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Asset Forfeiture and Money Laundering

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Introduction

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Asset Forfeiture plays a critical role in disrupting illegal enterprises, depriving criminals of the proceeds of illegal activity, deterring crime, and compensating victims. The effective use of criminal and civil asset forfeiture is an essential component of the Department of Justice's efforts to combat the most sophisticated criminal actors and organizations—including terrorist financiers, cyber criminals, fraudsters, human traffickers, and transnational drug cartels. There is authority to forfeit assets in nearly all of the types of cases prosecuted by the Department, including cases that fall in the highest priority areas.

The U.S. Supreme Court has recognized the importance of forfeiture, noting that "[f]orfeitures help to ensure that crime does not pay[.]"[1] The Court explained that forfeitures "at once punish wrongdoing, deter future illegality, and 'lessen the economic power' of criminal enterprises" and that "[t]he Government . . . uses forfeited property to recompense victims of crime, improve conditions in crime-damaged communities, and support law enforcement activities like police training."[2] "Accordingly, 'there is a strong governmental interest in obtaining full recovery of all forfeitable assets.'"[3]

Asset forfeiture provides powerful tools to seize and restrain criminal proceeds that can later be used to compensate crime victims. Realistically, a crime victim's hope of getting paid often rests on the government's superior ability to collect and liquidate a defendant's assets under the asset forfeiture laws. In fact, from FY 2002 until the present, over $8 billion was paid to victim compensation from the proceeds of forfeited assets.[4]

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[1] Kaley v. United States, 571 U.S. 320, 323 (2014).
[2] *Id.* (citing Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 630–31 (1989)).
[3] *Id.* (citing *Caplin & Drysdale*, 491 U.S. at 631).
[4] *See, e.g.,* Press Release, U.S. Dep't of Justice, Department of Justice Compensates Victims of Bernard Madoff Fraud Scheme with Funds Recovered Through Asset Forfeiture (Nov. 9, 2017); Press Release, U.S. Dep't of Justice, Department of Justice Begins Second Distribution of Funds

In addition, effective money laundering enforcement can identify and disrupt illicit financial networks. Such efforts not only assist in the prosecution of all kinds of criminal activity and the forfeiture of assets, but also enable law enforcement to halt and dismantle criminal organizations and other bad actors before they harm our citizens or our financial system.

This issue of the *Department of Justice Journal of Federal Law and Practice* highlights recent developments in asset forfeiture and money laundering law. When used in a coordinated manner, these statutory remedies are powerful tools that assist in the government's law enforcement efforts.

Recovered Through Asset Forfeiture Totaling $1.2 Billion to Compensate Victims of Bernard Madoff Fraud Scheme (Apr. 12, 2018); Press Release, U.S. Dep't of Justice, Department of Justice Begins Third Distribution of Funds Recovered Through Asset Forfeiture to Compensate Victims of Bernard Madoff Fraud Scheme (Nov. 29, 2018); Press Release, U.S. Dep't of Justice, Department of Justice Begins Fourth Distribution of Funds Recovered Through Asset Forfeiture to Compensate Victims of Bernard Madoff Fraud Scheme (July 31, 2019).

Civil Asset Forfeiture: Purposes, Protections, and Prosecutors

Money Laundering and Asset Recovery Section
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U.S. Department of Justice

I. Introduction

On July 5, 2006, Kenneth Lay died in his bed while on vacation near Aspen, Colorado. Lay, who was the founder and Chief Executive Officer (CEO) of Enron Corporation (Enron), had been convicted earlier that year in federal court of ten counts of fraud and making false statements related to Enron.[1] Lay's fraud victimized Enron's shareholders and employees, as well as energy consumers in California and across the country.[2] At the time of his death, the United States was seeking more than $43 million from Lay in criminal forfeiture and approximately the same amount from one of Lay's co-defendants, Jeffrey Skilling. While Skilling would later pay his forfeiture as part of his criminal sentence,[3] the death abated Lay's conviction and any chance the United States had of obtaining a criminal forfeiture judgment against him. To recover some portion of these funds, the United States instituted a civil forfeiture action against specific property owned by Lay,[4] including an expensive condominium owned by Lay and his wife that was potentially

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[1] Jeremy W. Peters & Simon Romero, *Enron Founder Dies Before Sentencing*, N.Y. TIMES (July 5, 2006), https://www.nytimes.com/2006/07/05/business/05cnd-lay.html.

[2] *Enron's Many Victims*, L.A. TIMES (Nov. 28, 2001), https://www.latimes.com/archives/la-xpm-2001-nov-28-me-9068-story.html (noting it has been widely reported that some 20,000 people lost their jobs in the wake of the Enron fraud).

[3] *See* Karen Freifeld, *Skilling Restitution to go to Enron Victims' Fund*, REUTERS (May 9, 2013), https://www.reuters.com/article/us-enron-skilling-victims/skilling-restitution-to-go-to-enron-victims-fund-idUSBRE94818B20130509.

[4] *See Victim Notification Program, United States v. Kenneth L. Lay, Court Docket Number: H-04-0025-SS*, U.S. DEP'T OF JUST., https://www.justice.gov/criminal-vns/case/layk (outlining "13 million civil forfeiture action pending against Lay's estate").

protected from civil suits by the homestead laws of Texas.[5] The federal government could use a civil forfeiture action where criminal forfeiture had become impossible due to Lay's death because all forfeiture is designed to deny individuals the benefit of ill-gotten gains and property used to facilitate crime. In the end, the Department of Justice (Department) released approximately $65 million in forfeited funds for distribution to 128,200 victims of the Enron securities fraud who suffered losses at the hands of its principals, whose illegal actions caused Enron's stock price to drop from more than $80 per share to less than $1.[6]

As the Enron case demonstrates, both criminal and civil forfeiture have much needed roles to play in our justice system. Forfeiture is a critical part of the Department's law enforcement authorities. *The Attorney General's Guidelines for the Asset Forfeiture Program* (*AG Guidelines*) set forth the primary goals of asset forfeiture (both civil and criminal), including to "punish and deter criminal activity by depriving criminals of property used in or acquired through illegal activities," and "recover assets that may be used to compensate victims when authorized under federal law."[7] In addition, "The effective use of both criminal and civil asset forfeiture is an essential component of the Department of Justice's efforts to combat the most sophisticated criminal actors and organizations[.]"[8]

In recent years, civil forfeiture has been the subject of intense scrutiny and criticism in the press and elsewhere. One major theme of this criticism is that civil forfeiture is not conviction-based.[9] Criminal forfeiture is extolled because it is associated with a criminal conviction proven beyond a reasonable doubt, while civil forfeiture is criticized

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[5] *See* Kristen Hays, *U.S. Can Seek Ken Lay Estate Assets, Judge Rules*, HOUSTON CHRON. (Nov. 14, 2007), https://www.chron.com/business/enron/article/U-S-can-seek-Ken-Lay-estate-assets-judge-rules-1555237.php.

[6] Press Release, U.S. Dep't of Justice, Justice Department Returned $1.5 Billion to Victims of Crime Since January 2012 (Apr. 26, 2013).

[7] U.S. DEP'T OF JUSTICE, OFFICE OF THE ATTORNEY GEN., ATTORNEY GENERAL'S GUIDELINES ON THE ASSET FORFEITURE PROGRAM sec. II (2018).

[8] *Id*.

[9] *See, e.g.,* Nick Sibilla, *Congressman Slams Civil Forfeiture As 'A Series of Government Shakedowns,'* FORBES (Jan. 11, 2019), https://www.forbes.com/sites/nicksibilla/2019/01/11/congressman-slams-civil-forfeiture-as-a-series-of-government-shakedowns/#4ce2a0134072.

because it allows forfeiture of assets without an associated criminal conviction under a civil standard of proof. This narrow focus, however, does not account for the entirely legitimate and vitally important role civil forfeiture plays in law enforcement and for victims.

Criminal and civil forfeiture serve the same purposes and have similar procedural safeguards. But in many circumstances, criminal forfeiture may be entirely unavailable or effectively impractical. Civil forfeiture may be the only route to recovery for victims. Criminal and civil forfeiture authorities have enabled the Department to return over $8 billion in funds forfeited under criminal and civil authorities to the victims of crime.[10] The Lay example is not an isolated one—without civil forfeiture, many wrongdoers will ultimately benefit from their crimes because they cannot be criminally prosecuted for any number of reasons and they will do so at the expense of their victims. The Department is steadfast in its resolve to use all available forfeiture tools to protect the rights of crime victims.

Moreover, as detailed below, civil forfeiture is a critical tool in disrupting the most serious criminal threats this nation faces, but that are difficult to prosecute criminally. Civil forfeiture can attack and disrupt the flow of funds to major drug cartels, international terrorist organizations, international cyber criminals, and kleptocrats who steal millions and impoverish their nations and their citizenry. Without civil forfeiture, the United States would be virtually powerless to combat these threats.

Department policies, in addition to recognizing the power of forfeiture authorities and their importance to the law enforcement mission, also recognize the need to exercise these authorities appropriately. Indeed, another fundamental goal of the Asset

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[10] *See, e.g.,* Press Release, U.S. Dep't of Justice, Department of Justice Compensates Victims of Bernard Madoff Fraud Scheme with Funds Recovered Through Asset Forfeiture (Nov. 9, 2017); Press Release, U.S. Dep't of Justice, Department of Justice Begins Second Distribution of Funds Recovered Through Asset Forfeiture Totaling $1.2 Billion to Compensate Victims of Bernard Madoff Fraud Scheme (Apr. 12, 2018); Press Release, U.S. Dep't of Justice, Department of Justice Begins Third Distribution of Funds Recovered Through Asset Forfeiture to Compensate Victims of Bernard Madoff Fraud Scheme (Nov. 29, 2018); Press Release, U.S. Dep't of Justice, Department of Justice Begins Fourth Distribution of Funds Recovered Through Asset Forfeiture to Compensate Victims of Bernard Madoff Fraud Scheme (July 31, 2019).

Forfeiture Program is "to ensure the Program is administered professionally, lawfully, and in a manner consistent with sound public policy."[11] While the legal framework for forfeiture provides many protections, and Departmental guidance incorporates concerns about appropriate use of forfeiture, prosecutors must use their judgment to ensure every case serves the goals of the Department and its Asset Forfeiture Program.

II. What is asset forfeiture?

Asset forfeiture is the taking of property by the government without compensation because of the property's connection to criminal activity. Most commonly, forfeiture is available for property that represents the proceeds of a particular crime. In some instances, statutes also authorize the forfeiture of property that facilitated a crime. As noted above, two types of proceedings can result in a forfeiture: criminal and civil. They may be used independently or in conjunction with one another, as in Enron, to ensure the underlying purpose and effect of the criminal statute is honored. Regardless of the procedure used, forfeiture seeks to extinguish title to property because it represents the proceeds of crime, is a crime to possess, or was used in an unlawful manner. Property forfeited via either process may be used to compensate victims or to ensure the safety and security of our communities.

