

## LECTURE 4

### CRIMINAL FORFEITURE

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#### I. REVIEW

Yesterday, we began by talking about the reasons why it is important to make asset forfeiture part of your criminal investigation

- Punishment, deterrence, incapacitation, fairness, etc.

Then we talked about what can be recovered:

- In a criminal case, it is the proceeds and instruments of any crime under Botswana law for which the defendant has been convicted
- And we noted that in Botswana there is also a civil forfeiture statute that authorizes the forfeiture of the proceeds and instruments of the more serious crimes
- domestic or foreign crimes for which the penalty is at least 2 years
- Without obtaining a conviction

We also noted that in a criminal case, the court can order the defendant to pay a pecuniary penalty equal to the benefit he realized from his offense

- We haven't talked about how to do any of that yet
- We're coming to that today and tomorrow
- but we understand that's where we're going

Instead of getting into the nuts and bolts of what you have to do to get a confiscation order – criminal or civil – we also covered two other topics

First, we talked what types of property can be recovered

- moveable and immoveable, tangible and intangible

Then we talked about what the terms “proceeds” and “instruments” mean

- proceeds means anything that the defendant would not have but for having committed the offense
- and instruments are anything that he used to make the crime easier to commit or harder to detect

Finally, in the afternoon, we talked about investigative techniques:

- the tools and methods of obtaining the evidence you need to locate the property and prove that it is subject to forfeiture
- production orders
- information notices
- monitoring orders
- search warrants
- and so forth

Before we get started today, are there any questions about any of that?

## **Today**

So, where do we go from here?

- Today, we’re going to start with criminal confiscation orders
- As a matter of procedure, what is the process for obtaining a confiscation order
- And as a matter of proof, what evidence will convince a court to make a forfeiture order

Finally, we need to talk about how you preserve the property to make sure that it is still available pending the defendant's trial

- And how do you deal with third parties who claim that the property belongs to them

After the coffee break, we'll do another practical exercise that involves those issues

- Then after lunch, we'll talk about the alternatives to criminal confiscation
- That is, administrative forfeiture and civil forfeiture

## II. CRIMINAL CONFISCATION ORDERS

A criminal confiscation order is part of the punishment that is imposed on a person who has been convicted of a criminal offense

- He can be sent to prison
- He can be ordered to pay a pecuniary penalty – much like a fine – equal to the benefit that he obtained from committing his offense
- And he can be ordered to forfeit property derived from his crime: the proceeds
- and the property he used to commit it: the instruments

### The procedure

The process for obtaining the confiscation order is set forth in Part IV of Chapter 2 of the PICA, §§ 18-21

- **Section 18** says that once the defendant is convicted, the prosecutor may apply to the court where he was convicted – or to the High Court – for a forfeiture order
- notice, this can only be done once the defendant is convicted
- a criminal confiscation order is part of his punishment: no conviction, no punishment, no confiscation order

- generally the request is made immediately after the conviction, but in no event can it be made more than 12 months after the conviction: § 18(2)

Notice of the application for the forfeiture order must be given to anyone with an interest in the property; § 18(4)

- that includes the defendant, of course.
- But it may also include third parties
- Why? Because the instrument the defendant used to commit the crime may not belong to him
- Maybe he used his brother's truck to smuggle drugs
- Or he may have transferred the proceeds of his crime to someone else
- To his wife, his girlfriend, his minor child
- All of those people are entitled to notice of the forfeiture order
- It does mean they're going to win, but they are entitled to notice so that they may be heard

**Section 19** tells us what the court must find to make the confiscation order

- It says that if the court is satisfied that the property is proceeds or an instrument, the court *may order* that the property be forfeited to the Government
- Notice that it does not say what the burden of proof is
- I assume that the burden is on the Government to show that the property is proceeds or an instrument on a balance of the probabilities – but I didn't see where it actually says that in the statute
- In any event, the forfeiture order may be based on any evidence in the trial record or on any other evidence the court "thinks fit"; § 19(4)

Notice also that making a forfeiture order is not mandatory

- It says that the court "may order" that the property be forfeited.
- That means that making a forfeiture order is discretionary,

- even if the property is the proceeds of the defendant's crime, or the instrument that he used to commit it, the court may decide not to enter the forfeiture order

What would be a reason for the court not to make a forfeiture order?

