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ASSET FORFEITURE Bulletin

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ENHANCING THE FORFEITURE REMEDY: Planning Real Property Seizures

Slightly more than a month had passed since the area forfeiture team's seizure of the $1.5 million home when two of the officers on the team returned to the house and saw what had happened. The congratulations they had received from their department, the media, and the public seemed distant. Gone was the confidence they had displayed during all the interviews. Gone too was their sense of satisfaction and fulfillment. Their hearts dropped as they looked around the once-lovely home and saw the water damage from the pipes, burst by an early November freeze. The question of what had gone wrong seemed, at this point, out of place. The question of what to do *now*, in this contested forfeiture case, pointed up their failure to plan for a problem of this magnitude.

Horror stories like this one plague law enforcement agencies around the country as they pursue the seizure and forfeiture of real property. The purpose of repeating these stories is not to dwell on problems, but rather to help agencies learn from them so such fiascoes can be avoided in the future.

In general, the process of forfeiture can be difficult. But in the case of real estate forfeiture, the difficulties are compounded by all the complexities of real estate transactions. With careful planning, however, law enforcement agencies can readily implement real property forfeiture as a productive means of combatting narcotic traffickers. For this reason, the BJA-PERF Asset Forfeiture Training and Technical Assistance Project has developed a helpful new guide entitled **Forfeiture of Real Property: An Overview**. The publication, by George Aylesworth of the Metro-Dade Police Department, is based on both Florida and federal forfeiture laws, and is designed to help enforcement personnel plan thoroughly before they seize real property.

Strategies for Seizing Real Property

Although the laws governing seizure of real and personal property are the same, the nature of real estate makes real property seizures more difficult. Real property must be managed and maintained wherever it is located and requires a complicated sale and closing process. The smallest error can nullify months of work and possibly render the property unsalable. Attorneys hired to handle real property forfeiture should have experience with real estate, or at a minimum, should have access to relevant information on the subject. Since not all states have enacted effective forfeiture laws, a useful

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New Director For Asset Forfeiture Office

On June 30, 1991, George W. Proctor became the new Director of the Asset Forfeiture Office (AFO) in the Criminal Division, U.S. Department of Justice. This office provides general counsel support and is a source of training and publications on asset forfeiture for the Criminal Division and for U.S. Attorney's Offices. PERF works closely with the AFO in coordinating its BJA Asset Forfeiture Training and in reviewing project publications.

Mr. Proctor brings a wealth of experience to his duties at the AFO. His previous federal experience includes Deputy Chief, Organized Crime and Racketeering Section, Criminal Division; Assistant U.S. Attorney for the Districts of Guam and the Northern Mariana Islands; Chairman, Attorney General's Advisory Subcommittee of U.S. Attorneys; and U.S. Attorney for the Eastern District of Arkansas. Mr. Proctor also served as a law clerk to an Associate Justice of the Arkansas Supreme Court.

Mr. Proctor solicits suggestions and comments on the AFO's role in the asset forfeiture field. His telephone number is (202) 514-1263 (FTS 368-1263).

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tool for asset forfeiture (of both real and personal property) is the sharing by local law enforcement agencies in the proceeds of federal forfeitures. This can be done either by conducting a joint investigation or by the federal government "adopting" the seizure. When real property is involved, the federal asset-sharing and adoption programs may have advantages for the local agency—even in a state with its own forfeiture laws. Federal agencies have the attorneys or other resources necessary to prosecute complex forfeiture cases to conclusion. However, local agencies may have little control over those cases, and the pace of the federal judicial process can be slow compared with some state systems. For states with their own forfeiture laws, the percentage of the assets remitted to the local agency is usually less.

Agencies that target real property should devise an overall strategy and policy for handling forfeitures. Guidelines for deciding whether to seize property, for handling and maintaining seized property, for prosecuting forfeiture cases, and for disposing of forfeited assets should be included in the agency's blueprint. Assets and their movement should be targeted and investigated just as offenders are.

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Forfeitures of real property involving federal agencies are processed in accordance with the U.S. Department of Justice policy. The BJA-PERF guide contains several model policies in an appendix.

Planning a Seizure

The first step in planning a forfeiture of real property is determining *whether* to seize a particular parcel. This decision should be based on several factors. The most obvious is the ultimate value of the seized property; other factors are the cost of pursuing the case and the cost of managing and disposing of the property.

When placing a value on real property, the nature of the ownership must be considered. Value will most often be defined as the dollar amount of the owner's equity in the property, because the interests of innocent mortgagees and lienholders will be protected. The title to real property must be examined carefully to identify all recorded interests in the property, the extent and nature of those interests, and their values relative to the overall value of the property. This type of examination may also provide leads for further investigation. To preclude a later claim of "innocent" ownership, the initial investigation should target the spouse or other co-titled owners.

It may be advisable to retain an outside firm to perform the title search. The firm should also agree to provide title insurance if and when the property is sold, because most real estate cannot be sold for maximum value without title insurance.

Because responsibility for the property passes to the initiating enforcement agency upon seizure, the condition of the property is an important consideration. When the agency becomes responsible for the property, it also inherits liabilities associated with that property. For example, if the seized property is found to be contaminated with toxic waste, the agency might be held responsible for the cleanup costs. Particular attention should be given to such properties as service stations, dry cleaners, paint manufacturers, warehouses, and drug-manufacturing or drug-processing sites.

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The guide recommends that whenever possible the seized property be kept occupied by the tenants. Keeping it occupied can reduce deterioration, deter vandalism, offset the costs of management and provide continuation of mortgage payments. An occupancy agreement, including terms regarding maintenance responsibilities, rent payment, entry by the seizing agency, eviction, and insurance coverage, can be formulated at or near the time of seizure. This agreement not only will protect the interest of the seizing agency but also will help defray the costs associated with owning a property. A sample occupancy agreement recommended by the Department of Justice is included in an appendix to the BJA-PERF guide.