Criminal forfeiture is part of a criminal action against a defendant. Specifically, it is part of a defendant's sentence. Notice of the intent to forfeit property is included in the criminal indictment or information. Criminal forfeiture is limited to the property interests of the defendant, including any proceeds earned through the defendant's illegal activity. Further, criminal forfeiture is generally limited to the property involved in the particular counts on which the defendant is convicted or to which he pleads guilty. As part of sentencing, a court may order the forfeiture of a specific piece of property listed in the indictment, or, if the proceeds themselves were dissipated or are otherwise unrecoverable, a sum of money or other property equivalent to proceeds obtained through the criminal act. Following a finding of guilt, the government must prove its forfeiture case by a preponderance of the evidence. In a case where the government is

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[11] THE ATTORNEY GENERAL'S GUIDELINES ON THE ASSET FORFEITURE PROGRAM, *supra* note 7, at sec. II.

alleging specific property is forfeitable, the defendant may request that a jury decide whether the connection—or nexus—to the crime of conviction has been proven. As with the conviction itself, the sentence, including forfeiture, may be appealed to a higher court.

By contrast, civil forfeiture does not require a conviction. It is available when a crime has been committed, but for any host of potential reasons, the criminal process is insufficient. Civil forfeiture has been an integral part of American jurisprudence since the nation's founding.[12] Although its conceptual roots can be traced back thousands of years, modern civil forfeiture stems from 18th century admiralty law, which sought to root out piracy and smuggling.[13] The captains and crews of smuggling ships could be arrested and tried, but the owner of the ship, the mastermind and financier of the operation, was generally located abroad and could not be brought to justice. Without forfeiture—specifically, civil forfeiture which did not require conviction of the owner—the ship and its contraband could simply return to sea with a new captain and a new crew. By seizing the ship, the government had the ability to thwart further attempts to continue smuggling into the country and ensure that the owner was not permitted to continue profiting from his criminal enterprise. In furtherance of the government's objective to control import/export violations, one of the first acts of Congress in 1789 was to enact a forfeiture statute subjecting vessels and cargoes to civil forfeiture for violation of the customs laws.[14] Congress codified the traditional maritime law principle that a ship involved in crime was subject to forfeiture even if the owner could not be criminally charged or convicted. The vessel was civilly forfeited as an instrumentality of the offense so that it could not be reused in future criminal activity.[15]

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[12] *See* United States v. Bajakajian, 524 U.S. 321, 330 n.5 (1998) ("The 'guilty property' theory behind *in rem* forfeiture can be traced to the Bible, which describes property being sacrificed to God as a means of atoning for an offense. In medieval Europe and at common law, this concept evolved into the law of deodand, in which offending property was condemned and confiscated by the church or the Crown in remediation for the harm it had caused.") (internal citations omitted); *see also* Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L. J. 2446 (2016).

[13] Nelson, *supra* note 12, at 2457–67.

[14] Act of July 31, 1789, §§ 12, 36, 1 Stat. 29, 39, 47.

[15] *See id.*

Piracy and smuggling have much more sophisticated and profitable modern-day equivalents. Drug trafficking, human trafficking, cybercrimes, terrorist plots, and kleptocracy can all be accomplished without those most culpable setting foot in the country where the crimes take place or the profits and instrumentalities of crime can be found. Asset forfeiture statutes—civil and criminal—allow the government to take criminally tainted property out of these criminals' hands.

III. Why forfeiture?

Criminal activity is often carried out for the primary purpose of financial gain. As the story goes, when William Francis "Willie" Sutton Jr. was asked why he robbed banks, he replied, "Because that's where the money is."[16] Moreover, even those crimes not primarily designed to generate financial profits, such as terrorism and child pornography, are often dependent on funding or the use of particular property, such as weapons or computers. By depriving criminals of the proceeds of their crimes, as well as the facilitating property, the government has the ability to carry out critical functions. As stated in the *AG Guidelines*, "The effective use of both criminal and civil asset forfeiture is an essential component of the Department of Justice's efforts to combat the most sophisticated criminal actors and organizations—including terrorist financiers, cyber criminals, fraudsters, human traffickers, and transnational drug cartels."[17]

A. Deterrence

If the purpose of a crime is to make money, then forfeiture is a highly effective tool of deterrence. If a criminal actor is willing to serve a few years in prison before returning to his criminally funded, million-dollar home and expensive lifestyle, perhaps the benefits of crime might be worth the cost. But, if a criminal actor risks not only incarceration, but also losing the proceeds of his crime, the risks of crime are higher, and the purpose of profit is thwarted.

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[16] *Famous Cases & Criminals: Willie Sutton,* FBI.GOV, https://www.fbi.gov/history/famous-cases/willie-sutton (last visited June 4, 2019).

[17] THE ATTORNEY GENERAL'S GUIDELINES ON THE ASSET FORFEITURE PROGRAM, *supra* note 7, at sec. II.

B. Disruption

In the case of crimes that are dependent on physical or financial assets, failure to forfeit the instrumentality or the proceeds of the offense leaves a criminal enterprise with the resources to continue illegal activity. By removing these resources from the hands of wrongdoers, the criminal enterprise is able to carry out fewer, or less sophisticated, criminal acts. For example, if a drug cartel purchases a boat to transport drugs to the United States, forfeiting the boat, whether purchased with legitimate funds or criminal proceeds, disrupts the cartel's ability to continue to transport its goods.

C. Victim compensation

Crime is not a victimless enterprise. Even in the case of more general crimes without an identified victim, such as drug trafficking, the community suffers. Forfeiture laws—criminal and civil—have provisions that allow the government to take steps to preserve assets, such as fraud proceeds, so that they may be returned to victims. In fact, asset forfeiture laws are frequently the most effective tools in recovering the proceeds and property of crime for victims. The *AG Guidelines* state, "Recovering assets that may be used to compensate victims when authorized under federal law is one of the Program's primary goals. Whenever possible, prosecutors should use asset forfeiture to recover assets to return to victims of crime, as permitted by law."[18] As noted above, the Department has returned over $8 billion in forfeited property to crime victims.[19]

IV. Protecting rights, perfecting forfeiture

Asset forfeiture is a powerful law enforcement tool. Just as the statutes authorizing forfeiture provide authority for the government to seek forfeiture, they also contain numerous protections and safeguards to ensure the forfeiture process protects the rights of criminal defendants and property owners, and to adhere to constitutionally established mandates, such as due process

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[18] THE ATTORNEY GENERAL'S GUIDELINES ON THE ASSET FORFEITURE PROGRAM, *supra* note 7, at sec. V.D.
[19] *See* note 10, *supra*.

requirements.[20] Another primary goal of the Department's asset forfeiture program is to "ensure the Program is administered professionally, lawfully, and in a manner consistent with sound public policy."[21] Constitutional, statutory, regulatory, and policy limitations help the Department carry out this critical goal.

A. Asset seizure must be lawful

The government must exercise lawful authority to seize property for forfeiture. When pursuing civil or criminal forfeiture (or both), asset seizure may take place pursuant to a court-issued warrant in which a court has determined, based on evidence presented by the government, that probable cause exists to conclude that an asset is subject to forfeiture.[22] Asset seizure may also take place pursuant to an exception to the warrant requirement.[23] Exceptions to the warrant requirement include search incident to lawful arrest, the plain view exception, consent, stop and frisk, the automobile exception, emergency or hot pursuit.[24] The determination of whether property is subject to forfeiture is based on the nature of the statutory violation. Some statutes authorize forfeiture of only the proceeds of crime, while others, based on the nature of the crime and how it is committed, may authorize seizure of property that facilitates commission of the crime

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[20] The Fifth Amendment to the United States Constitution states, in part, that no person shall "be deprived of life, liberty, or property without due process of law." U.S. CONST. amend. V.

[21] THE ATTORNEY GENERAL'S GUIDELINES ON THE ASSET FORFEITURE PROGRAM, *supra* note 7, at sec. II.

[22] Chapter 2 of the *Asset Forfeiture Policy Manual* states:

> Law enforcement generally must obtain authority for seizures from a warrant issued by a federal magistrate and based upon a sworn affidavit that describes in detail the item for seizure and the evidence showing its connection to a crime. Federal Rule of Criminal Procedure 41 governs the authorization of seizure warrants. The basis for seizing an asset falls into one of four categories: (1) evidence of an offense; (2) contraband or items illegally possessed; (3) fruits of crime (profits and illegally obtained items); and/or (4) instrumentalities (property used in an illegal act).

ASSET FORFEITURE POLICY MANUAL (2019), Chap.2, Sec.I.

[23] *See id*.

[24] *See generally* WEST CRIM. PRO. HANDBOOK, ch. 1 (June 2019 update).

or property involved in the offense. In order to seize property for forfeiture, the seizing agent must have probable cause to believe that a crime has been committed, the associated criminal statute must provide forfeiture authority, and the property must possess the requisite nexus to the crime.

Even after a lawful seizure, where the government is pursuing civil forfeiture, a claimant may have the right to obtain the release of seized property pending conclusion of forfeiture proceedings by filing a hardship petition. Specifically, if the claimant in an action under the civil forfeiture laws[25] "has a possessory interest in the property," "has sufficient ties to the community to provide assurance that the property will be available at the time of trial," "continued possession [of the property] by the [g]overnment" is likely to cause substantial hardship (that is, "preventing the functioning of a business, preventing the individual from working, or leaving the individual homeless"), and the hardship outweighs the likelihood "that the property will be destroyed, damaged, lost, concealed, or transferred," then a claimant is entitled to have the property returned pending forfeiture proceedings.[26] While there are certain limitations on the types of property that may be released pending completion of the forfeiture proceeding, in general, this provision recognizes that in certain circumstances more process is due because the right restricted is more compelling.

B. Personal and public notice is required within statutory deadlines

Both criminal and civil forfeiture have notice provisions. Where the government seeks criminal forfeiture of property, it must notify the charged defendant in the indictment or information.[27] Moreover, in the case of criminal forfeiture, even if a defendant is convicted and his interest in the property is forfeited, the government must then give notice, both directly and through publication to potential third parties with an interest in the property.[28]

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[25] The civil forfeiture laws include a process known as administrative forfeiture.

[26] 18 U.S.C. § 983(f).

[27] FED. R. CRIM. P. 32.2.

[28] FED. R. CRIM. P. 32.2(b)(6)(a).

On the civil side, 18 U.S.C. § 983(a) establishes notification deadlines for administrative forfeiture to ensure that prompt notification is provided to all affected individuals who are known or become known to the government. Similarly, Rule G of the Federal Rules of Civil Procedure Supplemental Rules provides notice procedures for civil judicial forfeiture actions.[29] In either case, the government is required to provide direct notice to any person who reasonably appears to be a potential claimant on the facts known to the government.[30] Additionally, the government must publish notice so that individuals not known to the government may be identified.[31] If the identity or interest of a party is not determined until later, notice must still be provided and the individual claim must be examined.[32] If the government fails to provide notice within the required period of time, it must return the property to the person from whom it was seized without prejudice to commencing a new forfeiture action.[33]

C. Administrative forfeiture may only be used when forfeiture is uncontested

The Enron case, which involved a massive fraud and millions of dollars, is exceptional. More often, forfeiture is sought in smaller, often uncontested cases. For example, people routinely attempt to enter into the United States with things that violate the law—exotic protected animals, stolen property, illegal drugs, undeclared cash (often itself the proceeds of drug trafficking and other crimes), and many other items. Often times, the people transporting these items may deny ownership or otherwise seek to distance themselves from the illicit property. Administrative forfeiture allows the government to process uncontested civil forfeitures outside of the courts, yet still subject to applicable regulations, policies, and other controls.

