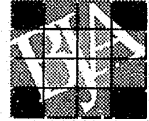


U.S. Department of Justice  
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ASSET  
FORFEITURE

# How to Present The Forfeiture Case to the Prosecutor

16<sup>th</sup> in a series



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## **How to Present the Forfeiture Case to the Prosecutor**

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**NCJRS**

**SEP. 14 1993**

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## **Foreword**

Nowhere is the need for police-prosecutor cooperation more important than on the issue of asset forfeiture. Very quickly, investigative issues can become legal problems—unless there is a joint commitment to planning and working together.

This guide is intended as a simple mechanism to help foster a closer working relationship between investigators and prosecutors. The vehicle is a brief and fairly simple protocol consisting of basic questions that the prosecutor routinely asks about the forfeiture matter under consideration. The answers to these questions by investigators should help the prosecutor make a more informed decision about a prospective forfeiture—and to provide the mechanism for addressing any problems early on, before they become serious obstacles.

We hope that investigators and prosecutors will find that this guide helps build another important bridge between their respective disciplines.

**Clifford L. Karchmer**  
**Project Manager**  
**Police Executive Research Forum**

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**Police Executive Research Forum**

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U.S. Department of Justice Asset Forfeiture

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## **The Focus of This Guide**

This guide is designed to help investigators understand and effectively utilize forfeiture<sup>1</sup> as a law enforcement tool. Its emphasis is on successfully preparing the forfeiture segment of a case for presentation to the prosecutor.

There are two types of forfeiture: civil and criminal.<sup>2</sup> Because most state forfeiture laws are civil, this guide does not address criminal forfeiture. Civil forfeiture is a legal action against *property* and, depending on the specific state provision, may or may not require the conviction of a defendant or even the identification of a perpetrator.

Every investigator should be familiar with the criminal statutes that he or she routinely enforces and should know whether they have accompanying forfeiture provisions. If they do, these powerful provisions should be studied and understood, so that they may be used to full advantage. This pamphlet will help by explaining when and how these provisions may be used. To assist the investigator in organizing and presenting the forfeiture case to the prosecutor, a *Model Presentation Memorandum* is found in *Appendix A*.

This guide is intentionally general in nature because no two forfeiture provisions are alike. It emphasizes both state and federal forfeiture procedures. Because many state provisions emulate federal concepts, federal forfeiture case law and practice are the principle references.\*

## **Background**

Prior to 1970, most forfeiture provisions permitted forfeiture only of personal property directly tied to an offense. These

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\* For an overview of federal forfeiture law, see Michael Goldsmith, *Civil Forfeiture: Tracing the Proceeds of Narcotics Trafficking* (Rev. ed. 1992), available from the BJA Clearinghouse, (800) 688-4252.



provisions did not address the ill-gotten gains—derived assets generated by illegal activity, which are frequently found well beyond the immediate crime scene. This is not true of more recent state and federal forfeiture provisions, but past limitations still influence the present-day thinking of investigators and prosecutors. Until recently, forfeiture has been viewed as an afterthought or secondary consideration.

Starting in 1970, Congress turned to the forfeiture sanction as one of a number of anti-crime initiatives to address a worsening organized crime problem and passed criminal forfeiture provisions to deal with organized crime and illegal drug trafficking.<sup>3</sup> From 1970 to the present, Congress has added more civil and criminal forfeiture provisions and greatly expanded the scope of existing provisions. In 1984, for instance, it amended the Customs laws<sup>4</sup> to permit the sharing of federally forfeited property with state and local law enforcement agencies.<sup>5</sup> In 1986, Congress passed a money laundering statute<sup>6</sup> and added civil and criminal forfeiture provisions<sup>7</sup> to this statute.

Since 1970, many state legislatures have followed the lead of Congress and added forfeiture provisions to various criminal statutes or enhanced those provisions already present.