Documents Involved in Seizing Real Property

Although a warrant to seize property, including real property, is not needed under most forfeiture statutes, it is nonetheless desirable. A warrant issued on probable cause is required by the Fourth Amendment to enter private premises. Property that is subject to forfeiture generally is forfeitable on grounds similar to those for search and seizure. Therefore, such property is, generally, a proper subject under most states' search warrant statutes, and a seizure warrant can be obtained in essentially the same manner as an arrest or search warrant. The content of a seizure warrant should be similar to that of a search warrant, although additional provisions regarding the handling of th

seized property pending forfeiture should be included in the warrant.

An affidavit for a seizure warrant should recite sufficient facts to support overwhelmingly the existence of probable cause. Probable cause must be recited for each holder of interest in an item of property, if that interest is to be forfeited. Particularized probable cause for each item of personal property that is to be seized along with the realty must also be included. Once the affidavit has been presented to the judge and the seizure warrant has been signed, service of the warrant must be coordinated. The forfeiture investigators should consult with their attorney and with the criminal case investigators.

The Process of Seizing a Property

The forfeiture action against an item of property is begun by filing a complaint or petition. This document should cite the facts supporting probable cause to forfeit. All persons with an interest in the property, all titled owners, and lienholders of record should be named and their interests specified.

In many jurisdictions, when a real property forfeiture is begun, a notice of *lis pendens* must also be filed. This document puts all prospective purchasers on notice of the pending forfeiture action and of the fact that title to the property has passed to the seizing agency.

The seizure warrant for an item of property should be obtained at least the day before the planned seizure. This will allow for adequate planning and will leave time to handle any contingencies that may arise. Immediately after the seizure, the petition or other initiating document should be filed by a member of the seizure team or by the attorney. A phone call or radio transmission is an appropriate method for notifying the legal staff that the seizure has been accomplished. Immediately after the initiating document is filed, the *lis pendens* should be filed in the appropriate recorder's office. Immediate filing will lessen the opportunity for the owner to complicate or subvert the forfeiture process.

Once the premises has been entered and the property is secure, the seizure team should conduct a walk-through inspection of the property, recording its condition with a still or video camera. Permanent fixtures on the property, as well as any damage or defects, should be noted. If an occupancy agreement is to be used, it should be filed with the forfeiture action, thereby placing the agreement under the control of the court for its enforcement. In order to evict a tenant upon a breach of the occupancy stipulation or upon failure to sign an occupancy agreement, a traditional writ of possession should be obtained from the presiding judge.

Additional Considerations

The seizure warrant should be obtained after any collateral criminal investigation has been completed and all criminal search warrants have been served. Information obtained from the search may help support the forfeiture and may prevent the confusion that accompanies execution of two separate warrants at the same time. A disadvantage of this approach is that a sophisticated target, fearing an impending seizure, may transfer his or her ownership interest to an attorney or bondsman. The seizing agency would then have to prove that the attorney or bondsman had knowledge of the underlying criminal activity, which can be very difficult.

Litigation

If any party with an interest in the property disputes the forfeiture action, the case must be litigated. Since a forfeiture case against a parcel of real property is a civil action, it is handled largely in the same manner as other civil proceedings. There are certain circumstances, however, when a different approach to litigation is needed.

A sophisticated target, fearing an impending seizure, may transfer his or her ownership interest to an attorney or bondsman.

If there is a related criminal prosecution, a claimant may try to use the civil discovery mechanisms available in the forfeiture action to acquire information to which a criminal defendant would not normally be privy. In this situation, seeking a stay in the civil case might be advisable. A guilty plea in a criminal case can also be used to establish facts in the civil action or for impeachment. Lastly, an acquittal or dismissal of criminal charges should have no effect on a related forfeiture proceeding.

Civil forfeiture cases can be resolved in several ways—through settlement, summary judgement, or trial. Since most forfeiture cases are civil actions, disputes can be settled outside of court by the parties involved. The details of the out-of-court settlement are then incorporated into the final Decree of Forfeiture issued by the court. This can eliminate the expense, preparation time and risk associated with going to trial. Since real property forfeitures are more complicated than other types of forfeiture actions, all settlements should be carefully supervised and should be conducted according to the policies of the seizing agency and its legal staff.

When the facts are clear-cut and well-documented, a summary judgment may be appropriate. A motion for summary judgment must be accompanied by affidavits showing that there are no material facts left to be found by a judge or jury and that the seizing agency is entitled to final judgment for forfeiture as a matter of law.

When forfeiture cases are not concluded by either settlement or summary judgment, the case will come to trial. Trials may be before a judge or a jury. In most jurisdictions, either party may request a jury trial. One of the more difficult aspects of a jury trial in a forfeiture case is preparation of jury instructions. Currently, there are no uniform standards for these instructions, yet they are critical, because forfeiture is not readily understood and the burden of proof is radically different than in other civil cases. A helpful set of jury instructions from a Florida case that may be helpful is included in an appendix to the guide.

Conclusion

Civil forfeiture of real property can deprive criminals of valuable assets and sites for their activities, discourage similar activity, establish a positive public image for an agency, and provide the seizing agency with a source of revenue. Real property forfeitures, however, are more difficult and complicated than personal property forfeitures. A forfeiture strategy and policy should be developed by forfeiture teams. With a comprehensive policy that covers legal, practical, and public relations issues, the forfeiture of real property can become an effective tool for law enforcement.

Single copies of the publication **Forfeiture of Real Property: An Overview** can be obtained free of charge by calling the Bureau of Justice Assistance Clearinghouse, 1-800-688-4252.

—Steve DeNelsky

Beginning November 1, 1991 asset forfeiture project publications should be ordered by calling the Bureau of Justice Assistance Clearinghouse at 1-800-688-4252

L E G A L C O R N E R

ALABAMA—Simple Possession Not a Basis for Forfeiture

State v. Smith, No. 2900012, Ct. of Civ. App. of Ala. (2/27/91). The state sought forfeiture of three vehicles that had been used by various violators to possess several marijuana cigarette butts and a small bag of marijuana found in a passenger's purse. The trial court denied forfeiture of all the vehicles, finding that the state had failed to make a prima facie case. The court declined to forfeit the automobiles "...on the basis of one 'roach,' or upon the temporary possession of a quantity of marijuana. [I]t was not the legislative intent to exact such harsh remedy for such minor infractions."