Administrative forfeiture, which is authorized under 19 U.S.C. § 1607, is available only for specific categories of property

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[29] FED. R. CIV. P. Supp. R. G.

[30] FED. R. CIV. P. Supp. R. G(4)(b)(i).

[31] The Department generally provides public notice via https://www.forfeiture.gov/; other agencies, however, and state and local organizations may provide notice in newspapers or other print media.

[32] 18 U.S.C. § 983(a)(1)(A)(v).

[33] 18 U.S.C. § 983(a)(1)(F).

under certain threshold values.[34] Real property of any value or personal property (other than currency) with a value greater than $500,000 may not be forfeited administratively.[35] Administrative forfeiture is subject to strict deadlines for notice, and all that is required to challenge an administrative forfeiture is for a purported owner to submit a claim.[36] When a claim is filed, all administrative proceedings stop and, if the government wants to proceed with the forfeiture, it must file a civil or criminal judicial action.[37]

D. Attorneys must review cases consistent with law and policy

When a claim is filed in an administrative forfeiture or if a case is referred directly to the U.S. Attorney's Office (USAO) for civil judicial forfeiture, the prosecutor maintains discretion over whether to proceed with the forfeiture.[38] If the attorney declines the case, it is not necessarily a judgment about the seizing agency's authority or the strength of the case, but, by policy, there are certain cases the Department does not pursue.[39] For example, cases below a certain threshold value may be declined because limited prosecutorial resources must be preserved for more serious criminal cases. Additionally, the government generally does not pursue cases based solely on a structuring violation or bulk cash smuggling violation without further evidence of underlying criminal activity.[40] The attorney will also determine whether the forfeiture is proportional to the gravity of the offense within the boundaries established by the Eighth Amendment.[41] If the USAO declines to proceed with a civil judicial forfeiture, the seized property, with the exception of

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[34] ASSET FORFEITURE POLICY MANUAL (2019), Chap.5, Sec.II. Administrative forfeiture may proceed for monetary instruments in any amount or personal property valued at $500,000 or less. Administrative forfeiture may not be used for real property, no matter the value.

[35] *Id.*

[36] *Id.* at Chap.5, Sec.II.C.

[37] *Id.*

[38] *Id.* at Chap.5, Sec.II.

[39] *See id.*

[40] *Id.* at Chap.2, Sec.VII.

[41] *See id.* at Sec.IV.K.

contraband, must be returned to the owner within specific deadlines, generally in less than 60 days.[42]

E. Complaints must provide detail concerning the nature of the offense

If the USAO accepts a case, the attorney must file a complaint establishing the basis for subject matter jurisdiction, in rem jurisdiction, and venue, and identify the statutory basis for the forfeiture.[43] If the government is seeking to forfeit the proceeds of an offense, it must establish that the property was obtained directly or indirectly as a result of the commission of the offense giving rise to the forfeiture and any property traceable thereto.[44] If the government is seeking forfeiture based on a facilitation or "involved in" theory, it must establish that there was a substantial connection between the property and the offense.[45] In fact, civil forfeiture complaints are held to a higher standard than regular civil complaints. They must be verified and state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial.[46]

F. Parallel civil proceedings may be stayed to protect Fifth Amendment rights

While civil cases may run in parallel to criminal cases, they are governed by different rules of discovery and can often create problems for criminal defendants, cooperating witnesses, or even prosecuting attorneys who may not normally have access to certain evidence in a criminal trial. In a civil case, a party cannot refuse to testify on Fifth Amendment self-incrimination grounds,[47] but may refuse to answer any specific question that might tend to incriminate. Unlike in a criminal case, however, the jury can take the party's failure to testify or answer questions into account.[48] In order to protect individual rights or allay any concerns over access to information that would not

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[42] *Id.* at Chap.5, Sec.II.
[43] FED. R. CIV. P. Supp. R. G(2).
[44] 18 U.S.C. §§ 981(a); 983(c).
[45] 18 U.S.C. § 983(c)(3).
[46] FED. R. CIV. P. Supp. R. G(2).
[47] No person "shall be compelled in any criminal case to be a witness against himself[.]" U.S. CONST. amend. V.
[48] Baxter v. Palmigiano, 425 U.S. 308 (1976).

otherwise be available to prosecutors in a parallel criminal case, either party may request a stay of the civil proceedings pending resolution of a criminal case.

G. Parties to a forfeiture have the right to opt for a trial by jury

In a criminal trial where the government has alleged that specific property is forfeitable because of its relation to a crime (for example, it is proceeds), after a finding of guilt, either party may request that the jury be retained to determine if the property is subject to forfeiture.[49] Similarly, in a civil forfeiture action, any party may demand a jury trial.[50] The advantages and disadvantages of a bench or jury trial are the same whether dealing with a forfeiture or any other case, but whatever the preference, where the issue is the forfeiture of specific property, whether in a criminal or civil case, the rules permit the parties to choose to have a jury.

H. Claimants may have a right to appointed counsel in certain circumstances

In criminal forfeiture, the defendant has the right to counsel because forfeiture is part of his sentence. As part of the comprehensive reforms included in the Civil Asset Forfeiture Reform Act of 2000, a claimant in a civil forfeiture case also may be entitled to counsel.[51] A claimant is entitled to appointed counsel if the claimant already has appointed counsel in a related criminal proceeding, or if the defendant property is the claimant's primary residence and the claimant is financially unable to obtain representation.[52] In addition, a court can provide a lawyer to represent a home owner contesting the civil forfeiture of his home.

I. Claimants may have a right to attorney's fees

Claimants who substantially prevail in a challenge to a civil judicial forfeiture, may be entitled to have the government pay their attorney's fees and costs. This is not a special provision of the forfeiture laws—it arises from statutes governing civil proceedings

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[49] FED. R. CRIM. P. 32.2.
[50] FED. R. CIV. P. Supp. R. G(9); *see also* FED. R. CIV. P. 38.
[51] 18 U.S.C. § 983(b).
[52] *Id.*

more generally,[53] as does the more limited provision for criminal forfeitures.[54]

J. Innocent owners will retain their property

Even if the government is able to prove by a preponderance of the evidence that the property was in fact linked to a criminal act and subject to forfeiture, protections exist for third-party claimants such as lienholders. In the criminal forfeiture context, after a defendant's interest in the property is forfeited, the government must provide notice to other potential claimants.[55] Any such claimant then has the opportunity to establish by a preponderance of the evidence in an ancillary proceeding that he or she has a legal right, title, or interest in the property that:

> renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property[56]

or that the claimant "is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture."[57]

Similarly, in a civil forfeiture action, a claimant may prevail even after the government has proven the property is subject to forfeiture if he can qualify as an innocent owner. Innocent ownership can be proven by showing that claimants did not know of the illegal conduct or, if they did know, that upon learning of the conduct, they did all that reasonably could be expected under the circumstances, to terminate the illegal use of the property, including giving timely notice of the conduct to law enforcement and revoking, or making a good faith attempt to revoke, permission of those engaged in the illegal conduct to continue using the property or taking other reasonable steps to discourage or prevent such illegal use, or

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[53] 28 U.S.C. § 2465.
[54] *See* ASSET FORFEITURE POLICY MANUAL (2019), Chap.12.
[55] 21 U.S.C. § 853(n).
[56] 21 U.S.C. § 853(n)(6)(A).
[57] 21 U.S.C. § 853(n)(6)(B).

unwittingly purchased the property after its illegal use.[58] "A person is not required . . . to take steps that the person reasonably believes would be likely to subject any person (other than the person whose conduct gave rise to the forfeiture) to physical danger."[59]

The innocent owner defense is unavailable as to property that qualifies as contraband or other property that is illegal to possess.[60] The innocent owner defense is also not available to "straw owners" who obtain possession or ownership of tainted property without exchanging just compensation. A person who gave nothing of value for the property, however, may still qualify as an innocent owner if the property is the claimant's primary residence, deprivation of the residence would leave the claimant without reasonable shelter in the community, the property is not or is not traceable to the proceeds of criminal activity, and "the claimant acquired . . . interest in the property through marriage, divorce, or legal separation, or the claimant was the spouse or legal dependent of the person whose death [effectuated] the transfer of [interest in] the property."[61] As Justice Kennedy has observed, in civil forfeiture, "only the culpable stand to lose their property; no interest of any owner is forfeited if he can show he did not know of or consent to the crime."[62]

K. Constitutional protection from excessive fines

The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[63] The constitutional right to be free from excessive fines applies not only to criminal forfeitures, when forfeiture is part of the sentence, but also to civil forfeitures.[64] Thus, even if the government has satisfied all of the burdens to support forfeiture, this right must still be protected. Prosecutors must consider whether the forfeiture is proportional to the gravity of the offense.[65]

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[58] 18 U.S.C. § 983(d).
[59] 18 U.S.C. § 983(d)(2)(B)(ii).
[60] 18 U.S.C. § 983(d)(4).
[61] 18 U.S.C. § 983(d)(3)(B).
[62] United States v. Ursery, 518 U.S. 267, 294 (1996) (Kennedy, J., concurring) (internal citation omitted).
[63] U.S. CONST. amend VIII.
[64] *Id.*; 18 U.S.C. § 983(g); United States v. Bajakajian, 524 U.S. 321 (1998).
[65] 18 U.S.C. § 983(g).

V. Why isn't criminal forfeiture enough?

Often, criminal forfeiture is sufficient and even preferable to civil forfeiture. It allows the government to recover substitute, untainted assets to satisfy a forfeiture order against an individual under certain circumstances.[66] But, as noted above, criminal asset forfeiture takes place only after a conviction and is part of a defendant's criminal sentence. While obtaining a criminal conviction in many cases would be ideal, sometimes it is not possible to charge an individual or even identify a culprit. Moreover, sometimes criminally prosecuting an individual would be a miscarriage of justice given her role in the criminal activity. Even so, the property in question is still tainted by criminal activity and victims deserve compensation. In such cases, the inability to prosecute or the exercise of prosecutorial discretion does not reduce the government's responsibility to recover the proceeds and instrumentalities of crime. Civil forfeiture is often the only means by which the government can carry out that responsibility.

A. Property in possession of a third party

By design, neglect, or accident, criminally tainted property is often in the possession of someone other than the person who committed the crime. Criminals frequently hide assets in the possession of third parties, like family members or trusted confederates. In such cases, civil forfeiture enables the government to recover property when criminal prosecution of the possessor or apparent owner may not be appropriate or feasible. For example, a criminal may give her spouse or child a piece of tainted property, or sell her property for a fraction of its worth; in such cases, the family member or new "owner" may view him or herself as the lawful owner of the property and may even possess title to the property, but has contributed little to no value to the purchase or maintenance of the property. These so-called "owners" are merely "possessors" or "straw owners," benefitting from the crime and, in cases like fraud, possessing property that represents funds stolen from victims. But because the person convicted of the crime may have no apparent title to the property, criminal forfeiture may be difficult, making civil forfeiture the better means of forfeiting the property.

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[66] 21 U.S.C. § 853(p).

