiture action -- went to trial, and the court found that there was enough evidence to prove that the money was drug proceeds

The key evidence:

- the quantity of currency and the manner in which it was bundled,
- the pay-owe sheets and notebook,
- the discovery of 30 kg of cocaine in the location to which the two couriers had traveled upon leaving Claimant's residence,
- the prior criminal conviction of one of the couriers for a drug offense, and
- the dog alert.

With respect to the dog alert, the Government relied on the testimony of the dog handler who testified that her dog was trained to alert to methyl benzoate, the volatile substance that indicates the recent presence of cocaine.

— the court accepted that evidence, saying that while much of the currency in the US may be contaminated by cocaine, an alert by a dog trained to react not to cocaine itself but to the odor of a quickly-dissipating by-product, indicates cocaine was recently present in the location to which the dog reacts.

- *United States v. $36,000.00 in U.S. Currency,* 2018 WL 839865 (C.D. Cal. Feb. 8, 2018);
- *See also United States v. $115,020.00 in U.S. Currency*, 2018 WL 722556 (S.D. Ill. Feb. 6, 2018) (complaint alleging the unexplained possession of a large sum of

currency, a positive dog alert, and contradictory stories is sufficient to withstand a motion to dismiss the complaint);

- *United States v. $189,150.00 in U.S. Currency*, 2018 WL 740962 (D. Md. Feb. 6, 2018) (seizure of large sum of money bound with rubber bands at an airport, a dog alert, and facts fitting the courier profile are sufficient to satisfy the pleading requirements);

Note: A compilation of all of the dog sniff cases may be found in Section XI.A.5 of the Civil Forfeiture Case Outline and in Section 25-5(d) of *Asset Forfeiture Law in the United States* (2d ed. 2013) and 2016 Supplement.

$48,880

There is one other case – this one from Texas -- where the dog alert and the follow-up investigation to check out the claimant's story were critical

Postal Inspectors seized a package in transit from Waco, Texas to Lebanon, Oregon when a drug dog alerted to it at a Postal facility.

— search pursuant to a warrant revealed $48,880 in currency but no other documentation

— Claimant, the sender, said that the money was the down payment for a house that he intended to buy in Oregon, but he provided no supporting evidence

The court granted the Government's motion for summary judgment based on these facts:

1) A large quantity of currency, bundled in rubber bands, was being sent through the mail;

2) A trained and certified drug dog alerted to the money;

3) Witnesses in Texas stated that Claimant frequently caused packages sent from Oregon to be addressed to fictitious persons and delivered to their residences in Texas, and that Claimant paid them for this service with marijuana;

4) Claimant made false and inconsistent statements regarding the currency; for example: he said that this was the only time he had sent a package to this particular addressee in Oregon but Postal records show 15 prior shipments to the same address; and

5) Claimant failed to explain why there was no correspondence relating to the alleged down payment in the package containing the currency,

- *United States v. $48,880, More or Less, in U.S Currency*, 2018 WL 1404408 (W.D. Tex. Mar. 20, 2018)

The AMTRAK Case

I want to close with what is my favorite case of the year in this category

— Another case that illustrates the importance of the follow-up investigation

A traveler on an Amtrak train, traveling between North Carolina and New York, inadvertently picked up someone else's backpack as he exited the train in Washington, DC, and turned it over to Amtrak police.

— It contained $17,900 in currency and various papers identifying the owner

— A drug dog alerted to the currency.

The police contacted the owner who confirmed that the backpack was his but professed that he had no idea that it contained any money.

— His mother, however, filed a claim asserting that the money belonged to her

— This was her story:

- She and a friend had recently sold their mink coats to raise money in preparation for a move to North Carolina
- Shortly before the incident in question, she traveled with the currency to North Carolina to visit her son
- She left without completing her plans to relocate, but intending to return, decided to leave their currency in the son's backpack for safekeeping.
- They did not tell him it was there, however, for fear that he might spend the money.

The Court of Appeals held that this story was plausible, and denied a motion for

summary judgment, so the Government did some follow-up investigation

— How would you check out this story?

— The weak point was that the mother had no documentation to prove that she was actually in North Carolina at the time she claimed to have left the money in her son's backpack.

— So, the Government subpoenaed her credit card records to see if she was spending money in North Carolina on the dates in question

— It turned out that she was spending money during that time period, but not in North Carolina

— Instead, she was making cash withdrawals and putting charges on her credit cards at upscale boutiques in New York City.

How did the court react to that evidence?

— It granted the Government's motion to strike the mother's claim on the ground that her story contained perjury.

- *United States v. $17,900 in U.S Currency,* 2018 WL 2455436 (D.D.C. May 31, 2018);

Lessons

What are the lessons to take away from these cases?

1. Notwithstanding all of the criticism of the civil forfeiture program – some of it deserved – civil forfeiture is alive and well as a law enforcement tool *provided* we do the work to support the case with sufficient evidence

2. Among other things, it is important to support the dog sniff with the testimony of the dog handler as to the dog's training, certification and track record, and the scientific evidence of the alert's value.

3. In addition to the usual facts in currency seizure cases – the amount of money, the bundling in rubber bands, etc. – debunking the claimant's story – showing that it is false – can be the best evidence supporting the Government's forfeiture case

We can’t simply rest on the fact that someone is carrying a lot of unexplained money

— Get him to provide as detailed an explanation as possible for where the money came from and what he was going to do with it

— And then do the work to show that it is all nonsense.