REPORT FOR THE CULLEN COMMISSION

Prepared by

Stefan D. Cassella[1]

I. Criminal Legislation Relating to Money Laundering in the United States

A. Overview

Federal law in the United States includes two sets of statutes that prosecutors may use to prosecute money laundering offenses. The first set focuses on transactions involving currency regardless of its source or its connection to another crime; the second set focuses on transactions involving criminally-derived property.

The purpose of first set of statutes is to penalize attempts to evade the regulations that require certain currency transactions to be reported to the Government; they include such violations as the deliberate failure to file a report, the filing of a false report, the structuring of transactions to evade the threshold reporting requirements, and the smuggling of currency into or out of the United States across an international border. Collectively, these are known as the "currency reporting statutes."

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[1] Stefan D. Cassella is a former federal prosecutor who served for 30 years in the U.S. Department of Justice, specializing in money laundering and asset forfeiture law. He has published over 50 articles on these topics and two books: *Federal Money Laundering: Crimes and Forfeitures,* and *Asset Forfeiture Law in the United States.*

The purpose of the second set of statutes is to criminalize domestic and international transactions involving criminally-derived property that are designed to conceal or disguise criminal proceeds ("concealment money laundering"), transactions designed to perpetuate on-going criminal activity ("promotion money laundering"), and transactions that involve simply spending or disbursing large sums of illicit money ("transaction money laundering").

There is also a statute that falls between these two sets of money laundering statutes that makes it an offense to operate an illegal or unlicensed money transmitting business.

B. The Currency Reporting Statutes

The currency reporting statutes are codified in what is popularly known as the Bank Secrecy Act, Title 31, United States Code, Sections 5312-32, (31 U.S.C. §§ 5312-32). They incorporate a set of related currency reporting regulations promulgated by the U.S. Department of the Treasury through its agency, the Financial Crimes Enforcement Network ("FinCEN").[2] The regulations are found in Chapter X of Title 31, Code of Federal Regulations (31 C.F.R. §1010.100 *et seq.*).

The currency reporting statutes date back to the 1970s and have been revised periodically since that time. Initially, their purpose was simply to create a

[2] FinCEN is the U.S. Government's Financial Intelligence Unit (FIU).

paper trail that the Government could use to detect tax evasion or the attempt to conceal criminally-derived proceeds by engaging in untraceable cash transactions. Accordingly, several statutes were enacted to require persons engaged in currency transactions involving more than $10,000 to file a report with FinCEN identifying the parties to the transaction, the date and place where the transaction occurred, and the amount of currency involved.

The principal statutes are 31 U.S.C. § 5313 (requiring financial institutions engaging in currency transactions in excess of $10,000 to file a Currency Transaction Report (CTR)); 31 U.S.C. § 5316 (requiring a person transporting more than $10,000 in currency in or out of the country to file a Currency and Monetary Instrument Report (CMIR)); and 31 U.S.C. § 5331 (requiring any person involved in a trade or business to file a report known as a Form 8300 when engaged in a currency transaction in excess of $10,000 with a customer or client).

When, in 1986, it was determined that criminals were attempting to evade these reporting requirements in a number of ways, Congress enacted 31 U.S.C. § 5324 which makes it an offense to fail to file a required report, to file a false or incomplete report (such as one that fails to identify accurately the party conducting the transaction), or to structure a currency transaction so as to evade the reporting requirement (such as by breaking a sum of currency in excess of

$10,000 into multiple parts and conducting transactions on different days, or at different banks, or through different persons).

Criminal prosecutions for violations of Section 5324 are quite common. Some have involved the failure to file a report or the filing of a false report. *See, e.g., United States v. Caro,* 454 Fed. Appx. 817, 842-43 (11th Cir. 2012) (check casher and its owner convicted of violating §§ 5313 and 5324(a)(2), respectively, for filing CTRs falsely identifying a shell company as the entity cashing checks when they knew the checks were being cashed for an employer using the cash to pay illegal employees); *United States v. Guevara*, 894 F.3d 1301 (11th Cir. 2018) (holding that having a straw buyer purchase a car with cash in his name so that the car dealer would identify the straw as the person who provided the cash on the Form 8300 is sufficient to prove the defendant caused or attempted to cause the dealer to file a form containing a material omission or misstatement).

But most prosecutions of currency reporting offenses involve elaborate attempts to divide large sums of money into smaller amounts to evade the CTR requirement. This is commonly called "structuring." *See, e.g., United States v. Tantchev,* 916 F.3d 645 (7th Cir. 2019) (evidence that defendant made 100 cash deposits, close in time, totaling $575,000, with no deposit exceeding $10,000, and then quickly wired the money to Bulgaria, was sufficient to establish the elements of a structuring offense); *United States v. Peterson,* 607 F.3d 975, 978-81 (4th Cir. 2010) (explaining that structuring may consist of breaking up a lump

sum and making multiple deposits into the same bank on the same day ("imperfect structuring") or into the same bank on different days ("perfect structuring"), or a series of transactions over many days involving a constant flow of cash income even if there was never more than $10,000 in a lump sum at one time ("serial structuring")).

One application of the structuring statute involves the process known as "funneling." This occurs when a person opens an account at a bank that has branches in multiple cities throughout the United States and directs underlings in various cities to have multiple persons make deposits into that account at multiple branches in different cities. For example, a drug dealer might open an account in Los Angeles and have underlings make cash deposits into that account at branches in New York, Chicago, Detroit and numerous other cities, so that he could withdraw the money in Los Angeles and use it to pay his Mexican supplier.

Other structuring offenses have involved attempts to evade the requirement of filing a CMIR when transporting more than $10,000 into or out of the United States across an international border. *See, e.g., United States v. Melo,* 954 F.3d 334 (1st Cir. 2020) (courier who received envelopes from another person at an airport, distributed them to other travelers, flew to an international destination, and collected the envelopes and returned them to the person who gave them to him, convicted of structuring under § 5324(c)(3)).

In 2001, Congress determined that tax evaders and other criminals were evading the CMIR requirement simply by concealing large quantities of currency on their persons, in their luggage, or in containers that were being shipped across the border in commercial transactions. Thus, Congress enacted a bulk cash smuggling statute, 31 U.S.C. § 5332, that makes it an offense to conceal more than $10,000 in currency with the intent to evade the reporting requirement that would be triggered when the currency reached border. *See United States v. Jimenez*, 421 F. Supp. 2d 1008, 1014 n.9 (W.D. Tex. 2006) (a bulk cash smuggling offense is complete once concealment with appropriate intent occurs and the defendant begins to move the money toward a destination outside of the United States; thus, the offense can be committed before the defendant reaches the border).

Prosecutions for such bulk cash smuggling offenses are also common. *See, e.g., United States v. Camacho-Ontiveros,* 770 Fed. Appx. 233 (5th Cir. 2019) (the elements of a bulk cash smuggling offense are 1) knowing concealment of more than $10,000 in currency; 2) attempt to transport the money across the border; 3) knowledge of the reporting requirement; and 4) intent to evade the reporting requirement; proof that courier was aware that he had more than $689,000 in cash concealed in his vehicle may be inferred from his lack of surprise when the money was discovered, as well as the implausibility of a third party's placing the money in the vehicle without any way to track it); *United*

States v. Del Toro-Barboza, 673 F.3d 1136, 1145 (9th Cir. 2012) (§ 5332 requires proof that the defendant was aware of the reporting requirement and that he was carrying more than $10,000; when defendant claimed he did not know his vehicle contained $500,000 in currency, Government was able to establish knowledge with circumstantial evidence including quantity of currency, attempt to conceal, time of day when transportation occurred, and attempts by third parties to learn defendant's whereabouts when he was detained).

The advantage to the Government of prosecuting money laundering under the currency reporting statutes is that there is no need to prove a nexus to another crime. The gravamen of the offense is the knowing violation of the currency reporting requirement or the intent to evade it. Whether the currency involved was derived from a criminal offense or was intended to be used to commit one is irrelevant. *See, e.g., United States v. MacPherson,* 424 F.3d 183, 193 (2d Cir. 2005) (§ 5324 makes no reference to the source of the money or to the defendant's motive; its "singular focus is on the method employed" to evade the filing requirement).

While such prosecutions are sometimes criticized for penalizing conduct that causes no harm, courts generally hold that the Government has the right to require compliance with the currency reporting requirements and that criminal prosecutions of attempts to evade them are justified. *See United States v. Malewicka,* 664 F.3d 1109, 1107-08 (7th Cir. Dec. 2011) (rejecting defendant's

argument that structuring causes no harm; it deprives the Government of the information it needs to detect tax evasion, fraud, and other crimes).

C. Laundering Criminal Proceeds

In 1986, Congress made money laundering itself a criminal offense by enacting the two principal money laundering statutes, 18 U.S.C. §§ 1956 and 1957.

Section 1956 has three parts: 18 U.S.C. § 1956(a)(1) (the "domestic money laundering statute") makes it an offense to conduct a financial transaction involving the proceeds of crime with certain specific intent, including the concealment of the criminal proceeds or the promotion of a criminal offense; 18 U.S.C. § 1956(a)(2) (the "international money laundering statute") makes it an offense to transport money -- it does not have to be criminal proceeds -- into or out of the United States with the intent to promote a criminal offense; and 18 U.S.C. § 1956(a)(3) (the "sting" provision) makes it an offense to commit concealment or promotion money laundering with money represented by an undercover agent to be criminal proceeds.

Section 1957 is a separate offense altogether; it makes it an offense to spend, invest or transfer through the banking system more than $10,000 in criminal proceeds for any purpose.

1. **Domestic Money Laundering**

Section 1956(a)(1) (the domestic money laundering statute) has four elements. The Government must prove that the defendant 1) conducted a financial transaction, 2) that involved criminal proceeds, 3) knowing that the property was in fact criminally-derived, and 4) knowing that the transaction was designed to conceal or disguise the criminal proceeds *or* intending to promote the continuation of the underlying criminal offense or the commission of another offense.

a. The financial transaction

The financial transaction element is easily established. Virtually any transaction involving two or more persons, or a person and a financial institution, will qualify. Typical examples include bank deposits, wire transfers, processing credit card charges, cashing chips at a casino, and using a safe deposit box. Even the simple transfer of cash from one person to another would qualify as a financial transaction.

b. Proceeds

The "proceeds" element is more problematic. The money laundering statutes in most countries make it any offense to launder the proceeds of any crime, foreign or domestic. In contrast, Section 1956(a)(1) -- and Section 1957 -- require proof that the property in question was the proceeds of a "specified unlawful activity" – that is, that it was the proceeds of one of the approximately

250 state, federal, and foreign crimes set forth on a list of predicate offenses. *See* 18 U.S.C. § 1956(c)(7) (defining "specified unlawful activity"). Most of the commonly-prosecuted state and federal crimes appear on that list, but there are some notable exceptions (*e.g.*, tax evasion, aggravated identity theft). Moreover, only six categories of foreign crimes appear on the list. These include crimes of violence, public corruption, bank fraud, and human trafficking, but again there are some notable omissions, including garden-variety fraud and other property crimes.