Amplifying this problem is the deliberate use by criminal actors of "shell" and "shelf" companies to insulate the proceeds of criminal activity from discovery and seizure. While shell companies have legitimate uses, unfortunately they have become "the financial and deception vehicle of choice for some of the most corrupt, dangerous and ruthless individuals and entities in the world. Arms dealers, drug cartels, corrupt politicians, scammers, terrorists and cybercriminals are just a few of the frequent users of shells."[67] Due to the in rem nature of civil forfeiture, assets shielded by shell or shelf companies can be forfeited directly, without the need to criminally charge the corporation (which may be impossible or impractical) or litigate difficult issues of ownership.

B. Criminals located outside the United States

When criminals are beyond the reach of the U.S. judicial system, criminal conviction with associated criminal forfeiture may be impossible. U.S. courts, however, may retain jurisdiction over property linked to the defendants and their criminal acts.

1. Fugitives

Criminal actors often attempt to evade arrest. These individuals may still have access to their ill-gotten gains, but may avoid capture and conviction long enough to hide or dissipate these assets. Or, they may abandon assets subject to forfeiture, in which case they could be used or obtained by family members or coconspirators, or simply become hazardous for failure to maintain the property. Without a criminal conviction, civil forfeiture is often the only tool that may be used to divest the criminal actor of the tainted property. For example, from 2001–2004, Jose, Carlos, and Luis Benitez allegedly defrauded the U.S. Medicare program of approximately $80 million.[68] The Benitez brothers, using straw owners to disguise their own involvement, owned and directed 11 medical clinics that purportedly provided HIV infusion treatment to infected Medicare beneficiaries. The medication allegedly given to patients, however, was medically

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[67] Ryan C. Hubbs, *Shell Games: Investigating Shell Companies and Understanding Their Roles in International Fraud*, FRAUD MAGAZINE (July/Aug. 2014).

[68] *See* Press Release, U.S. Dep't of Justice, Justice Department Returned Over $4 Billion to Victims of Crime Through Asset Forfeiture Program Between 2002 and 2005 (Apr. 22, 2015).

unnecessary and was often never given to patients. A number of these patients provided their Medicare information in exchange for kickbacks. On May 22, 2008, the Benitez brothers were indicted for conspiracy to defraud the United States, including health care fraud, submission of false claims, and money laundering.[69] Before their arrest, however, the brothers fled Miami and remain at large. Even so, the government identified tens of millions of dollars in assets, including commercial and residential real estate, a water park, a soft drink distribution center, multi-unit motel complexes, and waterfront condominium apartments, and forfeited them civilly.[70]

2. Terrorists

Statutes grant the government broad latitude to seize and forfeit assets related to terrorist activity.[71] Foreign terrorist organizations often establish accounts or purchase property in different countries to support planned attacks or operations. Additionally, terrorist organizations often engage in unlawful business to develop sources of income to finance these operations. In order to undermine those operations and prevent future attacks, the government must cut off access to the organization's resources, resources necessary to grow an organization or purchase explosives, firearms, transport vehicles, bases of operation, etc. For example, from approximately 2007–2011, at least $329 million was laundered through the United States using the now-defunct Lebanese Canadian Bank (LCB).[72] Parties in West Africa worked with Hizballah and Hizballah-related entities to engage in trade-based money laundering to conceal the origins of narcotics trafficking proceeds.[73] Not only did these funds represent the proceeds of crime, but through the arrangement with Hizballah, they were partially used to finance terrorism. LCB had been routinely used to launder money and LCB managers were complicit in the money laundering activities.[74] The U.S. government seized $150 million from

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[69] *Id.*
[70] *Id.*
[71] *See, e.g.,* 18 U.S.C. § 981(a)(1)(G).
[72] Press Release, U.S. Dep't of Justice, U.S. Attorney's Office (S.D.N.Y.), Manhattan U.S. Attorney Announces $102 Million Settlement of Civil Forfeiture and Money Laundering Claims Against Lebanese Canadian Bank (June 25, 2013).
[73] *Id.*
[74] *Id.*

a correspondent account in the United States and ultimately negotiated a settlement with LCB and associated parties to civilly forfeit $102 million.[75] These complex schemes demonstrate one of the ways terrorist organizations develop resources and sustain operations.

In this case, the officials of LCB, the members of Hizballah, and the drug traffickers were located outside the United States, but the victims of their operations included American citizens. Through the use of civil forfeiture, the U.S. government had a substantial opportunity to protect the U.S. financial system from the corrupting influence of terrorist funds and cut off access to financial resources that could further campaigns of criminal activity.[76]

3. Kleptocrats

Kleptocrats are foreign corrupt officials who steal from their governments, take bribes from individuals in exchange for special access or favors, or defraud their countries, thus depriving citizens of benefits and resources owed. Due to the stability and security of the U.S. market, these individuals often purchase property or transfer these fraudulently obtained assets to the United States or to countries with special relationships to the United States. In these cases, the United States has the authority to civilly forfeit these assets and return them to the people of the injured nation. If the government of that nation is stable and relatively free of corruption, the United States can return the assets directly to the injured government, but in circumstances where the kleptocrat is part of a wider problem and funds returned to the government are unlikely to be directed in an appropriate and lawful manner, the United States may retain the funds in trust until such time as they may be returned to the government or direct the funds in other ways to benefit the citizens of that nation through aid or other support programs. When kleptocrats are outside the United States, civil forfeiture is often the only tool that may be used to recover these assets and return them for their rightful purpose, to their rightful owner.

A recent example of kleptocracy asset recovery through civil forfeiture involves 1Malaysia Development Berhad (1MDB). 1MDB was a company incorporated by the Malaysian Minister of Finance to support long-term strategic initiatives and economic growth designed

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[75] *Id.*
[76] *See id.*

to support the Malaysian people.[77] Instead, Prime Minister Najib Razak and those connected to him used the company to defraud the Malaysian people on a massive scale.[78] From 2009–2015, more than $4.5 billion was misappropriated by 1MDB officials and their associates, including the prime minister.[79] The coconspirators allegedly laundered the stolen funds through a series of complex financial transactions and shell companies with bank accounts located in the United States and abroad. The money was used to purchase a luxury yacht, movie rights, high-end properties, jewelry, artwork, etc.[80] Through a complex financial corruption investigation, U.S. officials were able to identify and seize more than $1 billion in assets that could be civilly forfeited and returned to the Malaysian people.[81] Recently, as a result of one of these civil forfeiture actions, the United States returned almost $200 million to Malaysia.[82]

4. Cybercrime

The internet has opened new avenues for international organized criminals to commit crimes in the United States without leaving foreign countries that are safe havens from extradition. Civil forfeiture is often the only tool to secure their ill-gotten gains and return them to victims. Further, civil forfeiture statutes often allow the government to forfeit intangible property that facilitates overseas cybercrime such as domain names and IP addresses. By forfeiting this intangible property, foreign cyber criminals may be deprived of direct access to the U.S. market or trusted pathways that facilitate hacking or unlawful interference with U.S. business, government, or politics.

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[77] *1MDB: The Case That Has Riveted Malaysia*, BBC NEWS (July 22, 2016), https://www.bbc.com/news/world-asia-33447456.
[78] *Id*.
[79] Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, U.S. Seeks to Recover Approximately $540 Million Obtained From Corruption Involving Malaysian Sovereign Wealth Fund (June 15, 2017).
[80] *Id*.
[81] *See id*.
[82] *United States Returns More than RM800 Million to Malaysia in Recovered 1MDB Funds,* U.S. EMBASSY IN MALAYSIA (May 7, 2019), https://my.usembassy.gov/u-s-returns-more-than-rm800-mil-recovered-1mdb-050719/.

C. Criminal defendant is deceased

Criminal forfeiture is part of the criminal sentence, but if a criminal defendant dies prior to conviction, sentencing, or while an appeal is pending, the criminal case ceases, and terminates criminal forfeiture authority over the property. This may include property obtained by fraud at the expense of victims who will have no recourse to be made whole. This has happened in a number of cases.

As noted above, Kenneth Lay, a primary defendant in the Enron case, died after he was convicted by a jury but before he could be sentenced.[83] Civil forfeiture allowed the government to secure additional assets that could be used to compensate victims.[84] Jeffry Picower, an associate of Bernard Madoff and one of the largest beneficiaries of the famous Ponzi scheme, died without being charged for his role in the fraudulent enterprise. Civil forfeiture proceedings allowed the government to collect $2.2 billion that was used to compensate victims.[85] More recently, David H. Brooks, the former CEO of DMB Industries, Inc., a supplier of body armor to the U.S. military and law enforcement agencies, was convicted of mail and wire fraud, securities fraud, and obstruction of justice.[86] Although he subsequently pleaded guilty to filing false tax returns, he appealed his fraud convictions and sentence.[87] He died in prison while his case was on appeal and, as a result, his fraud convictions and sentence were vacated.[88] Because the government had filed and stayed a civil forfeiture action, the government was able to retain and civilly forfeit more than $143 million in seized assets. The forfeited assets were made available to compensate thousands of victim investors.[89]

In some cases, a perpetrator of a criminal fraud scheme may die before he or she can ever be charged with a crime. In a case in Kansas

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[83] Peters & Romero, *supra* note 1.

[84] United States v. Lay, 456 F. Supp. 2d 869 (S.D. Tex. 2006).

[85] Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Department of Justice Begins Second Distribution of Funds Recovered Through Asset Forfeiture Totaling $1.2 Billion to Compensate Victims of Bernard Madoff Fraud Scheme (Apr. 12, 2018).

[86] Press Release, U.S. Dep't of Justice, U.S. Attorney's Office (E.D.N.Y.), Government Forfeits More Than $143 Million in Fraud Proceeds Seized from David H. Brooks (Nov. 5, 2018).

[87] *Id.*

[88] *Id.*

[89] *Id.*

City, Missouri, Mark Sellers ran a fraud scheme for over a decade resulting in victim losses of over $10 million.[90] While the FBI was executing a search warrant at his home in 2016, Sellers drove up to the house and fatally shot himself.[91] The United States subsequently filed a civil forfeiture complaint naming assets traceable to the fraud scheme, and provided a process for victims to seek compensation for their losses. Following a defendant's or perpetrator's death, results this favorable to the victims were possible only with civil forfeiture.

