

NCB FORFEITURE IN MALTA

How the Provisions of Part VI of the Proceeds of Crime Act Will Work

Malta – March 25, 2022

Stefan D. Cassella

Asset Forfeiture Law, LLC

www.AssetForfeitureLaw.us

Cassella@AssetForfeitureLaw.us¹

INTRODUCTION

Under Part VI of the Proceeds of Crime Act, Malta now has the ability to recover criminally-tainted property using Non-Conviction-Based (NCB) Forfeiture in certain situations.

NCB forfeiture is a law enforcement tool

- It is a means of recovering criminally tainted property when a criminal prosecution is not possible
- It does not require a criminal conviction,
- but in all other respects it is a law enforcement action in which the Government must prove that a crime was committed and that the property was derived from or used in the commission of the crime

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

This is a process that is well-known in the United States, in most common law countries, and in an increasing number of civil law countries as well

- its popularity reflects the need to have a tool to recover property when a criminal prosecution is not possible
- in other words, it fills a gap in the law

In the United States we have been doing this for over 200 years

- it started in the 18th Century when the Government could seize pirate ships and ships used for slave trafficking but could not lay hands on the pirate or slave trader
- we now can use NCB forfeiture in all manner of cases from drug trafficking to terrorism, to fraud and public corruption
- the cases that are now underway to seize and forfeit the property of Russian oligarchs in the United States and in other countries are NCB forfeiture cases

I am going to go through the provisions in Part VI of the POCA to explain when you are permitted to use NCB forfeiture, what property is subject to forfeiture, and how the procedure is intended to work.

- So, to repeat, we will discuss 1) when you can use this; 2) what you can recover; and 3) how to do it

WHEN DOES NCB FORFEITURE APPLY

Art. 43 says that the Government may use NCB forfeiture to recover property in a wide variety of cases including –

- Drug trafficking
- Terrorism and terrorist financing
- Money laundering
- Arms trafficking
- Violations of UN Sanctions
- Crimes involving organized crime

- “any other crime liable in Malta to . . . imprisonment of not less than 10 years”
- Provided that one of the following circumstances is present
 - 1) when the person who committed the crime is dead;
 - 2) when he is a fugitive; or
 - 3) when he committed the crime from outside of Malta and is not subject to the jurisdiction of a court in Malta

So, the underlying crime giving rise to the forfeiture has to be one of the crimes on this list and one of these circumstances has to apply

For example:

- 1) a person committed fraud in Malta, accumulated proceeds of his crime in Malta, but died before he could be prosecuted criminally
 - is fraud one of the crimes on the list? 10-year felony
 - is one of the circumstances satisfied? dead perpetrator is one of the circumstances
 - suppose he’s not dead but has fled and can’t be found? Fugitive
- 2) a person sold drugs in France and invested his proceeds in Malta but has never been to Malta
 - is drug trafficking one of the crimes on the list? Yes
 - does it matter that it involves a foreign crime? Article 47 specifically says that the property is subject to confiscation whether the underlying crime was committed “in Malta or outside Malta”
 - Does this fit into one of the circumstances when the NCB statute applies? Yes, he is not in Malta and not subject to your jurisdiction
- 3) a person is a corrupt public official in another country who laundered his property in Malta

- is corruption one of the crimes on the list? Maybe, if it comes under the 10-year felony provision
 - if not, is it still covered because money laundering is on the list?
 - Suppose he's still here: not a fugitive; not dead? No NCB forfeiture; he could be prosecuted for money laundering
 - But suppose after he launders his money in Malta he disappears? Yes, then he's a fugitive
- 4) a corrupt Russian oligarch obtained his wealth through crimes committed in Russia and used that money to buy a yacht that is now in Malta
- could you use NCB forfeiture to confiscate the yacht?

WHAT PROPERTY IS SUBJECT TO FORFEITURE

And what kinds of property can be confiscated?