Most prosecutors in the United States regard the list-based approach in the money laundering statutes, and in particular, the truncated list of foreign crimes to which the statutes apply, as the great weakness in the federal money laundering statutes.

The "proceeds" element is also problematic for a different reason. Because the Government must prove that the property was the proceeds of a criminal offense at the time the money laundering transaction occurred, it must show that the money laundering offense was separate from the underlying crime. That is, there must be a temporal sequence: proof that a crime was committed that generated criminal proceeds, and proof that the defendant used those proceeds to conduct a financial transaction. If the same event constituted both the underlying crime and the charged money laundering offense, the two events would be said to "merge", and the proceeds element would not be satisfied.

A great deal of litigation in federal money laundering cases involves the application of this "merger" rule. *See, e.g., United States v. Johnson,* 971 F.2d 562 (10th Cir. 1992) (where defendant fraudulently induces victim to wire transfer funds directly to defendant's account, such transfer does not constitute money laundering, because funds were not "criminally derived" at the time the transfer took place). *But see United States v. Baxter,* 761 F.3d 17, 29-30 (D.C. Cir. 2014) (where the defendant embezzled funds by writing a check from her employer to a front company, which in turn transferred the funds to a co-defendant, the latter transactions involved proceeds of the embezzlement and thus could be charged as money laundering offenses).

c. Knowledge

To prove that the defendant knew that the property was criminally-derived, the Government does not have to prove that the defendant knew the precise origin of the property being laundered, or that the property was derived from one of the crimes on the list of "specified unlawful activities." Rather, it is sufficient to prove that the defendant was aware that the property in question was derived from "some form of unlawful activity." *See* 18 U.S.C. § 1956(c)(1); *United States v. Turner,* 400 F.3d 491, 496 (7th Cir. 2005). In a drug case, for example, it would not be a defense for the defendant to say that he did not know the money was derived from a drug offense, but thought that it came from a bank robbery. *See United States v. Reiss,* 186 F.3d 149 (2d Cir. 1999).

When the defendant is accused of laundering the proceeds of a crime that he committed ("self-money laundering"), proving the knowledge element is simple. But the money laundering statutes also apply to persons who launder the proceeds of crimes committed by others ("third party-money laundering"). In such cases, proof of the knowledge requirement almost always must be based on circumstantial evidence. For example, such evidence could include the family or business relationship between the defendant and the perpetrator of the predicate offense, the unusual circumstances of the financial transaction, or the implausibility of the defendant's explanation for the transaction. *See, e.g., United States v. Farrell,* 921 F.3d 116, 139 (4th Cir. 2019) (lawyer who acts as consigliere or "fixer" for drug organization and boasts that he "knows everything" about the organization, found to have knowledge of the source of the organization's money); *United States v. Rivas-Estrada,* 761 Fed. Appx. 318 (5th Cir. 2019) (that money transmitter received tens of thousands of dollars in shoe boxes from couriers, and assisted the couriers in structuring the transactions to avoid reporting requirements and suggested fake names for the senders, was sufficient to establish knowledge of the illegal source).

Knowledge may also be shown by the defendant's efforts to remain "willfully blind" or "deliberately ignorant" of the source of the property involved in the financial transaction. *See United States v. Haire,* 806 F.3d 991 (8th Cir. 2015) (courier who carried $33,000 in a vacuum-sealed bag on behalf of a known drug

dealer, using a one-way train ticket, was at least willfully blind to the illegal source of the money); *United States v. Rivera-Rodriguez,* 318 F.3d 268, 272 (1st Cir. 2003) ("because governing law equates willful blindness with knowledge, it would suffice for the jury to conclude that [defendant] consciously averted his eyes from the obvious explanation for the funds"); *United States v. Puche,* 350 F.3d 1137, 1147 n.4, 1149 (11th Cir. 2003) (defendant's deliberate ignorance shown by his reaction when undercover agent attempted to explain the source of the cash he was laundering: defendant said, "No, no, no," and said agent should not say anything about the source of the money).

d. Specific Intent

The fourth element of the domestic money laundering offense concerns the defendant's knowledge that the purpose of the transaction was to conceal or disguise the criminal proceeds, or his specific intent to use the money to continue the underlying criminal offense or to commit a new one. These are alternative ways of proving the money laundering offense: the first is called "concealment money laundering" and the second is called "promotion money laundering."

The Government can obtain a conviction for concealment money laundering if it proves that the defendant knew that the transaction was designed to conceal or disguise the source, location, nature, ownership, or control of criminal proceeds. 18 U.S.C. § 1956(a)(1)(B)(i). *See Cuellar v. United States,* 553 U.S. 550 (2008) (rejecting view that the only way to commit concealment

money laundering is to attempt to create the appearance of legitimate wealth; such "classic money laundering" is one way to violate the statute, but the text makes clear that there are many other ways to violate it as well).

That the purpose of the transaction was to conceal or disguise will generally be shown through circumstantial evidence which may include conducting the transaction in an unusual or convoluted way, or using shell companies, third parties' names, or the names of legitimate businesses. *See, e.g., United States v. Oloyede*, 933 F.3d 302 (4th Cir. 2019) (evidence of concealment included the use of other people's bank accounts, instructions to a co-conspirator to structure cash transactions in amounts under $10,000, writing himself 11 checks totally $70,000 to move money from one account to another, and engaging in a pattern of maxing out ATM withdrawals); *United States v. Patel,* 651 Fed. Appx. 468 (6th Cir. 2016) (use of two shell companies to move Medicare fraud proceeds from one coconspirator to another shows that at least one purpose of the transaction was concealment); *United States v. Cessa,* 861 F.3d 121 (5th Cir. 2017) ("Evidence that the defendant commingled illegal proceeds with legitimate business funds is sufficient to support a conviction under § 1956").

In contrast, "promotion money laundering" need not involve any attempt to conceal or disguise the criminal proceeds. Rather, the gravamen of the offense is to use the criminal proceeds to conduct a transaction with the intent to

continue the underlying scheme, or to commit an entirely new offense. For example, a defendant would be guilty of promotion money laundering if he used the proceeds of a fraud scheme to lure more victims, or to pay his co-conspirators so that they were willing to continue their participation in the scheme. *United States v. Lawrence*, 405 F.3d 888 (10th Cir. 2005) (using proceeds of Medicare fraud scheme to pay doctor whose participation was essential to the scheme, and to keep "the doors of the clinic open," promoted the scheme and were not ordinary business expenses); *United States v. Warshak,* 631 F.3d 266, 319 (6th Cir. 2010) (using fraud proceeds to make a charitable contribution promotes the scheme if it was "intended to raise [Defendant's] philanthropic profile and create an aura of legitimacy").

Drug dealers also commit promotion money laundering when they use the proceeds from prior drug sales to buy the next load of drugs from their supplier. *See United States v. Pendelton,* 832 F.3d 934 (8th Cir. 2016).

2. **International Money Laundering**

The international money laundering statute, 18 U.S.C. § 1956(a)(2)(A), differs from its domestic counterpart in an important way: It makes it an offense to send *any property* into or out of the United States with the intent to promote a specified unlawful activity. That is, the property involved in the offense need not be the proceeds of an earlier crime; rather the focus is solely on the defendant's

intent to use the money to commit a crime in the future. For this reason, the statute is sometimes referred to as a "reverse money laundering" statute.

Examples include sending money out of the U.S. to pay for a supply of drugs or to bribe a public official, or sending money into the U.S. to further a fraud scheme. *See United States v. Feldman,* 931 F.3d 1245 (11th Cir. 2019) (defendant committed international promotion money laundering when he received investments from relatives in Europe in his fraudulent business and returned dividends to them so that they would maintain their investments and thus allow him to keep the scheme going); *United States v. Maddux,* 917 F.3d 437 (6th Cir. 2019) (evidence that defendant sent money overseas to buy cigarettes that she later sold without collecting taxes was sufficient to show she sent the money with the intent to promote wire fraud by defrauding the Government of tax revenue); *United States v. Walker*, 129 Fed. Appx. 92 (5th Cir. 2005) (having girlfriend travel from United States to Mexico to deliver $6,250 to drug dealer in exchange for cocaine is § 1956(a)(2)(A) violation) ; *United States v. Harder*, 2016 WL 807942 (E.D. Pa. Mar. 2, 2016) (sending money overseas to pay a bribe to a foreign official is a violation of § 1956(a)(2)(A)).

The statute is also used frequently to criminalize the use of correspondent bank accounts in the United States to send US dollars between two foreign banks in violation of U.S. or foreign law, such as the international sanctions against North Korea and Iran. *See, e.g., United States v. $6,999,925.00 of*

Funds Associated with Velmur Management PTE Ltd, 2019 WL 1317336 (D.D.C. Mar. 22, 2019) ($5 million sent into US in violation of § 1956(a)(2)(A) as part of scheme to use front company to buy gasoil for N Korea in violation of international sanctions).

Nevertheless, the offense being "promoted" must be one of the 250 offenses designated as a "specified unlawful activity." Accordingly, while Section 1956(a)(2)(A) is frequently used prosecute the movement of money through U.S. bank accounts in furtherance of foreign crimes, the list of foreign crimes to which the statute applies is limited to the six categories of offenses listed in the statute. *See* 18 U.S.C. § 1956(c)(7)(B).

3. **The "Sting" Statute**

Section 1956(a)(3) was added to the money laundering statute to allow the Government to prosecute a defendant who accepted money from an undercover law enforcement agent with the understanding that the money was the proceeds of a crime, and intending to use the money to commit a money laundering offense. The addition to the statute was necessary because the domestic money laundering statute, Section 1956(a)(1), requires proof that the money involved in the transaction was *in fact* criminal proceeds, and thus would not apply when the money was actually Government funds being used to conduct the undercover "sting" operation. Accordingly, all that is required is that the undercover agent

represent to the defendant that the money is derived from a "specified unlawful activity."

The "sting" statute is not used frequently, but it has been used to target professional money launderers and the owners of money service businesses who are willing, for a fee, to launder money for criminals. *See, e.g., United States v. Costanzo,* 956 F.3d 1088 (9th Cir. 2020) (holding that accepting cash from purported drug dealers in exchange for bitcoins violates § 1956(a)(3)(B)); *United States v. Puche*, 350 F.3d 1137 (11th Cir. 2003) (affirming conviction of owner of money transmitting business who accepted and transmitted money represented to be drug proceeds).