The Court of Civil Appeals of Alabama affirmed the trial court's denials of forfeiture. It held that Section 20-2-93(a)(5) of the Alabama Code requires either transportation or receipt of controlled substances to sustain forfeiture. The appeals court further held that Alabama case law has defined receipt as "receiving for the purpose of sale or in some way to facilitate the sale of drugs. It does not mean possession merely." The appeals court concluded that the state had failed to present reasonably satisfying evidence that the forfeiture statute had been violated.

CALIFORNIA—Delay in Filing Forfeiture Action

The People v. Property Listed in Exhibit One, Nos. F013379 and F013805, 227 Cal. App. 3d 1, Ct. of App. of Calif. (1991). The trial court denied forfeiture in several consolidated cases. It held that Section 11488.4(j) of the California Health and Safety Code, which states that "...the Attorney General or district attorney shall file a petition of forfeiture pursuant to this section within 30 days of the receipt of the claim," was mandatory. Because the time it took to process the forfeitures exceeded the 30-day limit, the cases had to be dismissed. The state had filed forfeiture petitions 37 days and 65 days after the claim. Neither defendant claimed prejudice as a result of the delays.

The state appealed. The Court of Appeals of California considered the issue to be whether the statute was "mandatory" or "directory." It found that the applicable general rule is that "...requirements relating to the time within which an act must be done are directory rather than mandatory or jurisdictional, unless a contrary intent is clearly expressed." The appeals court held that the statute involved was directory, and that to construe the 30-day limit as mandatory would defeat the legislative intent of the forfeiture statutes, which is to strip drug dealers of the tools and profits of their illicit trade. The court further stated, "...the mandatory interpretation would permit a drug trafficker to retain his economic base because a prosecutor missed a filing deadline without regard to any prejudice to the trafficker."

CONNECTICUT—Delay; Criminal Violation Not Required

State v. One 1981 BMW Automobile, 546 A.2d 879, Conn. App. (1988). The state appealed the trial court's dismissal of an *in rem* forfeiture action brought against a vehicle under Section 54-33g of the Connecticut General Statutes. The state claimed that the trial court had erred in (1) finding that the information in the search and seizure warrant underlying the action (unlawful activity in 1982 and warrant issued in 1986) was "stale" and did not support a determination of probable cause; and (2) holding that the *in rem* action could not be sustained without an allegation of criminal activity by the vehicle's owner.

The Appellate Court of Connecticut reversed the trial court and remanded the matter for further proceedings. It

held: (1) An allegation that property had been used in the commission of a crime could not become stale because there was no question of the timeliness of the information in the affidavit regarding the location of the automobile. The staleness doctrine involves the concept that the passage of time can diminish the reliability of information provided in a search warrant request; hence, it was not applicable in this case. (2) Because Section 54-33g provides for a civil action *in rem* for the forfeiture of property, in such an action the guilt or innocence of the property owner is not an issue. The only issue is whether the property was used in violation of the law. The appeals court concluded by stating, "This follows from the nature of the action which is one against the *res* and an action *in rem*." The court further stated that such a rule may indeed be harsh in some situations; to counteract its claimed unfairness, certain exceptions have been made, and constitutional protections often have been invoked, for example, to protect innocent holders of security interests.

FLORIDA—Currency; Connection to Violation

Lamboy v. Metro-Dade Police Department, Case No. 90-1577, Ct. of App. of Fla. (2/19/91). The state obtained in the trial court an order forfeiting $82,050 in U.S. currency. The police had discovered 45 kilos of cocaine in a warehouse rented by the claimant and another party. The claimant denied knowledge of the items in the warehouse and gave the police the name of the other party who had access to the premises. The claimant cooperated with the police regarding the origins of the cocaine. He stated that although 7 years earlier he had been involved in cocaine transactions, he had since become a DEA informant. The claimant gave the police permission to search his separate office and home for drugs. No drugs were discovered, but the police did find a hidden compartment in the home containing jewelry, furs, and the $82,050. The claimant, through uncontroverted testimony, presented evidence concerning the source and intended use of the money and evidence that the money had no connection to cocaine. The state sought to rely on *Lobo v. Metro Dade Police Department*, 505 So.2d 621, Fla. 3d DCA (1987) for the principle that probable cause could be established by circumstantial evidence.

The appeals court reversed the forfeiture by the trial court. It held that unlike the *Lobo* case, there was no connection between the money and the drugs. Unlike *Lobo*, there had been no alert by a detector dog, no unique packaging of the money, and no inability to establish the source of the money. The court further found that the facts of this case were closer to those in the more recent case of *In Re Forfeiture of $37,388*, 16 F.L.W. D43, Fla. 1st DCA (12/17/90). In that instance the court found no evidence of a connection between money found in a suitcase separate and apart from drugs. The appeals court concluded that in this case the state had not proved a connection between the money and a violation of the applicable statute, and hence had not shown probable cause for forfeiture.

FLORIDA—Burden of Proof; Record of Criminal Case Not Admissible

In Re Forfeiture of 1987 Chevrolet Corvette, 571 So.2d 594, Fla. App. (1990). In the trial court, the owner and driver of a seized vehicle did not submit any testimony or evidence in the forfeiture proceeding but, rather, during final argument, requested the court to take judicial notice of the owner's testimony in the criminal trial which had been previously held before the same judge. In the criminal trial, the owner had apparently testified that he did not know cocaine was in the car, and the court subsequently found the owner not guilty of the criminal charge of possession of cocaine. The trial court proceeded to take judicial notice of the owner's testimony in the criminal trial and held, in denying forfeiture, that the state could not show "beyond every reasonable conclusion" that the owner had knowledge that the cocaine was in the vehicle.