- There is some ambiguity in the statute
- Art. 43 says that NCB forfeiture may be used to forfeit the proceeds of any of the crimes on the list
- But Art. 44(3) says that an action may be brought “to recover any property subject to confiscation”

The key term is “property subject to confiscation” which is defined in Art. 3(6) to include three things:

- 1) the proceeds of a crime;
- 2) property used or intended to be used to facilitate a crime; and
- 3) property involved in a money laundering offense.

So, we have to assume that NCB forfeiture can be used to confiscate property that falls into any of those categories

- Let me explain what those terms mean

Proceeds

What constitutes proceeds in most cases is fairly obvious

- it's whatever the defendant acquired as a result of the offense
- if the defendant robs a bank, sells drugs, or takes a bribe, the money he obtains is the proceeds
- if he *pays* a bribe to get a Government contract, the contract – and all revenue traceable to the contract – is the proceeds of the crime

The last example illustrates a key point

- Art. 3(1) defines “proceeds” using a “but for” test
- That is, proceeds includes whatever property the defendant would not have *obtained or retained* but for his having committed the offense
- If he would not have the contract but for paying the bribe, then the contract is the proceeds of the bribe

This means that the scope of the term “proceeds” can actually be quite broad

- First, the proceeds could be money or any other personal property, immovable property, or intangible property. Art. 2 & 3(2)
- Whatever the person obtained *directly or indirectly* because he committed the offense would be the proceeds. Art. 3(1)

“Proceeds” also includes any property traceable to the criminally derived property

- That is, Art. 3(2) defines proceeds to include “any subsequent reinvestment or transformation of the proceeds”
- So, if the defendant is a corrupt public official who steals money from the public treasury, and he uses that money to buy a beach house, the beach house is the proceeds
- and if he uses the beach house as the security for a loan, the loan money is the proceeds

- And if he uses the loan money to buy a boat, the boat is the proceeds, and so forth
- Or alternatively, if he rents out the beach house, the rent he receives would be the proceeds of the original crime

The point is that no matter how much time passes, or how many times the property changes form, proceeds remain proceeds and may be confiscated

“Proceeds” also includes any appreciation in the value of that property.

- *United States v. Betancourt*, 422 F.3d 240, 251 (5th Cir. 2005) (if defendant buys a lottery ticket with drug proceeds, the lottery winnings are traceable to the offense even though the value of the ticket appreciated enormously when it turned out to contain the winning number);
- In fact, an entire business, and all of its revenue and assets, are subject to forfeiture if the business would not exist but for the investment of criminal proceeds to start the business or to keep it going.
 - *United States v. Warshak*, 631 F.3d 266, 329-330 (6th Cir. 2010) (all proceeds of defendant’s business are forfeitable because the business was “permeated with fraud;” but even if a part of the business was legitimate, the proceeds of that part are nevertheless forfeitable if the legitimate side of the business would not exist but for the “fraudulent beginnings” of the entire operation);
 - *United States v. Smith*, 749 F.3d 465, 488-89 (6th Cir. 2014) (following Warshak; if business is so pervaded by fraud that its revenue stream would not have existed but for the fraud, any asset derived from that revenue stream is forfeitable as proceeds);

Gross proceeds v. net profits

As defined in Article 3(3), proceeds means the gross proceeds of the offense without any reduction for costs

- So a drug dealer cannot deduct the cost of the drugs
- a contractor paying kickbacks cannot deduct the cost of the kickbacks
- but suppose a contractor pays a kickback to get a contract to build a road and he does build the road

- does he forfeit everything he was paid for building the road or only his profit after deducting his costs?

