

OVERVIEW OF ASSET FORFEITURE

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I. INTRODUCTION

Most countries – including all of the countries represented here – have a procedure for confiscating property at the conclusion of a criminal case

- At least some of you also have the authority to confiscate property even if there is no criminal case: what is called non-conviction-based (NCB) confiscation or forfeiture

All of you have the authority to confiscate the proceeds of the crime for which the defendant is convicted

- At least some of you can also confiscate other property, such as the instrumentalities of the crime or the subject of a money laundering offense
- And at least some of you have the authority to obtain an extended confiscation order – an order which applies to other criminal conduct the defendant may have committed but was not the subject of his conviction
- And to obtain an order for the “equivalent value” of the property if the forfeitable property itself is unavailable

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In all cases, however, the confiscation authority is rarely used

- In Serbia, Lithuania, Ukraine and Moldova, the authority is “on the books” and each country can cite a handful of examples of when it was used
- But obtaining a confiscation order is not a systematic or routine part of the criminal case
- And the number of confiscation orders pales in comparison to the number of convictions

The question is, why is that so?

- Why is asset confiscation not systematically employed in criminal cases, and in particular, in money laundering cases?
- Is it a lack of training and expertise among the investigators, prosecutors and judges?
- Is it the failure to make a financial investigation part of the case at the outset?
- Is it the failure to obtain an order preserving or sequestering assets prior to conviction?

These are all issues that I would like to address as we discuss confiscation in the context of money laundering cases

So, here is what I plan to do:

- First, discuss the reasons why it is important to make confiscation part of your criminal case
- Second, talk about what can be recovered: proceeds, instrumentalities, traceable property, property of equivalent value
- And Third, talk about the procedure in criminal cases, and the instances where you might want to use NCB confiscation if it is available.

II. WHY DO FORFEITURE

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

- *Kaley v. United States*, 571 U.S. 320, 323 (2014) (forfeiture serves to punish the wrong-doer, deter future illegality, lessen the economic power of criminal enterprises, compensate victims, improve conditions in crime-damaged communities, and support law enforcement activities such as police training);

1. Punish the wrongdoer

- don't just put him jail; take away the fruits of the crime;
- make him pay a judgment equal to the proceeds he received, even if he has spent the money, and even if he has reimbursed the victim
- in a money laundering case, make the defendant pay a judgment equal to the amount of money that he laundered whether he kept the money or not
 - *United States v. Peters*, 732 F.3d 93, 98-99,101 (2nd Cir. 2013) (the purpose of forfeiture is punishment; that is what distinguishes forfeiture from restitution and other remedial tools; restitution puts the defendant and the victim back in the position they were in before the crime occurred; forfeiture punishes the defendant by forcing him to pay the gross receipts of the crime, not just his net profit);

2. Deter other wrongdoers

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

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

- we don't want drug dealers to keep the airplane so they can use it again,
- the same is true for letting the child pornographer keep the computer and cameras that he used

— or letting the money launderer keep the business through which he laundered his money

4. Disrupt the organization

— money is the glue that holds organized criminal enterprises together; they have to recycle the money to keep the scheme going

— it is harder for a drug organization to replace the money than to replace the drugs

— taking the money does more to interrupt the cycle of drug trafficking than any number of buy/bust arrests

— the same is true for persons engaged in wildlife trafficking; seizing the money flowing from Asian markets back to the poaching enterprises is more effective than arresting the guy with the truck and the gun in Africa

— figuring out how terrorism is financed, and taking away the money before it can be used, is a critical part of the anti-terrorism effort

— and seizing money destined for sanctioned countries like N. Korea and Iran disrupts their ability to evade those sanctions

5. Get money back to the victim

— forfeiture is a more effective way of recovering money for victims than ordering the defendant to pay restitution

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

6. Protect the community

— shutting down the crack house or meth lab removes a hazard to public health and safety and gives law enforcement the opportunity to convince the community that they’re not letting the bad guys profit from their crimes

- you don't want organized crime or drug organizations that have acquired great wealth use it to control markets or institutions
- you don't want to let corrupt leaders of developing countries use your financial system to loot their treasuries and safeguard a nest egg to use when they have to go into exile
- and forfeiture ensures that the playing field is level, so that people trying to run businesses honestly don't have to compete with capital from illegal sources