D. Living or perishable property

Administrative and civil judicial forfeiture actions are often resolved more expeditiously than criminal forfeitures, which can be completed only at criminal sentencing and may be stayed pending appeal. Such cases can last for years and in the case of living or perishable property, may require significant, costly, and cumbersome maintenance pending resolution of the criminal case. For example, former NFL quarterback Michael Vick and his associates once owned and operated Bad Newz Kennels. The kennel housed and trained over 50 pit bulls, which were often abused or even killed, staged dog fights using these animals, and ran a high stakes gambling ring. In this circumstance, forfeiture proceedings had to be concluded as quickly as possible to allow for pet adoptions to take place and to ensure proper care was provided for the animals.[92]

E. Impossible to identify a defendant

Stolen art and other items of cultural significance often appear for sale in an auction house or gallery with no clear path to the person or group that originally stole the artifact. The current possessor of the artifact may have no knowledge of its history and no culpability in the original theft, but because of its cultural significance or the manner in which it was taken from the original owner, could not be considered a lawful owner of the artifact or antiquity. In order to return the artifact

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[90] Steve Vockrodt, *Kansas City Businessman Led a $10 Million Investment Fraud Scheme, Feds Say*, KAN. CITY STAR (Apr. 14, 2017), https://www.kansascity.com/news/business/article144721274.html.
[91] *Id.*
[92] U.S. Dep't of Justice, Statement for the Record, For a Hearing Entitled The Need to Reform Asset Forfeiture, Before the Committee on the Judiciary, United States Senate at 7 (Apr. 15, 2015).

to the appropriate party, the government generally must extinguish any perceived rights of third parties through forfeiture actions.[93]

There are many such examples ranging from the theft of cultural artifacts subsequently replaced with forgeries to looting during a period of unrest. Most notable is the theft of Jewish property by the Nazis in World War II. During World War II, the Nazis created a division known as the Einsatzstab Reichleiter Rosenberg (ERR), or the Reichsleiter Rosenberg Taskforce.[94] Its formal mission was to "study" Jewish life and culture, but ERR officials were actually responsible for confiscating books, works of art, and other cultural artifacts of "the enemies of the Reich."[95] The ERR was meticulous in its cataloging efforts, registering, identifying, and even photographing these stolen artifacts, which consequently made it easier to identify stolen works after the war.[96] One of these works came from the Schloss Collection in Paris.[97] This collection was compiled by Adolphe Schloss, a Jewish art collector who died in 1910. The collection was passed to his wife, Lucie Schloss and thereafter to their heirs.[98] After the invasion of France, German soldiers began searching for the collection and ultimately found the location where the family was hiding.[99] Two of the heirs were arrested and the third was never found.[100] A 1639 work by Salomon Koninck titled, *A Scholar Sharpening His Quill*, was stolen along with 261 other paintings in

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[93] Forfeiture of cultural property and antiquities is generally accomplished using provisions of the Archaeological Resources Protection Act (16 U.S.C. §§ 470aa–470mm), the Cultural Property Implementation Act (19 U.S.C. § 2601, *et seq*.), the National Stolen Property Act (18 U.S.C. § 2314, *et seq*.), or customs laws.

[94] Press Release, U.S. Dep't of Justice, U.S. Attorney's Office (S.D.N.Y.), Manhattan U.S. Attorney Announces Action to Recover Old Master Painting Stolen By Nazis and Selected for Hitler's Art Collection (Oct. 19, 2018).

[95] *Id*.

[96] *Id.*

[97] *Id*.

[98] *The Looting*, *Historical Introduction*, DIPLOMATIE.GOUV.FR, https://www.diplomatie.gouv.fr/sites/archives_diplo/schloss/sommaire_ang.html (last visited Sept. 11, 2019).

[99] *Id*.

[100] *See* Paula Mejia, *Dutch Masterpiece Looted By Nazis Resurfaces At Christie's, Will Be Returned To Rightful Owner's Heirs*, GOTHAMIST (Apr. 2, 2019), http://gothamist.com/2019/04/02/nazi_painting_looted.php.

1943.[101] After being transferred to Munich, the painting was again looted after the fall of the Third Reich but before the arrival of the Allied Troops.[102] In November 2017, a Chilean art dealer attempted to sell the painting through Christie's auction house in New York, which identified its origins.[103] The seller stated that her father had purchased the painting from Walter Andreas Hofer in Munich in 1952.[104] "In 1950, after being tried in absentia by a French military tribunal for his role in art plundering during World War II, Hofer was found guilty and sentenced to 10 years in prison."[105] Although the seller's father may have been aware of the origins of the painting, neither he nor his daughter was responsible for the original theft of the painting nor the crimes committed against the Schloss family.[106] Therefore, prosecutors could not obtain a criminal conviction or criminal forfeiture. Civil forfeiture was the only avenue to extinguish any ownership interest the seller might have had in the painting. On October 19, 2018, the USAO for the Southern District of New York filed a complaint seeking civil forfeiture of the painting and on April 2, 2019 it was returned to its rightful owners.[107]

This is just one example. Unfortunately, there are many others. Native American artifacts often appear for auction. Additionally, items looted during the wars in Iraq and Syria have entered the market. These cases continue to appear and civil forfeiture is often the only available tool that may be used to right past wrongs.

F. Negligent owner

Sometimes the lawful owner of the property may not be involved in the criminal act to the extent of incurring criminal liability but cannot demonstrate that she is an innocent owner due to negligence. Even if the owner is not found criminally liable for the act, she may still lose

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[101] *The Looting*, *Historical Introduction*, DIPLOMATIE.GOUV.FR, https://www.diplomatie.gouv.fr/sites/archives_diplo/schloss/sommaire_ang.html (last visited Sept. 11, 2019).
[102] Mejia, *supra* note 100.
[103] *Id.*
[104] *See id.*
[105] Press Release, U.S. Dep't of Justice, U.S. Attorney's Office (S.D.N.Y.), Manhattan U.S. Attorney Announces Action To Recover Old Master Painting Stolen By Nazis And Selected For Hitler's Art Collection (Oct. 19, 2018).
[106] *See id.*
[107] *See id.*; *see also* Mejia, *supra* note 100.

title through forfeiture if she knowingly allowed the property in question to be used by the criminal actor in an unlawful manner without making attempts to withdraw consent, suspend the use of the property, or notify officials of the unlawful activity. Such property may be forfeited as facilitating property. For example, a landlord may have known that leased property is being used by tenants as a meth lab, have evidence or first-hand knowledge of the activities taking place in the property over an extended period of time, or have received complaints from neighbors—and done nothing to either notify officials of the criminal activity, withdraw consent for use of the property, or evict the tenants. While the owner may not be criminally liable as a coconspirator, through neglect or peripheral support, the owner may have materially contributed to the rise in neighborhood crime, attacks on neighbors, and devaluation of adjacent property. Such property is often called "nuisance property" and could be civilly forfeited based on the facts and circumstances surrounding the case.

In 2015, federal officials seized three multi-family rental houses in downtown Rutland, Vermont.[108] For years police had been responding to neighbors' complaints. There were discarded syringes in nearby yards, strangers dropping in around the clock, and the street became a notorious destination for drug sellers and buyers during the height of Vermont's opioid epidemic.[109] Although a number of arrests took place, removal of these individuals failed to address the larger problem. After years of investigation, it became clear that while the owner was not involved in the illegal activity, the individual was aware of what was happening and did nothing to stop it.[110] After arrests were made and tenants cleared from the houses, the properties, which still carried back taxes and fines, were civilly forfeited and returned to the city. The city transferred the properties to a local non-profit, which proceeded to renovate and restore the properties.[111] The properties would ultimately become owner-occupied

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[108] *Seizing the Moment: Vermont Civil Forfeiture Leads to Renewal of Homes, Community*, FBI.GOV (June 24, 2017), https://www.fbi.gov/news/stories/vermont-civil-forfeiture-leads-to-community-renewal.

[109] *Id.*

[110] *Id.*

[111] *Id.*

single family or multi-tenant homes, in which the property owners would have a personal stake in the success of the neighborhood.[112]

VI. Prosecutors must put purposes and protections into practice

Despite the many protections built into the process, asset forfeiture—in particular, civil asset forfeiture—remains a controversial exercise of law enforcement authorities. Critics come from "strange bedfellows" on the right and the left.[113] While some oppose any exercise of civil forfeiture authority, many focus their criticism on seizures of relatively small amounts of cash without a concurrent arrest or subsequent prosecution.[114]

The Department recognizes that forfeiture processes incorporate the constitutional, statutory, and regulatory protections for criminal defendants and property owners discussed in this paper and elsewhere. Yet the Department does not limit seeking forfeiture solely on the protections in the law—the Department also establishes policies governing prosecutors' use of asset forfeiture. These encourage the *appropriate* use of federal forfeiture. In addition to carefully considering whether their cases meet all the legal requirements for forfeiture, prosecutors should also consider whether they should bring a forfeiture action.

Prosecutors must determine that every case is appropriate for federal action. This includes whether the case meets the minimum asset value thresholds set forth in the *Asset Forfeiture Policy Manual*

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[112] *Id.*

[113] *See, e.g.*, Radley Balko, *Study: Civil Asset Forfeiture Doesn't Discourage Drug Use or Help Police Solve Crimes*, WASH. POST (June 11, 2019), https://www.washingtonpost.com/opinions/2019/06/11/study-civil-asset-forfeiture-doesnt-discourage-drug-use-or-help-police-solve-crimes/; DICK M. CARPENTER II ET AL., INST. FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE (2d ed. 2015); *Asset Forfeiture Abuse*, ACLU, https://www.aclu.org/issues/criminal-law-reform/reforming-police-practices/asset-forfeiture-abuse (last visited June 23, 2019); Note, *How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement*, 131 HARV. L. REV. 2387 (2018).

[114] Indeed, the Department's Office of the Inspector General reviewed the Department's cash seizures. *See* U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., REVIEW OF THE DEPARTMENT'S OVERSIGHT OF CASH SEIZURE AND FORFEITURE ACTIVITIES 17-02 (2017).

and any higher thresholds set by their USAO.[115] As noted in the Justice Manual, "The net equity values are intended to decrease the number of federal seizures, thereby enhancing efforts to improve case quality and to expedite processing of the cases we do initiate. The thresholds are also intended to encourage state and local law enforcement agencies to use state forfeiture laws."[116] Prosecutors must also consider whether federal forfeiture is appropriate when state law is also at issue.[117] This includes whether the federal agency or prosecutor versus a state authority is pursuing a federal criminal action. Forfeiture should follow the prosecution. If a case is more appropriately prosecuted in a state court, the forfeiture should be pursued there, too.[118] This obviates the need for federal forfeiture in those cases.

Other state law concerns may apply as well. If a state or local agency seizes an asset and seeks to have a federal agency or prosecutor forfeit it federally (an "adoption"), this is possible only if state law permits the transfer to the federal entity.[119] Some states place restrictions on this practice. Moreover, before proceeding federally, federal prosecutors must determine whether a federal court can exercise jurisdiction over property seized by a state or local authority that may remain subject to state court jurisdiction.[120] Recognizing the varying law and practice in different jurisdictions is an essential aspect of determining which cases to bring. A primary goal of the Asset Forfeiture Program is "[t]o promote and enhance cooperation among federal, state, local, tribal, and foreign law enforcement agencies."[121] This cooperation depends on all partners using their own authorities lawfully and appropriately.

Prosecutors must determine what action is appropriate when multiple agencies—federal and sometimes state and local, as

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[115] ASSET FORFEITURE POLICY MANUAL (2019), Chap.2, Sec.D.1 (Asset-specific net equity thresholds); *see also id.* at Chap.1, Sec.C.2 (Pre-seizure planning overview) (noting "[s]hould the asset be seized or even identified for forfeiture?").

[116] JUSTICE MANUAL § 9-111.120 (forfeiture net equity values).

[117] *See* ASSET FORFEITURE POLICY MANUAL (2019), Chap.5, Sec.I.B.

[118] *See id.*

[119] *See id.* at Chap.3, Sec.IV.B.

