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Money Laundering Forfeitures—Landmark Structuring Case Provides Guidance

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In *Ratzlaf* v. *United States,* 1994 WL 4189, 1994 U.S. Lexis 936 (U.S., January 11, 1994), the Supreme Court clarified the elements of the Federal structuring offense, 31 U.S.C. § 5324. The opinion gives law enforcement officers useful direction for targeting cases, gathering evidence, anticipating defenses, and evaluating the likelihood of prevailing against a claimant in seizure and forfeiture matters.

The Crime

Structuring means breaking transactions larger than $10,000 into smaller increments by making multiple deposits or withdrawals or by buying cashiers' checks, money orders, or other monetary instruments for the express purpose of evading the reporting requirements. These reports, required by the Bank Secrecy Act (BSA)[1] and the Internal Revenue Code,[2] must be filed with the Internal Revenue Service every time a transaction involving more than $10,000 in cash is carried out with a financial institution.[3]

The Conviction

To be convicted of structuring, an individual must knowingly and willfully transact below the $10,000 threshold level, intending to evade the reporting requirements.[4] This means the Government must prove that the defendant knew that the financial institution is required by law to file transaction reports and knew that breaking transactions into multiples of less than $10,000 to avoid triggering these reports is unlawful.[5]

In *Ratzlaf,* the petitioners (who had been convicted of structuring) went to several banks in and around Stateline, Nevada, and South Lake Tahoe, California, using cash to purchase, or attempt to purchase, cashiers' checks in amounts of

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1. P.L. 91–508, 84 Stat. 1114 (1970) (codified as amended in scattered sections of 12 U.S.C., 15 U.S.C., and 31 U.S.C.).

2. 26 U.S.C. § 60501.

3. 31 C.F.R. § 103.11(i) lists a broad range of entities that are considered financial institutions for currency transaction report-filing purposes. Among them are banks, securities brokers, sellers of cashiers' checks, dealers, or exchangers of currency to include check cashers, transmitters of funds, casinos, and the U.S. Postal Service.

4. *Ratzlaf* v. *United States,* 1994 WL 4189 (U.S., January 11, 1994).

5. Ibid.

less than $10,000. They also gave three individuals cash and asked them to purchase cashiers' checks in amounts of less than $10,000 from two banks in Oregon. They did this to settle a $160,000 gambling debt at a casino in Nevada with numerous payments of less than $10,000 each so as to evade the banks' and the casino's reporting requirements on cash transactions involving more than $10,000 in currency.

For investigators and prosecutors, it is critical to document the target's knowledge that structuring to evade reporting requirements is a crime.

Reversing the Ninth Circuit Court of Appeals, the Supreme Court held that the Government must prove that the defendant acted with knowledge that his or her conduct was unlawful.[6] A jury may convict a defendant of the crime of structuring if the Government proves the defendant had actual knowledge that structuring is a crime or that the defendant intentionally or recklessly disregarded a legal duty (willful blindness).[7]

Although direct evidence of the defendant's knowledge that structuring is a crime is certainly desirable for the prosecution's case, it is not necessarily required. Circumstantial evidence is entitled to the same weight as direct evidence in determining whether there is sufficient evidence to support a guilty verdict.[8]

In *Ratzlaf,* the Supreme Court cited cases to illustrate how a properly instructed jury may find the requisite knowledge on the defendant's part by drawing reasonable inferences from evidence of the defendant's conduct.[9] Perhaps most important, the Court suggested that evidence that the structured funds are proceeds of drug dealing or other criminal ventures could support the inference of bad purpose to disobey or disregard the law; establishing intent is required for a conviction.[10]

Reasoning by analogy to a U.S. Customs case, the Court indicated that signs advising customers of the reporting requirements posted conspicuously on the premises could support the inference that the defendant knew that structuring is illegal.[11] Some banks provide circulars to customers transacting with more than $10,000, advising them of currency transaction report requirements. Although a form of this type provides the requisite information to the $10,000+ bank customer that structuring is illegal, it does not address the so-called "smurf" who transacts at a bank or nonbank financial institution with amounts of less than $10,000.

For investigators and prosecutors, it is critical to document the target's knowledge that structuring to evade reporting requirements is a crime. Documenting can be accomplished with timely and indepth interviews with all financial institution employees who have dealt with the target. Prior filings should be followed up with interviews at the filing institution as well as with any other parties who may be listed on the currency transaction report.

Consensual monitorings, or even a direct interview of the target, should be considered to document knowledge. In undercover situations or whenever bank employees agree to act as cooperating witnesses, the undercover officer or cooperating witness should ensure that recorded conversations with the target include statements to the effect that structuring to evade filing of the currency transaction report with the Internal Revenue Service is against the law.

The Civil Forfeiture Aspect of Structuring

Property involved in or traceable to a transaction in violation of the anti-structuring laws is subject to forfeiture to the U.S. Government[12] and, depending on the jurisdiction, perhaps under State law as well.[13] This means that all the structured cashiers' checks, money orders, etc., and the property they purchased are forfeitable.

Facilitation Theory

When structured funds not necessarily derived from an illegal source can be traced to an account into which both legal and illegal source funds have been deposited, courts have upheld forfeiture of all of the money in the account because the "clean" money facilitated the laundering offense.[14]

Investigators and prosecutors should consider seizure and forfeiture of funds traced to accounts when there is evidence of structured deposits in addition to evidence that the account

6. *Ratzlaf* v. *United States,* 1994 WL 4189 (U.S., January 11, 1994).

7. *Ratzlaf,* 1994 WL 4189 *7, n. 19. But see also *United States* v. *Rogers,* 1994 WL 74415 *3, n. 4 (4th Cir. March 14, 1994). In *Rogers,* the Fourth Circuit pointed out that structuring to avoid filing of IRS Form 8300 is a tax crime. Therefore, penalties are set by 26 U.S.C. § 7203 and governed by the holding of *Cheek* v. *United States,* 498 U.S. 192, 201 (1991). Under the *Cheek* formulation, a jury can be instructed to return a verdict of guilty only on an actual knowledge theory.