4. **Using more than $10,000 in criminally-derived funds**

Section 1957 provides prosecutors with a simpler alternative to the domestic money laundering statute. While, like Section 1956(a)(1), it requires proof that the defendant conducted a financial transaction involving the proceeds of a specified unlawful activity and that he knew the money was criminally derived, unlike Section 1956(a)(1) it does not require proof of any specific intent. Thus, Section 1957 applies when the defendant simply spends, invests or transfers criminally-derived property, or converts it into another form. *See, e.g., United States v. Ruan,* 966 F.3d 1101 (11th Cir. 2020) (explaining that because unlike § 1956, § 1957 does not require an intent to conceal or to promote, it "prohibits a wider range of activity than money laundering as traditionally

understood;" affirming conviction for spending $110,000 in proceeds to buy a Lamborghini).

The purpose of Section 1957 is to freeze criminal out of the banking system – or more generally, out of the stream of commerce – by making it illegal for anyone to conduct a transaction knowing that the money was derived from a criminal offense. *See United States v. Rutgard*, 116 F.3d 1270, 1291 (9th Cir. 1997) (holding that § 1957 is designed to freeze criminal proceeds out of the banking system). In essence, it was "designed to 'make the drug dealer's money worthless'." *United States v. Hatcher*, 132 Fed. Appx. 468, 477 n.3 (4th Cir. 2005) (quoting the legislative history). Thus, it applies not only to the wrongdoer who is spending or investing his own criminal proceeds, but also to the merchant who accepts the money knowing of its illegal source. *See United States v. Allen,* 129 F.3d 1159, 1167 n.3 (10th Cir. 1997) (holding that while Congress's primary concern in enacting § 1957 may have been with third parties who give criminals opportunity to spend ill-gotten gains, the statute nevertheless reaches conduct of wrongdoers who conduct transactions with the fruits of their own criminal acts).

Recognizing that a violation of Section 1957 would be much easier to prove than a violation of Section 1956, and to avoid having the statute apply to *de minimus* transactions, Congress made the statute applicable only to transactions involving more than $10,000 in criminal proceeds, and limited the

maximum penalty to 10 years incarceration (in contrast to the 20-year maximum sentence for a violation of Section 1956).

5. **Conspiracies**

It is an offense for two or more persons to conspire to commit a violation of either Section 1956 or 1957. 18 U.S.C. § 1956(h). The penalty for the conspiracy is the same as it would be for the completed act.

D. Illegal Money Transmitting Businesses

Finally, Congress enacted 18 U.S.C. § 1960 to make it an offense for a business (or individual) who transmits money from one place or person to another for a fee to do so without obtaining a license from the applicable state licensing agency, or without registering with FinCEN. *See* 18 U.S.C. § 1960(b)(1)(A) and (B). The focus of the statute is on hawalas and other informal money transmitting businesses that transfer money between the U.S. and foreign countries in a way that makes the money difficult to trace, and that preserves the anonymity of the person whose money is being transferred. It has also been used to target money laundering operations that make use of alternative currencies – such as bitcoins – and other advanced technology. *See United States v. Harmon,* ___ F. Supp.3d ___, 2020 WL 4251347 (D.D.C. Jul. 24, 2020) (defendant engaged in a money transmitting business when he enabled customers to send money from one bitcoin account to another bitcoin account); *United States v. Stetkiw,* 2019 WL 417404, *2-3 (E.D. Mich. Feb. 1, 2019) (§

1960 applies to a Bitcoin exchange; it is not limited to intermediaries who transfer funds on behalf of a client but applies to a person who buys Bitcoin, stores them temporarily, and sells them to another party, all for a commission or fee).

Section 1960 also applies to foreign money transmitting businesses that conduct business through U.S. bank accounts. *See United States v. Mazza-Alaluf,* 621 F.3d 205, 210-11 (2d Cir. 2010) (foreign corporation that conducted money transmitting business in the U.S. through its U.S. bank accounts, may be convicted under § 1960 even though it maintained no office in the U.S. and its officers and customers were all based in a foreign country; § 1960(b)(1)(A) is not limited to domestic financial institutions, but even if it were, a business that transports currency to the U.S., deposits it in New York banks, and uses those banks to transmit the money to customers is a "domestic financial institution").

II. Asset Forfeiture Law in the United States

Federal law in the United States authorizes the confiscation or forfeiture of criminally-tainted property in two ways: as part of the sentence of a defendant convicted of the offense giving rise to the forfeiture, and in a separate non-conviction-based forfeiture action. The former is called "criminal forfeiture" and the latter is called "civil forfeiture."

A. What is forfeitable

In both cases, what can be forfeited varies depending on the nature of the underlying offense. In contrast to the forfeiture laws in other countries, the

federal forfeiture laws contain no uniform "proceeds of crime" or other broadly-applicable asset forfeiture statute that provides for the recovery of criminally-tainted property regardless of the nature of the underlying offense. To the contrary, Congress has taken a piecemeal approach, authorizing the criminal and civil forfeiture of different categories of property for different crimes.

Thus, for example, in drug cases (and many others), the Government may seek to forfeit both the proceeds of the offense and any property used to commit or to facilitate its commission – what is commonly referred to as "facilitating property." *See* 21 U.S.C. § 853(a). In other cases, however, Congress has authorized the forfeiture of only the proceeds of the offense (fraud and most other white-collar crimes fall into this category), *see* 18 U.S.C. § 981(a)(1)(C), or only facilitating property (*e.g.,* in cases involving the looting of archaeological sites, the tools used to commit the offense are forfeitable, but the proceeds are not).

In other cases, Congress has used broad language to authorize the forfeiture of still other categories of property. In money laundering cases, for example, the Government may seek the forfeiture of all "property involved" in the money laundering offense, which includes not only the criminal proceeds being laundered and property that makes the crime easier to commit, but also any property commingled with the tainted funds in the course of the money laundering offense, and any property in which the tainted funds were invested.

18 U.S.C. §§ 981(a)(1)(A) and 982(a)(1). *See United States v. Huber,* 404 F.3d 1047, 1056, 1058 (8th Cir. 2005) ("Forfeiture under section 982(a)(1) in a money laundering case allows the Government to obtain a money judgment representing the value of all property 'involved in' the offense, including the money or other property being laundered [the corpus], and 'any property used to facilitate the laundering offense'"; the corpus includes untainted, commingled property); *United States v. Kivanc*, 714 F.3d 782, 794-95 (4th Cir. 2013) (residence in which fraud proceeds were invested is subject to forfeiture in its entirety as property involved in a money laundering offense, even though legitimate funds were also invested in the property).

In racketeering cases brought under the RICO statute, 18 U.S.C. §§ 1962 and 1963, the Government may forfeit the defendant's entire interest in the RICO enterprise, whether or not it was involved in the pattern of racketeering, *United States v. Anderson*, 782 F.2d 908, 918 (11th Cir. 1986), and in terrorism cases, it may forfeit every asset the terrorist owns regardless of its connection to the terrorist activity. 18 U.S.C. § 981(a)(1)(G). *See United States v. Saade,* 2013 WL 6847034 (S.D.N.Y. Dec. 30, 2013) (§ 981(a)(1)(G), applied through § 2461(c), permits the forfeiture of all property of the defendant, without regard to the absence of any connection between the property and the offense).

Finally, in many cases, Congress has not authorized any forfeiture at all.

No one thinks that this system makes sense. It is the result of the historical process of enacting different forfeiture statutes at different times over a period of more than 200 years. Accordingly, prosecutors in the United States believe that any other country enacting comprehensive asset forfeiture provisions should not follow the U.S. model with respect to what can be forfeited, and instead should enact legislation uniformly authorizing the criminal and civil forfeiture of all property involved in any domestic or foreign criminal offense including the proceeds of the offense, any facilitating property, and in the case of money laundering and similar offenses, any commingled property.

B. Criminal Forfeiture

1. Criminal forfeiture is a mandatory part of the defendant's sentence

When forfeiture is authorized for a particular offense, and the defendant is convicted of that offense in a criminal case, the court must order the forfeiture of the property for which forfeiture is authorized as part of the defendant's sentence. Criminal forfeiture, in other words, is mandatory. *See* 28 U.S.C. § 2461(c) (providing that when any form of forfeiture is authorized for a criminal offense, "the court shall order the forfeiture of the property as part of the sentence in the criminal case pursuant to the Federal Rules of Criminal Procedure"); *United States v. Monsanto*, 491 U.S. 600, 607 (1989) ("Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied..."); *United States v. Waked,* 969 F.3d 1156 (11th Cir. 2020)

(criminal forfeiture is mandatory in a money laundering case under § 982(a)(1); thus, the district court had no discretion to decline to impose a forfeiture order based on equitable considerations, such as the lack of any loss by the victim of the underlying crime); *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.").

2. Directly-forfeitable property, money judgments and substitute assets

A criminal forfeiture order may take several forms. If the defendant is still in possession of the proceeds of his crime or property traceable thereto, or is still in possession of facilitating property, the court must order the forfeiture of that property as part of his sentence. But if he no longer has that property in his possession, or if it cannot be found or is beyond the jurisdiction of the court, the court must order the defendant to pay a personal money judgment based on the value of the missing forfeitable property.

For example, a court may order a drug dealer to forfeit a sum of money equal to the drug proceeds that he earned but did not retain. As one court said, this reflects the nature of criminal forfeiture as "a sanction against the individual

defendant rather than a judgment against the property itself," and is the only way to truly separate the wrongdoer from the fruits of his crime once he has spent them on "wine, women and song." *United States v. Hall,* 434 F.3d 42, 59 (1st Cir. 2006). *See also 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"); *United States v. Phillips*, 704 F.3d 754, 771 (9th Cir. 2012) (following *Newman*; district court had no discretion to refuse to impose money judgment because it thought it unnecessary); *United States v. McGinty*, 610 F.3d 1242, 1246 (10th Cir. 2010) (criminal forfeiture is mandatory under § 982(a)(2); the district court erred in refusing to order the defendant to pay a money judgment equal to the proceeds of his offense); *United States v. Smith,* 749 F.3d 465, 488 (6th Cir. 2014) ("Criminal forfeiture judgments are mandatory for mail fraud convictions").

Finally, if the defendant has untainted property in his possession that may be used to satisfy a forfeiture money judgment, the court must order the forfeiture of that property as a "substitute asset." 21 U.S.C. § 853(p). *See 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. 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 entireties laws).

Similarly, a money launderer is liable to pay a money judgment for the value of the money that he laundered even if the money did not belong to him and he retained little or none of it for himself. *United States v. Waked*, 969 F.3d 1156 (11th Cir. 2020).