Facilitating Property

The second category of property subject to confiscation is called “facilitating property”

- It is defined in Article 3(4) include any property used or intended to be used to make the crime easier to commit or harder to detect
 - *United States v. Schifferli*, 895 F.2d 987, 990-91 (4th Cir. 1990) (dentist’s office “provided an air of legitimacy and protection from outside scrutiny,” and thus made the crime of writing false prescriptions less difficult to commit and “more or less free from obstruction or hindrance”);
 - *United States v. Huber*, 404 F.3d 1047 (8th Cir. 2005) (facilitating property is anything that “makes the prohibited conduct less difficult or more or less free from hindrance”);

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

- *United States v. Rivera*, 884 F.2d 544, 546 (11th Cir. 1989) (defining facilitating property broadly);
 - *United States v. Ortiz-Cintrón*, 461 F.3d 78, 80 (1st Cir. 2006) (residences where defendants packaged drugs and stored drug money, and where telephone calls were made, was forfeitable as facilitating property);
 - *United States v. Singh*, 390 F.3d 168, 190 (2d Cir. 2004) (a medical license is forfeitable as facilitating property under section 853(a)(2) if the doctor uses the license to distribute controlled substances in violation of the Controlled Substances Act; under section 853(b), property includes “rights, privileges, interests, claims, and securities”);
- in fact, an entire business and/or all of its assets could be forfeited as facilitating property
 - *United States v. \$7708.78 in U.S. Currency*, 2011 WL 3489835, *3 (S.D. Miss. Aug. 9, 2011) (facilitating property is anything that makes the crime “less difficult or more or less free from obstruction or hindrance;” a pharmacy used as a cover for the illegal distribution of drugs is forfeitable as facilitating property, and hence so are all of its assets; including funds in its bank accounts that include money traceable to legitimate sales);

- *United States v. Segal*, 432 F.3d 767, 779 (7th Cir. 2005) (if a business is forfeited, then so are all of its assets, including any subsidiary business that is wholly owned by the forfeited business; that there is no independent basis for the forfeiture of the subsidiary does not matter);

Money Laundering

The third category of property subject to confiscation is “property involved in money laundering”

- This is the broadest category of all
- As defined in Article 3(5), it includes the criminal proceeds being laundered, any commingled property including property in which the proceeds are invested, and any property used to facilitate the money laundering offense

So, suppose the defendant launders 1 million euros in drug proceeds:

- The 1 million euros are subject to confiscation because they are the criminal proceeds being laundered
- But suppose that in laundering the money, he combines / commingles the 1 million euros with another 2 million euros in clean money
- In that case, all 3 million euros would be subject to confiscation
- And if he invested those 3 million euros in a castle on a hilltop in Malta, the entire castle would be subject to confiscation regardless of its value
- And if the defendant concealed or disguised this money laundering offense by conducting all of these transactions in the name of his business, the business and all of its other assets would be subject to confiscation as property used to facilitate the money laundering offense
 - *United States v. Beltramea*, 2016 WL 427096, *6-7 (N.D. Iowa Feb. 3, 2016) (defendant’s use of fraud proceeds to pay for improvements to real property was a money laundering offense, making the property forfeitable in its entirety as the “object” of the offense);
 - *United States v. Aguasvivas-Castillo*, 668 F.3d 7, 17 (1st Cir. 2012) (retailer who commingled \$4.4 million in food stamp fraud proceeds with legitimate funds “to shield the fraud” ordered to forfeit \$20 million);

PROCEDURE: HOW DOES THIS WORK

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

- In fact, Art. 46(2) says, "The procedure for implementing preventive measures provided for under this Part is independent of the institution of criminal proceedings but may be employed in conjunction with or parallel to criminal proceedings"
- but the Government still has to prove that a crime was committed *and* that the property was derived from or used to commit that crime