Today, many state forfeiture provisions allow forfeiture of property located well beyond the immediate scene of a crime, and often permit the forfeiture of derivative proceeds and property that have facilitated a violation. A few state forfeiture provisions exceed those of the federal government and provide for the forfeiture of property involved in *all* or *many* felonies. Florida,<sup>8</sup> New York,<sup>9</sup> and Texas,<sup>10</sup> for instance, have passed comprehensive forfeiture laws that reach property illegally used in a number of felony violations.

To take full advantage of these new provisions and use existing forfeiture laws whenever possible, the investigator should keep in mind several key points when preparing the forfeiture aspect of a case.

## **Seven Questions the Prosecutor Will Want Answered**

The investigator should be prepared to answer the following questions regarding any forfeiture case he or she wants prosecuted.

1. What crime was committed?
2. Is there a forfeiture provision?
3. What property is forfeitable?
4. What evidence makes this property forfeitable?
5. How *should* the property be seized? or, how *was* the property seized?
6. What is the value of the property, and where is it now?
7. Who are the owners and lienholders of the property?

### **1. What Crime was Committed?**

The fact that there must be a violation of a criminal statute (but not necessarily an individual charged with a crime) before there can be a forfeiture may seem elementary.

Generally, the civil forfeiture of property is part of a criminal case in which an *individual* is charged with commission of a crime, but the *property* associated with the crime is separately charged with forfeiture. The investigator should provide the prosecutor with a summary of the facts, including the

statute violated, the date and place of the offense, evidence to prove the criminal offense, and the person or persons responsible.

When the persons responsible for a crime are not charged, but property is seized for forfeiture, the investigator should provide a summary of the facts of the violation and investigation for the benefit of the prosecutor.

## **2. Is There a Forfeiture Provision?**

Once probable cause establishes that a violation of a criminal statute has occurred, the investigator should look to the statute for a related forfeiture provision.

There is no such thing as common-law forfeiture. If the criminal statute does not have a forfeiture provision, forfeiture may not be used. For example, the federal bank robbery statute does not have a forfeiture provision, so the car used by a robber to get to and from a bank cannot be forfeited (unless it was used in a subsequent effort to launder the proceeds of the robbery).

Investigators who are not familiar with particular forfeiture provisions in their jurisdiction should not hesitate to seek assistance from a superior or local prosecutor. A good working knowledge of the rules of forfeiture is important in preparing a successful forfeiture case.

## **3. What Property is Forfeitable?**

All forfeiture provisions provide information on the type of property covered in the statute and the illegal activity that triggers the forfeiture of specific property. Unfortunately, the various statutes often do not use common language.

As a general rule, forfeitable property falls into three categories. Property may be forfeited because: (1) it is *contraband* and, therefore, illegal to possess; (2) it is the *proceeds*

of illegal activity (or traceable, either directly or indirectly, to the proceeds of illegal activity); or (3) it somehow *facilitated* the commission of an illegal act. Property in this last category is typically referred to as an *instrumentality* of illegal activity or as *involved in* or *used* in the commission of a crime.

For the purposes of this guide, we will use the latter two criteria—*type of property* and *prohibited activity*—to identify the property subject to forfeiture and the illegal activity that makes the property forfeitable under law.

### **Type of Property**

A forfeiture statute may specifically identify the type of property that can be forfeited, e.g., *equipment, a conveyance* (a car, boat, or plane), or *real property* (buildings and land), or it may define the property in more general terms, e.g., *contraband, things of value, an instrumentality, property involved in, or proceeds*.

Some forfeiture statutes may be unclear in their description of forfeitable property. For instance, can an *instrumentality* mean a house or land, or is it limited to personal property? For help in understanding vague forfeiture terms, look to the definitions provided in the particular provision, court decisions interpreting the provision, similar language in other provisions or ask a prosecutor.

The term *proceeds* bears more discussion. A simple definition of proceeds is: that which is received in exchange when an object is sold, traded, or disposed of otherwise. Proceeds include, but are not limited to, money. For example, money received for illegal drugs constitutes the proceeds of the exchange. If that money is then used to purchase a car, however, the car becomes the proceeds of the exchange (assuming the statute covers traceable proceeds), or if the drug seller simply

receives jewelry in exchange for the drugs, the jewelry is the proceeds.

