

## LECTURE 1

### WHY DO FORFEITURE?

Gaborone, Botswana  
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#### I. INTRODUCTION

As we begin, I should tell you something about my background:

- I served for 30 years as federal prosecutor in the U.S. Department of Justice
- My focus was on the recovery of criminal property (asset forfeiture) and the prosecution of money laundering cases
- In Government, and in the years since, I have had the opportunity to train law enforcement in the use of the confiscation laws
- And advise governments on the drafting, enactment, amendment, and implementation of effective confiscation laws
- I've been fortunate to be given the opportunity to do that all over the world, both at international conferences and in training sessions like this one

Twenty-five years ago, I had the opportunity to spend a great deal of time in South Africa, helping to establish the first asset confiscation program there

- I continue to maintain the contacts and friendships that I made with our South African colleagues at that time

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- And I'm happy to say that South Africa continues to have one of the most effective asset confiscation programs in this part of the world
- I've also done training in Kenya and Tanzania.

More recently, I've been working in Eastern Europe and the Mediterranean

- For example, last year I was in Latvia at a conference that focused on the use of non-conviction-based confiscation under the laws that they have in place
- trying to sort out some of the difficulties that they have encountered, particularly with respect to the proceeds of corruption and other crimes that occur in other countries but are placed (or laundered) in Latvia

I also spent a week in Estonia meeting with law enforcement and policy makers discussing whether Estonia should enact NCB confiscation laws.

- In the summer I was in Malta where I helped to draft both the NCB confiscation statutes and the procedural rules for doing criminal confiscation and addressing the rights of third parties
- And right now I'm in the process of putting together a training program on the confiscation of the proceeds of public corruption for Lithuania.

So, with that background, I have been asked to talk about asset confiscation and what seems to work best in terms of having a successful asset confiscation program here in Botswana

By the way, in the U.S. we use the term "asset forfeiture" when others use the term "asset confiscation"

- So if I occasionally slip and use the term with which I am most familiar, "forfeiture", I don't mean to be making a distinction between two different things
- To me, "forfeiture" and "confiscation" mean the same thing.

## II. OVERVIEW: THE COMPONENTS OF A SUCCESSFUL PROGRAM

A successful asset confiscation program has several components

First, you need legislation that is sufficiently broad in scope – both in terms of procedural alternatives and substantive reach – to address the problem

- While providing due process to property owners and recognizing the rights of third parties

The procedures need to be flexible enough to apply in a wide variety of situations

- Sometimes you can confiscate property as part of a criminal prosecution
- Sometimes no prosecution is possible (or it is not appropriate) and you need to recover the property in another way
- One of those other ways is NCB confiscation
- As we will discuss over the next few days, you have both methods available in Botswana

By substantive scope, I mean that you have to have the authority to confiscate not only the proceeds of crime but the instrumentalities or property used to commit the crime

- And you must be able to do so with respect to all crimes, foreign and domestic

That is the international standard; how does Botswana compare?

- Again, the good news is that you have broad legislation in Botswana
- And later this morning we'll be talking about what the terms "proceeds" and "instrumentalities" mean, and exactly what can be confiscated under your law.

But at the same time, we must recognize that no legislative scheme, no matter how broad in scope and no matter how effective, is going to be successful if the judges, the media, and the public don't recognize it as reasonable and fair

- So, in all of our discussions, we must talk about the need to follow the rules of the game to ensure that property owners – whether they be criminals or third parties – are afforded procedural due process,
- And that we respect fundamental human rights

A successful asset confiscation program also needs adequate resources:

- funding for training – of investigators, prosecutors and judges -- so that they understand what may, for some, be a novel concept
- and for dedicated prosecutors and investigators who will specialize in the financial side of the criminal investigation
- and in the often arcane legal issues that arise at the intersection of the criminal law and property rights

You also need a bureaucratic structure that addresses asset confiscation issues

- who generates the cases? Where do they come from?
- From the FIU? Do they arise organically from criminal investigations?
- Whose job is it to investigate the cases? Is it “everyone’s job” or should people specialize?
- Most experienced asset confiscation professionals will say that when it is everyone’s job to investigate the financial side of a crime, then it is no one’s job
- And most would say that it is not feasible or desirable to make expect every prosecutor an asset confiscation specialist