- Section 19(5) discusses the criteria for exercising discretion
- Among other things, a court may decline to order the forfeiture based on the hardship that the forfeiture would cause "to any person" – such as a spouse or family member
- Or based on the claim of a third party who has an interest in the property
- But is hardship *to the defendant* a factor as well?

We'll talk more about third party rights in a few minutes

- But the key point is that if the instrument the defendant used to commit the offense belongs to a third party and not the defendant, the court may decline to order its forfeiture
- So, a large part of the investigator or prosecutor's job is to show that the property really belongs to the defendant, not to someone else, who claims that the loss of the property would be unfair

If it turns out that the property the defendant used to commit the offense really does belong to a third party, there is a remedy

- The court may order the defendant to forfeit substitute property of the same general nature

So, for example, if the defendant used someone's else car -- or a rental car – to commit the offense

- That property cannot be forfeited because it did not belong to the defendant
- But the court can order the defendant to forfeit his own car (regardless of its value) as substitute property; § 21(1)(2)

## **Proving the nexus between the property and the offense**

Obviously, it is critical that the Government be able to establish that the property in question was the proceeds of, or an instrument used to commit, the defendant's crime

- This is why all of the financial investigation that we talked about yesterday is so important
- You cannot start doing the financial investigation at the point when the defendant is convicted
- You must be ready to explain to the satisfaction of the court that assets A, B and C are traceable to the defendant's offense
- And you must be ready to do that with bank records, forensic accounting records tracing the money from one place to another as it changed form
- And with witness testimony

So what evidence will be sufficient, when taken together, to satisfy the court that the property should be forfeited?

- If you can directly trace the proceeds of the defendant's crime to the property, this is easy
- If you could show that a smuggler was paid for his merchandise with a deposit into his bank account, and the money is still in the account, then the money in the account is forfeitable as the proceeds of the crime
- Or if you can show that he used that account only to receive payments for the smuggled goods, and used the money in the account to buy a car, boat, or airplane,
- there will be no problem in showing that the thing that he purchased was the proceeds of his crime

But that is not always the case

- Often the defendant will claim that he had other sources of income and that the car, boat or airplane that you want to forfeit as proceeds was derived from some legitimate source.

In such cases, the prosecutor will have to rely on the information that you developed in your investigation to establish the connection between the property and the defendant's offense with circumstantial evidence

- What kind of evidence might that be?

### **Transactions indicative of an attempt to conceal**

One thing to look for is evidence that the defendant engaged in activity indicative of an attempt to conceal or disguise the source of the money or his connection to it

For example:

- The use of a shell company that does no legitimate business to hold the money
- Moving the money through a series of complex transactions involving third parties that have no apparent economic purpose
- Moving the money through fictitious entities or through accounts held by third parties or third parties using false names
- Conducting transactions using large quantities of cash, cryptocurrency, or other forms of payment that create no paper trail
- Structuring transactions (breaking large transactions into small amounts) to avoid currency reporting laws or otherwise to avoid attracting attention
- The point is that one would not engage in such behavior if the money were from a legitimate source

The case law in the United States is filled with colorful examples of instances where the prosecutor or investigator proved the proceeds element with circumstantial evidence:

- Here are some examples

#### **Convolved or unusual transactions**

- *United States v. Reiss*, 186 F.3d 149, 152-53 (2d Cir. 1999) (convoluted method of payment for aircraft -- \$2,531,955 was sent to trust accounts in twelve separate wire transfers in 30-day period -- from at least six accounts in Switzerland, Brooklyn, and Israel -- was evidence money was criminal proceeds);

- *United States v. Wynn*, 61 F.3d 921, 926 (D.C. Cir. 1995) (convoluted method of payment for car, including attempt to disguise purchaser's identity, implied that purchase money was criminal proceeds);
- *United States v. Kaur*, 525 Fed. Appx. 143, 145 (3rd Cir. 2013) (circumstantial evidence that money was criminal proceeds included making all-cash deposits distinct from regular sources of income, and property owner's concern that the Government was going to freeze his account);
- *United States v. Misher*, 99 F.3d 664 (5th Cir. 1996) (paying for car with suitcase full of cash is evidence that the money is criminal proceeds);
- *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 deposit of criminal proceeds);
- *United States v. Wilkes*, 662 F.3d 524, 547 (9th Cir. 2011) (making three transfers within a week before using proceeds of fraudulently-obtained contract to pay kickback was a convoluted transaction designed to conceal the source and future ownership of the money);
- *United States v. Morales-Rodriguez*, 467 F.3d 1, 13 (1st Cir. 2006) (monthly secretive transfers of funds between three separate bank accounts was an attempt to conceal the nature, location, source, ownership, and control of criminal proceeds);
- *United States v. Ayala-Vazquez*, 751 F.3d 1, 15-16 (1st Cir. 2014) (paying expenses in small bills in paper bags through third parties was evidence of concealment of criminal proceeds);
- *United States v. Dvorak*, 617 F.3d 1017, 1024 (8th Cir. 2010) (depositing fraud proceeds in a bank account and immediately withdrawing the funds as cash, while not dispositive, is strong evidence of an intent to conceal criminal proceeds "for the simple reason that cash cannot be traced");