The Court of Appeal of Florida reversed the trial court. It held that the trial court had erred in taking judicial notice of the proceedings in the criminal trial since neither the records nor the judgment in a criminal proceeding is admissible in a civil forfeiture proceeding. The appellate court also held that the trial court had applied the wrong standard of proof, which in effect amounted to proof beyond a reasonable doubt when it should have applied the preponderance of the evidence standard, the proper burden of proof in a civil proceeding. The appellate court ordered forfeiture of the vehicle since the state had established probable cause for forfeiture and the owner had presented no contrary evidence to rebut the probable cause.

FLORIDA—Adoption by DEA; State Pleading

Tunnell v. Hicks, Case No. 90-1539, Ct. of App. of Fla. (2/6/91). The trial court ordered a Florida county sheriff, Tunnell, to return $16,655 that had been improperly seized from its owner. The court also ordered the sheriff to pay interest on the seized money from the time of seizure until the time of return to the owner. The owner of the money had been arrested on a Gulf County *capias* and taken to a sheriff's office in Bay County. At that time, the owner of the currency was carrying the $16,655 in cash. He was not arrested or charged with any offense associated with the currency. The Bay County sheriff stated that he believed he had probable cause to seize the currency, but he would not divulge the basis for his belief because it related to an ongoing criminal investigation about which he would not comment. The owner of the currency sued Sheriff Tunnell for conversion. The sheriff filed a motion to dismiss, alleging that DEA currently had

possession of the money and that he, therefore, was not the proper party to sue for conversion. In the trial court, following discovery, the owner moved for summary judgment. After the hearing was completed, but before summary judgment was entered, Sheriff Tunnell mailed an unsworn document entitled "Declaration of Forfeiture" to the trial judge. The document, purported to have been issued by the DEA, stated that the money had been forfeited to the United States. Based on these proceedings, the trial court granted the owner's summary judgment motion.

The Court of Appeal affirmed the trial court's order to return the currency but disallowed payment of interest. It held that although Sheriff Tunnell apparently had sufficient evidence to thwart the motion for summary judgment (the federal forfeiture documentation), he had not filed it in a manner that would permit the trial court to consider it pursuant to the applicable rules of the court.

It is important to note that both the trial court and the appellate court appear to have recognized that a DEA adoption of a local forfeiture is entirely proper under these circumstances, but that in order to use such adoption by DEA as a defense in an action to recover the currency, proper local pleadings must be followed in establishing and authenticating the federal forfeiture.

FLORIDA—Simple Possession as Basis for Forfeiture

In Re Forfeiture of 1987 Cadillac, Case No. 89-03402, Ct. of App. of Fla. (3/26/91). The defendant in this case was arrested in his vehicle. He submitted to a protective frisk search, and a crack pipe, a bottle containing crack cocaine, and $1,424 were seized from his pocket. The trial court ordered forfeiture of the seized currency but for no stated reason denied forfeiture of the vehicle.

The Court of Appeal of Florida reversed the trial court's denial of forfeiture of the vehicle and remanded the case to the trial court for further proceedings. The appellate court noted that the facts supported the forfeiture of the currency and also required forfeiture of the vehicle pursuant to Section 932.703 of the Florida statutes. The appellate court also noted that in the case of *State v. Crenshaw*, 548 So.2d 223 (Fla. 1989), the Florida Supreme Court had held that possessing drugs, even solely for personal use, subjects vehicles to forfeiture whether the drugs are in the vehicle or in the occupant's pocket. Since the trial court failed to state any basis for denial of forfeiture of the vehicle, the appellate court remanded the case to the trial court for further proceedings consistent with its decision.

FLORIDA—Currency; Connection to Violation

In Re: Forfeiture of $37,388, Case No. 90-400, Ct. of App. of Fla. (12/17/90). State troopers stopped a Chevrolet Blazer for traveling 72 mph in a 65 mph zone. During the stop, they saw a marijuana cigarette in plain view on the front seat of the Blazer. The driver exited the vehicle and was patted down for weapons. A small vial containing traces of cocaine and $1,388 in currency were seized from his person. A drug detection dog alerted to a map containing marijuana and seeds in the driver's area of the Blazer. More seeds and more marijuana were found during the vehicle search, but not enough to constitute a felony. However, the vial containing traces of cocaine did constitute felony contraband. The vehicle search also revealed a suitcase containing $36,060 in currency. The husband and wife occupants of the Blazer claimed they had saved the money over a number of years and were planning to buy real estate in Florida. No illicit drugs were found in the suitcase that contained the money, and the dog did not alert on the money.

The appellate court reversed the forfeiture of the currency seized from the driver and from the suitcase. It held that Section 932.701-932.704(e), which includes certain money as "contraband article," was clearly not applicable in this case since the evidence failed to establish the requisite connection between the currency and any offense. The appellate court noted that in another case, *Crenshaw v. State*, 521 S.2d 138 (Fla. 1st DCA 1988), the Florida Supreme Court had rejected its view that a relationship between drugs and a vehicle was required for forfeiture. The appellate court stated, however, that *Crenshaw* applied only to the vehicle involved, and that the state cannot seize money under that authority. The appellate court also noted that the detector dog in this case did not alert on the suitcase containing the money, the money was not packaged in a manner unique to drug dealers, and there were no conflicting statements as to the source of the money. The court concluded, "There is simply a dearth of evidence connecting the money with any past or anticipated drug transaction."

ILLINOIS—Simple Possession as Basis for Forfeiture

State v. Hogg and A 1985 Pontiac, No. 4-90-0593, App. Ct. of Ill. (4/12/91). The trial court in this case denied forfeiture of the defendant's vehicle and held that: "possession of 1.2 grams of cocaine in a vehicle does not subject said vehicle to forfeiture as facilitating possession of cocaine." The state appealed the denial of its petition to forfeit the vehicle. It contended that recent Illinois Supreme Court decisions, including the *Buick* case, 537 N.E.2nd 748 (1989), required forfeiture of vehicles used in any manner to make possession of controlled substances easier or less difficult.