8. See *Holland* v. *United States,* 348 U.S. 121, 140 (1950).

9. *Ratzlaf* v. *United States,* 1994 WL 4189 *7, n. 19.

10. Ibid.

11. *Ratzlaf* v. *United States,* 1994 WL 4189 *7, n. 11.

12. 18 U.S.C. § 981. The U.S. Department of Justice Asset Forfeiture Office and the Money Laundering Section concur that the Supreme Court's opinion in *Ratzlaf* v. *United States,* 1994 WL 4189 *6, n. 16, should have no effect on 18 U.S.C. § 981 civil forfeitures based on 31 U.S.C. § 5324 structuring offenses. Memorandum to United States Attorneys attaching model jury instructions for 31 U.S.C. § 5324(3) and § 5324(a)(3) dated January 18, 1994.

13. See Model Financial Remedies Act, Article IV, Sec. 30.

14. *United States* v. *All Monies,* 754 F. Supp. 1467, 1472 (D. Haw. 1991); *United States v. Certain Funds on Deposit in Account No. 01–0–71417,* 769 F. Supp. 80 (E.D.N.Y. 1991); *United States* v. *Certain Accounts,* 795 F. Supp. 391, 397 (S.D. Fla. 1992). See also *United States* v. *$448,342.85,* 969 F. 2d. 474, 478 (7th Cir. 1992), stating in dicta that "money need not be derived from crime to be 'involved' in it; perhaps a particular sum is used as a bank roll facilitating the fraud."

has been used to deposit proceeds of criminal activity. Whenever the Government can demonstrate a "substantial connection" between criminal activity and the subject account, some portion of the account may be forfeitable. In *United States* v. *All Monies,* 754 F. Supp. 1467, 1472 (D. Haw. 1991), the court held that transactions involving tainted funds and a bank account, together with noted instructions for subsequent disbursements and a statement by the defendant that he controlled the account, were enough to show a substantial connection between the account and the illegal activity that made the entire account forfeitable. This applied even though some money in the account was not connected with illegal procedures. The Government did not dispute the claimant's defense that he ran a business in which most of the transactions were legitimate. The court reasoned that legitimate money provided a cover for drug proceeds, making it more difficult to trace the drug proceeds.[15]

Source of the Funds

Property traceable to or involved in currency transaction reporting violations is subject to forfeiture whether or not it can be proven to have an illegal source.[16] The standard of proof imposed on the Government in civil forfeiture is probable cause to believe the seized property was involved with structured transactions in violation of the reporting laws, and the reporting laws apply to all transactions in excess of $10,000 without regard to the source of the funds.[17]

Nonetheless, investigators and prosecutors should be mindful that Congress, in enacting the Bank Secrecy Act and the Money Laundering Control Act, and State legislatures in enacting similar legislation, were concerned with money laundering related to narcotics trafficking, organized crime, and related criminal activity.[18] Forfeiture of proceeds of criminal activity, and property involved in and traceable to such activity, certainly advances this important social policy. In addition, the Federal forfeiture laws accommodate forfeiture of proceeds and property traceable to or involved in State felony crimes of murder, kidnaping, gambling, arson, robbery, bribery, extortion, and dealing in obscene matter, if they are involved in a money-laundering transaction[19] as well as narcotics-related offenses.[20]

Courts in some circuits are reluctant to enforce the forfeiture laws in cases involving structured funds that do not appear to derive from, or be connected with, criminal activity.[21] The Supreme Court's opinion in *Ratzlaf* reinforces this position. In reversing the conviction, the Court expressly pointed out that the Government never asserted that the defendant was laundering proceeds from drug sales or other criminal ventures.[22] The Court emphasized that antistructuring laws were enacted to curb narcotics trafficking and other organized crime.[23] Other courts have declined to enforce the forfeiture laws in cases involving legal-source funds, emphasizing that forfeiture is a drastic remedy; that "probable cause," which is the civil standard of proof, is much easier for the Government to satisfy than the "beyond a reasonable doubt" standard necessary for a criminal conviction; and that innocent parties often assert equitable claims to ownership rights that override Government interests.[24]

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The U.S. Department of the Treasury, as a matter of policy, has approved mitigation guidelines for seizures and forfeitures relating to currency transaction reporting and the structuring offense.[25] Under these guidelines, if the claimant can demonstrate a legitimate source of the funds, if it is a first offense, and if there is no criminal conviction, a mitigated penalty may be levied, pursuant to a formula weighing mitigating and aggravating factors.[26]

15. But see, e.g., *Marine Midland Bank* v. *U.S.,* Nos. 93 Civ. 0307 (RPP), 0357 (RPP) (E.D.N.Y. May 11, 1993), aff'd in part and remanded in part, 11 F. 3d 1119 (2d Cir. 1993); *U.S.* v. *All Funds on Deposit (Great Eastern Bank),* 804 F. Supp. 444, 447 (E.D.N.Y. 1992). The Government lost these cases, seeking to forfeit the entire balance of an account based on the theory that some of the balance represented funds traceable to "structuring" offenses while the remaining funds "facilitated" those offenses.

16. A fair reading of the plain language of 18 U.S.C. § 981 and 31 U.S.C. §§§ 5313, 5322, 5324 does not limit forfeiture to illegal-source funds. But see, e.g., *U.S.* v. *Aversa,* 984 F. 2d 493, 503 (1st Cir. 1993), Torruella, J., dissenting, discussing the purview of the conduct Congress intended to criminalize by the Bank Secrecy Act and the Money Laundering Control Act of 1986.

17. See, e.g., *Ratzlaf* v. *United States,* 1994 WL 4189 (January 11, 1994).

18. See, e.g., S. Rep. No. 433, 99th Cong., 2d Sess. (1986) (accompanying S. 2683); H.R. Rep. No. 746, 99th Cong., 2d Sess. (1986) (accompanying H.R. 5176). See also The President's Commission on Organized Crime, Interim Report to the President and the Attorney General, *The Cash Connection: Organized Crime, Financial Institutions and Money Laundering* (1984); S. Rep. No. 433 (1986). See also Model Financial Remedies Act, Article I, Sec. 2.