3. Proportionality

The only exception to the mandatory nature of criminal forfeiture is the constitutional rule that the forfeiture may not be "grossly disproportional to the gravity of the offense." *United States v. Bajakajian*, 524 U.S. 321, 323 (1998) (holding that full forfeiture of unreported currency in a CMIR case would be "grossly disproportional to the gravity of the offense" in violation of the Excessive Fines Clause of the Eighth Amendment unless the currency was involved in some other criminal activity). *See 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*").

The forfeiture of the proceeds of an offense would rarely if ever be found to be disproportional to the gravity of the offense. But in a case involving facilitating property, or a money laundering case involving commingled property, a court might find that the property was subject to forfeiture in terms of the statute, but nevertheless exempt all or part of it from a forfeiture order to avoid violating the proportionality rule. *See, e.g., United States v. Stanford,* 2014 WL 7013987, *4-6 (W.D. La. Dec. 12, 2014) (declining to forfeit residence when defendant pays down mortgage with commingled funds in violation of § 1957 because the criminal proceeds were a relatively small part of the commingled funds). *But see United States v. Aguasvivas-Castillo*, 668 F.3d 7, 16-17 (1st Cir. 2012) (the forfeiture of $20 million, three-fourths of which comprised untainted funds forfeited under the facilitation theory, was not grossly disproportional to the gravity of a $4.4 million food stamp fraud offense).

4. Criminal forfeiture procedure

The procedures governing criminal forfeiture matters are set forth in two places: in Rule 32.2 of the Federal Rules of Criminal Procedure, and in 21 U.S.C. § 853 (which is made applicable to all criminal forfeitures by 28 U.S.C. § 2461(c)).

To summarize, the Government must include notice in the charging document – *i.e.,* in the indictment or criminal information – that the Government will be seeking forfeiture as part of the defendant's sentence. Rule 32.2(a). If it

has not done so already, the Government may then seek to take the forfeitable property into custody by applying for and obtaining a seizure warrant from the court, 21 U.S.C. § 853(f), or it may seek to restrain the property while leaving it in the defendant's custody and control by obtaining a pre-trial restraining order, 21 U.S.C. § 853(e).

Such seizures and restraints generally occur *ex parte,* with the defendant having to wait until trial to contest the forfeiture of his property. If the defendant is able to show that he has no other property with which to retain counsel in his criminal case, however, he may ask for a hearing at which he may contest the Government's grounds for seizing or restraining the property. *United States v. Jones*, 160 F.3d 641, 647 (10th Cir. 1998). Such a hearing is called a *Monsanto* hearing. *See United States v. Cosme,* 796 F.3d 226 (2nd Cir. 2015) ("A *Monsanto* hearing vindicates a defendant's Sixth Amendment right to counsel by testing in an adversary hearing whether seized assets are properly forfeitable in circumstances where the defendant has insufficient assets from which to fund his defense").

If, at the hearing, the Government fails to establish probable cause to believe that the property will be forfeited upon conviction, it must be released. *See Luis v. United States,* 578 U.S. ___, 136 S. Ct. 1083 (2016). But if the Government satisfies its probable cause burden, the property will remain under restraint, and the defendant must use court-appointed counsel for his defense.

United States v. Monsanto, 491 U.S. 600, 616 (1989) (rejecting Sixth Amendment challenge to pre-trial restraint of forfeitable property that defendant wishes to use for his defense).

Once the case proceeds to trial, the forfeiture issues are set aside until after the court (or jury) has entered a verdict of guilty on at least one offense for which forfeiture is authorized. Then the court must conduct a forfeiture hearing at which the Government has the burden of showing by a preponderance of the evidence that the property is subject to forfeiture in terms of the applicable forfeiture statute. Rule 32.2(b)(1) and (2). For example, if the defendant has been convicted of a fraud offense and the Government is seeking to forfeit his residence as property derived from that offense, the Government must show that the residence is traceable to the defendant's fraud, and is not property that he obtained in some other manner.

If the case was tried before a jury, the defendant has a limited right to have the jury determine if the Government has met its burden, *see* Rule 32.2(b)(5), but in most cases the defendants waive that right.

Once the court has determined what property is subject to forfeiture – or that the defendant must be ordered to pay a money judgment in lieu of the forfeiture of specific assets – the court must enter a forfeiture order as part of his sentence. Rule 32.2(b)(4). If the forfeiture order includes a money judgment, or if it names assets that the Government is unable to recover, the Government

may move at any time to forfeit other property of the defendant as substitute assets. Rule 32.2(e); 21 U.S.C. § 853(p).

To continue the above example, if the defendant was convicted of fraud but the Government failed to show that his residence was acquired with fraud proceeds, the court would enter a money judgment for the value of the missing proceeds, and the Government would have the right to move to forfeit the residence as a substitute asset. *See United States v. Voigt,* 89 F.3d 1050, 1088 (3d Cir. 1996) (order forfeiting jewelry as directly forfeitable property reversed on appeal, but Government remains free on remand to seek forfeiture of same property as substitute asset).

In cases where the defendant enters a guilty plea, his agreement to forfeit property may be incorporated into a written plea agreement, in which case the court will enter a "consent judgment" of forfeiture as part of his sentence. Alternatively, the defendant may plead guilty to the criminal offense but reserve the right to contest the forfeiture at sentencing.

5. Third-party rights

In the forfeiture phase of the criminal trial, the court is concerned only with whether the Government can establish the requisite connection between the assets subject to forfeiture and the criminal offense with which the defendant has been convicted. Accordingly, third parties are not permitted to participate in the forfeiture phase of the trial, *see* 21 U.S.C. § 853(k), and Rule 32.2(b)(2)(A)

expressly provides that the court must enter a *preliminary* forfeiture order "without regard to any third party's interest in the property." *See United States v. Holy Land Found. for Relief & Dev.*, 493 F.3d 469, 477 (5th Cir. 2007) (*en banc*) (§ 853(k) ensures an orderly process that relieves the Government of the burden of having to defend the forfeiture against third party claims during an ongoing prosecution while protecting the third party's right to a day in court later in the proceeding).

The statute and rule recognize, however, that the property subject to forfeiture may actually belong to a third party, not to the defendant. For example, the defendant may have used his wife's property to facilitate the offense, or he may have transferred the proceeds of the offense to a third party after the offense was committed.

Recognizing that it would be a violation of the due process rights of a third party to forfeit the third party's property in a proceeding in which the third party was unable to participate, the statute and rule provide that once the preliminary order of forfeiture is entered, any third party with an interest in the property may assert a claim contesting the forfeiture in a post-trial ancillary proceeding. Rule 32.2(c); 21 U.S.C. § 853(n). *See 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).

The ancillary proceeding is essentially a quiet title proceeding in which the only issue is the ownership of the property. It is not a proceeding in which the third party is allowed to relitigate the merits of the criminal case. Rather, the third party will prevail only if he can establish, by a preponderance of the evidence, that the property belonged to him at the time it was used to commit the criminal offense, or that he acquired the property thereafter as a bona fide purchaser for value who was without reason to know that it was subject to forfeiture when he acquired it. 21 U.S.C. § 853(n)(6)(A) and (B). *See United States v. Timley*, 507 F.3d 1125, 1130 (8th Cir. 2007) (there are two grounds on which to prevail in the ancillary proceeding; the claimant must either demonstrate a priority of ownership under § 853(n)(6)(A), or that he subsequently acquired the property as a bona fide purchaser under § 853(n)(6)(B)); *United States v. Andrews,* 530 F.3d 1232, 1237 (10th Cir. 2008) ("a third party has no right to challenge the preliminary order's finding of forfeitability;" the only issue in the ancillary proceeding is ownership; it is a complete defense to the forfeiture; "if the property really belongs to the third party, he will prevail and recover his property whether there were defects in the criminal trial or the forfeiture process or not; and if the property does not belong to the third party, such defects in the finding of forfeitability are no concern of his").

It is important to understand that establishing a superior interest in the property at the time the offense giving rise to the forfeiture occurred is a complete defense to the forfeiture. 21 U.S.C. § 853(n)(6)(A). Thus, the third party *does not* have to show that he or she was an "innocent owner" of the property. *See United States v. Totaro,* 345 F.3d 989, 995 (8th Cir. 2003) (an innocent owner defense would be superfluous in a criminal case; as property belonging to a third party must be excluded from the forfeiture order, a third party need only show superior ownership, not innocent ownership).

For example, if the defendant says to his wife, "may I use your gun to rob the bank," and proceeds to do so with her consent, the court would order the forfeiture of the gun in the preliminary order of forfeiture based on its connection to the offense, but the wife would prevail in the ancillary proceeding based on her ownership of the property at the time the offense was committed. As discussed below, forfeiting the property of non-innocent third parties in such situations is one of the reasons the Government uses civil forfeiture.

C. Civil Forfeiture

1. Overview

The United States has a robust set of statutes authorizing civil forfeiture actions.

Civil forfeiture cases are *in rem* actions against the property, not against the property owner. In the US, the custom is to name the property in the caption

of the case, which is why civil forfeiture cases are styled in a way that may seem unusual: *e.g., United States v. An Assortment of Firearms,* or *United States v. $17,900 in U.S. Currency.*

This convention – which dates back to the 18th Century – creates the impression that the Government believes that property has done something wrong. In fact, bringing the case as an *in rem* action is simply a procedural device designed to allow anyone with an interest in the property to oppose its forfeiture and litigate his interest at the same time, and the style of the case is merely a way of identifying the property that is the subject of the action. *See United States v. Ursery*, 518 U.S. 267, 295-96 (1996) (Kennedy, J. concurring) (proceedings *in rem* are simply structures that allow the Government to quiet title to criminally-tainted property in a single proceeding in which all interested persons are required to file claims contesting the forfeiture at one time); *United States v. Real Property Located at 475 Martin Lane*, 545 F.3d 1134,1144 (9th Cir. 2008) ("*in rem* actions are generally considered proceedings against the world" in which "the court undertakes to determine all claims that anyone has to a thing in question").

So, for example, if the Government seizes a sum of money that it believes is subject to forfeiture as the proceeds of crime, it names the money as the subject of the forfeiture case, publishes notice, and invites anyone with an interest in contesting the forfeiture of the money to come into the court to do so.

In the United States, this is not a new concept. It was developed in the 18th Century as a way of recovering property from pirates and slave traffickers whose vessels and cargo could be seized, but who remained outside of the jurisdiction of the US and its courts. In such cases, where the Government was able to seize the ship and its cargo but could not lay hands on the ship owner, an *in personam* action such as a criminal prosecution would not have been effective. So, as an alternative, the Government would bring a civil forfeiture action against the ship and invite its owner -- the pirate or slave trafficker -- to come into court to oppose the action. If he refused to appear before the court he could not be prosecuted criminally – there is no possibility of obtaining a conviction in *abstentia* in the United States – but the Government could recover his property.