The investigator must present to the prosecutor the facts that connect the sale or exchange transaction to the property to be forfeited. As Michael Goldsmith writes in his guide on tracing narcotics proceeds, this is "...not an insurmountable task."<sup>11</sup> As Goldsmith notes, the standard of proof in civil forfeiture is usually less than the beyond a reasonable doubt standard in criminal law. Therefore, law enforcement agencies do not need to prove the linkage beyond a reasonable doubt. In addition, under many civil forfeiture provisions, the burden shifts to the claimant after the government establishes proof of probable cause.

To assist in tracing the proceeds of a crime, Goldsmith defines some common evidentiary factors<sup>12</sup> that will assist the investigator. They include:

- **Close Proximity** – when the proceeds are in close proximity to narcotics or other contraband.
- **Concealment Efforts and Commingled Funds** – the use of fictitious owners or businesses to hide assets, or the commingling of illegal funds with legitimate funds.
- **Pre-Trial Statements** – statements made to associates, co-conspirators, or undercover officers identifying places or methods used to conceal property derived from a criminal activity.
- **Narcotics Records** – e.g., entries in a drug ledger.
- **Evasive Trial Testimony** – deposition testimony that is inconsistent or conflicts with testimony given at trial.

Goldsmith also describes another method used to trace proceeds: "*net worth*" analysis.<sup>13</sup> This method examines the discrepancy between a claimant's lifestyle (the amount of money being spent) and his or her legitimate means of support. Generally, net worth analysis relies on proof that the claimant's lifestyle is well beyond what would be expected based on his or her declared legal income.

A recent federal case<sup>14</sup> provides a good example of using net worth analysis to support the contention that property was the proceeds of illegal drug activity. The government showed that the claimant reported an annual income over a period of years that averaged \$27,000. Yet, over this same period, he purchased millions of dollars worth of property. The court noted that some of these purchases were made with large sums of cash carried in paper bags, that he attempted to shield money from the government by not making cash deposits greater than \$10,000 (to avoid the Bank Secrecy Act reporting requirement), and that he directed his accountant not to take some legitimate tax benefits.

The net worth analysis in this decision was also supported by more direct evidence. For example, the government provided the statements of an undercover agent and an informant implicating the claimant in illegal drug transactions and seized a large quantity of a controlled substance, firearms, and a scale from the claimant's residence.

The investigator should present all relevant facts which show that the property in question is traceable to an individual or to the original proceeds of a crime.

### **Prohibited Activity**

To recap, the investigator must demonstrate that the property to be forfeited violated a provision of a specific statute. For

example, most drug forfeiture provisions make the illegal drugs involved in a crime forfeitable. The illegal drug, e.g., marijuana or cocaine, is directly involved in the crime. Likewise, the federal and several state money-laundering statutes provide for the forfeiture of money laundered in violation of these statutes.

Property that is indirectly involved in a violation, such as a car used to transport money to purchase illegal drugs, may also be forfeitable. In this example, the car facilitated the violation by making it easier to purchase the drugs. If there is facilitation language in the provision, then consider whether the property aided, assisted, or encouraged the prohibited act.<sup>15</sup>

Keep in mind that there can be subtleties in the language of a forfeiture statute. For example, *property involved in* can mean property *directly* involved in a violation, property that was *indirectly* involved and facilitated a violation, or both. Modifying the language, such as *in any manner* when it precedes the term *facilitation*, broadens the concept of facilitation in that provision.

Where this modifying language is present in a statute, almost any conceivable type of assistance or aid will meet the facilitation requirement. For example, a federal appeals court<sup>16</sup> permitted the forfeiture of a house based on two phone calls made to the house to arrange a drug transaction.

### Intended Use

Finally, a statute may contain language such as *intended for use*. When the facts show that property was intended to be used in a prohibited act, it may be forfeitable.