Moreover, the owner of the property does not have to be the wrongdoer

- the Government must prove that someone committed a crime, but he may have used someone else's property to do it
- in that case, the property is still subject to forfeiture as property used to commit the crime
- if the owner is not the wrongdoer, however, he can assert an innocent owner defense
- so, for example, if someone uses his wife's car to commit a crime but she knew nothing about it, the Government must return the car to the wife and pay her attorney's fees
- but if the wife knew all about the crime and let her property be used to commit it, we can forfeit the car in civil case even though the wife is not charged with any crime
 - *Bennis v. Michigan*, 516 U.S. 442, 446 (1996) (innocent property owners have no protection from civil forfeiture under the Due Process Clause; unless the legislature enacts an innocent owner defense by statute, property may be forfeited based solely on its use in the commission of an offense);
 - 18 U.S.C. § 983(d) (creating a statutory innocent owner defense for civil forfeiture cases);

This possible because, as it says in Art. 44(2), an NCB action is an *in rem* action against the property, not an action against individuals

- What does that mean?

In an *in rem* action, instead of naming a person as the subject of the case, the Government names the property

- In the United States, we actually include the name of the property in the caption of the case
- that's why our cases have funny names: *United States v. \$1.2 million*, or *United States v. Real Property Located at 475 Martin Lane*

That doesn't mean that the property has done something wrong or that it has to defend itself in court

- it is just a convenient way of letting the world know that this is the subject of the confiscation action
- it is the property that the Government believes was derived from or was otherwise involved in a criminal offense
- if the Government wants to confiscate 1 million euros as drug proceeds, it brings an action naming the \$1 million euros
- if it wants to forfeit a castle on a hill as property involved in money laundering, it brings an action naming the castle

In short, NCB confiscation is simply a procedural device designed to get everyone with an interest in the property in the courtroom at the same time

- *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”);

For example: A drug dealer has been murdered and the police find 90,000 euros in cash in his car:

- The Government files an action against the 90,000 euros and asks, “who claims this?”

- And anyone who responds – anyone who claims the 90,000 euros – comes into court and litigates his claim against the govt

So, as explained in Art. 44, in an NCB confiscation,

- the Government is the plaintiff,
- the property is the *res* subject to confiscation, and
- anyone wishing to contest the action is an intervener who can intervene to contest the action by showing that he has an ownership interest in the property
 - *United States v. \$822,694.81 in U.S. Currency*, 2019 WL 4369936, *1 n.1 (D. Conn. Sep. 12, 2019) (“In a civil forfeiture case, the Government is the plaintiff, the property is the defendant and the claimant is an intervener seeking to challenge the forfeiture”, quoting *Asset Forfeiture Law in the United States* at 324 (2d ed. 2013));

So, in the case of the 90,000, the Government would be the plaintiff, the 90,000 euros would be the *res* subject to confiscation, and if the dead drug dealer’s mother, or child, or business partner – or all of them – wanted to lay claim to the money, they would be interveners

Art. 48 sets out the procedural steps:

- first, the Government starts the process by commencing the action against the property. Art. 48(1)

Notice and Claim

- then it must send notice “to any person who appears to have an ownership interest”
- That would include titled owners, persons with mortgages or other secured liens, persons with an interest under marital property law, joint holders of bank accounts, and so forth
 - *United States v. One Star Class Sloop Sailboat*, 458 F.3d 16, 25 (1st Cir. 2006) (if “the Government does not know the name of a potential claimant, it need not take heroic measure to identify him;” in such cases, publication alone may be sufficient; “but when the Claimant’s identity may be easily ascertained through minimal effort,” the Government must undertake such effort);

- Then, any person wishing to file a claim – whether he or she received the notice or not – would have 30 days in which to intervene. Art. 48(2)

The reply – in the United States we call it a claim – must set forth the intervener’s ownership interest in the property and “the time and manner in which he acquired such interest”. Art. 48(2)

- In the case of the 90,000 euros, the dead drug dealer’s mother would have to file a claim stating something like, “that money belonged to me because it was marital property”
- Or his child would have to say something like, “the property belongs to me because I am the drug dealer’s only heir”
- Or the business partner would have to say, “the dead person was not really a drug dealer; he was my partner in a landscaping business and half of the money belongs to me”