Federal prosecutors now use civil forfeiture in all manner of cases. As already mentioned, there is no single "proceeds of crime" statute that authorizing either civil or criminal forfeiture for all crimes, but there are hundreds of crimes for which civil forfeiture is authorized on a statute by statute basis. One statute alone – 18 U.S.C. § 981(a)(1)(C) – authorizes the civil forfeiture of the proceeds of the over 250 crimes designated as "specified unlawful activity" for purposes of the money laundering statute. Other civil forfeiture statutes are found throughout the U.S. Code in connection with a myriad of other criminal offenses including immigration offenses (8 U.S.C. § 1324(b)), the looting of archaeological resources (16 U.S.C. § §§ 470gg(b) and (c)), wildlife protection (16 U.S.C. §§

916f, 957, 971e, *et al.*), violations of the Customs laws (19 U.S.C. § 1595a, *et seq.*), and many others. Indeed, the 18th Century focus on pirates and slave traffickers is carried forward in the modern use of civil forfeiture against the assets of terrorists and human traffickers.

Aside from the form of the action, what distinguishes civil forfeiture from criminal forfeiture is that it does not require a conviction or even a criminal case; the forfeiture action may be commenced before a related criminal case is filed, while one is pending, after one is concluded, or if there is no related criminal case at all. *See United States v. One Assortment of 89 Firearms,* 465 U.S. 354, 361-62 (1984); *One Lot Emerald Cut Stones v. United States,* 409 U.S. 232, 234-35 (1972). But the Government nevertheless must prove two things: that a crime was committed, and that the property was derived from or used to commit that crime.

As in a criminal forfeiture case, the Government must establish the second element – the nexus between the property and the offense – by a preponderance of the evidence. But in contrast to a criminal case, it need only establish the first element – that a criminal offense was committed – by a preponderance of the evidence as well, not beyond a reasonable doubt.[3]

[3] Prior to the enactment of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), the burden was on the claimant to prove that the property was *not* subject to forfeiture. CAFRA, however, abolished the reverse burden of proof and placed the burden of establishing the forfeitability of the property on the Government. 18 U.S.C. § 983(c)(1).

For example, if the Government brings a forfeiture action against real property in New York, alleging that it was purchased with the proceeds of a foreign criminal offense, it would have to prove, by a preponderance of the evidence, that the foreign offense occurred and the real property was traceable to the proceeds of that offense. *See United States v. Prevezon Holdings, Ltd.,* 2015 WL 4719786, *8 (S.D.N.Y. Aug. 7, 2015) (tracing proceeds of $230 million theft in Russia to real property in New York).

Similarly, in the case of facilitating property, the Government would have to prove that a crime occurred, and that the property was used to commit the offense or to make it easier to commit or harder to detect. It is important to understand that in such cases, the Government brings the action not because it believes the property owner necessarily was the person who committed the crime, but because it believes that the property was used to commit the crime and thus should be confiscated. Indeed, as far as the Government's burden of proof is concerned, the role of the property owner in the offense is irrelevant. *See, e.g.*, *United States v. 99,337 Pieces of Counterfeit Native American Jewelry*, 2018 WL 1568725 (D.N.M. Mar. 27, 2018) (denying motion to dismiss for failure to allege any wrongdoing on the part of the property owner; in an in rem action, the complaint need not allege any wrongdoing on the part of the property owner).

The property owner, however, is entitled to assert what is known as the innocent owner defense. *See* 18 U.S.C. § 983(d). That is, if the Government is successful in establishing that a crime was committed *by someone* and that the property was derived from or was used to commit that crime, the burden shifts to the property owner to establish, again by a preponderance of the evidence, either that he was unaware of the illegal use of his property when the crime occurred, or that he acquired the property thereafter as a bona fide purchaser for value who was without reason to believe that the property was subject to forfeiture when he acquired it. *See United States v. Ferro,* 681 F.3d 1105, 1109 (9th Cir. 2012) (to prevail on the innocent owner defense, the claimant must prove by a preponderance of the evidence that she was an innocent owner). *See generally United States v. One 1990 Beechcraft*, 619 F.3d 1275, 1278 (11th Cir. 2010) (§ 983(d) was enacted in response to the Supreme Court's decision in *Bennis v. Michigan*, 516 U.S. 442, 446 (1996), holding that an innocent owner defense is not constitutionally required).

So, for example, if someone uses his wife's car to commit a crime, and the wife knew all about it and let it happen, the Government could not forfeit the wife's car as part of the husband's criminal case, but it could forfeit the car in a civil case without having to charge the wife with any crime. It would only have to show that the crime occurred and that the car was used to commit it. The wife would have the opportunity to put on an innocent owner defense, but if she was

aware of the illegal use of her car, she would not prevail. On the other hand, if the wife were able to show that she did not know that her car was being used to commit a crime, she would prevail on the innocent owner defense and would recover the car – and her attorney's fees. 28 U.S.C. § 2465(b) (making the award of attorney's fees mandatory where a claimant prevails in a civil forfeiture case).

Similarly, in a money laundering case, if a money launderer launders his money by selling it to someone who needs dollars, the buyer would be protected if is able to show that he acquired the money as a bona fide purchaser, but not if he is not. *United States v. $822,694.81 in U.S. Currency*, 2019 WL 4369936 (D. Conn. Sep. 12, 2019) (denying summary judgment to account holder who was willfully blind to the source of the money deposited into his account, and who conducted no inquiry in the face of "red flags").

2. When does the Government use civil forfeiture?

In the United States, there is no distinction between criminal courts and civil courts. There are only federal courts of general jurisdiction. Moreover, there is no distinction within federal law enforcement between those authorized to bring criminal prosecutions and those authorized to bring civil forfeiture actions. The same federal prosecutors are authorized to commence a given case as a

criminal prosecution, a civil forfeiture, or as frequently happens, both.[4] Accordingly, in any given case, the Government has at least theoretically the option of attempting to recover criminally tainted property criminally or civilly.

The question thus naturally arises, if civil forfeiture has a lower standard of proof, at least with respect to the proof of the underlying crime (preponderance of the evidence versus beyond a reasonable doubt), and if it does not require a conviction, why doesn't the Government forfeit everything civilly instead of including it as part of a criminal case? Or asked differently, how does the prosecutor decide whether to bring the case criminally as part of a criminal prosecution, or separately in a civil forfeiture action?

First, simply as a matter of resources, if there is going to be a criminal prosecution, it would make little sense for the Government to incur the time and expense of bringing a separate civil action to recover the property after the criminal case is concluded when it could have forfeited the property as part of the defendant's sentence in the criminal case. In a sense, criminal forfeiture provides the prosecution with the opportunity for "one-stop shopping."

Beyond that, however, civil forfeiture turns out to be a much more limited tool in the majority of cases.

[4] As noted below, this does not mean that, for bureaucratic reasons, the respective prosecutors' offices do not organize themselves into criminal and civil divisions, or that they do not appoint particular individuals to serve as the point person for civil forfeiture.

Recall that the Government must prove the property was derived from or used to commit the crime. Because it is an action against specific property, there are no substitute assets or value-based judgments in civil forfeiture cases. So, if the Government cannot establish the connection between the particular asset and the underlying crime, there can be no civil forfeiture. This can be problematic in any case, but particularly in cases involving sophisticated money laundering schemes where hiding the connection between the money and the underlying crime was the object of the entire exercise. In contrast, as discussed above, the *in personam* nature of criminal forfeiture allows the Government to obtain a personal money judgment against the defendant for the value of the missing property, and to satisfy the judgment by forfeiting substitute assets.

For both of these reasons, federal prosecutors in the United States generally reserve civil forfeiture for cases where the criminal prosecution is not possible or not appropriate, or where a criminal case is not ready to indict. Nevertheless, that leaves the following eleven situations in which civil forfeiture is likely to be the prosecutor's vehicle for recovering criminally-tainted property.

1. <u>When the property is seized but the forfeiture is unopposed</u>

It is commonplace in the United States for a defendant accused of a criminal offense to waive his right to contest the forfeiture of the money, firearm or other property seized from his possession at the time of his arrest. In such cases, the Government is able to dispose of the property quickly in an

unopposed NCB forfeiture action (referred to as "administrative forfeiture" in the case law) rather than delaying the disposition of the property until the conclusion of the defendant's criminal trial.

2. When the wrongdoer is dead or is incompetent to stand trial

There can be no criminal forfeiture if the defendant cannot be brought to trial. Thus, in many cases, the Government files an civil forfeiture action because the defendant has died but the property remains subject to forfeiture.[5] The best-known example of this involved former Enron executive Kenneth Lay who died before his criminal conviction and forfeiture judgment became final, and whose criminally-derived assets therefore had to be forfeited in a subsequently-filed civil forfeiture case.[6]

3. When the defendant is a fugitive or a foreign national beyond jurisdiction of the United States.

[5] *See United States v. $120,751.00*, 102 F.3d 342, 344 (8th Cir. 1996) (civil forfeiture does not abate upon the death of the owner).

[6] *See also United States v. $389,820.00 in U.S. Currency,* 2019 WL 4935402 (M.D. Ala. Oct. 4, 2019) (recovery of money found in murdered drug dealer's residence); *United States v. $465,789.31 Seized from Term Life Ins. Policy,* 2018 WL 4568408 (D. Conn. Sep. 24, 2018) (Government files civil forfeiture to recover fraud proceeds when defendant convicted of investment fraud dies pending appeal); *United States v. $7,599,358.90,* 953 F. Supp. 2d 549 (D.N.J. 2013) (proceeds of fraud seized from defendant who promised to provide workmen's com insurance but did not, and committed suicide before trial).

Criminal forfeiture is also not an option if the defendant is a foreign national who commits a crime in a foreign country but launders or invests the proceeds in the United States. In such cases, civil forfeiture is the only available remedy.