### **The use of third parties or other deception:**

- *United States v. Magluta*, 418 F.3d 1166 (11th Cir. 2005) (moving cash from Miami to New York to Israel, where it was deposited in an account in a false name, was evidence of the illegal source of the money);
- *United States v. Rivera-Rodriguez*, 318 F.3d 268, 272 (1st Cir. 2003) (structuring large cash transactions and use of third party name shows the illegal source of funds);
- *United States v. Sheridan*, 679 Fed. Appx. 492 (7th Cir. 2017) (having third party open bank accounts that were used to deposit drug proceeds in one part of the country and funnel them to California concealed the source of the money);



- *United States v. Ayala-Vazquez*, 751 F.3d 1, 16 (1<sup>st</sup> Cir. 2014) (using straw purchaser to acquire race cars was evidence that the money was criminal proceeds involved in money laundering);
- *United States v. Davis*, 690 F.3d 912, 921 (8th Cir. 2012) (putting cash in girlfriend's account so she could get a cashier's check and use it to buy a car in her name shows purpose was to conceal criminal proceeds);
- *United States v. Cruzado-Laureano*, 404 F.3d 470 (1st Cir. 2005) (corrupt mayor who deposited extortion checks payable to wife's dental practice into her account had intent to conceal criminal proceeds);

### **Use of offshore accounts; advanced technology:**

- *United States v. Bansal*, 663 F.3d 634, 646 (3d Cir. 2011) (illegal source inferred from defendants' keeping accounts offshore and using the internet to preserve anonymity);

### **Structuring transactions**

- *United States v. Elder*, 682 F.3d 1065, 1072 (8th Cir. 2012) (paying for prescriptions with used, small denomination bills rather than by check, and instructing intermediary to limit bank deposits to amounts under \$10,000, is circumstantial evidence of intent to conceal criminal proceeds);
- *United States v. Richardson*, 658 F.3d 333, 341 (3d Cir. 2011) (listing ways in which concealment of criminal proceeds may be shown, including making structured cash deposits before using funds to conduct a transaction, and funneling money through a legitimate business);

### **Using codes; unusual secrecy:**

- *United States v. Gotti*, 459 F.3d 296, 337 (2d Cir. 2006) (cash transactions conducted through several intermediaries, in a surreptitious manner, and using coded language, evidenced intent to conceal the source of the money);
- *United States v. Slagg*, 651 Fed. Appx. 832, 845 (8th Cir. 2011) ("pointedly guarded telephone conversations" regarding the movement of the money was evidence that it was criminal proceeds);

### **Falsifying the nature of the transaction:**

- *United States v. Kelley*, 461 F.3d 817, 829-30 (6th Cir. 2006) (disguising kickback to public official as payment to wife for consulting services, depositing check, and having bank issue cashier's check to hotel to pay for wife's birthday party);
- *United States v. Hall*, 434 F.3d 42, 53 (1st Cir. 2006) (giving seller \$24,000 in cash in a paper bag and falsifying the bill of sale to show the price of a vehicle

was only \$5,000 allowed defendant to conceal the additional funds);

- *United States v. Delgado*, 653 F.3d 729, 738 (8th Cir. 2011) (understating the purchase price on real estate documents and paying the difference with cash in an unrecorded transaction violates);

## **False explanations**

There are many more examples of convoluted, unnecessary, or suspicious transactions that would support at least a threshold showing that the property is criminally derived.