Standing

This is important

- In an *in rem* action where the property is the subject of the case, *anyone* could conceivably file a claim
- A person walking down the street when the money was found in the drug dealer’s car could file a claim saying, “that’s my money”
- Or a person to whom the drug dealer owed a gambling debt could file a claim saying, “he was going to pay me the 90,000 the day he was killed, so that was my money”

So, the threshold question in every NCB confiscation case is whether the intervener has standing to make a claim

- One way to deal with the potential for false claims is for the courts to require strict compliance with Art. 48(2)
- That is, require the intervener to explain his interest in the property in some detail
- It should not be sufficient to say, “I claim this money because I own it”

- *United States v. Caruthers*, 765 F.3d 843, 845 (8th Cir. 2014) (claim stating only that claimant was in possession of currency when it was seized does not satisfy the requirement that the claim state the nature and extent of the claimant's interest; the requirement is important because it allows the court to assess whether claimant is asserting a legal interest cognizable in the ancillary proceeding or only an equitable interest which is not);
- *United States v. Fabian*, 764 F.3d 636, 638 (6th Cir. 2014) (affirming dismissal of claim that asserted only a "conclusory legal interest;" the claim must describe the nature and extent of the legal interest the time and circumstances of claimant's acquisition of it);

The Government can challenge the intervener's right to intervene either by challenging the sufficiency of the claim on its face, or by challenging the intervener's ability to prove that he has the interest in the property that he claims

- Art. 44(4) says that the intervener must show that he is an owner of the property
- Notice that the burden of proof is *on the intervener* to establish ownership, not on the Government to show that he is not the owner
- And Art. 48(4) says that the standing issue must be resolved first before any other issue is litigated in the case
- That's because the Government should not have to litigate with a person who has absolutely no interest in the property

Under Art. 2, "owner" is defined to include a person with a secured lien against the property, but it does *not* include a nominee who does not exercise dominion and control over the property

- and it does not include the defendant's unsecured creditors

So, in my example involving the dead drug dealer's 90,000 euros, a creditor would not have standing to intervene if all he could say was that "the drug dealer owed me money"

- His ex-wife could not claim that he owed her child support payments
 - *United States v. Cambio Exacto, S.A.*, 166 F.3d 522, 529 (2d Cir. 1999) (person to whom a money transmitter owes money lacks standing as a general creditor to contest forfeiture of money transmitter's account);

- *United States v. Carrell*, 252 F.3d 1193, 1207 n.2 (11th Cir. 2001) (woman contesting forfeiture on the ground that the property owner owes her child support payments lacks standing because she is not an owner);
- *United States v. \$38,852.00 in U.S. Currency*, 328 F. Supp. 2d 768, 769 (N.D. Ohio 2004) (same; for article III standing, claimant must show colorable ownership or possessory or secured interest, but claimant was not in possession, her interest was unsecured, and an unsecured creditor is barred from asserting ownership);
- *United States v. \$27,980.00 in U.S. Currency*, 2014 WL 2712197, *5 (D. Alaska June 13, 2014) (same);

Or if you were seeking confiscation of the drug dealer’s car, a lien holder who had a secured interest in the car could file a claim

- But the drug dealer’s mother, whose name was on the title, but who exercised no real control over the car, could not
 - *See also* Art. 48(4), providing that “notwithstanding title to the property, the court shall not be satisfied that a third party has an ownership interest in the property if it finds that the third party is a nominee who did not exercise effective dominion and control over the property . . .”
 - *United States v. 2009 Dodge Challenger*, 2015 WL 6829084, *4-5 (D. Neb. Nov. 5, 2015) (being the titled owner is not sufficient to establish ownership; under § 983(d)(6), claimant must exercise dominion and control; drug dealer’s grandmother claim that she was the owner of vehicle in which 50 lbs of marijuana were found was belied her claim of innocence: claim that she didn’t know about the drugs suggests she didn’t exercise much control);
 - *United States v. \$47,550 U.S. Currency*, 2007 WL 1032369, *9 (W.D. Mich. 2007) (because claimant, the mother of a drug dealer, could not prove that the money seized from the drug dealer’s residence belonged to her, she could not establish the ownership element of the innocent owner defense);