Examples of this abound. In a series of cases, federal prosecutors have used civil forfeiture to recover the assets of Gen. Sani Abacha who used banks in the US to launder billions of dollars stolen during his time as the military ruler in Nigeria, of Kim Dotcom who stole millions of dollars of intellectual property from copyright holders in the US while residing in New Zealand, and of Russian organized criminals who stole over $200 million from the Russian treasury and invested some of the money in property in New York.[7]

Similarly, criminal forfeiture is not an option if the defendant commits the crime in the United States but then flees to another jurisdiction, leaving his forfeitable property behind. In such cases, the Government typically files a civil forfeiture action against the property and then invokes the fugitive disentitlement

[7] *United States v. All Assets Held in Account Number 80020796*, 83 F. Supp.3d 360 (D.D.C. 2015) ($2 billion stolen from Nigeria by Gen. Abacha, laundered through U.S. banks, and deposited in Jersey, France and the UK); *United States v. All Assets Listed in Attachment A (MegaUpload, Ltd.)*, 89 F. Supp.3d 813 (E.D. Va. 2015) (funds derived from theft of U.S. intellectual property on internet website managed from New Zealand); *United States v. Prevezon Holdings, Ltd.,* 251 F.Supp.3d 684 (S.D.N.Y. 2017) (timing and pattern of transactions may serve as circumstantial evidence that the money moving through a complex series of transactions is traceable to the original SUA); *United States v. All Assets Held at Bank Julius Baer & Co.*, 664 F. Supp. 2d 97, 102-03 (D.D.C. 2009) (civil forfeiture action to recover more than $250 million deposited into over 20 bank accounts located in Guernsey, Antigua, Switzerland, Lithuania, and Lichtenstein by former Ukrainian Prime Minister Pavel Lazerenko).

doctrine, 28 U.S.C. § 2466, to bar the fugitive from contesting the forfeiture until and unless he surrenders to face the criminal charges.[8]

4. When the statute of limitations has run on the criminal case

In the United States, a criminal prosecution generally must be commenced within five years of the date of the offense. Civil forfeiture actions also have a five-year limitations period, but the time runs from the date of the *discovery* of the offense, not the date when the offense occurred. 19 U.S.C. § 1621. So, there are cases in which a criminal prosecution is not viable because the statute of limitations has expired but civil forfeiture remains available as a means of recovering the criminally-tainted property. This is frequently the case with respect to cultural property that was stolen decades ago but is only now found in an auction house or in a private collection.[9]

5. When the Government as recovered the property but does not know who committed the crime giving rise to the forfeiture

It is not uncommon for law enforcement agents to recover property that is demonstrably connected to a criminal offense even though it is not possible to

[8] *See United States v. $506,069.09 Seized from First Merit Bank*, 664 Fed. Appx. 422 (6th Cir. 2016) (doctor in Ohio obtains drug proceeds from selling prescriptions for pain killers, puts the money in a bank account and flees to Pakistan); *United States v. Real Property Known As 7208 East 65th Pl.,* 185 F. Supp.3d 1288 (N.D. Okla. 2016) (defendant indicted for selling worthless medicine to terminally ill cancer patients flees to Mexico).

[9] *See United States v. Portrait of Wally,* 105 F. Supp. 2d 288 (S.D.N.Y. 2000) (civil forfeiture action to recover painting stolen by the Nazis from Jewish family during the Holocaust).

determine who the perpetrator of the offense happens to be. For example, if weapons, flight simulators, contraband electronics, or money is intercepted while on the way to a country designated as a supporter of terrorism, the property is subject to forfeiture even though it is unclear who the exporter or recipient of the property might be, and there is therefore no one to prosecute and no one to convict in a criminal case.

The same is true if bundles of money wrapped in rubber bands and tainted with drug residue are seized from a courier who is unable (or unwilling) to identify the owner of the property, or if a cultural artifact or work of art is recovered from an auction house but no one knows who stole it or imported it.

In all of those instances, a non-conviction-based order will reach the property and force the property owner to come forward to contest the forfeiture proceeding.[10]

[10] *See United States v. 113 Virtual Currency Accounts,* 2020 WL 4515361 (D.D.C. Aug. 4, 2020) (finding probable cause and issuing arrest warrant in rem for virtual currency accounts involved in international money laundering and as the assets of North Korea, a state sponsor of terrorism, subject to forfeiture under § 981(a)(1)(G)); *United States v. All Petroleum-Product Cargo,* 2020 WL 3771953 (D.D.C. Jul. 2, 2020) (issuing arrest warrant *in rem* for gasoline en route from Iran to Venezuela as the property of a terrorist organization subject to forfeiture under § 981(a)(1)(G)); *United States v. One Gold Ring with Carved Gemstone,* 2019 WL 5853493 (D.D.C. Nov. 7, 2019) (entering default judgment under § 981(a)(1)(G) against foreign assets of terrorist organization ISIS); *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); *United States v. Two General Electric Aircraft Engines*, 2016 WL 6495397 (D.D.C. Nov. 2, 2016) (civil forfeiture action against two aircraft engines being shipped to Iran in violation of US law and were intended to be delivered to a terrorist organization: the Islamic Revolutionary Guard Corps-Qods Force)..

6. When the defendant pleads guilty to a crime different from the one giving rise to the forfeiture

As mentioned earlier, the federal courts in the United States have not fully adopted the concept of 'extended confiscation' whereby a conviction for a given offense will give rise to a forfeiture order directed at the proceeds of all other crimes that the same defendant has committed. To the contrary, because criminal forfeiture is regarded as part of the defendant's sentence relating to the commission of a given offense, only property connected to the commission of that offense is subject to criminal forfeiture. In those cases, the Government must bring a non-conviction-based forfeiture action to recover any property involved in other offenses.[11]

7. When there is no federal criminal case because the defendant has already been convicted in a state or foreign or tribal court

Suppose a crime was committed outside of the United States and the perpetrator has been convicted in the foreign country, but the property is now in the United States and the foreign country has not (for whatever reason) been able to obtain a confiscation order that the US is able to enforce. In that case,

[11] *See United States v. Duran*, 769 Fed. Appx. 626 (10th Cir. 2019) (guilty plea in connection with second bank robbery includes consent to the civil forfeiture of the proceeds on an earlier bank robbery); *United States v. Real Property Located at 8 Drift Street,* 2020 WL 833070 (D.N.J. Feb. 20, 2020) (civil forfeiture action against real property and bank accounts traceable to theft of $3.7 million in China filed after defendant, who was originally charged with money laundering, pled only to criminal contempt).

even if the US were able to lay hands on the defendant it might be unnecessary – and be considered a waste of judicial resources – to prosecute him a second time for crimes that he committed in the US just to recover his US-based criminal assets. The same could true regarding a federal criminal prosecution for an offense for which the defendant has already been convicted in a state court.

In both instances, filing a civil forfeiture action allows the Government to recover the property in federal court without having to bring an unnecessary second criminal prosecution.[12]

8. When there is no criminal case because the interests of justice do not require a conviction

There are many times when the Government chooses not to bring a criminal case even though there was a clear violation of the criminal law because the interests of justice do not require a conviction. This is called the exercise of prosecutorial discretion.

Suppose, for example, a convicted felon has persuaded his 70-year old mother to purchase a firearm on his behalf, in a situation where both of them know that it is a violation of federal law for a convicted felon to possess such a

[12] *See United States v. $7,679.00 U.S. Currency,* 2015 WL 7571910 (W.D.N.Y. Nov. 24, 2015) (defendant pleads guilty to state drug offense and federal agency adopts seizure for civil forfeiture under federal law).

weapon. And suppose the mother not only buys the firearm but lies on the required document when asked if she is buying it for herself or for a third party.

In that case, the mother has clearly violated federal law and would be subject to criminal prosecution, but faced with the choice between doing nothing (and allowing the felon to retain the weapon) and bringing criminal charges against the aged woman, the Government might decide that confiscating the weapon pursuant to a non-conviction-based forfeiture order is the right thing to do.[13]

9. When the evidence is insufficient to prove that the crime was committed by a particular defendant beyond a reasonable doubt

In both criminal and civil forfeiture cases, the Government bears the burden of proving the connection between the property and the criminal offense by a balance of the probabilities. The same standard applies in civil cases to the Government's proof that a crime was committed, but in criminal cases the Government must prove not only that a crime was committed, but that a *particular defendant* committed the crime beyond a reasonable doubt. When the Government cannot meet that higher standard in a criminal case, it may resort to civil forfeiture as the appropriate means of recovering the property, because in

[13] *See United States v. 6 Firearms, Accessories and Ammunition,* 2015 WL 4660126 (W.D. Wash. Aug. 5, 2015) (circumstantial evidence established that claimant was actually purchasing firearms for her convicted-felon son).

such cases it need only prove, by a preponderance of the evidence, that the crime giving rise to the forfeiture was committed *by someone*.

10. When the defendant uses someone else's property to commit the crime and that person is not an innocent owner

As mentioned earlier, it is not uncommon for a defendant to use another person's property to commit a criminal offense. For example, he may have laundered his money through a third party's business, robbed a bank with a third party's gun, or distributed drugs using a third party's airplane. In such cases, civil forfeiture makes it possible to forfeit the third party's interest in the property without having to charge the third party with a crime. Indeed, because federal law in the United States does not permit the forfeiture of a third party's property in a criminal case even if the person is not an innocent owner, civil forfeiture is the only way for the Government to recover the property without charging the third party with a criminal offense.

In such cases, the third party would have the right to intervene and defend his property interest by contesting the Government's proof on the merits and/or by asserting that he is an innocent owner of the property.[14]

[14] *See United States v. One Red 2003 Hummer H2*, 234 F. Supp.3d 415 (W.D.N.Y. 2017) (forfeiting vehicle used by owner's son to transport illegal drugs; civil forfeiture necessary to forfeit interest of third party even though person in possession was charged criminally); *In re Marks Family Trucking*, LLC, 64 B.R. 255 (E.D. Wis. 2017) (noting that when LLC that defendant controlled filed a claim in the ancillary proceeding, Government switched to civil forfeiture to avoid litigating the ownership issue in the criminal case).

11. When the criminal case is not ready to take to trial but there is a danger that the property will disappear.

Finally, federal prosecutors may commence a civil forfeiture action as a means of freezing forfeitable property while a criminal investigation is underway but before the Government is ready to file formal criminal charges. In such cases, which are common, the Government commences the forfeiture action but then asks the court to stay the civil case to avoid having to disclose the details of the criminal investigation in the course of civil discovery. *See* 18 U.S.C. § 981(g) (setting forth the procedure for staying a civil forfeiture case).

At the same time, the property owner is highly likely to agree to the stay, or to seek a stay on his own behalf, to avoid having to choose between waiving his Fifth Amendment right against self-incrimination and failing to give evidence in defense of his property.

Indeed, beyond the United States, this turns out to be a key reason for enacting civil or NCB forfeiture provisions in civil law jurisdictions, where the investigation of politically exposed persons involved in corruption cases can take years to resolve.

Given the significance of the cases that fall into these eleven categories, and the frequency with which these situations arise, federal prosecutors believe

that a system that relied exclusively on criminal forfeiture would be ineffective, and that therefore civil forfeiture is an essential component of any asset forfeiture and asset recovery program.