19. U.S.C. § 1956(c)(7); 18 U.S.C. § 981.

20. 21 U.S.C. § 881.

21. See, e.g., *Marine Midland Bank* v. *United States,* 1993 WL 51337 (2d Cir. December 13, 1993); or *U.S.* v. *All Funds on Deposit in Great Eastern Bank Account No. 1100817 in the Name of Hadson Toko Trading Co.,* 904 F. Supp. 444 (E.D.N.Y. 1992).

22. Ibid.

23. Ibid.

24. See, e.g., *Austin* v. *United States,* 113 S. Ct. 2801 (1993); *United States* v. *A Parcel of Land, Building, Appurtenances, and Improvements Known as 92 Buena Vista Avenue, Rumson, New Jersey,* 113 S. Ct. 1126 (1993); *Marine Midland Bank* v. *United States,* 1993 WL 513371 (2d Cir. December 13, 1993); *U.S.* v. *$448,342.85,* 969 F. 2d 474 (7th Cir. 1992); or *U.S.* v. *All Funds on Deposit in Great Eastern Bank Account No. 1100817 in the Name of Hadson Toko Trading Co.,* 804 F. Supp. (E.D.N.Y. 1992).

25. July 15, 1991, Assistant Secretary (Enforcement) directive to the Assistant Commissioner (Criminal Investigation) of the Internal Revenue Service.

26. See Internal Revenue Service Mitigation Guidelines for 18 U.S.C. §§ 5313(A) and 5324 Violations, September 18, 1991.

The mitigation guidelines serve as useful models for State and local investigators and prosecutors because they balance fundamental ethical considerations with legitimate law enforcement objectives.

Similar to the asset-sharing procedure regarding drug forfeiture laws, equitable sharing with State and local authorities is available for forfeitures pursuant to 18 U.S.C. § 981 related to Federal *structuring* crimes, based on currency transaction report and money laundering violations through joint investigative efforts or adoptive seizures.

Conclusion

Jurisdiction for the Federal structuring offenses, 31 U.S.C. § 5324 and 26 U.S.C. § 6050I(f) and applicable forfeiture laws, rests with the Criminal Investigation Division of the Internal Revenue Service (IRS–CID).[27] The U.S. Postal Service has joint jurisdiction for structuring cases involving postal money orders. State and local authorities conducting financial investigations pursuant to State antistructuring laws should consult local prosecutors for jurisdictional guidance. Money laundering violations under 18 U.S.C. §§§ 1956, 1957, 1960 that involve structuring activity may be investigated by IRS–CID or the Federal agency with investigative jurisdiction over the crime that generated the funds involved in the structured transaction(s).[28]

Investigators and prosecutors who discover structuring activities during their investigations should contact their local IRS–CID office for consultation and possible joint investigation.

27. 31 C.F.R. § 103.46

28. See Memorandum of Understanding dated August 16, 1990, among the U.S. Department of Justice, the U.S. Department of the Treasury, and the U.S. Postal Service.

State Court Case Law

ALABAMA—Conflict Between Forfeiture and Criminal Case

Taylor v. *State,* No. AV92000347, Ct. of Civ. App. Ala. (7/23/93). The State sought and obtained a forfeiture of a vehicle registered to the claimant, and the State alleged that the vehicle was purchased by the claimant's brother with proceeds from the sale of controlled substances. During the same month the State filed a forfeiture, the claimant was indicted in Federal court on the charge of money laundering, and the claimant's attorney failed to contest the forfeiture on the basis that her defense might jeopardize her Federal criminal case. The State obtained a summary judgment of forfeiture, and 3 weeks later the claimant was acquitted of the Federal criminal charges. Seven months later, the claimant filed a motion requesting that the default forfeiture be set aside on the basis that her defending the forfeiture would have prejudiced her pending Federal trial. A hearing was held on the claimant's motion. The trial court summarily denied the motion and, on appeal, the Appellate Court held that the decision not to defend the forfeiture was a tactical decision made by the claimant's attorney, and therefore, the trial court did not abuse its discretion in denying the claimant's motion to set aside the default judgment of forfeiture.

ALABAMA—Plain View Search/Constitutional Issues

Agee v. *State,* No. 2910699, Ct. of Civ. App. Ala. (5/28/93). While executing a search warrant for a residence, officers asked the owner of the residence and the claimant to identify themselves when they arrived in the claimant's vehicle. When the claimant opened the vehicle's glove compartment, an officer observed two bags of marijuana and arrested the claimant. The trial court forfeited the claimant's vehicle. On appeal, the claimant contended that the forfeiture was predicated upon an illegal search and seizure and that the Alabama forfeiture statute violated the equal-protection clauses of the U.S. and Alabama Constitutions. The Appellate Court affirmed the forfeiture of the trial court and agreed that, although a search warrant for a premises does not permit searches of persons who are not reasonably associated with the premises, the search in this case falls within the "plain view" exception to such searches. The Appellate Court highlighted that the "plain view" doctrine authorizes warrantless seizures of personal property when the initial intrusion that affords the officer a plain view is lawful, the discovery is inadvertent, and the incriminating nature of the property is immediately apparent. The Appellate Court noted that the claimant freely opened the glove compartment, thus permitting the officer to see the contents that included the marijuana upon which the forfeiture was based. The Court also noted that the claimant freely testified at the trial that the

substance was marijuana and that he was the owner. The Appellate Court proceeded to dispose of the claimant's constitutional challenges by noting that he had failed to serve the Alabama Attorney General on such a constitutional challenge, which is required by Alabama statute; hence, the trial court properly ruled it had no jurisdiction to decide such constitutional issues.