For example, a plane retrofitted to transport illegal drugs, though it had not yet actually transported drugs, would still be forfeitable. Similarly, the cash carried by an individual going

to a meeting to purchase illegal drugs may be forfeitable even if it is seized before the meeting takes place. It is the criminal's state of mind that is the controlling factor and not whether the cash (or other property) was in fact ever used in the prohibited activity.

### **Restrictive Provisions**

Forfeiture statutes must be read very carefully, because they may contain restrictive language. For instance, California requires that a minimum amount of a controlled substance be present before the forfeiture of a vehicle is permitted.

Some state forfeiture provisions, although civil, require the conviction of a defendant in a separate criminal case. For example, the Ohio provision<sup>17</sup> not only requires the conviction of a defendant but also requires that the conviction be for a specified felony. The civil forfeiture provision of the federal drug statute limits forfeiture of realty to situations where the underlying offense is a felony, e.g., the sale of a drug in the house.<sup>18</sup>

#### **4. What Evidence Makes This Property Forfeitable?**

In civil forfeiture, the focus is on property and not on an individual. The same techniques and procedures used to develop evidence to charge an individual with a crime are used to establish evidence in support of forfeiture. These techniques include:

- use of informants, cooperating witnesses, and undercover officers;
- garbage searches for utility, bank, insurance, and credit card records;
- questioning witnesses (including in a grand jury); and



- use of public records, such as deeds, that link the defendant with the property.

Another effective tool is a search warrant specifically seeking financial records, often referred to as a financial search warrant. If available, the financial search warrant can be a valuable aid in identifying property ripe for forfeiture.<sup>19</sup>

The investigator should be prepared to set forth detailed facts relating to how and why the property in question is forfeitable. Simply to tell the judge (or prosecutor) that a defendant is a money launderer or a "doper" merely states a conclusion and does not provide the evidence needed to justify the forfeiture of his or her property.

As an example, to support forfeiture of the plane mentioned above, you might present facts that show how it was purchased, e.g., with cash; that it was specially equipped with fuel bladders and navigation equipment to fly extraordinary distances; that it has concealed compartments; and that the owner would not likely use such a plane in his or her legitimate business. You would obtain records of the purchase, the expenses for retrofitting the aircraft, and statements from the individuals who built the concealed compartments. Photographs of the plane, including the concealed compartments, would be made. If available, statements from uninvolved pilots and mechanics describing the limited use of a plane so equipped and the costs of the retrofitting might aid in the proof.

In the *Model Presentation Memorandum (Appendix A)* only few facts are needed to show that the vehicle in question should be forfeited, because a vehicle that transports a controlled substance is clearly forfeitable under federal and many state laws. More facts will be needed when property is less directly tied to an offense.

## 5. How *Should* the Property be Seized? or, How Was the Property Seized?

In the best circumstances, the seizure of property for forfeiture should not occur until the investigator and prosecutor have fully discussed the facts of the case. Some forfeiture provisions, or policies based on them, address required methods of seizing property.<sup>20</sup>

For example, some provisions require that a seizure warrant be issued or that a seizure be incident to an arrest or search; others permit seizure based on probable cause alone. If a provision requires a seizure warrant, a judge will make the probable cause determination and issue a warrant. Warrants help protect the investigator and prosecutor from possible civil liability.

Seizures are often unplanned, such as when property is seized incident to an arrest or search. When a seizure is unplanned, the investigator should contact the prosecutor immediately and be prepared to present as many facts as possible. Some state provisions require the state to make a formal charge against the property within a matter of hours following the seizure. Where there is such a deadline, the prosecutor should be so advised and consulted. The *Model Presentation Memorandum* in *Appendix A* covers situations in which a seizure is either planned or unplanned.

If the property is realty, a *lis pendens* (notice of legal action pending against property) should be filed with county or municipal authorities and attached to property records at the time of seizure. This puts all potential purchasers on notice that forfeiture proceedings are pending.

It should be noted that there are federal appeals court decisions holding that due process requires that an owner or occupant of real property be given notice before a seizure, as

well as an opportunity for a hearing.<sup>21</sup> Some state courts may follow this principle—be sure to check.