7. Recycle the money

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

III. WHAT CAN YOU FORFEIT?

In most cases, the law authorizes the court to order the confiscation of property that was "illegally obtained" in the course of committing a criminal offense

1. Proceeds

What constitutes proceeds in most cases is fairly obvious

- it's whatever the defendant acquired as a result of the offense, or stated differently, what he would not have "but for" having committed the offense
- usually that's expressed in terms of his gross receipts without any reduction for costs
- but I will return to that point in a minute
 - *United States v. Peters*, 732 F.3d 93, 101 (2nd Cir. 2013) (the purpose of forfeiture is punishment; forfeiting defendant's profits is not punishment because it merely returns him to the economic position he occupied before he committed the offense; therefore, defendant must forfeit the gross receipts);

- *United States v. McHan*, 101 F.3d 1027, 1041-42 (4th Cir. 1996) (gross proceeds forfeitable in drug case); *United States v. Keeling*, 235 F.3d 533, 537 (10th Cir. 2000) (same); *United States v. Colon*, 522 Fed. Appx. 61, 63 (2d Cir. 2013) (same); *United States v. Heilman*, 377 Fed. Appx. 157, 211 (3d Cir. 2010) (same; following *McHan*);
- *But see United States v. Jarrett*, 133 F.3d 519, 530-31 (7th Cir. 1998) (affirming calculation that gave defendants credit for cost of heroin);

If a person sold drugs, the money that he received is the proceeds

- If he robbed a bank, the money that he stole is the proceeds
- If he took a bribe, the bribe money is the proceeds
- If he *paid* a bribe, whatever he got in return would be the proceeds
 - *E.g.*, if a contractor obtains a contract by paying a bribe or kickback, the contract itself would be the proceeds of the crime

Appreciation and other traceable property

The scope of the term “proceeds” can actually be quite broad:

- proceeds include any property traceable to the proceeds, including any appreciation in the value of that property.
 - *United States v. Betancourt*, 422 F.3d 240, 251 (5th Cir. 2005) (if defendant buys a lottery ticket with drug proceeds, the lottery winnings are traceable to the offense even though the value of the ticket appreciated enormously when it turned out to contain the winning number);
- if the person who sold drugs or robbed a bank used the money to buy a car, the car can be confiscated as property traceable to, or derived from, the crime
- and that is true regardless of how much time has passed or how many times the property has changed form

Under the “but for” test, an entire business, and all of its revenue and assets, are subject to forfeiture if the business would not exist but for the investment of criminal proceeds to start the business or to keep it going.

- *United States v. Warshak*, 631 F.3d 266, 329-330 (6th Cir. 2010) (all proceeds of defendant’s business are forfeitable because the business was “permeated with fraud;” but even if a part of the business was legitimate, the proceeds of that part

are nevertheless forfeitable if the legitimate side of the business would not exist but for the “fraudulent beginnings” of the entire operation);

- *United States v. Smith*, 749 F.3d 465, 488-89 (6th Cir. 2014) (following *Warshak*; if business is so pervaded by fraud that its revenue stream would not have existed but for the fraud, any asset derived from that revenue stream is forfeitable as proceeds);

— and it also includes not only property obtained directly by the defendant as a result of the offense, but also property *retained*, or obtained by a third party who acted in concert

- *United States v. Torres*, 703 F.3d 194, 199 (2d Cir. 2012) (all that is required is a “causal nexus between the wrongdoer’s possession of the property and her crime”; rent money that defendant saved or retained as a consequence of the crime is proceeds obtained “indirectly”);
- *United States v. Peters*, 732 F.3d 93, 102 (2nd Cir. 2013) (because the statute makes defendant liable for property obtained “directly or indirectly,” he is liable for proceeds obtained by a corporation that he dominates or controls, even if he did not obtain the money himself);
- *United States v. Olguin*, 634 F.3d 384, 398-99 (5th Cir. 2011) (the provision authorizing the forfeiture of funds obtained “directly or indirectly” is the statutory basis for joint and several liability, making each defendant liable for the proceeds obtained by his co-conspirators whether or not he obtained any of the funds himself);

So, in the case of a contract obtained by fraud, or by paying a bribe or kickback, all of the payments on the contract would be proceeds because they would not have been obtained but for the crime

Net v. Gross

As I’ve said, generally there is no deduction for the cost of committing the crime