[120] *See id.*

[121] THE ATTORNEY GENERAL'S GUIDELINES ON THE ASSET FORFEITURE PROGRAM, *supra* note 7, at sec. II.

well—are conducting investigations related to the same or similar conduct. "Consultation between the Department's civil and criminal attorneys, together with agency attorneys, permits consideration of the fullest range of the government's potential remedies and promotes the most thorough and appropriate resolution in each case."[122] Federal forfeiture may be an appropriate element of a coordinated resolution, but it is just one option that should be considered. When considering appropriate action as to corporations in particular, "Prosecutors should consider whether non-criminal alternatives would adequately deter, punish, and rehabilitate a corporation that has engaged in wrongful conduct" and "evaluat[e] the adequacy of non-criminal alternatives to prosecution—*e.g.*, civil or regulatory enforcement actions[.]"[123] Case circumstances dictate whether criminal forfeiture, civil forfeiture, or both may be available—prosecutors must always determine whether pursuing any forfeiture is appropriate.

In addition, Department policy requires special considerations before pursuing civil forfeiture actions against facilitating property (as opposed to proceeds of crime),[124] using any asset forfeiture authorities in connection with structuring offenses,[125] instituting civil or criminal forfeiture against an asset transferred to an attorney as a fee for legal services,[126] or seizing or restraining an ongoing business.[127]

Forfeiture is an extremely powerful law enforcement tool for use in service of the Department's mission:

> [t]o enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans.[128]

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[122] JUSTICE MANUAL § 1-12.000; *see also* JUSTICE MANUAL § 1-12.100.
[123] JUSTICE MANUAL § 9-28.1200 (civil or regulatory alternatives).
[124] ASSET FORFEITURE POLICY MANUAL (2019), Chap.5, Sec.III.E.1.
[125] *Id.* at Chap.2, Sec.VII.
[126] *Id.* at Chap.12, Sec.IV.
[127] *Id.* at Chap.1, Sec.I.D.; Chap.4, Sec.III.B.
[128] *About DOJ*, U.S. DEP'T OF JUST., https://www.justice.gov/about (last visited June 17, 2019).

As noted in the *AG Guidelines*, "Asset forfeiture plays a critical role in disrupting and dismantling illegal enterprises, depriving criminals of the proceeds of illegal activity, deterring crime, and restoring property to victims."[129] It can support tremendously positive outcomes for victims and, when used properly, it plays an important role in the Department's commitment to seeking justice. Throughout every case, prosecutors are encouraged to consider the effect forfeiture might have on the individuals involved and the greater justice that might be served through the forfeiture.

About the Author

MLARS leads the Department's asset forfeiture and anti-money laundering enforcement efforts. MLARS provides leadership by: (1) prosecuting and coordinating complex, sensitive, multi-district, and international money laundering and asset forfeiture investigations and cases; (2) providing legal and policy assistance and training to federal, state, and local prosecutors and law enforcement personnel, as well as to foreign governments; (3) assisting Departmental and interagency policymakers by developing and reviewing legislative, regulatory, and policy initiatives; and (4) managing the Department's Asset Forfeiture Program, including distributing forfeited funds and properties to appropriate domestic and foreign law enforcement agencies and to community groups within the United States, as well as adjudicating petitions for remission or mitigation of forfeited assets.

[129] THE ATTORNEY GENERAL'S GUIDELINES ON THE ASSET FORFEITURE PROGRAM, *supra* note 7, at sec. II.

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The Post-*Honeycutt* Landscape of Asset Forfeiture

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I. Introduction

The United States Supreme Court's decision in *Honeycutt v. United States*[1] "altered the legal landscape regarding criminal forfeitures."[2] Before *Honeycutt*, most circuit courts held that a court could hold coconspirators jointly and severally liable and impose a forfeiture money judgment against a coconspirator for the reasonably foreseeable proceeds of a drug conspiracy under 21 U.S.C. § 853.[3] But in *Honeycutt*, the Court's interpretation of section 853 clarified that the principles of vicarious liability that underpinned a court's imposition of joint and several liability were not incorporated into the text of the statute. As a result, a court could only order forfeiture of drug proceeds that a defendant acquired or obtained.

This article will explore the change to the legal landscape post-*Honeycutt*. After discussing the Supreme Court's opinion in *Honeycutt*, the article will examine the application of *Honeycutt* analysis to other forfeiture statutes, including those addressing criminal proceeds and money laundering. The article will then discuss how *Honeycutt* affects the imposition of forfeiture liability, including whether two or more defendants can be held liable for the same proceeds and whether the government can still forfeit gross proceeds

[1] 137 S. Ct. 1626 (2017).
[2] United States v. Masino, No. 3:16CR17-MCR, 2019 WL 1045179, at *9 (N.D. Fla. Mar. 5, 2019).
[3] *See Honeycutt*, 137 S. Ct. at 1631 n.1.

under section 853; briefly address *Honeycutt*'s applicability on collateral review; and conclude with a discussion of whether *Honeycutt* affects a federal district court's ability to impose a forfeiture money judgment.

II. Overview of the *Honeycutt* decision

Federal drug laws mandate the forfeiture of "any property, constitut[ed], or derived from, any proceeds the person obtained, directly or indirectly, as the result of [a] violation."[4] Courts of appeals largely interpreted this language to permit joint and several liability among coconspirators for the proceeds of a drug conspiracy.[5] Each defendant, upon conviction, would be held liable for all foreseeable proceeds of the conspiracy, including those proceeds obtained or received by coconspirators.

In *Honeycutt*, petitioner and his brother sold a water purification product—known as Polar Pure—that contained a precursor chemical for manufacturing methamphetamine. They made all their sales from a hardware store that petitioner's brother owned. When they refused multiple law-enforcement requests to cease selling Polar Pure, they were indicted for conspiracy and substantive drug offenses. The government sought to forfeit the profits of their sales, approximately $270,000. Petitioner's brother pleaded guilty and agreed to forfeit $200,000. Petitioner was convicted, but argued at sentencing that he should not have to forfeit the remaining amount because his brother received all the profit from the illegal sales. The district court agreed, but the court of appeals reversed, holding petitioner liable under a joint-and-several theory. In doing so, the court applied a three-decades-long near-consensus among the courts of appeals that 21 U.S.C. § 853 authorizes joint and several liability.

The Supreme Court rejected that view. In reaching its conclusion, the Court highlighted section 853(a)'s textual requirement that a defendant "obtain" the proceeds—which, the Court determined, evidenced the statute's focus on personal possession or use.[6] The Court also highlighted the other provisions in section 853(a), which similarly address property the defendant personally obtained. For instance, section 853(a)(2) mandates forfeiture of property used to

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[4] 21 U.S.C. § 853(a)(1).
[5] *See Honeycutt*, 137 S. Ct. at 1631 n.1.
[6] *Id.* at 1632.

facilitate the crime, but limits the forfeiture to "the person's property."[7] Similarly, section 853(a)(3) "requires [the] forfeiture of property related to continuing criminal enterprises, but . . . requires the defendant to forfeit only 'his interest in' the enterprise."[8]

The Court found further support for this conclusion in other provisions of section 853, such as section 853(c) (vesting of forfeited property in the United States) and section 853(e) (addressing pretrial restraint of property).[9] The Court had previously construed these provisions as applying only to "tainted" property.[10] Interpreting section 853(a)(1) to authorize joint and several liability would, however, "mandate forfeiture of untainted property that the defendant did not acquire as a result of the crime."[11]

The Court also relied on the substitute asset provision in section 853(p), which the Court said was "the sole provision of § 853 that permits the Government to confiscate property untainted by the crime."[12] This provision authorizes the government to seek forfeiture of "any other property of the defendant" if, "as a result of any act or omission of the defendant," the directly forfeitable property:

> (A) cannot be located upon the exercise of due diligence;
> (B) has been transferred or sold to, or deposited with, a third party;
> (C) has been placed beyond the jurisdiction of the court;
> (D) has been substantially diminished in value; or
> (E) has been commingled with other property which cannot be divided without difficulty.[13]

In other words, section 853 sets forth the procedures for forfeiting untainted substitute assets if the tainted assets are no longer available. The Court observed that, in crafting this remedy, "Congress did not authorize the Government to confiscate substitute property from other defendants or co-conspirators," but "only from the

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[7] *Id.* at 1633.
[8] *Id.*
[9] *Id.*
[10] *Id.*; *see also* Luis v. United States, 136 S. Ct. 1083, 1091 (2016).
[11] *Honeycutt*, 137 S. Ct. at 1633.
[12] *Id.*
[13] 21 U.S.C. § 853(p)(1)–(2).

defendant who initially acquired the property and who bears responsibility for its dissipation."[14]

In the final substantive section of its opinion, the Court explained that the principle of conspiracy liability under which conspirators are responsible for each other's foreseeable acts in furtherance of a common scheme—also known as the *Pinkerton* principle—did not unsettle its reading of section 853.[15] First, section 853's text and structure make clear that Congress did not incorporate either the *Pinkerton* principle or joint and several liability.[16] Second, the background principles animating forfeiture law indicated that in section 853, Congress enabled the government to hold responsible a defendant who "acquired" tainted property but, with the sole exception of substitute assets under section 853(p), did not expand the scope of forfeitable property.[17]

Thus, the Court announced that section 853(a)(1) authorizes forfeiture of only the property the defendant himself obtained as the result of the crime. Section 853(a)(1) does not authorize entry of a forfeiture judgment for proceeds that the defendant never obtained.

III. Application to other statutes

After *Honeycutt,* courts began to consider whether *Honeycutt*'s reasoning in prohibiting joint and several liability for proceeds a defendant did not obtain was applicable to other forfeiture statutes. While the holding of *Honeycutt* was limited to an interpretation of the language of section 853, the reasoning could apply more broadly to most criminal forfeiture statutes authorizing forfeiture of the proceeds of crime. But both the language and scope of the money laundering forfeiture statute, 18 U.S.C. § 982(a)(1), differs from the proceeds-based forfeiture statutes and may allow for an individual to be liable for more than she personally obtained.

A. Criminal forfeiture statutes

There has been little dispute that *Honeycutt*'s reasoning applies to criminal forfeiture statues. Several cases have addressed *Honeycutt*'s applicability to forfeitures under the general criminal forfeiture

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[14] *Honeycutt*, 137 S. Ct. at 1634.
[15] *Id.* at 1634–35 (citing Pinkerton v. United States, 328 U.S. 640 (1946)).
[16] *Id.* at 1634.
[17] *Id.* at 1635.

statute, 18 U.S.C. § 982(a)(2). Section 982(a)(2) provides that the court, "in imposing sentence on a person convicted of a violation of, or a conspiracy to violate" one of numerous criminal offenses "shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation."[18] Forfeiture under section 982(a)(2) is procedurally governed by section 982(b)(1), which incorporates most of the provisions of section 853, including subsections (c), (e), and (p).[19]

In *United States v. Chittenden*,[20] the Fourth Circuit held that *Honeycutt*'s holding regarding 21 U.S.C. § 853(a)(1) also applied to forfeitures under 18 U.S.C. § 982(a)(2), which applies to bank fraud and conspiracy to commit bank fraud.[21] The court vacated a $1 million forfeiture money judgment that covered over $1 million in proceeds that the defendant's coconspirators had received and dissipated.[22] The court found that section 982(a)(2)'s language "mirrors" that of section 853(a)(1) because it limits forfeiture to "property constituting, or derived from, proceeds *the person obtained* directly or indirectly, as the result of" the crime.[23] *Honeycutt*'s interpretation of this language as permitting forfeiture only of tainted property the defendant personally acquired applies equally to forfeitures under section 982(a)(2).[24] Further, the court noted that section 982(a)(2) expressly incorporates section 853(p), and followed *Honeycutt*'s conclusion that section 853(p) does not authorize forfeiture of substitute property from other defendants or coconspirators when the tainted assets of the defendant have been dissipated.[25] For these reasons, the Fourth Circuit held that "forfeiture under 18 U.S.C. § 982(a)(2) is limited to property the defendant acquired as a result of the crime. The statute