ALABAMA—Vehicle Purchased With Drug Proceeds/Straw Owner

Stringer v. *State,* No. AV92000028, Ct. of Civ. App. Ala. (6/18/93). The State obtained a forfeiture of the claimant's vehicle, alleging that the vehicle was purchased by the claimant's brother-in-law with proceeds derived from the sale of controlled substances. In forfeiting the vehicle, the trial court made certain factual findings, including the following: (1) the claimant's brother-in-law (Mr. Lee) derived all of his substantial income from the sale of cocaine; (2) Mr. Lee purchased many vehicles and made it a practice to register these vehicles in the names of other persons as a means of concealing his interest and concealing the property from forfeiture; (3) Mr. Lee told an associate to get some money together so that he could buy the seized vehicle; (4) the associate who gathered the money aided Mr. Lee in the importation of cocaine; and (5) Mr. Lee obtained a cashier's check with the money obtained from the associate and purchased a vehicle in the name of the claimant. The Appellate Court confirmed the forfeiture by the trial court and held that the State had proven by sufficient evidence that the vehicle registered to the claimant had been derived from proceeds from the sale of controlled substances. The Appellate Court also noted that the claimant had testified falsely concerning the purchase of the vehicle and that the claimant had failed to rebut the prima facie case established by the State. The Appellate Court concluded that, although the claimant was the title owner of the vehicle, such ownership had been contradicted by other evidence.

ALASKA—City Transfer of Seized Money to DEA Ruled Conversion

Johnson v. *City of Fairbanks,* 849 P. 2d 1361, Sup. Ct. Alaska (1993). On February 1, 1990, police officers responded to a domestic violence call at the claimant's house; found evidence of illegal narcotics activity; and subsequently obtained a warrant to search the house, resulting in the seizure of 75 items, including $44,850 in cash. A criminal complaint based on information in the search was filed against the claimant on February 2; on the same date, a police officer contacted the Drug Enforcement Administration (DEA) and was told that DEA would adopt the seizure of the currency and proceed with a Federal forfeiture. The next working day, the police officer took the money to a bank, exchanged it for a cashier's check made payable to the U.S. Marshal, and transferred custody of the check to the U.S. Marshal. On February 7, a grand jury returned a 14-count State indictment against the claimant involving weapons, theft, and drug charges. On April 2, DEA commenced administrative forfeiture proceedings; the claimant was notified of the proceedings by a certified letter but took no action to reclaim the money. Forfeiture of the money was completed by DEA on May 17, and the City of Fairbanks received $17,940 of the forfeited money from DEA for its participation in the case. On April 5, the claimant moved the Superior Court to suppress and return the evidence seized under the search warrant, arguing that the police had no authority to search his house after they arrested him. On May 7, the Superior Court granted the claimant's motion to suppress, and the State dismissed the criminal charges against the claimant. On July 3, the Superior Court ordered the State to return the money to the claimant.

The claimant subsequently filed a conversion suit against the city, and the trial court denied the claimant relief. A summary judgment was entered for the city, after which the claimant appealed. On appeal, the city contended that the claimant's conversion claim is barred by the "relation back" doctrine contained in 21 U.S.C. § 881(h). The Appellate Court reversed the holding by the trial court and held that the application of the "relation back" doctrine in this case ignored the fundamental problem that the city had transferred the money to DEA without court approval, thereby violating State law regarding the disposition of seized property. The Appellate Court held that, at the time of the transfer, the money was in the custody of the State court in connection with a pending criminal proceeding; by the "return" required under the search warrant, the seized currency had been placed under the control of the State courts. The Court held that a search warrant is more than just a means of establishing in personam jurisdiction because it also enables a court to exercise jurisdiction of the property seized; hence, the State court in this case had jurisdiction over the money to the exclusion of DEA as a result of the search warrant. The Court concluded that the money "was never out of the legal control of the State court, and thus, was never in possession of the Federal Government," citing the *Scarabin* case, 966 F. 2d 989 (5th Cir. 1992). The Court concluded by stating that by transferring the property without any authority and in contravention of State statutes, the city committed a conversion; hence it is liable for the full value of the conversion.

New DOJ State and Local Asset Forfeiture Training Initiative

Terrence P. Farley, former director, National Drug Prosecution Center, American Prosecutors' Research Institute

Asset forfeiture is one of the most powerful and effective law enforcement tools we have to combat drug trafficking and other forms of organized crime. If we are to achieve the maximum use of our Federal and State forfeiture laws, then we need to pursue forfeiture aggressively while protecting individual rights. In short, we need consistent, enhanced, and increased training for State and local law enforcement personnel.

To respond to this need, in the summer of 1993, Cary H. Copeland, then director and chief counsel of the U.S. Department of Justice (DOJ) former Executive Office for Asset Forfeiture, initiated discussions with representatives of major national, State, and local law enforcement associations about asset forfeiture training. In August of that year, a meeting was convened that led to the formation of the State and Local Law Enforcement Asset Forfeiture Training Working Group.

This Working Group consisted of representatives of the following organizations: Fraternal Order of Police (FOP), International Association of Chiefs of Police (IACP), National Association of Attorneys General (NAAG), National Drug Prosecution Center/American Prosecutors' Research Institute (APRI), National District Attorney's Association (NDAA), National Organization of Black Law Enforcement Executives (NOBLE), National Sheriffs' Association (NSA), National Troopers Coalition (NTC), and the Police Executive Research Forum (PERF). The Working Group also included representatives of the DOJ Bureau of Justice Assistance, Asset Forfeiture Office of the Criminal Division, Executive Office for United States Attorneys/Law Enforcement Coordinating Committee, Executive Office for Asset Forfeiture, the Office of Public Liaison and Intergovernmental Affairs, and the FBI Training Academy in Quantico, Virginia.

Given the wide range and occasionally competing nature of the interests and ideas of these varied groups, it was abundantly clear that this would be no small undertaking. It is to the credit of the staff of the former Executive Office for Asset Forfeiture that the effort succeeded.