The merits: establishing forfeitability

Once the court is satisfied that one or more interveners has standing, it turns to the merits of the case

- The Government bears the burden of proving that the property is subject to forfeiture by a balance of the probabilities – i.e., the civil forfeiture standard. Art. 44(2) & (4)

- That is, the burden is on the Government to prove two things: that one of the crimes listed in Art. 43 occurred and that the property was derived from or was otherwise involved in that crime
- Notice: if the Government proves those things, the confiscation is mandatory, not discretionary, unless the intervener establishes an affirmative defense. Art. 48(5)

Affirmative defenses

There are two possible affirmative defenses under Art. 49

The first is that the intervener acquired the property from the defendant as a **bona fide purchaser for value**; Art. 49(a)

- For example, maybe the defendant committed fraud, used the fraud proceeds to buy a yacht, and sold the yacht to the intervener
- The Government may establish that the yacht was traceable to the fraud, but if the intervener can show that he paid fair market value for the yacht in an arm's length transaction, and did not know that it was derived from a crime, he would have an affirmative defense
- But he would have had to show that he paid fair market value in an arm's length transaction
- This defense cannot be used by someone who received the tainted property as a gift, bought it for a dollar in a fraudulent transaction, or inherited it as an heir.
 - *United States v. 10503 Campus Way South*, 2018 WL 6834355 (D. Or. Dec. 27, 2018) (transfer of residence from brother to sister for \$10 was not a purchase; because the purchase must be an arm's length transaction, "love and affection" cannot be considered part of the consideration);
 - *United States v. 1309 Fourth Street*, 2015 WL 670572, *9 (D. Or. Feb. 17, 2015) (transfer from brother to sister for "love and affection" and for savings bonds that remained in buyer's name and possession was not an arm's length transaction);

The second affirmative defense is called the "innocent owner" defense

- The intervener says, "even if the property was criminally tainted, it belonged to me at the time it was used to commit the crime, and

1) I did not know it was being so used, or

2) I did know but I did everything I could to stop it; Art. 49(b)

So, for example, suppose someone uses his wife's car to rob the bank

- She could say, I knew my husband was borrowing my car, but I did not know he was going to use it to rob the bank
- Or she could say, “when I realized he was going to use my car to rob the bank, I called the police”
 - *United States v. 16328 South 43rd E. Ave.*, 275 F.3d 1281, 1286-87 (10th Cir. 2002) (woman who failed to call police, evict her son, or more thoroughly investigate his marijuana grow operation could not possibly show by a preponderance of the evidence that she had taken all reasonable steps; bond between mother and son is not enough to create triable issue for a jury on the reasonableness of her inaction);
 - *United States v. One Parcel ... 801 East Franklin Ave.*, 2013 WL 2948075 (S.D. Ala. May 17, 2013) (“one who abandons property and leaves it to the devices of those using it as an illegal drug operation and does nothing to try to stop it cannot be an innocent owner”; claimant should have requested the assistance of law enforcement; collecting cases);

If she proves one or the other, she would prevail as an innocent owner and would recover the car