3. Civil forfeiture procedure

As in the case of criminal forfeiture, the procedures for bringing a civil forfeiture action are mainly codified in two places: in a suite of statutes enacted by the Civil Forfeiture Reform Act of 2000 (CAFRA) -- 18 U.S.C. §§ 981, and 983-86, and in one of the Federal Rules of Civil Procedure – Rule G of the Supplemental Rules for Admiralty and Maritime Claims and Asset Forfeiture Actions.

In short, the procedure for forfeiting property in a civil forfeiture case is as follows:

1. A law enforcement agency seizes the property, usually with a warrant issued by a judge, and sends notice of the Government's intent to forfeit the property to the property owner, 18 U.S.C. §§ 981(b) and 983(a)(1);[15]

2. Anyone with an interest in the property has 30 days in which to assert an interest in the property, 18 U.S.C. § 983(a)(2);

[15] A slightly different procedure applies to the forfeiture of real property. In such cases, the process begins with Step 4, with the property remaining in the possession of the property owner, subject to a notice of *lis pendens* or a pre-trial restraining order. *See* 18 U.S.C. §§ 985 and 983(j).

3. If no one files a claim, the property is forfeited by default (this is called an "administrative forfeiture"), 19 U.S.C. § 1609.

4. If someone files a claim, the seizing agency turns the property over the United States Attorney who has 90 days in which to file a complaint in federal court, setting forth the grounds to believe the property is subject to forfeiture, 18 U.S.C. § 983(a)(3), Rule G(2);

5. The U.S. Attorney must send a copy of the complaint to all potential claimants and publish notice of the forfeiture action on the Government's internet website, www.forfeiture.gov; Rule G(4);

6. Any person wishing to intervene in the judicial forfeiture proceeding must file a claim stating, under oath, his interest in the property, and an answer to the Government's allegations, Rule G(5);

7. The parties may engage in civil discovery and motions practice in the district court; among other things the Government may move to strike a claim for lack of standing (an issue on which the claimant bears the burden of proof), the claimant may move to suppress illegally seized evidence, and either party may move for summary judgment based on the undisputed facts, Rule G(6) and Rule G(8);

8. If the case is unresolved and goes to trial, the Government bears the initial burden of proving that the property is subject to forfeiture, 18 U.S.C. § 983(c)(1), and if the Government meets its burden, the claimant bears the burden of proof

on the innocent owner defense, 18 U.S.C. § 983(d); the claimant has the right to trial by jury on these issues, Rule G(9);

9. The claimant may also oppose the forfeiture on the ground that it would violate the Excessive Fines Clause of the Eighth Amendment because it would be grossly disproportional to the gravity of the offense, 18 U.S.C. § 983(g);

10. If, at the end of the day, the Government prevails, the court makes a forfeiture order conveying title to the property to the United States. If the claimant prevails, he or she is entitled to be reimbursed for attorney's fees, costs, and interest. 28 U.S.C. § 2465(b).

4. Constitutional Safeguards

While civil forfeiture does not require a criminal conviction, most of the safeguards for individual liberty that apply in criminal cases apply equally in civil forfeiture cases. Where exceptions exist, the rationale is that the protections that apply when someone's liberty is at stake have historically not applied when the only issue is the imposition of a monetary penalty or the loss of property.

In both criminal and civil forfeiture cases, the property owner enjoys the right to have the forfeitability of his property determined by a jury, and to have the Government establish the nexus between the property and the offense by a balance of the probabilities. In both cases, the property owner also has the right to move to suppress evidence that was obtained in violation of his Fourth Amendment protection against unreasonable searches and seizures. And in

both cases, the forfeiture is limited by the Excessive Fines Clause of the Eighth Amendment which bars forfeitures that are "gross disproportional to the gravity of the offense."

In addition, both legislative schemes protect the rights of third parties by allowing them to intervene in the forfeiture case and to assert that the property belongs to them (which is a complete defense to criminal forfeiture) or that it belongs to them and they qualify as innocent owners (in civil cases). In both cases, the burden of proof is on the third party to establish that he is entitled to have his property exempted from forfeiture.

Finally, in both cases, the party that fails to prevail at the trial level has the right to appeal.

In other instances, the protections afforded in civil forfeiture cases are actually greater than they are in criminal cases. For example, the scope of civil discovery in civil cases is much broader than the scope of criminal discovery. Thus, in civil forfeiture cases, the claimant / property owner can force the Government to divulge evidence and produce witnesses in advance of trial that the Government would not be required to divulge or produce in a criminal case. [1] *See United States v. Approximately $69,577 in U.S. Currency,* 2009 WL 1404690, *3 (N.D. Cal. May 19, 2009) (Government is entitled to stay if providing discovery to defendant's family members in the civil case would provide

defendant with earlier and broader discovery than he could obtain in his criminal case).

Also, while hearsay is admissible in criminal forfeiture cases to establish the forfeitability of the property after the defendant is convicted (because the forfeiture proceeding is deemed to be part of the sentencing process), in civil forfeiture cases the Government must establish both elements – that a crime occurred and that the property was derived from or used to commit the crime – with admissible non-hearsay evidence. *Compare United States v. Ali*, 619 F.3d 713, 720 (7th Cir. 2010) (hearsay admissible in criminal forfeiture proceedings) *with United States v. $92,203.00 in U.S. Currency,* 537 F.3d 504, 510 (5th Cir. 2008) (hearsay not admissible in civil forfeiture cases).

Furthermore, a variety of due process protections apply in civil forfeiture cases that have no counterpart in criminal cases. For example, the Government must commence a civil forfeiture proceeding by providing notice to anyone with a potential interest in the property in a manner that is likely to achieve actual notice. *Dusenbery v. United States*, 534 U.S. 161, 167 (2002). Moreover, the Government must commence its action within a fixed time following the seizure of the property and the demand by the property owner for its return.

There are other instances, however, in which the safeguards in criminal cases are greater than those in civil cases, the most important of which concerns the burden of proof. While the Government bears the burden of proof in both

cases, and while it is required to establish the nexus between the property and the offense by the same standard in both cases, in criminal cases the Government must establish that a crime was committed, and was committed by a particular person, beyond a reasonable doubt, whereas in civil forfeiture cases it need only prove that a crime was committed *by someone* by a balance of the probabilities. This reflects the historical view in the United States that the higher standard must be met when a person's life or liberty is at stake, but that the lower standard is sufficient when the litigation concerns only the possibility of a monetary penalty or the loss of a property interest. *See United States v. $114,700.00 in U.S. Currency,* 2017 WL 6205529 (D. Col. Dec. 8, 2017) (Report and Recommendation) (rejecting due process challenge to the preponderance standard; civil forfeiture serves an important Government purpose, there is a clear rationale to the preponderance standard, and the other protections in CAFRA are adequate to ensure property is not taken without due process; beyond a reasonable doubt is reserved for criminal cases, and clear and convincing applies in extraordinary cases involving deportation, denaturalization and termination of parental rights, not cases involving the loss of money), adopted by the district court, 2018 WL 655040 (D. Col. Feb. 1, 2018).

Criminal and civil cases also differ with respect to the application of the Fifth Amendment right against self-incrimination. While the defendant / claimant retains the right to refuse to be a witness against himself in both cases, the

consequences of invoking that right differ depending on the nature of the proceeding. In criminal cases, the Government can make no reference to, nor draw any adverse inference from, the defendant's invocation of his Fifth Amendment right to remain silent. In contrast, in civil forfeiture cases, if a claimant invokes that right, the court may draw an adverse inference from his silence. *See, e.g., United States v. U.S. Currency in the Amount of $119,984.00,* 304 F.3d 165, 177 (2d Cir. 2002).

Moreover, a claimant who refuses to answer any questions regarding his relationship to the property in a civil forfeiture case may find that he is unable to satisfy his burden of establishing standing to contest the forfeiture. *See United States v. $162,576.00 in U.S. Currency,* 2011 WL 5239747, *5-6 (M.D. Ga. Nov. 1, 2011).

Finally, criminal and civil cases differ with respect to the application of the Sixth Amendment right to counsel. In neither case may the defendant / claimant use criminally-derived funds to pay for an attorney. *See Luis v. United States,* 136 S. Ct. 1083 (2016). In criminal cases, however, a defendant who is barred from using his property for that purpose is entitled to the appointment of counsel at the Government's expense. In contrast, in civil forfeiture cases, a claimant is entitled to the appointment of counsel only if the property subject to forfeiture is his personal residence. 18 U.S.C. § 983(b). In all other cases, the claimant must

await the outcome of the case, and is entitled to be reimbursed for his attorney's fees only if he prevails.

III. Allocation of Responsibilities Relating to Money Laundering

The United States is a common law country, which means that unlike the system in civil law jurisdictions, federal courts and judges take no part in the investigation and prosecution of criminal cases. The cases are investigated by law enforcement agencies and are presented in court by federal prosecutors.

All asset forfeiture investigations are considered criminal investigations; when the investigation is complete, the prosecutor decides whether to seek the forfeiture of assets as part of the defendant's sentence in a criminal case or in a separate civil forfeiture action.

As mentioned earlier, there is no distinction between criminal and civil courts in the federal judicial system: All federal judges can and do hear both criminal and civil cases, including criminal and civil asset forfeiture cases. Accordingly, whether the prosecutor decides to pursue the forfeiture criminally or otherwise, the forfeiture action is filed by the same prosecutor in the same court.

Criminal investigations are generally initiated by one of the federal law enforcement agencies. Each agency has areas of expertise and responsibility. For example, the FBI (Federal Bureau of Investigation) investigates fraud and corruption cases; the DEA (Drug Enforcement Administration) investigates drug cases; HIS (Homeland Security Investigations) investigates smuggling,

immigration, and other cross-border cases, the ATF (Bureau of Alcohol, Tobacco, Firearms and Explosives) investigates firearms cases, and so forth. Because money laundering is a crime that cuts across all jurisdictional lines, many agencies have the authority to investigate money laundering cases if the underlying crime falls within their jurisdiction. In addition, given its expertise in cases involving financial crimes, the IRS (Internal Revenue Service) is often brought into cases involving complex money laundering.

The same agencies investigate the cases in the same way whether the recovery of the assets involved in the case will ultimately be pursued as a criminal forfeiture or as a civil forfeiture action.

The investigative tools available to the agents include physical and electronic surveillance, witness interviews, subpoenas requiring the compulsory production of records (including bank records), searches and seizures, and calling witnesses before an investigative grand jury. At the investigative stage, the same tools are available, and the same rights against self-incrimination and unreasonable searches and seizures apply, whether the prosecutor ultimately decides to pursue the forfeiture case criminally or civilly. Indeed, in most cases, the prosecutor will not have made any decision as to the method of forfeiture until the investigation is complete.