Initially the Working Group sought to determine whether the development of an asset forfeiture curriculum was the correct course to take. The group members agreed on basic asset forfeiture policies, procedures, and regulations that every prosecutor and law enforcement officer or investigator needs to know to be able to work effectively in the asset forfeiture field. The Working Group concluded that a core curriculum, using the best instructional materials that had already been developed and going beyond the courses already available, was needed. The group agreed on the prime importance of teaching ethics to forfeiture practitioners.

The group developed a mission statement to provide focus.* To achieve its mission, the group developed three core curriculums to be used and distributed at all State and local law enforcement asset forfeiture.

* "To provide standards for State and local asset forfeiture training that parallel Federal standards by: (1) developing and promoting an asset forfeiture core curriculum, which shall include up-to-date information on asset forfeiture issues, ethical standards expected of State and local law enforcement officers and prosecutors, and goals of asset forfeiture as a law enforcement tool; (2) setting the minimum standards required for all asset forfeiture training programs; (3) coordinating with State and local law enforcement agencies to implement this mission; and (4) responding to the training needs of State and local law enforcement officers, both police and prosecutors."

ARKANSAS—Notice to All Parties Required

Harris v. *State,* No. CA 92–762, Ct. of App. Ark. (6/2/93). The State sought and obtained the forfeiture of 108 items of personal property from a premises jointly occupied by a husband and wife. On appeal, the wife contended that the State failed to send her notice of the hearing in the trial court; rather, notice of the trial was sent only to counsel for the husband. The Appellate Court held that the trial court was in error when it forfeited the interest of the wife because she had failed to receive the required notice of the forfeiture trial. The Appellate Court remanded the case to the trial court regarding the forfeiture of the wife's interest in the seized property but declined to review the contentions raised by the husband regarding the adequacy of the search and the nexus between the seized property and controlled substances.

CALIFORNIA—One-Year Limitation to File Forfeiture

People v. *Ten $500 Barclay's Bank Visa Traveler's Checks,* 20 Cal. Rptr. 2d 128 (1993). In April 1989, officers searched the claimant's car and seized various drug-related items and 10 $500 VISA traveler's checks. The checks were seized as potentially

trainings: a 6-hour program for chiefs, executives, and prosecutors; a 2- to 3-day course for supervisors/middle managers and mid-level prosecutors; and a 2- to 3-day program for street-level officers, investigators, and line prosecutors.

After developing the core curriculums, the Working Group divided into subcommittees that developed modules, including agendas, outlines, and resource materials for the topics to be covered in each module. The Working Group believes that the following eight modules make this the most complete civil asset forfeiture course available:

- **Introduction to Forfeiture:** Contains an overview of asset forfeiture, focusing on basic terminology, purposes, statutory bases, procedures, and remedial benefits of asset forfeiture.
- **Ethics:** Contains the minimum ethical rules to guide the asset forfeiture practitioner.
- **Resource Allocation:** Focuses on developing or improving an asset forfeiture program by providing models of successful programs.
- **Investigative Techniques and Seizures:** Focuses on locating sources of documentary information; applying financial investigative techniques; understanding probable cause to seize; and learning preseizure planning, how to use preseizure hearings and warrants, the seizure process, and postseizure requirements.
- **Constitutional Protections:** Focuses on constitutional and equitable protections afforded individuals and institutions in forfeiture situations, including innocent owners, bona fide purchasers, and lienholders.
- **Custody, Maintenance, and Disposition:** Focuses on the procedures in the custody, management, and disposition of seized or forfeited property.
- **Equitable Sharing:** Focuses on the equitable sharing process, including how to participate in the sharing program, how to apply for sharing, how to calculate sharing percentages, how to complete the required forms, and how to coordinate with the agencies involved in the forfeiture process.
- **Legislation/Policies/Trends:** Focuses on pending legislation and Federal, State, and local asset forfeiture policies.

Like most groups involved in an undertaking of this magnitude, the Working Group had to deal with new adverse rulings from the Supreme Court, with legislative proposals being made in Congress, and with the DOJ review of the entire Federal civil asset forfeiture program. Other tasks included recommending instructors for the various modules, selecting sites for courses, obtaining P.O.S.T. and C.L.E. credits for the courses, and obtaining funding for the training.

With these challenges met, the group developed a course that it believes is the most up-to-date and comprehensive training program available. The Working Group is also looking into (1) obtaining State certification for the asset forfeiture curriculum to make it a part of continuing law enforcement education for police and prosecutors; (2) preparing a monthly training bulletin to keep the State and local law enforcement community apprised of current asset forfeiture case decisions, policies, and legislation; and (3) devising training videotapes to help State and local government officials and the banking industry become more familiar with asset forfeiture issues as they relate to these entities.

The group looks forward to working with agencies across the United States in implementing this important initiative. In December 1994, the DOJ Criminal Division assumed responsibility for asset forfeiture training. For information contact the Asset Forfeiture Office at 202–514–1263.

stolen property; approximately 2 years after the checks were seized, the State sought forfeiture of the checks as proceeds of drug sales or as being intended to facilitate drug trafficking. The claimant contended in the trial court that Section 11488.4 of the California Code requires that a complaint for forfeiture be filed within 1 year of the seizure of property; hence, the forfeiture in this case was barred by this statute of limitations. The State argued that the statute of limitations should not start to run at the time of seizure but instead should begin to run only when the probable cause develops to support the forfeiture. The trial court characterized the construction of the statute as contended by the State as untenable and denied the forfeiture. The Appellate Court affirmed the decision of the trial court in denying the forfeiture, holding that the language in the limitations statute was clear and unambiguous and that nothing in the language could be read as creating "the imprecise and problematic" standard argued by the State.