- But if she did not, the car would be confiscated even though it belonged to the wife and she was not convicted of any crime.
- That's because before even reaching this stage of the case, the Government will have already proved that the bank was robbed and that this particular car was used to rob it.
- That she did not personally commit the crime would be irrelevant
 - *United States v. \$822,694.81 in U.S. Currency*, 2019 WL 4369936, *4 (D. Conn. Sep. 12, 2019) (the “claimant's culpability in the underlying criminal conduct is irrelevant”; rejecting claim that claimant was not involved in the fraud that generating the money a third party deposited into his bank account), citing *Asset Forfeiture Law in the United States* at 503 (2d ed. 2013) (“The claimant's lack of personal involvement in the crime giving rise to the forfeiture is irrelevant ...”);
 - *United States v. One 2005 Dodge Magnum*, 845 F. Supp. 2d 1361, 1371 (N.D. Ga. 2012) (“in a civil forfeiture case, the claimant's culpability in the underlying

crime is irrelevant; it is her knowledge of that activity that subjects the property to forfeiture”);

Notice that I said that the wife could prevail and recover the car *if she proves* that she is an innocent owner

- Art. 44(4) sets forth a shifting burden of proof
- As we have seen, the intervener has the initial burden of proving that he or she has a sufficient interest in the property to have standing
- Then the burden shifts to the Government to prove that the property is subject to forfeiture
- That is, that a crime was committed and that the property was derived from that crime
- Finally, if the intervener asserts an affirmative defense, she has the burden of proving that defense

Proportionality

There is one other defense that an intervener can raise – assuming that he has standing

- he can say, “even if the property was used to commit an offense, and even though I am not an innocent owner, the confiscation of the property would be “grossly disproportional to the gravity of the offense giving rise to the confiscation order”
- this is set forth in Art. 45(b)

For example, suppose the dead or fugitive drug dealer used his girlfriend’s house to store a quantity of drugs worth 10 euros, and the girlfriend knew all about it

- The house would be subject to confiscation as facilitating property
- And the girlfriend would not be an innocent owner
- But the confiscation of her house because of its role in concealing drugs worth 10 euros would be “grossly disproportional to the gravity of the offense”

But that does not mean that the value of the property being forfeited has to be exactly equal to the proceeds of the crime

- That would be the case if you were only forfeiting proceeds
- The proceeds of the offense are always subject to forfeiture
- The forfeiture of the proceeds cannot be disproportionate to the seriousness of the crime
 - *United States v. Reed*, 908 F.3d 102 (5th Cir. 2018) (distinguishing *Bajakajian*; there is no gross disproportionality when a defendant is ordered to forfeit \$574,000 in proceeds of a 20-year fraud scheme);
- The same is true for property traceable to the proceeds of the crime
 - *United States v. Betancourt*, 422 F.3d 240, 250-51 (5th Cir. 2005) (“the Eighth Amendment has no application to the forfeiture of property acquired with proceeds”; the forfeiture of a winning lottery ticket purchased with drug proceeds therefore could not violate the Excessive Fines Clause, regardless of the value of the lottery winnings; that the forfeiture greatly exceeded the maximum statutory fine is irrelevant);

But what about facilitating property or property involved in a money laundering offense?

- Does the property have to be equal in value to the proceeds of the crime to be “proportional?”
- In my example of the girlfriend’s house, forfeiting a house worth 100,000 euros might be disproportional if there were only 10 euros worth of drugs stored there
- But what if there were 50,000 euros worth of drugs?

In other countries, courts look to a variety of factors in addition to the amount of proceeds to gauge the seriousness of the offense

- How important was the property to the offense
- How long did the offense go on
- What harm was caused

— What would the maximum criminal penalty have been if the case had been prosecuted criminally

- *United States v. Aguasvivas-Castillo*, 668 F.3d 7, 16-17 (1st Cir. 2012) (the forfeiture of \$20 million, three-fourths of which comprised untainted funds forfeited under the facilitation theory, was not grossly disproportional to the gravity of a \$4.4 million food stamp fraud offense);
- *United States v. Waked Hatum*, 969 F.3d 1156 (11th Cir. 2020) (when applying the Eighth Amendment to forfeiture in a money laundering case, the court must consider not just the harm to the particular victim, but harm suffered by society when criminals launder their money to obtain “unfettered, unashamed and camouflaged access to the fruits” of their crimes);