If the property needs to be seized immediately, e.g., because it is about to be sold or removed from the court's jurisdiction, the prosecutor should be immediately advised. Likewise, be sure to notify the prosecutor if a seizure should be postponed to avoid compromising an ongoing investigation.

## **6. What is the Value of the Property, and Where is it Now?**

If the property has not yet been seized, then its approximate value should be determined. This can be done without jeopardizing the investigation. For example, if the property is realty, public tax records will provide the necessary information.

If the property has already been seized, then a more precise value should be determined. This is usually the fair market value at the time and place of seizure. Seized property should be appraised using accepted appraisal methods.<sup>22</sup>

Many items seized for forfeiture can easily become "wasting assets." Cars, boats, planes, and houses deteriorate very rapidly if not cared for. The investigator should be prepared to provide long-term storage and maintenance of such properties. Any storage arrangement should include provisions for regular maintenance, and the investigator and prosecutor should be informed if the value of the property appears to be diminishing. Occupancy agreements with the owners or renters of real property should be considered. These agreements have proved very effective in maintaining realty seized for federal forfeiture.

## **7. Who are the Owners and Lienholders of the Property?**

Often ownership of a property is obvious. When it is not, ownership or an interest in the property can be determined

from various sources. There is a presumption that the possessor of the property at the time of its seizure has an interest in it. Records such as bills of sale and vehicle registrations may identify persons or lienholders with an ownership interest.

The investigator should make a good-faith effort to identify all possible owners, whether they be the possessor at the time of seizure, owners of record, lienholders, mortgagees, or victims. Property is often placed in the name of another (a nominee) in order to shield it from forfeiture. When this occurs, be prepared to show why the nominee is not the true owner, and back this up with persuasive documentation.

The investigator should be able to provide the prosecutor with the names and addresses of possessors of the property, owners of record, lienholders, mortgagees, or victims soon after the seizure. If the owner is incarcerated, then the investigator should obtain both his or her residence address and the address of the place of incarceration.

Once fair-market value of the property is known, the investigator must consider the interest of any innocent owners in the seized property, because their interests are usually recognized and they are compensated. If an innocent owner's interest is at or near the fair-market value, serious consideration should be given to discontinuing the forfeiture action. Some forfeiture actions are brought even when there is no economic incentive, e.g., forfeiture of crack houses, but in most cases, they should not be brought (or continued) when the cost of forfeiture will far exceed the value to the agency of the forfeited property.

The prosecutor should also be advised if any other agency has requested a share of the forfeited property or if the seizing agency plans to place the property into use following the forfeiture. This information may affect decisions made in the course of the forfeiture proceedings.

## Conclusion

When forfeiture is permitted, it should be an integral part of a criminal investigation. Because every forfeiture provision is different, however, the investigator needs to be certain that all specific procedural and evidentiary requirements are met in order to satisfy a court that forfeiture is the appropriate remedy. For your assistance, a *Case Presentation Example* is set forth in *Appendix B*.

Answering the seven questions in this guide will help the investigator collect the facts needed to commence a successful forfeiture action, and to present those facts clearly to the prosecutor. These questions are repeated in the *Model Presentation Memorandum* that follows.

## End Notes

<sup>1</sup>Forfeiture is defined as the divestiture without compensation of property used in a manner contrary to the laws of the sovereign, *United States v. Eight (8) Rhodesian Statues*, 449 F. Supp. 193, 195 n. 1 (CD Cal. 1978).

<sup>2</sup>Criminal forfeiture is a legal action against the defendant and his or her property and always requires the conviction of this defendant.

<sup>3</sup>RICO, 18 U.S.C. § 1963 and the Controlled Substances Act, 21 U.S.C. §§ 853 and 881.

<sup>4</sup>Tariff Act of 1930, 19 U.S.C., §§ 1602 et seq.

<sup>5</sup>See *A Guide to Equitable Sharing of Federally Forfeited Property for State and Local Law Enforcement Agencies*, prepared by the Executive Office for Asset Forfeiture, Office of the Deputy Attorney General, United States Department of Justice, (1990). Telephone number: (202) 616-8000.