GEORGIA—Jury Trial Not Required

Swails et al. v. *State,* 431 S.E. 2d 101, Sup. Ct. Ga. (1993). The State filed a petition for forfeiture of property seized from the claimant's place of

business, and the claimant requested a jury trial on the forfeiture. Following a hearing, the trial court denied the claimant's request for a jury trial on constitutional grounds, relying on the Georgia statute that states that a forfeiture proceeding "must be held by the court without a jury." The claimant appealed directly to the Supreme Court of Georgia solely on the issue of whether a jury trial was required in a forfeiture action under the Georgia Constitution. The Supreme Court of Georgia reviewed the Seventh Amendment to the U.S. Constitution, which provides that "in Suits at common law . . . the right of trial by jury shall be preserved." The Court concluded that a forfeiture under the Georgia statute is not a suit under the "common law" and that under the Georgia Constitution, there is no right to a jury trial with respect to proceedings of statutory origin unknown at the time the Georgia Constitution was adopted. The Court concluded that because the Georgia forfeiture statute created a statutory proceeding that was unknown when the Georgia Constitution was enacted in 1798, it follows that the General Assembly was authorized to provide for a bench trial in forfeiture proceedings. Three justices dissented from the majority opinion and noted in their dissent that the issue was not a question of the breadth of the Georgia Constitution, but rather a question of the parallel between statutory proceedings known as common law and proceedings as they exist today. The dissent noted that there was no common-sense distinction between the underlying nature of forfeitures before 1798 and the forfeitures under the current Georgia statute.

GEORGIA—Only Land Within Curtilage Forfeited

State v. *Wilbanks,* 430 S.E. 2d 668, Ct. of App. Ga. (1993). The State sought the forfeiture of the defendant's mobile home and 4.37 acres of real property upon which the mobile home was located. The forfeiture was based on a sale of cocaine and the seizure of cocaine scales and weapons from the mobile home. Following a bench trial, the trial court declared the personal property seized to be forfeited and further determined that "only the mobile home and the curtilage thereto, rather than the entire 4.37 acres of land, is forfeited to this State pursuant to § 16–13–49(d)(2)." The State appealed the finding of the trial court and contended on appeal that the trial court erroneously interpreted the language and legislative intent of the statute by limiting the real property forfeiture to the curtilage instead of determining that the entire 4.37 acres was subject to forfeiture. The State argued that the real property forfeiture statute mandates that, upon a finding that any portion of the real property was used to facilitate a drug transaction, the entire tract of land must be forfeited to the State. The Appellate Court did not agree with the contention of the State and affirmed the decision of the trial court, remanding the case to the trial court to determine specifically what property was included within the curtilage of the mobile home. In reaching its conclusion, the Appellate Court distinguished the Georgia real-property forfeiture statute from the similar Federal statute and noted that the Federal statute was more comprehensive in scope than the Georgia statute. Three justices dissented from the majority opinion, stating that the language in the Georgia statute clearly signifies the intent of the legislature that the entirety of any real property be forfeited.

GEORGIA—Validity of Search Issue in Forfeiture

Pitts v. *State,* 428 S.E. 2d 650, Ct. of App. Ga. (1993). Officers executed a search warrant at the claimant's residence, seizing $64,258 from the premises and an additional $1,240 on the claimant's person when he returned to the residence. Officers also seized cocaine at the time of the search, and the claimant's girlfriend stated that the drugs were hers. The State filed a complaint seeking forfeiture of the currency. During the forfeiture hearing, the claimant attempted to challenge the basis for the underlying search warrant. The trial judge concluded that any challenge to the search warrant was more properly the subject of a motion to suppress at the criminal trial. The trial judge also denied a motion to stay the forfeiture proceedings pending the resolution of the criminal trial. The claimant appealed, and the only issue presented on appeal was whether a collateral attack on the legality of an underlying search may be made at a forfeiture hearing when the validity of the search has not been previously adjudicated in a criminal action. The Appellate Court concluded that such a collateral attack is proper when the forfeiture proceedings precede the criminal action; hence, the claimant is not stopped from raising a collateral challenge to the underlying search warrant. The Appellate Court stated that this procedure is consistent with the requirement that a seizure in forfeiture actions be made with process or be conducted in a good faith belief that probable cause exists to conduct the search.

IDAHO—Entrapment Defense Not Applicable in Forfeiture

Cade v. *One 1987 Dodge,* No. 19787, Ct. of App. Idaho (7/30/93). The State sought forfeiture of the defendant's vehicle, which had been used to facilitate a controlled substances violation. During the forfeiture hearing before a magistrate, the defendant argued that the vehicle should not be forfeited because he was entrapped by the law enforcement officers to commit the illegal drug transaction. The magistrate ruled that the defense of entrapment was unavailable to the defendant in a civil forfeiture case, and the magistrate ordered the vehicle forfeited.

The defendant appealed to the District Court, and the District Court reversed the magistrate and held that the defense of entrapment was available in a civil forfeiture case because the action is quasi-penal. After an extensive review of the entrapment defense in criminal cases, the Appellate Court noted that the defense of entrapment is judicially, rather than constitutionally, based. The Appellate Court noted that although forfeiture cases may be deemed both civil and quasi-penal, such cases are predominately civil in nature; hence, the entrapment defense is not available in such cases. The Appellate Court reviewed a number of Federal cases, particularly the case of *U.S.* v. *One Assortment of 89 Firearms,* 465 U.S. 354, 79 L.Ed. 2d 361 (1984), wherein a firearms dealer who was acquitted on the grounds of entrapment in the criminal case still forfeited the firearms involved in a civil forfeiture action.

ILLINOIS—Notice, Hearing, and Nexus to Offense Required to Forfeit Firearms

State v. *Braden,* 611 N.E. 2d 575, App. Ct. Ill. 2nd Dist. (1993). Subsequent to an officer purchasing cocaine from the defendant's residence, officers executed a search warrant and seized property that included five rifles and two shotguns that the defendant alleged were family heirlooms. The State sought and obtained forfeiture of the five rifles and two shotguns during an ex parte proceeding in which the State contended that the weapons were forfeitable because of their presence at the site of the drug transaction and because the weapons were not properly registered under State law. The defendant appealed, contending that the State failed to provide him proper notice of the hearing to forfeit the firearms and also failed to establish the required connection between the firearms and the drug offenses. The Appellate Court reversed the forfeiture by the trial court, holding that the State failed to furnish the defendant sufficient notice and a meaningful opportunity to contest the forfeiture action; hence, there was a denial of due process. The Appellate Court further held that to be deemed contraband, guns must have had some close connection to the illegal activity; in this case, no such close connection had been established by the case, and evidence had been submitted by the defendant that the guns were family heirlooms. The Appellate Court concluded that because the requisite sufficient nexus between the weapons and the crime had not been established by the State, the weapons could not be deemed derivative contraband.