The Appellate Court of Illinois, 4th District, agreed with the state and remanded the case to the trial court with directions to forfeit the vehicle under Section 505(a)(3) of the Illinois

statutes. It cited cases which held that vehicles which are used to make the possession of drugs easier are subject to forfeiture whether the drugs are found in the vehicle itself or in the possession of an occupant of the vehicle, and that the vehicle provides essentially the same "dimension of privacy" whether the drugs are in the vehicle or on the person of an occupant.

ILLINOIS—Narcotics Racketeering; Forfeiture is Part of Sentencing

State v. Arman, No. 1-87-2705, App. Ct. of Ill. (4/10/91). The trial court jury found the defendant guilty of narcotics racketeering, and, in connection with sentencing, the state filed a petition for forfeiture of certain real property and bank accounts of the defendant. Following a hearing, the trial court entered a forfeiture order for the real property and bank accounts. The defendant appealed and raised the following four contentions: (1) His constitutional right to a jury trial was denied when the trial court conducted the forfeiture hearing without a jury. (2) The trial court erred in forfeiting his property by a mere preponderance of the evidence rather than requiring proof beyond a reasonable doubt. (3) The forfeiture of his property violated constitutional prohibitions of double jeopardy. (4) The forfeiture of his property amounted to cruel and disproportionate punishment.

The Appellate Court of Illinois, 1st District, 3rd Division, affirmed the forfeiture by the trial court and held against the defendant on all of his contentions, as follows: (1) The forfeiture proceeding was part of the sentencing and not part of the trial, hence the defendant was not entitled to a jury trial at that stage of the proceedings. (2) The defendant's argument that forfeiture was an element that must be proven beyond a reasonable doubt confused culpability with consequences since the statute characterizes forfeiture as punishment for the crime and not as part of the offense itself. (3) There was no double jeopardy involved since there was no retrial of the defendant on the underlying criminal charge during the forfeiture proceedings; instead, forfeiture was part of his sentence based on his already determined guilt of narcotics racketeering. Further, the double jeopardy clause does not bar the institution from both criminal and civil proceedings. (4) The defendant failed to show that the forfeiture was disproportionate to his offense's magnitude. Further, the trial court had properly considered whether particular property had been illegally acquired or maintained before deciding whether it was subject to forfeiture.

ILLINOIS—Restitution Not an Alternative to Forfeiture

State v. Durbin, No. 5-89-0811, App. Ct. of Ill. (3/13/91). The defendant pled guilty in the trial court to unlawful delivery of a controlled substance. He was sentenced to 3 years' imprisonment and was ordered to pay restitution of $440 given to the informant who made drug buys from the defendant and restitution of $140 provided by the state police which was used to make a drug buy from the defendant. Additionally, $60 seized from the defendant's home at the time of his arrest was also ordered forfeited to the state.

On appeal, the Appellate Court of Illinois, 5th District, reversed the trial court on all of the monies involved. It held that the government entities for which restitution was ordered were not "victims" within the meaning of the restitution statute and, hence, the restitution ordered for drug "buy money" under the circumstances of this case was improper. The appellate court further held that the trial court's forfeiture of the $60 seized from the defendant at the time of his arrest was improper since the Illinois statutes require a separate forfeiture proceeding in such cases, and that property cannot be forfeited as part of the criminal proceeding.

ILLINOIS—Profits Not Forfeitable

State v. 1984 BMW 528E Automobile, No. 2-90-0168, App. Ct. of Ill. (2/19/91). Police officers watched an individual attempting to conceal an item under the seat of a vehicle. A subsequent search revealed a loaded handgun under the vehicle's seat, a mobile telephone between the seats, and telephone paging devices on two of the occupants. The officers also seized $1,812 from one occupant and jewelry from two occupants. A search of the vehicle's trunk revealed 464 grams of marijuana. The trial court forfeited all the items and currency except the telephone, which was ordered returned to its owner, a third person. The owners appealed. The issue on appeal was whether there was a rational relationship between the items seized and the Controlled Substances Act. The state contended, in trial court and on appeal, that the jewelry was subject to forfeiture under a net worth theory, as explained in the decision in *U.S. v. Nelson*, 851 F.2d 956 (7th Cir. 1988).

The Appellate Court of Illinois held that the occupants of the vehicle had a joint and knowing possession of the marijuana found in the trunk. It also held that the facts justified the trial court's determination that there was sufficient evidence that the pagers and the currency were intended for use in violation of the Act, and hence were subject to forfeiture. However, the appeals court reversed the forfeiture of the jewelry, holding that *Nelson* was not applicable because it involved a federal criminal forfeiture, which was an *in personam*, and not an *in rem*, proceeding. Hence the trial court had erred in relying on *Nelson* and the net worth theory to forfeit the jewelry as profits of the illegal activity. The appellate court further noted that, contrary to the state's contention, there was no evidence that the jewelry had been received in exchange for the sale of a controlled substance, and therefore it was not forfeitable.

KANSAS—Proximity Presumption Rebuttal

State v. $1,305.20, No. 64,684, Ct. of App. of Kan. (12/7/90). The state sought forfeiture of $1,305.20 seized during a drug raid under the Kansas Forfeiture Statutes (K.S.A. 1989 Supp. 65-4135). These statutes subject to forfeiture "all moneys, coin and currency found in close proximity to forfeitable controlled substances...." The trial court refused to order forfeiture. It ruled that the claimants had overcome the proximity presumption. The state appealed, arguing that the evidence was insufficient to support the trial court's finding that the claimants had overcome the presumption.

The Court of Appeals of Kansas noted that one claimant had testified that part of the seized money had come from the sale of a vehicle and from a tax refund, and that they did not have a checking account and therefore kept sums of money at the residence. The appeals court also noted that the trial court had found that the evidence tended to support the claimants, contentions in regard to the currency and the residence, and that there was not "...a scintilla of evidence that these moneys had anything to do with the drug transaction." The appeals court affirmed the trial court's denial of forfeiture. It held that the state had not presented any evidence directly contradicting the claimants' explanation of the source of funds. Hence, the trial court's determination that the claimants had rebutted the statutory presumption was proper.