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[18] 18 U.S.C. § 982(a)(2).
[19] *See* United States v. Sanjar, 876 F.3d 725, 749 (5th Cir. 2017).
[20] 896 F.3d 633 (4th Cir. 2018).
[21] *Id.* at 636, 640.
[22] *Id.*
[23] *Id.* at 637.
[24] *Id.*
[25] *Id.* at 638 (The Fourth Circuit noted that the Supreme Court's decision in *Honeycutt* abrogated the earlier Fourth Circuit decision in United States v. McHan, 101 F.3d 1027 (4th Cir. 1996), which had held that a defendant was jointly and severally liable for the reasonably foreseeable proceeds of the conspiracy.).

does not permit courts to hold a defendant liable for proceeds that only her co-conspirator acquired."[26]

Similarly, in *United States v. Brown*,[27] the Third Circuit analyzed section 982(a)(2) and concluded that it shared several features with section 853. Both statutes used the word obtained, which "suggest[ed] that the scope of forfeiture [was] define[d] . . . solely in terms of personal possession or use."[28] The court also noted that the language referring to property "constituting or derived from proceeds obtained directly or indirectly from the crime" meant that section 982, like section 853, only applied to tainted property.[29]

Courts have applied the same reasoning to forfeitures under the healthcare fraud statute, 18 U.S.C. § 982(a)(7). In *United States v. Sanjar*, the Fifth Circuit held that, in light of *Honeycutt*, the district court erred in entering a forfeiture money judgment that held the defendant jointly and severally liable for proceeds in excess of $4 million obtained as part of a healthcare fraud scheme in which he received only $120,000.[30] The court concluded that section 982(a)(7) was substantially the same as the provisions considered in *Honeycutt*.[31] Additionally, the court noted that section 982(b)(1) imported "many of the drug law provisions on which *Honeycutt* relied in rejecting joint and several liability."[32] The Eleventh Circuit reached the same conclusion in *United States v. Elbeblawy*, vacating defendant's approximately $36 million forfeiture money judgment imposed jointly and severally with his coconspirators for various healthcare offenses.[33]

Finally, the Third Circuit has held that *Honeycutt* applies to the Racketeer Influenced and Corrupt Organizations Act (RICO) forfeiture provision, 18 U.S.C. § 1963. In *United States v. Gjeli*,[34]

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[26] *Id.* at 639.
[27] 694 F. App'x 57 (3d Cir. 2017) (not precedential).
[28] *Id.* at 58 (cleaned up).
[29] *Id.* (cleaned up).
[30] 876 F.3d 725, 748–49 (5th Cir. 2017), *cert. denied sub nom.* Main v. United States, 138 S. Ct. 1577 (2018).
[31] *Id.* at 749.
[32] *Id.*
[33] 899 F.3d 925, 930, 941–42 (11th Cir. 2018).
[34] 867 F.3d 418 (3d Cir. 2017), *as amended* (Aug. 23, 2017), *cert. denied sub nom.* Mustafaraj v. United States, 138 S. Ct. 697 (2018), *cert. denied,* Gjeli v. United States, 138 S. Ct. 700 (2018).

defendants were convicted of, among others things, RICO conspiracy in violation of 18 U.S.C. § 1962(d). As a result, defendants were liable for forfeiture under the RICO forfeiture provision, section 1963, which provides for forfeiture of "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962."[35] The court concluded that section 1963 was "substantially the same" as section 853.[36] Although the court did not discuss it, section 1963 also contains provisions similar to section 853, covering the relation-back doctrine, seizure of property, and substitute assets.[37]

B. Sections 981(a)(1)(C) and 2461(c)

While courts have been uniform in applying *Honeycutt* to criminal forfeiture statutes, there has been a split in the circuits about whether *Honeycutt*'s reasoning applies to forfeitures under 18 U.S.C. § 981(a)(1)(C). By way of background, section 981(a)(1)(C) authorizes forfeiture of "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to" a violation of numerous unlawful acts, including "any offense constituting 'specified unlawful activity' (as defined in section 1956(c)(7) of this title), or a conspiracy to commit such offense."[38] It is important to note that section 981(a)(1)(C) is a civil forfeiture statute; it focuses on the property itself rather than the individual committing the offense. As part of the Civil Asset Forfeiture Reform Act of 2000, Congress enacted 28 U.S.C. § 2461(c).[39] Section 2461(c) gives the government authority to bring a criminal forfeiture action against any defendant convicted of an offense for which forfeiture is authorized by either a civil or a criminal forfeiture statute.[40] Thus, the government is able to

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[35] 18 U.S.C. § 1963(a)(3).
[36] *Gjeli,* 867 F.3d at 427.
[37] *Compare* 21 U.S.C. § 853(c), (e), and (p), *with* 18 U.S.C. § 1963(c), (e), and (m).
[38] 18 U.S.C. 981(a)(1)(C); *see also* United States v. $6,190 in U.S. Currency, 581 F.3d 881, 884 (9th Cir. 2009) (explaining how section 981(a)(1)(C) authorizes forfeiture of the proceeds of all specified unlawful activities through the chain of references to sections 1956(c)(7) and 1961(1)).
[39] Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (2000).
[40] *See* United States v. Razmilovic, 419 F.3d 134, 136 (2d Cir. 2005) (section 2461(c) "authorizes criminal forfeiture as a punishment for any act for which

forfeit the proceeds of numerous offenses from a criminal defendant by seeking forfeiture in a criminal case under section 981(a)(1)(C), in conjunction with section 2461(c).[41]

Two aspects of section 2461(c) bear noting. First, section 2461(c) provides that "[t]he procedures in [21 U.S.C. § 853] *apply to all stages of a criminal forfeiture proceeding*."[42] This includes three of the four provisions—section 853(c), (e), and (p)—*Honeycutt* relied on to support its holding that "[j]oint and several liability is not only contrary to § 853(a), it is—for the same reasons—contrary to several other provisions of § 853."[43] Second, without section 2461(c), there can be no criminal forfeiture under section 981(a)(1)(C); standing alone, section 981(a)(1)(C) does not provide criminal forfeiture authority.

1. The Second, Third, and Eleventh Circuits have applied *Honeycutt* to forfeitures under sections 981(a)(1)(C) and 2461(c)

Several circuits have found that *Honeycutt*'s reasoning applies to forfeitures under sections 981(a)(1)(C) and 2461(c). In *United States v. Gjeli*, the Third Circuit vacated forfeiture orders imposing joint and several liability on defendants for more than $5 million in proceeds from their racketeering related charges involving loan sharking and illegal gambling.[44] The forfeiture was imposed under 18 U.S.C. §§ 981(a)(1)(C) and 1963. The court concluded that, like section 1963,[45] the "text and structure" of section 981(a)(1)(C) was "substantially the same" as section 853.[46] The court noted that forfeiture was "limited to [the] property [each] defendant himself actually acquired as a result of the crime."[47]

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civil forfeiture is authorized, and allows the government to combine criminal conviction and criminal forfeiture in a consolidated proceeding").

[41] For additional explanation of the application of 28 U.S.C. § 2461(c) in criminal forfeitures, see Craig Gaumer, *Criminal Forfeiture*, 55 U.S. ATT'YS BULL., no. 6, 2007, at 22–23.

[42] 28 U.S.C. § 2461(c) (emphasis added).

[43] Honeycutt v. United States, 137 S. Ct. 1626, 1633 (2017). Note that section 853(d) is excluded from section 2461(c).

[44] United States v. Gjeli, 867 F.3d 418, 420–21 (3d Cir. 2017).

[45] *See* section III.A, *supra*.

[46] *Gjeli,* 867 F.3d at 427.

[47] *Id.* at 428 (quoting *Honeycutt*, 137 S. Ct. at 1365).

Similarly, the Eleventh Circuit in *United States v. Carlyle*,[48] vacated a forfeiture money judgment imposed based on charges arising from a scheme in which the couple used stolen identities to file false tax returns and receive tax refunds. The district court initially imposed a forfeiture money judgment against defendant Carlyle in the amount of $1,820,759, jointly and severally liable with her co-defendant husband. But the government conceded that she could not be held jointly and severally liable and asked the court to vacate the forfeiture money judgment and remand to the district court for a determination of the amount she obtained as a result of the scheme. The Eleventh Circuit panel held that, although *Honeycutt* addressed a different statute, 21 U.S.C. § 853, the decision also likely applies to 18 U.S.C. § 981(a)(1)(C) because the two statutes are largely the same in terms of their pertinent language.[49]

Finally, the Second Circuit reached a similar conclusion in *United States v. Gil-Guerrero*.[50] There, because *Honeycutt* rejected joint and several liability as a basis for forfeiture, the government conceded that *Honeycutt*'s reasoning also applies to section 981(a)(1)(C). Given the government's concession, the court vacated the $860,511.88 forfeiture money judgment against defendant Gil-Guerrero, imposed jointly and severally with his other co-defendants for three conspiracy offenses, and remanded to the district court for determination of the proper amount of the forfeiture.[51] But the Second Circuit panel noted that it "need not here decide whether *Honeycutt*'s reasoning applies equally in all respects to forfeiture orders under 18 U.S.C. § 981(a)(1)(C)" in light of the government's concession.[52]

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[48] 712 F. App'x 862 (11th Cir. 2017) (not precedential).
[49] *Id.* at 862, 864–65. After remand, the Eleventh Circuit affirmed a $1.4 million forfeiture money judgment against Carlyle. United States v. Carlyle, No. 18-11486, 2019 WL 2307959 (11th Cir. May 30, 2019).
[50] 759 F. App'x 12 (2d Cir. 2018) (not precedential).
[51] *Id.* at *1.
[52] *Id.* at *4 n.8. One district court in the Southern District of New York has concluded that the *Honeycutt* holding does not apply to forfeitures under section 981(a)(1)(C) and section 2461(c). *See* United States v. McIntosh, No. 11-Cr-500 (SHS), 2017 WL 3396429 (S.D.N.Y. Aug. 8, 2017). This opinion appears premised on adherence to established Second Circuit precedent.

2. The Sixth and Eighth Circuits have not applied *Honeycutt* to forfeitures under sections 981(a)(1)(C) and 2461(c)

Two circuits have taken the opposite view, finding that *Honeycutt*'s reasoning does not apply to forfeitures under sections 981(a)(1)(C) and 2461(c). The Sixth Circuit, in *United States v. Sexton*,[53] affirmed the district court's approximately $2.5 million forfeiture order against defendant Sexton, who pleaded guilty to conspiracy to commit bank fraud under 18 U.S.C. §§ 1344 and 1349, for securing loans based on misrepresentations.[54] Sexton appealed his sentence, arguing, among other things, that *Honeycutt* applied and the forfeiture money judgment imposing joint and several liability was incorrect. But the Sixth Circuit disagreed. In analyzing the forfeiture money judgment, the court noted that *Honeycutt* examined section 853(a)(1), not section 981(a)(1)(C). Unlike section 853(a)(1), the court noted that section 981(a)(1)(C) does not contain the phrase "the person obtained," which it considered to be the "linchpin" of the Supreme Court's decision in *Honeycutt*.[55] While the panel recognized that two other circuits had applied *Honeycutt* to forfeitures under section 981(a)(1)(C), the court rejected their reasoning. The court concluded that section 981(a)(1)(C)'s text requires that the property must be connected or traceable to the crime, but it does not need to be property that a particular defendant obtained.[56] For these reasons, the court affirmed the forfeiture order.