- The drug dealer does not get to deduct the cost of the drugs
- The person who obtains business by paying a bribe does not get to deduct the amount of the bribe

There is some question, however, as to whether the person who obtains a contract by fraud or bribery, but who performs the work, gets to deduct the cost of that work or of the goods he provides

- *United States v. Martin*, 2014 WL 221956, *5 (D. Idaho Jan. 21, 2014) (contractor who obtains a Government contract by falsely claiming eligibility for a program for

disadvantaged businesses must forfeit the net profits, not the gross proceeds, of the fraudulently-obtained contracts);

2. Instrumentalities

At least some of you have legislation that allows the court to order the confiscation not only of the proceeds of the offense, but property used to commit the offense as well

- Property that was used to commit an offense is often called an instrumentality, facilitating property
- Depending on how it is described in the applicable statute, it could be anything that makes the crime easier to commit or harder to detect
 - *United States v. Schifferli*, 895 F.2d 987, 990-91 (4th Cir. 1990) (dentist's office "provided an air of legitimacy and protection from outside scrutiny," and thus made the crime of writing false prescriptions less difficult to commit and "more or less free from obstruction or hindrance");
 - *United States v. Huber*, 404 F.3d 1047 (8th Cir. 2005) (facilitating property is anything that "makes the prohibited conduct less difficult or more or less free from hindrance");

In cases stretching back over decades, courts have upheld the forfeiture of real property, vehicles, and other personal assets as facilitating property

- *United States v. Rivera*, 884 F.2d 544, 546 (11th Cir. 1989) (defining facilitating property broadly to include cows and horses used to make a heroin operation appear to be a working ranch);
- *United States v. Diaz*, 413 Fed. Appx. 704, 708 (5th Cir. 2011) (real property where owner allowed drug dealers to park their tractor-trailers while waiting to transport drugs and money across the border forfeited as facilitating property);
- *United States v. Ortiz-Cintrón*, 461 F.3d 78, 80 (1st Cir. 2006) (residences where defendants packaged drugs and stored drug money, and where telephone calls were made, was forfeitable as facilitating property);
- *United States v. Juluke*, 426 F.3d 323, 326 (5th Cir. 2005) (property is subject to forfeiture as facilitating property under § 853(a) even if only a portion of it was used to facilitate the offense; defendant's residence was forfeitable even though no drugs were found in the house because he parked his car containing heroin in the driveway and kept guns and currency in the house);
- *United States v. Singh*, 390 F.3d 168, 190 (2d Cir. 2004) (a medical license is forfeitable as facilitating property under section 853(a)(2) if the doctor uses the

license to distribute controlled substances in violation of the Controlled Substances Act; under section 853(b), property includes “rights, privileges, interests, claims, and securities”);

- *United States v. Harris*, 903 F.2d 770, 777 (10th Cir. 1990) (under section 853(a)(2), property used to facilitate a drug offense is forfeitable in its entirety, even if only a portion of the property was used for the illegal purpose);
- in fact, an entire business and/or all of its assets could be forfeited as facilitating property
 - *United States v. \$7708.78 in U.S. Currency*, 2011 WL 3489835, *3 (S.D. Miss. Aug. 9, 2011) (facilitating property is anything that makes the crime “less difficult or more or less free from obstruction or hindrance;” a pharmacy used as a cover for the illegal distribution of drugs is forfeitable as facilitating property, and hence so are all of its assets; including funds in its bank accounts that include money traceable to legitimate sales);
 - *United States v. Segal*, 432 F.3d 767, 779 (7th Cir. 2005) (if a business is forfeited, then so are all of its assets, including any subsidiary business that is wholly owned by the forfeited business; that there is no independent basis for the forfeiture of the subsidiary does not matter);

Instrumentalities in Money Laundering Cases

What might be an instrumentality in a money laundering case?