<sup>6</sup>Money Laundering Control Act of 1986, Pub. L. 99-570, Oct. 27, 1986, 100 Stat. 3207-18.

<sup>7</sup>18 U.S.C. §§ 981 and 982.

<sup>8</sup>Florida Contraband Forfeiture Act, Fla. Stat. Ann. §§ 932.701-932.705 (Supp. 1992).

<sup>9</sup>New York Civil Practice Law §§ 1310 - 52 (Supp. 1992).

<sup>10</sup>Texas Code of Criminal Procedure Ann. §§ 59.01 - 11 (Supp. 1992).

<sup>11</sup>*Civil Forfeiture: Tracing the Proceeds of Narcotics Trafficking* (Rev. ed. 1992) Bureau of Justice Assistance, (1985), page 1.

<sup>12</sup>*id.* at pages 5-7.

<sup>13</sup>*id.* at pages 8-10.

<sup>14</sup>*United States v. Parcels of Land*, 903 F.2d 36 (1st Cir. 1990), cert. denied, \_\_\_\_\_ U.S. \_\_\_\_\_, 111 S.Ct. 289 (1990).

<sup>15</sup> A recent federal court decision restated the definition of facilitation as *conduct that makes a prohibited activity less difficult or more or less free from obstruction or hindrance*. *United States v. One Parcel of Property Located at 1606 Butterfield Road, Dubuque, Iowa*, No. C 90-1012 (N.D. Iowa October 8, 1991).

<sup>16</sup> *United States v. One Parcel of Real Estate Commonly Known as 916 Douglas Avenue, Elgin, Ill.*, 903 F.2d 490 (7th Cir. 1990), cert. denied. \_\_\_\_\_ U.S. \_\_\_\_\_, 111 S. Ct. 1090 (1991).

<sup>17</sup> Ohio Revised Code Ann. § 2933.43.

<sup>18</sup> 21 U.S.C. § 881(a)(7).

<sup>19</sup> For a good discussion on searches and specifically on financial search warrants, see *Financial Search Warrants* by Richard S. Stolker, Police Executive Research Forum (1989).

<sup>20</sup> *Id.*

<sup>21</sup> See, e.g., *United States v. All Assets of Statewide Auto Parts, Inc.* 971 F.2d 896 (2d Cir. 1992).

<sup>22</sup> For instance, the Department of Justice uses the National Automobile Dealers Association (NADA) Guide for appraising automobiles, trucks, and boats. Most seizing agencies in the Department's Forfeiture Program use the wholesale rather than the retail value set forth in the NADA Guide.

**APPENDIX A**  
**Model Presentation Memorandum**

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**What crime was committed?**

The property is subject to forfeiture because it was involved in a violation of [ *set forth the criminal statute violated, e.g., the state drug law* ]...

**Is there a forfeiture provision?**

...[ *set forth the specific forfeiture provision(s) violated* ]...

**What property is forfeitable?**

...This property, [ *provide a complete description of the property* ] was [ *contraband, involved in, used as an instrumentality of a crime, was intended for use in, is proceeds from, is an interest in, security of, claim against, or influence over an illegal enterprise, or it facilitated a violation of* ]...

**What evidence makes this property forfeitable?**

...On [ *date* ], [ *name of the officer* ], [ *name of the law enforcement agency* ] [ *set forth the law enforcement action, e.g. stopped a vehicle (describe) and arrested the driver (describe) for (describe the violation). A controlled substance (describe, including quantity) was found in the vehicle during an inventory search* ]...



**How should the property be seized?  
Or, How was the property seized?**

...[ *set forth the details regarding how the property was seized (or will be seized), e.g., seizure warrant, incident to an arrest or incident to a seizure warrant, probable cause* ] and [ *provide any deadlines that must be met to make a formal charge of the property* ]...

**What is the value of the property and where is it now?**

...The seized property was appraised at [ \$ ] by [ *provide the method used to conduct the appraisal* ]. The property is stored [ *place of storage and the expenses to date for this maintenance and storage are \$* ]...