So, as an investigator, you need to know who the prosecutors are who handle the asset confiscation cases,

- And whether they are handled as part of a criminal investigation or prosecution or separately

- And as a prosecutor, who need to know not only who the investigators are who are developing asset confiscation cases, but also what court will hear such cases

You also need someone responsible for managing the assets

- Keeping inventory
- Paying for storage and maintenance
- Making application for sale pending final resolution
- Restoring recovered property to victims
- Managing complex assets like cryptocurrency, securities, or ongoing businesses

But perhaps most important – and often overlooked – requirement for a successful asset confiscation program is a law enforcement culture that recognizes the value of taking assets away from criminals

- a culture that recognizes that asset confiscation is an essential law enforcement tool

The most common complaint among asset recovery professionals is that the investigators take the low hanging fruit – the cash in the bad guy’s pocket when they arrest him -- and don’t want to do the work required to trace and recover the really important assets

- but just taking the cash found at the scene or in the smuggler’s luggage does not deprive the criminal organization of the property that allows it to prosper
- it does not have a serious impact on the ability of the defendant or his organization to continue to commit criminal acts in the future

Moreover, everyone in the field understands that the financial investigation must be part of the criminal investigation from the beginning

- You can’t wait until the end of the criminal case to ask, “I wonder where the proceeds of the crime might be”
- If you wait until it is too late, the property will be gone, and the chance to have an law enforcement impact will be lost

- But prosecutors around the world complain that the police and the other investigators just want the arrest and the conviction, and to move on to the next case, leaving the bad guy with the fruits of his crime.

This is not a new problem

- 30 years ago I attended asset forfeiture conferences in the U.S. where the prosecutors were complaining about the drug enforcement agents who made the arrests but let the drug dealers keep their money
- And last spring in Estonia, the conference began with exactly the same complaint
- In 30 years, from one side of the world to the other, nothing had changed

Prosecutors, however, are not without blame themselves

- Many prosecutors believe that confiscating assets adds an unnecessary complication to their work and is not worth the trouble
- That it's simpler just to convict the defendant and move on to the next case
- that it's easier to get a guilty plea if you just let the defendant keep his property

For that reason it is routine in some places – including many places in the United States – for prosecutors to agree to allow the criminal to keep his property in return for a plea of guilty to the criminal offense

- That is wrong for lots of reasons, not the least of which is that it creates the appearance of “buying” a guilty plea
- But it's also wrong because leaving the criminal in possession of his criminally derived property is not punishment for the offense, it's a reward

Until that changes --

- Until there is a cultural change within law enforcement that values the recovery of criminally-tainted property and its restoration to victims as much as it values arrests and convictions

- We are not going to make the progress we need to make to take the profit out of crime
- Which is why we are here
- And it is why we begin our time together with an emphasis on **why we do confiscation** in the first place

### III. WHY DO FORFEITURE

OK, why confiscate property?

#### 1. Punish the wrongdoer

- Putting the defendant in jail is a form of punishment, but so is taking away the fruits of the crime;
- If the defendant committed the crime so that he could buy an expensive car, forfeiting the car is a form of punishment

But the point of forfeiture is not just to force the defendant to disgorge the fruits of his crime

- It's to punish him for committing the crime
- He may no longer have the proceeds of his crime
- He may have spent it all on wine, women and song, so that there is nothing left to disgorge
- But we don't want to reward criminals for spending their money before we have the chance to take it away

Because confiscation is a form of punishment, the punishment has to apply whether the criminal still has the proceeds of his crime or not

- Which is why in most countries a criminal who is convicted of a crime is liable to forfeit an amount of money equal to the proceeds of his crime.
- What is called a value-based judgment or a "pecuniary penalty order"

— Or if there is not criminal case, a civil penalty

- *United States v. Blackman*, 746 F.3d 137, 143 (4<sup>th</sup> Cir. 2014) (forfeiture is mandatory even if the defendant lacks the present ability to satisfy the judgment; “To conclude otherwise would enable wrongdoers to avoid forfeiture merely by spending their illegitimate gains prior to sentencing”);
- *United States v. Newman*, 659 F.3d 1235, 1242-43 (9<sup>th</sup> Cir. 2011) (forcing defendants to disgorge their ill-gotten gains, “even those already spent,” ensures that defendants do not benefit from their crimes);