If we are talking about concealment money laundering, it could be anything that allows the defendant to make the concealment easier or the underlying crime harder to detect

- For example, if the defendant conceals the source of illegally-derived money by commingling it with money from a legitimate source, the commingled money would be an instrumentality of the money laundering crime
 - *United States v. Aguasvivas-Castillo*, 668 F.3d 7, 17 (1st Cir. 2012) (retailer who commingled \$4.4 million in food stamp fraud proceeds with legitimate funds “to shield the fraud” ordered to forfeit \$20 million);
- Or if he laundered his money by running it through his legitimate business, the entire business would be an instrumentality

Subject matter property

Property may also be subject to confiscation in a money laundering case if it is the subject of a money laundering transaction

- For example, if the defendant launders his money by investing in real property or in securities, the real property and the securities would be subject to confiscation
- This would be true even if only a fraction of the investment were traceable to illegally-derived money
 - *United States v. Beltramea*, 2016 WL 427096, *6-7 (N.D. Iowa Feb. 3, 2016) (defendant's use of fraud proceeds to pay for improvements to real property was a money laundering offense, making the property forfeitable in its entirety as the "object" of the offense);

IV. OVERVIEW OF FORFEITURE PROCEDURE

Criminal Forfeiture

A confiscation order is generally imposed by the court as part of the defendant's sentence after he/she has been convicted

- But it is important not to wait until sentencing to think about confiscation
- To the contrary, a financial investigation aimed at locating proceeds of the crime and other assets of the defendant must be part of the criminal investigation from the beginning

There are several reasons for this:

1. The financial investigation may aid in proving the crime
 - For example, showing that a public official has more assets than can be explained by his public salary can aid in proving that he is corrupt
 - And following the money can aid in identifying other parties to the crime and their relationship to each other
2. Failure to include a financial investigation can lead to missing the opportunity to bring a money laundering case as part of the prosecution

3. If you wait until the end of the case to try to locate the defendant's assets, you will likely find that they have disappeared
 - If you want to get a confiscation order, you need to do the financial investigation at the beginning of the case, not the end
 - And you need to get a preservation or sequestration order to preserve the property pending trial
 - Otherwise, it will be too late

So, here is a list of steps to take to obtain a confiscation order:

1. Make the financial investigation part of the criminal investigation from the beginning
2. Preserve the Property Pending Trial.
3. Include confiscation in any agreement to enter a guilty plea
4. Ask for a confiscation order at sentencing
5. Follow any statutory requirements for giving notice to third parties

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

- the punishment is directed against the defendant, not his property
- which means you are not limited to the traceable property
- if the defendant has dissipated the property, we can still get an order of forfeiture in the form of a judgment for property of "equivalent value"

Extended confiscation

In some countries, the confiscation order is limited to the property derived from, or used to commit, the specific offense for which the defendant is convicted

- if he is convicted of robbing a bank on Monday, and taking 10,000 euros, the confiscation order will be limited to the 10,000 euros that he stole on that occasion
- even if he stole another 10,000 euros from another bank on Tuesday unless he was also convicted of that offense

— that is the rule, for example, in the United States

But if your country has enacted an “extended confiscation” statute, your court will be able to order the confiscation of all of the proceeds of all related crimes that the defendant may have committed once he is convicted of one of those crimes.

Civil judicial forfeiture

Sometimes it is not possible to obtain a criminal conviction

— in which case it will not be possible to obtain a criminal confiscation order as part of the defendant’s sentence

— many countries, however, have a procedure that allows the court to make a confiscation order without the need for a criminal conviction

— these are called civil or “non-conviction-based” or “NCB” confiscation orders

— Serbia appears to have an NCB procedure (though it may never have been used)

— Moldova does have such a procedure and has used it.

— In the United States, NCB confiscation is fully part of the statutory scheme and is used all the time in appropriate cases

When would you use NCB confiscation?

Examples

1. when the wrongdoer is dead or is incompetent to stand trial;
2. when the defendant is a fugitive or a foreign national beyond jurisdiction of your court, but the property is in your country;
3. when the statute of limitations has run on the criminal case;
4. when we have recovered the property but do not know who committed the crime giving rise to the forfeiture;

5. when the defendant is convicted of a crime different from the one giving rise to the confiscation, and you don't have extended confiscation authority;
6. when the defendant has already been convicted in another country and there is no need to bring a sequential prosecution;
7. when there is no criminal case because the interests of justice do not require a conviction;
8. when the evidence is insufficient to prove that the defendant committed the offense beyond a reasonable doubt but sufficient to establish the crime and the connection between the property and the criminal on a balance of the probabilities;
9. when the defendant uses someone else's property to commit the crime
10. when the criminal case will not be concluded for a very long time, and there is a need to recover the property sooner rather than later

The important thing to know about NCB confiscation is that it doesn't require a conviction or even a criminal case,

- but the Government still has to prove that a crime was committed, *and* that the property was derived from or used to commit that crime