**Who are the owners and lienholders of the property?**

...The owner is [ *name and address of the owner (If there is a lien, the name of the lienholder and the amount of lien. If there are victims, provide their identities and interest in the property)* ]. The forfeited property will be disposed of [ *method of disposal, e.g., sharing, official use, or sale.* ]

## **APPENDIX B**

### **Case Presentation Example**

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Tony Bruce is the subject of an undercover investigation regarding the possession and sale of cocaine. Successful undercover recordings and purchases of cocaine have taken place. You (the investigator) are at the point of completing the investigation and want to be sure that all forfeitable property is seized. Your state forfeiture law does not permit the forfeiture of realty, so you request that the Drug Enforcement Administration assist you in seizing property for federal forfeiture.

Several undercover transactions have taken place at Bruce's residence. You have made an inquiry at the county courthouse regarding the legal owner of the residence and, surprisingly, found that it is Bruce's wife. You recall that during your investigation Bruce never permitted his wife to be present when he talked about his illegal drug business or when he made the actual sales.

One of the issues in the forfeiture of the residence will be a potential claim by Bruce's wife that she is an innocent owner. To be prepared for this possible challenge, you use two undercover colleagues equipped with body mikes. One is sent to talk with Bruce. The other is assigned to stay with Bruce's wife. The second officer engages Bruce's wife in conversation regarding Bruce's illegal activities. She makes incriminating statements regarding her knowledge of Bruce's illegal drug endeavors.

Your investigation of Bruce included a financial inquiry, which has determined that he has not been filing tax returns, but you have observed Bruce with a late model car and numerous pieces of expensive jewelry. Occasionally, the undercover officers have engaged Bruce in idle conversation, and

he has mentioned that he had purchased this personal property, using cash, within the last year. You have determined that Bruce has not had legitimate employment for over two years.

### **Presentation Memorandum**

The federal civil drug forfeiture statute 21 U.S.C. § 881 will be used for this example. The property to be seized for forfeiture will be Bruce's residence, car, and jewelry. The presentation is made to an Assistant United States Attorney.

#### **What crime was committed?**

The crime committed was a violation of the Controlled Substances Act. (Because you want to seize Bruce's residence, you must show that the crime was a felony.)

#### **Is there a forfeiture provision?**

The forfeiture provisions are 21 U.S.C. § 881(a)(4) for the car; § 881(a)(6) for the jewelry; and § 881(a)(7) for the residence.

#### **What property is forfeitable?**

This property, [provide a full description of the car (include the Vehicle Identification Number)], the jewelry, and the residence (provide a legal description of the residence). The car facilitated a violation of the Controlled Substances Act because it was used to transport cocaine. The jewelry can be traced to the proceeds of illegal drug sales. The residence was used to facilitate a violation of the Controlled Substances Act, in that it was used to make sales of cocaine.

### **What evidence makes this property forfeitable?**

Collect all of the information from your investigation. Ensure that the tapes are transcribed so that you can provide the prosecutor with specific information as to each of the properties being seized. For example, prepare transcripts of Bruce's conversations regarding when and where he purchased the property. Provide the prosecutor with copies of statements from the undercover officers and the results of laboratory analysis of the controlled substance.

### **How should the property be seized?**

Provide assistance to DEA and obtain a seizure warrant for each of the items of property to be seized.

### **What is the value of the property, and where is it now?**

Assist DEA in having the property appraised. It will hire a professional appraiser to appraise the jewelry and the residence.\* The U.S. Marshal will take custody of the seized property.

### **Who are the owners and lienholders of the property?**

Determine the owners of the seized property and their addresses. If there are lienholders, determine the monetary value of their interest in the seized property.