When the agency feels that the investigation has reached a certain point, the agents present it to a federal prosecutor, who may say that the case is ready

to file in court or may suggest that some additional investigation is required. It is the agency's responsibility not only to investigate the crime and to gather the evidence needed to prove it, but also to locate the assets that were derived from the crime or that were used to commit it, and to assemble the evidence that will be needed to establish that connection in court. Thus, while it is a rare occurrence, a prosecutor may decide that a case is not ready to file because although the agents have completed their investigation of the underlying crime, they have not completed their investigation of the assets subject to forfeiture.

When the prosecutor decides that the case is ready, he or she will decide if the Government will attempt to recover the assets as part of a criminal case or in a civil forfeiture action separate from any criminal prosecution. Money laundering cases are not treated any differently from other criminal cases with respect to any of the foregoing procedures.

Prosecution authority for all federal crimes including money laundering resides in the U.S. Attorney's Offices in the 94 judicial districts that are distributed throughout the United States. If a money laundering case involves acts that occurred in more than one district, the agents investigating the case will have a choice as to which of the U.S. Attorneys it will present the case.

Most U.S. Attorney's Offices divide responsibility for federal litigation between Civil and Criminal Divisions. In some cases, however, the responsibility for handling civil forfeiture cases resides in the Criminal Division. In those cases,

that decision recognizes that although the *procedures* in civil forfeiture case are akin to those employed in ordinary civil practice, civil forfeiture is regarded as an alternative tool for enforcing the criminal laws, and that it differs in kind from the other types of civil litigation in which the attorneys in the Civil Division of a U.S. Attorney's Office would normally be engaged.

While all federal prosecutors are expected to have sufficient familiarity with the criminal forfeiture laws to include a criminal forfeiture notice in their criminal indictments and to request the court to issue a forfeiture order at the conclusion of the criminal trial, many U.S. Attorney's Offices have designed asset forfeiture specialists to assist in that process. Moreover, in virtually every U.S. Attorney's Office, there will be one or more persons who handle all of the civil forfeiture cases; this reflects the unique procedures governing such cases and the need for specialized expertise to handle them properly.

In the smaller U.S. Attorney's Offices, there is no separate money laundering section; thus, money laundering charges may be included whenever appropriate by whichever federal prosecutor is handling the particular case. Some of the larger U.S. Attorney's Offices, however, have a specialized Money Laundering Section or Asset Forfeiture and Money Laundering Section in which a

cadre of experts in those areas are co-located and are available to take on the more complex money laundering and forfeiture cases.[16]

In addition to the U.S. Attorney's Offices in the 94 judicial districts, prosecutorial authority also resides in the Criminal Division of Department of Justice headquarters in Washington, DC – what is commonly referred to as Main Justice. The Criminal Division, in turn, is divided into a number of litigating sections, one of which is the Money Laundering and Asset Recovery Section (MLARS).

There is no clear delineation between the types of money laundering and asset forfeiture cases that are handled by MLARS and those that are handled by the U.S. Attorneys in the districts in which those cases arise. But as a general matter, MLARS is likely to handle cases that cross district lines, that are unusually complex in nature, that involve a substantial number of foreign transactions or actors, or that arise in a district that lacks to resources to handle a particularly large case. In addition, MLARS has its own specialized units handling foreign kleptocracy cases and cases in which financial institutions are the targets of the investigation.

[16] The author was the Chief of the Asset Forfeiture and Money Laundering Section in the U.S. Attorney's Office for the District of Maryland from 2009 to 2015.

IV. ASSESMENT OF EFFECTIVENESS

There is no accepted set of metrics that has been, or could be, used to assess the effectiveness of the criminal and asset forfeiture statutes in combatting money laundering. What empirical evidence exists consists of the number of money laundering cases indicted and convictions obtained in a given year, and the number of dollars or other assets seized and forfeited. Those numbers indicate a robust anti-money laundering program in the federal system in the United States that has annually resulted in scores of convictions and recovered hundreds of millions of dollars, but they do not shed much light on the effect such prosecutions and recoveries have had in deterring money laundering activity.[17]

It may be more useful to look at the reasons why prosecutors find it worthwhile and important to include money laundering charges in their criminal indictments, even if the defendant is also charged with other criminal offenses.

[17] The Department of Justice publishes annual statistics regarding the value of assets recovered through criminal and civil asset forfeiture. While these statistics are not broken down by the type of underlying crime, it can be assumed that a large fraction of the recoveries were in money laundering cases, as the money laundering forfeiture statutes are among the most frequently used by federal prosecutors. The data from the Justice Department's Assets Forfeiture Fund are published at https://www.justice.gov/afp. It shows deposits for the FY13 – FY16 totaling the following amounts, respectively: $2.1 billion, $4.5 billion, $1.6 billion, $1.9 billion. The variation is due to the inclusion two extraordinarily large recoveries in FY14. There is also a smaller Treasury Fund that collects receipts from cases handled by the Department of Homeland Security and the Department of the Treasury. Receipts into the Treasury Fund are typically one-third of those into the DOJ Fund. The total federal forfeiture receipts may be computed by aggregating the two Funds. For FY17, the DOJ fund deposited $1.64 billion, of which $480 million was derived from uncontested NCB forfeitures, $580 million from contested NCB forfeitures, and $590 million from criminal forfeitures.

First, money laundering charges allow the prosecutors to expand the universe of defendants who can be charged in a criminal case**.** While many money laundering defendants are charged with laundering the proceeds of their own crimes ("self-money laundering"), others will have been involved only in the movement of the money *after* the crime was complete ("third party money laundering"). A full financial investigation of the underlying crime and the disposition of its proceeds will therefore allow the Government to bring money laundering charges against defendants who could not be charged with the underlying crime, and thus signal the Government's unwillingness to allow the integration of criminal proceeds into the stream of commerce, and the facilitation of the use of such proceeds to fund a personal lifestyle, to go unpunished.[18]

Second, including money laundering charges allows the Government, in effect, to extend the statute of limitations for the predicate offense. The statute of limitations for the underlying crime runs from when that crime occurred; it is generally a period of five years. But the statute of limitations for money laundering runs from the date of the financial transaction that involved the proceeds of the underlying crime. So, for example, while a theft or fraud that occurred ten years ago would likely fall outside the statute of limitations for that

[18] *See United States v. Tolliver,* 949 F.3d 244 (6th Cir. 2020) (defendant acquitted of drug conspiracy but convicted of laundering the drug proceeds); *United States v. Silver,* 948 F.3d 538 (2nd Cir. 2020) (there is no requirement that the defendant be convicted of the predicate crime or even that he was the perpetrator; it is sufficient to prove, beyond a reasonable doubt, that someone committed each of the elements of the predicate crime, and that the defendant knew the money was criminally derived).

offense, a financial transaction involving the proceeds of the offense may have occurred yesterday. Because criminal proceeds remain criminal proceeds regardless of the passage of time, the latter financial transaction could be prosecuted as a money laundering offense, thus allowing the Government to bring the perpetrator to justice after the statute of limitations for the underlying crime had expired.[19]

Third, including money laundering charges in a criminal case expands the categories of evidence admissible at trial**.** When the defendant is charged only with the underlying crime, courts will generally allow only evidence relevant to that crime into evidence. That can lead to some very colorful and effective evidence regarding what the defendant did with the money – that he bought expensive cars, or hid the money in bank accounts in third party names – being excluded. But if the defendant is charged with money laundering, all of that is relevant and admissible.[20]

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[19] *See United States v. Silver,* 948 F.3d 538 (2nd Cir. 2020) (the statute of limitations for money laundering runs from the date of the financial transaction, which is the *actus reus* of the crime, not from the date of the underlying offense; thus, a money laundering conviction may be based on transactions involving proceeds of a crime that occurred outside the 5-year limitations period for money laundering); *United States v. Miller*, 2012 WL 2362366 (E.D. Pa. June 21, 2012) (defendant convicted of concealment money laundering when he uses house purchased 10 years earlier with drug proceeds to obtain a new mortgage loan and then launders the proceeds).

[20] *See United States v. Arledge*, 553 F.3d 881, 896 (5th Cir. 2008) (evidence of defendant's lavish spending was relevant to the money laundering counts, was not an improper appeal to class prejudice, and did not have a spillover prejudicial effect on other counts).

Fourth, charging a defendant with money laundering can result in an enhanced sentence in a criminal case, as the sentencing court takes into account the additional social harm caused by the defendant's efforts to conceal or disguise his criminal proceeds from the Government or from his victims, or the use of those proceeds to acquire wealth and economic and political influence.[21]

Finally, and perhaps most importantly, forfeiture under the money laundering statutes is almost always broader than it is for the underlying crime. As mentioned earlier, forfeiture in most federal criminal cases is limited to the proceeds of the crime or property used to commit it. But in money laundering cases, the Government is able to recover all property "involved in" the money laundering offense, which may include commingled funds and entire assets that are acquired in part with criminal proceeds and in part with other funds. Thus, prosecutors wishing to maximize the property that can be recovered in a criminal case – and restored to the victims – are encouraged to include money laundering charges in their indictments.

The benefits of forfeiture in money laundering cases are not limited, of course, to criminal prosecutions. The effective use of the civil forfeiture statutes in money laundering cases involving terrorist financing, the laundering of the

[21] The advisory Sentencing Guidelines provide that federal courts should add one or two "offense levels" for a defendant who is convicted of money laundering in addition to the predicate offense. *See* U.S.S.G. § 2S1.1.

proceeds of kleptocracy through U.S. bank accounts, the use of the U.S. financial system to circumvent international sanctions against countries such as Iran and North Korea, the international laundering of drug proceeds, the investment of money by foreign oligarchs in U.S. real estate, and the many other examples of the use of those forfeiture statutes given throughout this report stand as compelling testimony to the effectiveness and essential nature of such statutes as part of a comprehensive anti-money laundering regime.

In sum, an effective anti-money laundering regime must include the ability to prosecute both the perpetrator of the underlying crime and a third party money launderer for the money laundering offense; must recognize any domestic *or foreign* crime as a predicate for money laundering; and must include broadly-defined authority to recover the property involved in a money laundering offense either as part of a criminal prosecution or in a separate non-conviction-based or civil forfeiture action. And the agents charged with investigating such cases and the prosecutors charged with bringing cases in court, must be properly trained and supported in the use of those statutes.

The federal forfeiture statutes in the United States, and the training and support afforded agents and prosecutors, by and large, satisfy these requirements, which allows federal authorities in the United States to say that they have developed an effective anti-money laundering program however such programs are measured.