KANSAS—Summary Judgment and Discovery Procedures Applicable in Forfeiture Cases

City of Lenexa v. A Maroon 1978 Chevrolet, No. 65,432, Ct. of App. of Kan. (3/15/91). The trial court granted summary judgment to the City of Lenexa against the defendant's vehicle and $694.51 in currency. The defendant had been arrested in his vehicle, which contained a quantity of cocaine and the currency. While the criminal charges were pending, the city filed forfeiture proceedings against the vehicle and the currency and served on the defendant certain interrogatories, requests for production, and demands for admission of facts under Chapter 60 of the Kansas statutes. The defendant chose to ignore the city's various discovery requests, and the city subsequently filed a motion for summary judgment, arguing that the facts stated in its discovery requests were to be deemed admitted by reason of the defendant's failure to respond to the discovery requests. The defendant's response to the state's motion for summary judgment of forfeiture was to contend that motions for summary judgment were not available in forfeiture cases under Chapter 65 of the Kansas statutes.

The Court of Appeals of Kansas affirmed the forfeiture by the trial court. It held that since forfeiture actions are civil in nature, both Chapter 60, dealing with discovery, and Chapter 65, dealing with forfeitures, were applicable and that summary judgment for the city was proper based on the defendant's failure to respond to the city's requests for discovery. Hence, since there were no material disputed facts to be resolved by the trial court, the trial court's granting of summary judgment for the city was proper.

LOUISIANA—Criminal Forfeiture; Enterprise

State v. Nine Savings Accounts, No. 88-K-2809, Sup. Ct. of La. (1/18/90). Subsequent to the seizure from a residence of $15,000 in cash, including about $3,000 in marked bills used by agents for drug purchases, the state obtained forfeiture of seven savings accounts in the name of the violator and two savings accounts in the name of the violator, his wife, and his daughter. The forfeitures were obtained pursuant to Louisiana Criminal Forfeiture Statutes (La. R.S. 15:1351). The Court of Appeal affirmed the forfeiture of the seven accounts in the violator's name but reversed the forfeiture of the other two accounts.

The claimant appealed to the Supreme Court of Louisiana. The issue was whether the required violation of the "investment" of funds from drug racketeering was present as the result of the placing of the funds in the seven savings accounts. The supreme court reversed the forfeiture of the money in the savings accounts. It held that "a deposit of funds, derived from drug activity, in a bank savings account is not an investment in the establishment or operation of an enterprise contemplated by Section 1353A." In reaching this decision, the supreme court reviewed a number of federal cases that held that the existence of an "enterprise" is a condition precedent to establishing the basis for criminal forfeiture.

MISSOURI—Distribution of Forfeiture Proceeds

School District No. 7 v. Douthit, No. 72586, Sup. Ct. of Mo. (11/20/90). The trial (circuit) court ordered forfeiture of cash and the proceeds from the sale of forfeited property totaling more than $1 million. The circuit court also ordered distribution of the cash and proceeds under Missouri Statutes, Sections 513.607.1, 513.620, and 195.145.4. The School Commissioners of Lafayette County brought an appeal against the Commissioners of Lafayette County. They contended that the school district should have received the forfeited cash and proceeds, not the law enforcement agencies designated by the trial court.

The Supreme Court of Missouri, in reviewing the matter, noted that "...the presence of this large bundle of cash has attracted great interest." The primary issue was interpretation of Article IX, Section 7, of the Missouri Constitution, which states that "...penalties, forfeitures and fines collected...for any breach of the penal laws of the state...shall be distributed annually to

the schools of the several counties according to law" and that "...the statutory provisions purporting to authorize other distributions are unconstitutional." Lafayette County contended on appeal that the forfeitures were civil in nature; a breach of the penal laws was not involved, and thus Article IX, Section 7, was not applicable. The Supreme Court of Missouri held that the drug statutes upon which the civil forfeiture provisions were based are manifestly penal laws and that the plain language of Article IX, Section 7, allocates the net proceeds of forfeitures arising out of penal law violations to the schools. Hence, the Supreme Court of Missouri reversed the distribution of the forfeiture proceeds to the involved law enforcement agencies and ordered that the funds be distributed to the school district.

MISSOURI – Delay; Time Limit Mandatory

State v. Hampton, WD No. 43204, Ct. of App. of Mo. (2/19/91). The sole issue in this case was whether the time limitations for state action after seizure of property used or intended for use in criminal activities are mandatory. The Missouri Forfeiture Statutes, Section 513.607.5(2), states: "Within three days of the date of seizure, such seizure shall be reported by said officer to the prosecuting attorney...and the prosecuting attorney...shall, within five days after receiving notice of seizure, file a petition for forfeiture." In this case, police seized $1,133.89 on March 2, 1990; on March 14, 1990, 12 days later, the prosecutor involved was notified. The prosecutor filed the required forfeiture petition the next day, on March 15, 1990. The trial court denied forfeiture. It held that the 12 day delay in referring the matter to the prosecutor exceeded the 3-day limit imposed by the statute.

The state appealed. It contended that the 3-day limit was merely directive and that the failure to abide by the time limit is not a jurisdictional defect. The Court of Appeals of Missouri affirmed the trial court's denial of forfeiture. It noted the general rule that when a statute provision does not specify the results of failure to comply with its terms, it is generally held to be directory rather than mandatory. However, the court also stated that since "...forfeitures are not favorites of the law and should be enforced only when within both the letter and spirit of the law," strict compliance with statutory provisions is required. The state urged the appeals court to apply the federal standards applied in various U.S. Supreme Court cases, including the standard of whether the property owner has been prejudiced by the delay. The appeals court refused to use prejudice to the owner as a factor, however, and held that the three-day time limit to refer a seizure to a prosecutor is mandatory in Missouri.