After the seizure, prepare an Application for Transfer of Federally Forfeited Property (DAG-71), so that your agency

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\* This recommendation is based on U.S. Department of Justice experience: Before the seizure, get a tentative estimate of the property's likely value by viewing the property and examining property tax records. A formal pre-seizure appraisal is expensive and may tip off the owner/occupant that a seizure is likely.

can request a share of the property. This request must be filed with the federal seizing agency within sixty days of the seizure, or it may not be considered. For further details on the equitable sharing program, read the *Guide to Equitable Sharing of Federally Forfeited Property for State and Local Law Enforcement Agencies*, prepared by the Justice Department's Executive Office for Asset Forfeiture.

## About The Authors

**Laurence E. Fann** served as a special agent and agent supervisor with the FBI for twenty-five years. In 1983 he started the legal office of the FBI's forfeiture program, serving as chief from 1983 to 1989. He then transferred to the U.S. Department of Justice, where he held supervisory positions in the Department's forfeiture program, including Acting Director of the Asset Forfeiture Office. He retired in 1991 and now works in the private sector handling forfeiture matters.

**Glenda G. Gordon** is an Assistant United States Attorney, Western District of Michigan, Northern Division, at Marquette, Michigan. Ms. Gordon was a trial attorney in the Public Integrity Section of the Criminal Division at the U.S. Department of Justice from 1975 to 1980. She was an Assistant United States Attorney in Baltimore, Maryland from 1980 to 1991, when she transferred to Marquette. She has prosecuted a wide variety of criminal violations and is an instructor in the Department's Asset Forfeiture Training Program.

**Arthur W. Leach** was, most recently, the Assistant Director for Policy and Operations, Executive Office for Asset Forfeiture, Office of the Deputy Attorney General, U.S. Department of Justice. He was on detail to this position and is now permanently assigned as an Assistant United States Attorney in Atlanta, Georgia. Mr. Leach has extensive experience in both civil and criminal forfeiture and is an instructor in the Department's Asset Forfeiture Training Program.

## U.S. Department of Justice

### Asset Forfeiture Quality Assurance Principles

The Department of Justice has issued a series of asset forfeiture principles designed to ensure that law enforcement forfeiture authority is exercised with integrity and in a manner that will withstand public scrutiny. These ten principles are intended to be *minimum* principles for asset forfeiture, and they are intended to apply to all Federal, state, and local law enforcement agencies. They will be revised, refined, and strengthened as necessary in the coming years.

The Department, in conjunction with organizations such as the National Association of Attorneys General, National District Attorneys Association, International Association of Chiefs of Police, National Sheriffs Association, National Troopers Coalition, PERF, and the Fraternal Order of Police, proposes that the nation's more than 16,000 Federal, state, and local law enforcement agencies adopt these principles to ensure integrity in the asset forfeiture program.

#### National Asset Forfeiture Quality Assurance Principles

- I. Law enforcement is the principal objective of forfeiture. Potential revenue must not be allowed to jeopardize the effective investigation and prosecution of criminal offenses, officer safety, the integrity of ongoing investigations, or the due process rights of citizens.
- II. No prosecutor's or sworn law enforcement officer's employment or salary shall be made to depend upon the level of seizures or forfeitures he or she achieves.
- III. Except in exigent circumstances, and in all cases involving real property, a judicial finding of probable cause shall be secured before property is seized.
- IV. If no judicial finding of probable cause is secured prior to seizure, the seizure shall promptly be reviewed by an accountable prosecuting or agency attorney unless all elements of a completed felony offense are within the plain view of the seizing officer (e.g., border seizures).
- V. Seizing entities shall have a manual detailing the statutory grounds for forfeiture and all applicable policies and procedures; it shall be available for public inspection.
- VI. The manual shall include procedures for the expeditious release of seized property where appropriate and the prompt resolution of claims of innocent ownership.
- VII. Entities retaining forfeited property for official law enforcement use shall ensure that the property is subject to internal controls consistent with those applicable to property acquired through the normal appropriations processes of that entity.
- VIII. Forfeiture proceeds shall be maintained in a separate fund or account subject to appropriate accounting controls and annual financial audits of all deposits and expenditures.
- IX. Agencies shall strive to ensure that seized property is protected and its value preserved.
- X. Seizing entities shall avoid any appearance of impropriety in the sale of forfeited property.