- But the investigator must also look at the explanation that the property owner has provided and show that the explanation is either false, or that it is too full of holes to be believed

For example:

- the property owner gives an explanation that turns out to be demonstrably false

he says he got money from his mother and was to use it to buy a gift for his cousin in California, but his mother denies giving him any money and says he has no cousin in California

- his explanation is contrary to known records

he claims he legitimately earned the money but it wasn't declared on his tax returns  
he says that this was the only time he had sent a package to this particular address but Postal records show 15 prior shipments to the same address

- his explanation is full of holes

he says he got the money from selling a ranch in Mexico but has no documentation of the sale, and can't remember the name of the buyer

he says he is a concert promoter but has no records of revenue from a concert promotion business

- he has given multiple explanations which contradict each other and which cannot all be true

- *United States v. \$22,800.00 in U.S Currency*, 2018 WL 3738962 (C.D. Cal. Jul. 25, 2018) (says that he had come to Los Angeles to look for real property in which to invest; when he could not provide the location where he would be looking for such property, he changed his story, explaining that he had come looking for a vehicle to buy, but he could not identify the type of vehicle he was interested in purchasing);
- he claims the money came from a business or financial transaction that would normally yield documentation, but he has none
- he claims he withdrew the money from an investment account but has no account statements
- he refuses to answer all questions regarding the source of the money, citing his right against self-incrimination

The point is that the investigator's job is to ask the defendant to explain where the money came from and then check out the story

- You cannot simply accept what he says is true
- In most cases it will turn out to be false
- And making up a false or incredible story is itself evidence that the property was criminally derived
- Because the prosecutor's strongest argument in such a case is that there was no reason for the defendant to make up such a story if the property did not have an illicit origin
  - *United States v. Odiase*, 2018 WL 2926626, \*3 (S.D.N.Y. Jun. 12, 2018) (implausible story regarding source of the money – that she sold goods to a person she knew only as "Frank" who she knew nothing about but who sent her \$50,000 -- was itself evidence that defendant knew money was illegally derived and was attempting to avert suspicion from herself);
  - *United States v. Singh*, 2018 WL 1662483, \*4 (C.D. Cal. Apr. 2, 2018) (hawala operator's receipt and transmission of large sums of bulk currency, talking in codes, and lying to law enforcement that box containing large sum of currency actually contained his wife's shoes sufficient to establish illegal source of the money)

## Timing

Another factor to look at is timing

- When did the defendant acquire the car, boat, or airplane that you want to forfeit
- And how does that compare to when he acquired the proceeds of his offense?
- If his bank records show that for a long period of time the defendant had little incoming revenue, but then received the proceeds of his crime, and immediately started buying gold jewelry
- You have strong circumstantial evidence that the jewelry is traceable to the criminal proceeds
  - *United States v. Garbacz*, 33 F.4th 459 (8th Cir. 2022) (to show that the funds involved in a financial transaction were SUA proceeds and not funds from another source, the Government may rely on circumstantial evidence such as the timing of the transactions in relation to the underlying crime; deposits into priest's bank account coincided with thefts from the collection plate after Sunday mass);
  - *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);

### **Lack of legitimate income**

But the circumstantial evidence that is used most often to establish the proceeds element is the defendant's lack of legitimate income:

- This is often the most important evidence that the defendant must have used his criminal proceeds – and not clean money – to conduct the transaction:
- The defendant may dispute this and claim that he does have a cash intensive business on the side
  - *United States v. White*, 2023 WL 4567717 (E.D. Mich. July 17, 2023) (defendant claims cash is from his music promotion business; wants to call expert witness to explain how it can generate legitimate income);
- But the Government can rebut this with defendant's tax returns, employment records, or the absence of any records corroborating defendant's story
  - *United States v. Jones*, 56 F.4th 455 (7th Cir. 2022) (defendant's failure to file tax returns or receive W-2 forms is circumstantial evidence that the money he used

to buy a vehicle was derived from his drug trafficking offense, and not from legitimate income);

- *United States v. Gordon*, 954 F.3d 315 (1st Cir. 2020) (evidence that defendant was a marijuana trafficker spending far more money than was generated by his legitimate business sufficient to allow jury to find that he was spending drug proceeds);
- *United States v. Smith*, 824 Fed. Appx. 508 (9th Cir. 2020) (defendant's lack of legitimate income as a prison inmate, and his involvement in a drug conspiracy, were sufficient to allow jury to infer that the money he transferred to a fellow inmate was drug proceeds);
- *United States v. McQueen*, 636 Fed. Appx. 652 (6<sup>th</sup> Cir. 2016) (case agent's testimony that defendant's sole source of income at the time he conducted the alleged money laundering transactions was funds obtained from investors was sufficient to satisfy the "proceeds element" of §§ 1956 and 1957);