MISSOURI – Innocent Owner; Standing

State v. 1973 Fleetwood Mobile Home, No. WD43294, Ct. of App. of Mo. (2/5/91). The trial court ordered forfeiture of a mobile home that had been seized on November 4, 1988, from the claimants' son, who had used the mobile home in violation of the law. The claimants appealed, arguing that the state had failed to prove that their son was the owner of the mobile home. In fact, they claimed, they were the owners and their interest was not subject to forfeiture, as they were "innocent owners" within the definition in Section 513.615 of the Missouri forfeiture laws. The claimants based their interest in the mobile home on a bill of sale executed on June 17, 1988, approximately five months before the seizure. Among other things, the trial court found that the claimants were not the registered owners of the property; the claimants should have been aware of the mobile home's use since their son had previously been arrested for a drug-related offense; and the son, in his testimony, referred to the mobile home as "my trailer."

The Missouri Court of Appeals affirmed the forfeiture. It held that the claimants had not established their interest in the mobile home since the bill of sale was insufficient to convey ownership. Under Missouri law, the seller must endorse the title certificate and deliver it to the buyer when the property is delivered. The claimants had not done this, and hence had no ownership in the trailer when it was seized. Therefore, they had no standing to raise the issue of whether they were "innocent parties" as defined in Section 513.615.

NORTH CAROLINA – Forfeiture; Felony Violation

State v. Mebane, No. 9015SC172, Ct. of App. of N.C. (12/18/90). The defendant in this case was convicted of fifteen drug offenses, including the misdemeanor of maintaining a vehicle for the purpose of selling controlled substances in violation of North Carolina General Statutes, Section 90-108(a)(7). The trial court ordered forfeiture of the defendant's Corvette, which was the vehicle involved in the offense of "maintaining a vehicle."

On appeal, the defendant contended that since he was convicted on the misdemeanor violation under Section 90-108(a)(7), and not on the felony offense included in the same statute, his vehicle should not have been forfeited under Section 90-112(a)(4)c, which states: "...no conveyance shall be forfeited unless the violation is a felony under this article." The defendant questioned whether the word "felony" in Section 90-112(a)(4)c referred to a specific felony involving the violation of using the vehicle (such as maintaining a vehicle under Section 90-108(a)(7)) or to any felony violation in which the vehicle was used. The Court of Appeals of North Carolina, after reviewing the legislative history, particularly a 1973 amendment, concluded that the

legislature intended to expand the forfeiture statute to cover all felonies under the act in which a vehicle was used. Since the defendant was convicted of a number of felonies in which the vehicle was used, the forfeiture by the trial court was affirmed, even though the specific offense of maintaining a vehicle for use in a controlled substance violation for which he was convicted was a misdemeanor.

PENNSYLVANIA – Facilitation; Intent

Commonwealth v. Tate, 538 A.2d 903, Pa. Super. (1988). The trial court denied the commonwealth's petition for forfeiture of $1,950 seized from an arrested drug violator. The violator had withdrawn $3,000 in cash from an Ohio bank account, flown to Florida, there purchased a kilogram of cocaine for $35,000, and driven back to Ohio in a rented vehicle with the cocaine. He then drove to Pittsburgh, where he was arrested after selling cocaine to an undercover officer. The arresting officers found a quarter of a pound of cocaine and $1,950 in the trunk of his 1978 Toyota. The commonwealth sought to rely on the rebuttable presumption in 35 P.S. Section 780-128(a)(6)(i)(C) that currency found in close proximity to drugs is forfeitable, and also on the violator's intent to use the currency in violation of statute. The trial court granted the forfeiture of the 1978 Toyota but denied forfeiture of the currency.

The Superior Court of Pennsylvania, on appeal, reversed the trial court's denial of the currency forfeiture. It held that although the violator had rebutted the proximity presumption, by establishing that the $1,950 was the remainder of the $3,000 he had obtained from the bank after he had paid travel and other expenses to obtain the cocaine, the same facts revealed that the $3,000 had been obtained with intent to facilitate a drug violation. Hence, the appeals court held that the $1,950 which happened to be left after paying expenses was forfeitable because of intent, regardless of the presumption.

PENNSYLVANIA – Facilitation; Nexus

Commonwealth v. One 1988 Ford Coupe, et. al., 574 A.2d 631, Pa. Super. (1990). The commonwealth obtained forfeiture in the trial court of a residence and vehicle used by the defendant to facilitate sale of cocaine. On appeal, the defendant contended that the commonwealth had not included in its forfeiture petition sufficient facts to permit forfeiture and/or to establish a nexus between the property and the drug offenses. Specifically, 42 Pa. C.S. Section 6802(a)(5) requires that the forfeiture petition contain "...an averment of material facts upon which the forfeiture action is based."

The appeals court sustained the forfeiture. It held that although the defendant may have been correct that the commonwealth's forfeiture petition lacked sufficient facts to support a forfeiture, that issue had not been raised in the trial court in a timely manner and would not be considered on appeal. Moreover, the commonwealth was not required to establish the nexus between the offenses and the property until the time of the trial, and this had been done. After a lengthy review of federal and Pennsylvania cases dealing with "facilitation" and "nexus," the appeals court held that the commonwealth had established that the vehicle and residence had been used to facilitate cocaine sales and that "...an illicit nexus was established."

TEXAS – Currency; Lack of Nexus to Drugs

$5,559 in United States Currency v. State, No. 01-90-00335-CV, Ct. of App. of Tex. (2/7/91). The trial court in this case granted forfeiture of $5,559 in currency, one triple beam scale, and three other scales. The owner of the currency and scales contended on appeal that there was no evidence that the currency or scales had been derived from or intended for use in an enumerated offense under the Controlled Substances Act, Section 5.03(a)(6). The facts are as follows: On April 28, 1989, an informant went to the violator's apartment and attempted to buy $250 worth of cocaine while under police surveillance. The violator told the informant that he had already sold all the drugs he had, and no purchase was made. On May 3, 1989, the informant returned to the violator's apartment and purchased 0.12 gram of white powder containing cocaine for $25, paying with a marked $50 bill. Police recorded the conversation between the informant and the violator during the May 3 transaction. The conversation included statements by the violator that he sold drugs to all kinds of people and that he could get about any narcotic the informant wanted to purchase. That night, the police executed a search warrant for the violator's apartment which resulted in the seizure of scales, jars containing a white powdery substance (which was never identified at trial), drug paraphernalia, marijuana, plastic bags, and $5,559 in cash from the violator's wallet.