— Obtaining that value-based judgment is critical to ensuring that confiscation serves its punitive purpose

## 2. Deter other wrongdoers

— the point of committing most crimes is to make money

— if the defendant does not get to keep the money, there is less incentive for the next person to commit the same offense

— conversely, if defendants were able to keep the proceeds of their crimes, even if they are found guilty, others might think it is worth the risk of conviction

— that would be the opposite of deterrence; it would be an incentive

- *United States v. Martin*, 662 F.3d 301, 309 (4<sup>th</sup> Cir. 2011) (Criminal forfeiture is part of the defendant’s sentence; its purpose is “to deprive criminals of the fruits of their illegal acts and deter future crimes”);

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

— The confiscation of the proceeds of a crime limits the criminal’s ability to use those proceeds to commit other crimes in the future

— So, the confiscation of criminal proceeds is a form of incapacitation.

— But confiscation is not limited to proceeds

— It reaches the property used to commit a criminal offense



- we don't want drug dealers to keep the airplane that they used to smuggle drugs, or the armed robber to keep the gun that he used to commit the robbery,
- because if they were able to keep the property they are likely to use it again to commit other crimes in the future
- the same is true for letting the child pornographer keep the computer and cameras that he used
- or letting the money launderer keep the business through which he laundered his money
- in all of those instances and many others, we want to confiscate the property so that the bad guy cannot use it again for an illegal purpose

#### 4. Disrupt the organization

- if confiscation can incapacitate an individual criminal, it can incapacitate a criminal organization
- there is a temptation in drug cases to make easy arrests of street level dealers
- but to have a real, lasting impact on the organization, you have to go after the money
- money is the glue that holds organized criminal enterprises together; they have to recycle the money to keep the scheme going
- it is harder for a drug organization to replace the money than to replace the drugs
- taking the money does more to interrupt the cycle than any number of arrests of low level street dealers
- the same is true for persons engaged in wildlife trafficking; seizing the money flowing from Asian markets back to the poaching enterprises is more effective than arresting the guy with the truck and the gun in Africa
- figuring out how terrorism is financed, and taking away the money before it can be used, is a critical part of the anti-terrorism effort

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

## 5. Get money back to the victim

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

- *United States v. Blackman*, 746 F.3d 137, 143 (4<sup>th</sup> Cir. 2014) (“The Government’s ability to collect on a [forfeiture] judgment often far surpasses that of an untutored or impecunious victim of crime . . . Realistically, a victim’s hope of getting paid may rest on the Government’s superior ability to collect and liquidate a defendant’s assets” under the forfeiture laws);
- *United States v. Bennett*, 986 F.3d 389 (4<sup>th</sup> Cir. 2021) (following *Blackman* and rejecting defendant’s argument that the forfeiture order impinges on her ability to provide restitution to her victims; to the contrary, the forfeiture order is likely the only vehicle by which the Government will recover assets to be used to satisfy the restitution order);

## 6. Protect the community / Public policy / Rule of Law

— Confiscation also serves a role in protecting the community, advancing public policy, and preserving respect for the rule of law

— For example, confiscating a criminal’s assets demonstrates to the public that everyone is treated the same;

— that a wealthy criminal does not get to own the largest business in town, or live in the biggest house, or drive the most expensive car if he acquired that property with the proceeds of his crime

— It shows that the system of justice is fair and that law enforcement is effectual;

It also ensures that the playing field is level, so that people trying to run businesses honestly don’t have to compete with capital from illegal sources

— E.g., Miskiri’s restaurant

We also don’t want criminal organizations (foreign or domestic) that have acquired great wealth use it to control markets or institutions

- allowing wealthy criminals to buy up all the expensive waterfront property or penthouses in a city can skew the market, putting the property out of the reach of local residents
- We don't want to let corrupt leaders of developing countries use our financial system to loot their treasuries and safeguard a nest egg to use when they have to go into exile

Finally, forfeiting the assets of sanctioned Russian oligarchs who have tried to evade the sanctions by moving or disguising the ownership of their assets is one of the ways that countries right now are carrying out the public policy of supporting Ukraine in response to the Russian invasion

#### 7. Recycle the money

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