### **Proving property is an instrument**

Proving that the defendant used a given asset to facilitate the offense is usually easier than proving that it was proceeds

- He either used the truck to smuggle the drugs or other contraband or he did not
- If you have surveillance or other records proving that he did, you probably have enough for a forfeiture order
- But sometimes the connection is not so obvious
- And you might be called upon to explain exactly how using this warehouse, this business, piece of land in a remote area make his crime easier to commit or harder to detect

### **Substantial connection**

Moreover, the court in exercising its discretion, may want to know how often the defendant used the property in the commission of his crime

- Was it something he did repeatedly, or was it a one-time event
- Was it random chance that he happened to be at his residence when he planned the crime, or did he intentionally choose that location because he was free from observation or surveillance

- Was the property important to the success of the offense, or was it incidental
- for example, he drove to the scene of a drug deal in his truck, but would the crime have been just as successful if he drove some other vehicle?

What the courts are looking for in all of these situations is evidence that the connection between the property and the criminal was “substantial” and not merely “incidental or fortuitous”

- ordering the forfeiture of valuable property based on an incidental or fortuitous connection to a crime might be regarded as disproportional or unfair
- it is the investigator’s job to anticipate this defense and show that the use of the property was important to the success of the crime

### **Preservation of Property Pending Trial**

In the course of your investigation, you will discover property that is subject to forfeiture as the proceeds or the instruments of a crime

- and that will be subject to forfeiture once the defendant is convicted.

You may also determine that the defendant will be subject to a pecuniary penalty order equal to the value of the benefits that he obtained from the offense

There is always a danger that the proceeds and the instruments of the defendant’s crime

- or the property needed to satisfy a pecuniary penalty order
- will disappear, or be transferred to a third party, before the defendant is convicted and the forfeiture or penalty order can be issued
- the way to preserve the property so that that does not happen is with a pre-trial restraining order pursuant to Chapter IV (Sections 35-46) of the PICA

Chapter IV is very complex and detailed, and we will not go into all of the details now.

- We just need to understand these basis points

First, the prosecutor may ask the court to impose a restraining order to preserve any property subject to forfeiture as the proceeds or the instrument of an offense, or that is needed to satisfy a pecuniary penalty order. § 36

- It may also be used to preserve property that will be subject to a civil forfeiture order, but we'll talk about civil forfeiture orders later

To obtain the order, the prosecutor must submit to the court an application supported by an affidavit from the investigator stating, *inter alia*, that the defendant is under investigation for an offense

- And that there is a reasonable basis to believe that the property was derived from or used to commit the offense; **§ 37(c)**
- Or that the defendant derived a benefit from the offense and that it is necessary to secure the property to satisfy a pecuniary penalty order; **§37(d)**

If the court finds that such *reasonable basis* exists, it may issue the order. **§ 41**

- And it may direct that the property be maintained by a Receiver who has the authority to take any action necessary to preserve the value of the property. **§ 46**

When the application for the restraining order is made, the court may direct the Government to provide notice to the defendant and other persons with an interest in the property so that they may appear and give evidence in opposition.

- But the court may decide not to require prior notice if the giving of notice will “result in the risk of loss or dissipation of the property” **§ 40(1)(2)**

In all events, after the order is made, the Government must send notice to the persons affected by it, **§ 42(1)**

- And that person has the right to ask the court to modify the order to exclude their interest from it; **§ 44(1)**
- This is where the rights of third parties in criminal forfeiture matters comes into play

The reasons for releasing property from a restraining order include:

- It cannot be used to satisfy a pecuniary penalty order because it does not belong to the defendant; **§ 44(2)**
- the property is not an instrument or the proceeds of a crime; **§ 44(3)(a)**
- or the property was acquired by a third party after the commission of the offense “without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was proceeds or an instrument”; **§ 44(3)(c)** (Note: not clear if (a) and (c) are disjunctive or conjunctive)
- Note: it appears that a third party may not object that he owned the property at the time of the offense and did not know that that it was being used as an instrument of the offense – i.e., an innocent owner

In addition, the court may exclude from the restraining order property needed for reasonable living expenses, legal fees, and the expenses of running a business; **§ 35(4) and § 43(5)(c)**