The police testified that no marked bills used by the informant and the violator were recovered from the violator or his apartment. The police also testified that scales are used to weigh illegal drugs and that plastic bags are used to package them. The informant testified that he had no personal knowledge of the source of the $5,559 and that he had never seen the violator use the scales for illegal drug activity. The violator's wife testified that the $5,559 had come from various sources, including an income tax refund, a refund from a car dealership for a returned vehicle, and her and her husband's employment. The violator's wife further testified that neither she nor the violator were involved in illegal drug activity and that the seized scales were mainly used to weigh food.

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B O O K S H E L F

The White Labyrinth, by Rensselaer W. Lee III, TransAction Books, New Brunswick, N.J., 1990, 263 pages.

In his new book, Rensselaer W. Lee takes a comprehensive look at the powerful forces behind South American drug syndicates and their influence on politicians, governments, economies, and small neighborhoods across South America. Lee explores the web of power and control these drug organizations enjoy in Colombian society, and how that power is obtained, maintained, and dispersed throughout the political, social, and economic structure.

Lee sees the drug problem as a source of conflict between North and South America. Consumer countries, like the United States, are rich and industrialized, while drug-producing countries are poor and predominantly agricultural. Each blames the other for the accelerating drug traffic and, depending on whether they are drug producers or consumers, advocates supply-side or demand-side solutions.

Supply-side approaches have failed mainly because Latin American governments lack the resources to control the drug traffic and fear the economic and political costs if they are successful. "Narco-dollars" represent a relatively important source of foreign exchange for Andean countries. The narcotics industry itself is an important source of jobs and income. Workers along the cocaine production-distribution chain receive substantially higher wages than they would in the licit economy.

Even if the governments of producing countries possessed the resources to stem the traffic, they lack the necessary political support. The Colombian mafia, as Lee refers to the cocaine cartel, has cultivated a strong block of political power through the coca farmers and the cocaine traffickers. The farmers are numerous, well organized and politically well supported. The cocaine traffickers act as power brokers and provide funding for political campaigns. They have penetrated and corrupted nearly every important national institution, including the police and the judiciary.

To garner further support, some cocaine traffickers have recently exhibited a rudimentary sense of social responsibility. They have encouraged a popular following through sponsorship of public works and welfare projects to benefit the urban and rural poor.

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Despite its developing respectability, however, organized crime in Colombia has never shied away from using force to protect its interests. When an industry as large as the cocaine sector seeks protection, corruption and violence are spawned on a massive and unprecedented scale. The cocaine mafia starts out with large outlays for weapons and guard forces to protect laboratories, airfields, drug shipments, and key personnel. Traffickers generally are better armed than national police forces, use better communications equipment and faster aircraft. They commonly pay police or military officers to overlook drug operations and maintain an elaborate network of informants that provides advance warning of the timing and location of raids and checkpoints.

Other components of the protection strategy are a little more sophisticated. They include influencing the judicial system, public opinion through mafia-owned publications, and the entire political process by funding politicians' (re)election campaigns. Finally, the cocaine mafia has been successful in dictating the national "rules" of narcotics control by persuading the Colombian government to scuttle the U.S.-Colombian extradition treaty. Violence and threats have paralyzed the Colombian criminal justice system and effectively blocked extraditions.

Despite the economic growth narco-dollars have allowed, most of the billions of dollars earned by cocaine traffickers stay abroad in offshore havens, foreign real estate, securities, and business investments. The cocaine dollars that do return to the exporting countries may represent only a small fraction of traffickers' total earnings, but their impact is significant in financial markets. Large infusions of dollars from any source are of great value to developing nations, and narco-dollars are no exception. Cocaine sales are a vital source of hard currency in South America and are not a minor contribution to economic growth.

Many Latin American governments try to encourage the repatriation of narco-dollars and the flow of this money into the legitimate banking sector. Any successful crackdown on the cocaine industry would put noticeable pressure on these countries' finances, seriously devaluing the currency and possibly triggering an uncontrollable wage-price spiral. Drug earnings stabilize a country's currency, help finance needed imports, and may even enhance a country's creditworthiness. Yet, establishing a link between drug money and economic growth is a difficult task.

For these reasons the war against cocaine is not especially popular in South America. It is perceived as a

program imposed by the United States. The spraying of illicit crops and military intervention against cocaine laboratories have provoked considerable anti-U.S. sentiment. The political elites view anti-drug crusades with hostility because they impose significant new burdens and create formidable new challenges.

The author's research and analyses lead to several conclusions that advocates of supply-oriented programs will find discouraging. Even with significant U.S. assistance, Andean governments will probably make little progress in controlling cocaine production. Eradication campaigns, occasional large drug busts, and a few major arrests will not change the leadership of the cocaine industry, its agricultural base, manufacturing infrastructure, or smuggling networks. The war against cocaine cannot be won in the jungles, villages, or trafficking capitals of Andean countries. The industry will collapse only when Americans decide that they will no longer be the drug lords' customers.

—Adam M. Karr

New Personnel

With this issue PERF staff member Halley Porter joins us as managing editor of the asset forfeiture bulletin.

ASSET FORFEITURE BULLETIN

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LEGAL CORNER

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The Court of Appeals of Texas reversed the forfeiture by the trial court. It held that the state had not shown by a preponderance of the evidence that the seized currency was derived from selling illegal drugs or that the scales had been used or intended for use in illegal drug activity. The appeals court noted that, although there was no question the violator was engaged in illegal drug activity, the state had failed to link the currency and the scales to this activity. It also noted that unlike some recent cases, the violator had presented uncontradicted evidence as to the source of the money and other use of the scales, while the state had failed to establish the necessary link between the illegal drug activity and the currency and scales.

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