INDIANA—Search Incidental to Arrest/ Proximity Presumption

Caudill v. *State,* 613 N.E. 2d 433, Ct. of App. Ind. (1993). Officers observed an informant making a purchase of cocaine from the defendant and also observed that the defendant utilized his vehicle to transport and deliver the cocaine to the informant. The defendant was subsequently arrested and taken to his residence, where a search was under way. Officers then searched the defendant and found seven bags of cocaine on his person along with $355 in currency, which did not match any of the currency given to the defendant by the informant during the drug sale. The State sought and obtained the forfeiture of the vehicle and the $355 in cash seized from the defendant. The defendant appealed, challenging the sufficiency of the trial court's forfeiture order. Relying on the Federal forfeiture statute, the defendant contended that to bring a forfeiture action, the State must prove a "substantial connection" between the seized property and the drug violations. The Appellate Court affirmed the forfeiture by the trial court and held that while there are similarities between the Federal and Indiana forfeiture provisions, Indiana need not resort to Federal law to interpret its own forfeiture statute. The Appellate Court concluded that under the Indiana forfeiture statutes, probable cause may be proven by a preponderance of the evidence, which was present in this case. Furthermore, the currency seized from the defendant was properly presumed to be forfeitable under the applicable proximity presumption. The Appellate Court also held that the search of the defendant at the time of his arrest, immediately after the sale of drugs to the informant, and the search of the defendant at his residence were both incident to the arrest of the defendant and hence proper.

IOWA—Reinitiated Forfeiture Valid

In the Matter of Property Seized From Bobby Gene Sykes, et al., 497 N.W. 2d 829, Sup. Ct. Iowa (1993). Upon the arrival of officers at a premises to execute a search warrant, the defendant was observed leaving the premises in a vehicle. The officers gave chase and eventually stopped the vehicle. During the pursuit, the officers observed seven small plastic bags being thrown from the vehicle. The items were recovered and found to contain marijuana. After the officers stopped the vehicle and arrested the occupants, they seized the vehicle and found an additional bag of marijuana inside it. In summary, approximately 3 years after the seizure of the vehicle and after numerous pleadings and hearings regarding the forfeiture of the vehicle—including the Iowa Court of Appeals reversing the forfeiture of the same vehicle on the basis of a 1985 seizure—the State and the defendant were again before a trial court. The factual basis for the forfeiture was adjudicated in favor of the State. The defendant appealed, contending that the trial court erroneously allowed the State to reinitiate the forfeiture proceeding some 3 years after the seizure. The Appellate Court affirmed the

The FBI's Racketeering Records Analysis Unit: The Laboratory's Role in Supporting Asset Forfeiture

Carl J. Jensen III, FBI Laboratory, Washington, D.C.

As investigators and attorneys who regularly deal with forfeiture matters are aware, all proceeds traceable to illicit drug exchanges are subject to Federal and, increasingly, State forfeiture. It is often difficult for the investigator in the field, however, to document the profits realized by an illicit drug business over a long period of time. In those cases in which suspected drug and/or money laundering records are obtained, the Racketeering Records Analysis Unit (RRAU) of the FBI Laboratory in Washington, D.C., may prove an invaluable resource in identifying proceeds generated by illegal activity.

RRAU was originally formed to conduct forensic examinations of suspected gambling and vice-related business records. In the mid-1980's, this mission was expanded to include suspected drug and drug-related money laundering records.

When records are submitted, RRAU Agent Examiners and Cryptanalysts employ established techniques of document analysis and, where necessary, code-breaking to identify what each document represents. If it is determined that the records reflect drug sales and/or purchases, RRAU personnel attempt to establish the type of drug(s) involved, the quantity of drug sold or purchased, unit prices of each drug identified, payments made for drug purchases, dates of transactions, individuals involved in the operation, and profits and assets associated with the business.

Records often cover many years of illegal activity and document millions of dollars generated by the business. Additionally, assets heretofore unknown to investigators may be identified.

After RRAU personnel complete their analysis of the records, a report documenting the results of the examination is prepared and forwarded to the submitting agency. When needed, Agent Examiners testify as expert witnesses in court or at sentencing or forfeiture hearings with regard to the conclusions presented in the laboratory report.

In addition to examining ledgers and notebooks, RRAU conducts examinations of all types of evidence suspected of containing notations relating to drug dealing. This may include scraps of paper, envelopes, address books, and the like. RRAU also has the capability to reconstruct torn and shredded paper and, with the assistance of other units in the FBI laboratory, can analyze records obtained from computers and programmable calculators.

RRAU conducts its examinations free of charge for all Federal, State, and local law enforcement agencies. Agencies should submit information using the following guidelines:

- Submit original evidence whenever possible.
- Submit evidence as soon after its acquisition as possible.
- Submit all paper evidence relating to the seizure.
- Contact RRAU prior to submission if large volumes of evidence are involved (a field examination by RRAU personnel may be recommended).
- Advise RRAU of examinations requested (drug record analysis, handwriting, latent fingerprint, etc.).
- Indicate the following:
  - Name of subject.
  - Place and date of seizure.
  - Trial or other deadline dates, if known.
  - Name and telephone number of point of contact.
  - Brief description of the case.

Evidence should be mailed to the following address: Federal Bureau of Investigation, Attention: Laboratory Division, RRAU, Rm 1B089, 10th St. and Pennsylvania Ave. NW., Washington, DC 20535.

Any questions concerning RRAU may be directed to Unit Chief Joseph F. Giglio, 202–324–2500; or Special Agent Carl J. Jensen III, 202–324–6862.

forfeiture of the trial court, noting that although many errors had been made concerning the forfeiture of the vehicle, the State had never waived its intention to proceed with the forfeiture, and the defendant had failed to establish any misleading conduct by the State on which to base an estoppel theory. The Appellate Court noted that the defendants had been furnished a hearing on the merits of the forfeiture and that the defendants had failed to establish a valid defense to such forfeiture.

LOUISIANA—Legitimate Source Established for Seized Currency

State v. *Cash Totalling $15,156.00, et al.,* No. CA 92 1238, Ct. of App. La. (7/2/93). Officers executed a search warrant on the claimant's residence, which resulted in the seizure of cocaine in one bedroom in the house and the seizure of $15,156 from a trunk in another bedroom in the house. The trunk also contained blueprints of a house and invoices from a building materials dealer. The trial court forfeited a weapon and the $15,156 seized from the trunk, utilizing the statutory presumption that property found in proximity to controlled substances is subject to forfeiture. The claimant appealed, contending that she had established at trial that the money in the trunk had been obtained as part of an insurance settlement of more than $78,000 from her husband's death and that the money was being used to build a house for her son. The claimant also contended that she had no knowledge of the narcotics that had been seized from the house and denied that any drug trafficking took place at the house. The Appellate Court reversed the forfeiture by the trial court and held that the most believable facts were that the claimant had no direct knowledge of any drug activity and that she had established by a preponderance of the evidence that the seized money was from an independent source and not drug related. Hence, the claimant was held to have rebutted the probable cause established by the State to support the forfeiture.

MINNESOTA—Proximity of Currency and Drugs

Jackson v. *$2,407,* C6–92–1594, Ct. of App. Minn. (5/4/93). The defendant in this case was arrested twice during a 6-week period, and large amounts of cash that were found in proximity to drugs were subjected to forfeiture by the State. The trial court sustained the forfeiture of $2,407 found on the defendant after a traffic stop. A laboratory analysis found traces of cocaine on the seized currency. The trial court, on the basis of the direct evidence of the presence of cocaine on the currency, forfeited the currency and held that the defendant failed to rebut the evidentiary presumption of currency in proximity to drugs. A few weeks later the defendant was found passed out in his apartment, where crack cocaine, scales, glassine envelopes, cocaine cutting agents, and $12,000 were seized. Although the defendant claimed the cash was received from his music company, he was unable to show any records indicating how he came to have $12,000 in his possession. The Appellate Court confirmed both of the forfeitures of the currency seized from the defendant and held that the defendant had failed to rebut the applicable proximity presumption that established probable cause to believe that the currency was drug related.

MINNESOTA—Clear and Convincing Evidence Required for Forfeiture

Backstrom v. *One Freightline Semitractor,* No. C7–92–2222, Ct. of App. Minn. (5/4/93). The claimant in this case drove a tractor/trailer rig from Rochester, Minnesota, to Hampton, Minnesota, where the claimant was arrested for a controlled substance violation. The State sought forfeiture of the tractor/trailer, contending that the vehicle had been used to facilitate the drug violation. The trial court denied the forfeiture on the basis that the State had failed to prove by clear and convincing evidence that the vehicle had been used to facilitate the crime. The State argued that it need only establish the connection between the vehicle and the crime by a preponderance of the evidence and that it was the criminal offense that must be proven by clear and convincing evidence. The Appellate Court agreed with the decision of the trial court in denying the forfeiture and held that the statutory language "act or omission giving rise to the forfeiture" indicated that both the crime and its nexus to the property must be proved by clear and convincing evidence. Hence, the Appellate Court concluded that the standard of proof to show use of the subject property to facilitate the commission of the crime was "clear and convincing evidence," which the State failed to establish in this case. The Appellate Court noted that there was no evidence that the vehicle transported the drugs, no drugs were found in it, and no one testified to having seen drugs being taken into or out of the vehicle. The Appellate Court concluded that the discovery of a scale used for measuring controlled substances in the vehicle did not justify forfeiture.

MINNESOTA—Forfeiture of Drug Paraphernalia Sustained/Disclaimer Not Effective

City of St. Paul v. *Various Items of Drug Paraphernalia,* No. CO–92–1977, Ct. of App. Minn. (4/20/93). The city sought and obtained forfeiture of various items of drug paraphernalia from the claimant's "Hi Times Shop." The forfeiture was based on evidence obtained by an officer who purchased various items

of drug paraphernalia from the claimant's shop after signing a disclaimer that the items would not be used to abuse controlled substances. The city then executed a search warrant and seized nearly 6,000 items of merchandise from the claimant's shop. After a bench trial, the trial court forfeited the merchandise and held that (1) the items were obtained pursuant to a valid search warrant; (2) the claimant knowingly and intentionally possessed the items for sale; and (3) approximately 55 of 66 categories of items constituted drug paraphernalia. The claimant appealed the trial court's decision, and the Appellate Court remanded the case to the trial court to determine whether the claimant possessed the items intending that they be used as drug paraphernalia. Upon remand, the trial court made a determination that the claimant had the requisite intent and again sustained the forfeiture. The claimant then appealed for a second time. The Appellate Court again sustained the forfeiture by the trial court and held that the warrant used to search the claimant's shop was valid and that the application for the warrant satisfied the particularity requirements involved. The Appellate Court also concluded that because the trial court's findings were not clearly erroneous concerning the claimant's intent, the Appellate Court sustained such findings. Particularly, the requisite intent was supported by the name of the claimant's store and his awareness that certain of the items were clearly marketed and advertised for use with illegally possessed controlled substances. The Appellate Court also noted that the claimant's use of a disclaimer regarding the items not being used to abuse controlled substances were "easily contrived" and could "really cut the other way" by indicating knowledge of the potential unlawful use of the items.

For Further Information

To receive more information about the Asset Forfeiture Project and additional publications and resources, please contact—

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