The Eighth Circuit reach a similar result in *United States v. Peithman*.[57] The defendants—Peithman, Elder (Peithman's mother), and a company they owned—operated two smoke shops in Lincoln, Nebraska.[58] Over the course of several years, they purchased for retail sale over $1 million worth of "potpourri" containing synthetic marijuana.[59] Following their convictions on mail fraud, structuring, and drug paraphernalia conspiracy charges, the district court imposed

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[53] 894 F.3d 787 (6th Cir. 2018), *reh'g denied* (July 16, 2018), *cert. denied*, Sexton v. United States, 139 S. Ct. 415 (2018).
[54] *Id.* at 798.
[55] *Id.* at 799.
[56] *Id.*
[57] 917 F.3d 635 (8th Cir. 2019).
[58] *Id.* at 642–44.
[59] *Id.* at 650.

a joint and several forfeiture money judgment for the total cost of the drug paraphernalia in their stores and the potpourri they bought, which was related to the mail fraud conviction.[60] Both Peithman and Elder challenged the imposition of joint and several forfeiture money judgments.

While the Eighth Circuit reversed the forfeiture money judgment imposed jointly and severally under section 853, it affirmed the district court's imposition of a joint and several forfeiture money judgment under section 981(a)(1)(C). The court noted that, unlike section 853, section 981(a) defines the term "proceeds" in three ways. The provision relevant in *Peithman*, section 981(a)(2)(A), defines proceeds as: "property of any kind obtained directly or indirectly, as a result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense."[61] Comparing sections 853 and 981(a)(2)(A), the court noted that both sections use the word "obtained" and contain a similar requirement that the property be traceable to the commission of the offense (noting that section 853 requires the property be tainted).[62] The court then addressed the differences between the statutes, finding that section 981 does not reference a "person," as section 853 does.[63] The court stated that this difference makes section 981's language broader and "less focused on personal possession" than section 853's language.[64] It further found that section 981 does not require, either explicitly or implicitly, the possession of the property by the defendant.[65] For these reasons, and acknowledging the circuit split on the issue, the court joined the Sixth Circuit's reasoning, finding that the district court did not err when imposing a joint and several forfeiture money judgment because *Honeycutt* is not applicable to forfeitures under section 981(a)(1)(C).[66]

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[60] *Id.* Though it is unclear from the opinion, it appears that $117,653.57 represented the costs to purchase drug paraphernalia (forfeitable under section 853), and $1,025,288.75 represented the costs to purchase the "potpourri" (forfeitable under section 981(a)(1)(C) and section 2461(c)) related to the mail fraud conviction.

[61] *Id.* at 652.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

3. The majority position is better reasoned

While the Sixth and Eighth Circuits correctly note the textual differences between section 853 and section 981(a)(1)(C), both circuit courts failed to analyze section 2461(c)'s role in a criminal forfeiture under section 981(a)(1)(C). Both *Sexton* and *Peithman* compared apples to oranges; they compared a civil forfeiture statute to a criminal forfeiture statute—without accounting for the provision that applies the civil forfeiture statute in the criminal context. While it is true that section 981(a)(1)(C) does not contain the word "person" in the statute (because it's an in rem civil forfeiture statute), by itself section 981(a)(1)(C) does not authorize criminal forfeiture. It is only through section 2461(c) that there can be criminal forfeiture under section 981(a)(1)(C). As explained above, the *Honeycutt* Court found that "[j]oint and several liability is not only contrary to § 853(a), *it is—for the same reasons—contrary to several other provisions of § 853*."[67] Specifically, the Court concluded that joint and several liability is contrary to subsections (c), (d), (e), and (p) of section 853, and found that section 853(p) "*lays to rest any doubt that the statute permits joint and several liability*."[68] In other words, *Honeycutt* found that section 853 does not permit joint and several liability for two separate and independent reasons: (1) the language of section 853(a), particularly the word "obtained," and (2) the other provisions of section 853, particularly section 853(p). The application of these other provisions in criminal forfeitures under sections 981(a)(1)(C) and 2461(c) suggests that, just like section 853, joint and several liability cannot be applied. Neither the Sixth Circuit nor Eighth Circuit addressed the critically important application of section 2461(c) and its incorporated provisions. Indeed, the government "agrees with the view adopted by those other circuits that *Honeycutt*'s reasoning does apply to § 981(a)(1)(C)."[69]

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[67] Honeycutt v. United States, 137 S. Ct. 1626, 1633 (2017) (emphasis added); *see also* section III.B, *supra*.

[68] *Honeycutt*, 137 S. Ct. at 1633 (emphasis added).

[69] Gov't Br. in Opp. to Pet. for Certiorari, United States v. Sexton, No. 18-5391, 2018 WL 4941285, at *5 (2018). The government took this position in both the *Sexton* and *Peithman* cases.

C. Money laundering

While *Honeycutt* applies to proceeds-based forfeiture statutes, there is an open question about whether and to what extent *Honeycutt* applies to forfeitures for violations of 18 U.S.C. §§ 1956, 1957, and 1960. The textual difference between the money laundering forfeiture statute, 18 U.S.C. § 982(a)(1), and other proceeds forfeiture statutes demonstrates that section 982(a)(1) encompasses a broader category of forfeiture than proceeds statutes like section 853, and therefore a defendant may be liable for more than he or she obtained. The limited post-*Honeycutt* case law supports this distinction.

Section 982(a)(1) provides:

> The court, in imposing sentence on a person convicted of an offense in violation of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, *involved in such offense*, or any property traceable to such property.[70]

Courts have interpreted the "involved in the offense" language to include the actual money laundered (the corpus), the commission or fees paid to the launderer, and property used to facilitate the laundering offense (which may include clean funds).[71] Like other forfeiture provisions in section 982, the substitute asset provision of section 853(p) applies to forfeitures under section 982(a)(1), but there is an important qualification for money laundering offenses.[72] Section 982(b)(2) states:

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[70] 18 U.S.C. 982(a)(1) (emphasis added).

[71] *See* United States v. Huber, 404 F.3d 1047, 1056 (8th Cir. 2005) ("Forfeiture under section 982(a)(1) in a money-laundering case allows the government to obtain a money judgment representing the value of all property involved in the offense, including the money or other property being laundered (the corpus), and any property used to facilitate the laundering offense.") (cleaned up); United States v. Tencer, 107 F.3d 1120, 1134 (5th Cir. 1997) ("The term property involved is intended to include the money or other property being laundered (the corpus), any commissions or fees paid to the launderer, and *any property used to facilitate the laundering offense.*") (cleaned up).

[72] 18 U.S.C. 982(b).

> The substitution of assets provisions of [section 853(p)] shall not be used to order a defendant to forfeit assets in place of the actual property laundered where such defendant acted merely as an intermediary who handled but did not retain the property in the course of the money laundering offense unless the defendant, in committing the offense or offenses giving rise to the forfeiture, conducted three or more separate transactions involving a total of $100,000 or more in any twelve month period.[73]

Under section 982(b)(2), the government can seek substitute assets from a defendant for property "involved in" the money laundering offense where (1) the defendant is not an intermediary, or (2) the defendant is an intermediary, but in committing the offense conducted three or more separate transactions involving a total of $100,000, or more in any 12-month period.

The text of section 982(a)(1) and (b)(2) provide for broader forfeiture than that allowed under the proceeds-based provisions of section 982. Section 853(a)(1) (and other proceeds-based forfeiture statutes) limit forfeiture to the amount "the person obtained," meaning the amount that the person personally possessed or used.[74] In contrast, section 982(a)(1) allows for the forfeiture of property "involved in the offense." The forfeiture is not defined by personal possession or use, but rather by reference to the offense committed. Additionally, as discussed above, the "involved in the offense" language encompasses not only the proceeds of the offense, but also the property used to facilitate the offense.[75] And nothing in the statutory language requires this property be obtained by the defendant. Courts have previously held that the property "involved in" the offense under section 982(a)(1) includes the reasonably foreseeable funds laundered by a defendant's

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[73] 18 U.S.C. 982(b)(2).

[74] *See Honeycutt*, 137 S. Ct. at 1632–33.

[75] United States v. Bermudez, 413 F.3d 304, 306 (2d Cir. 2005) (rejecting argument that forfeiture is limited to proceeds that the defendant obtained because section 982(a)(1) requires forfeiture of funds "involved in the offense"); United States v. Reiner, 397 F. Supp. 2d 101, 112 (D. Me. 2005) (Section 982(a)(1) forfeiture "is not limited to amounts 'obtained by' the defendant" and extends to the funds the defendant conspired to launder).

coconspirators.[76] Thus, the plain text of 982(a)(1) allows for forfeiture beyond what the defendant personally obtained.

Subsection (b) of section 982 also supports the plain reading that money laundering forfeitures extend beyond the funds that a particular defendant obtained. In *Honeycutt*, the Court interpreted section 853(p) as reinforcing its conclusion that section 853(a) did not permit imposing on a defendant joint and several liability for all the funds attributable to a drug conspiracy. In doing so, it relied on section 853(p)'s reference to the "property described in subsection (a) [of section 853]," that is, the forfeitable property described in the substantive forfeiture provision, leading the Court to conclude that section 853(p) "authorized the Government to confiscate [substitute] assets only from the defendant who initially acquired the property and who bears responsibility for its dissipation."[77] But the forfeitable property for a section 982(a)(1) violation is not the property described in section 853(a). As the Second Circuit pointed out, "[t]he 'proceeds' limitation of § 853(a)(1) has no logical connection to § 982(a)(1) forfeitures."[78] Instead, the procedures of section 853(p) are incorporated into a section 982(a)(1) forfeiture, but section 982(a)(1) itself provides the substantive basis for forfeiture.

Section 982(b)(2) provides an even clearer indication that money laundering forfeitures reach a broader category of property than proceeds-based forfeitures. Section 982(b)(2) provides a "safe harbor" to protect certain low-level intermediaries, or third-party money launderers. It qualifies the government's authority to seek substitute assets from intermediaries "who handled but did not retain the property."[79] The government cannot obtain substitute assets from an intermediary defendant unless the defendant "conducted three or more separate transactions involving a total of $100,000 or more in any twelve month period."[80] Thus, Congress authorized the collection

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[76] *See* United States v. Cessa, 872 F.3d 267, 273–74 (5th Cir. 2017); United States v. Seher, 562 F.3d 1344, 1372–73 (11th Cir. 2009).
[77] *Honeycutt*, 137 S. Ct. at 1634 ("[The substitute asset] provision begins from the premise that the defendant once possessed tainted property as 'described in subsection (a),' and provides a means for the Government to recoup the value of the property if it has been dissipated or otherwise disposed of by 'any act or omission of the defendant.'").
[78] *Bermudez*, 413 F.3d at 306.
[79] 18 U.S.C. § 982(b)(2).
[80] *Id.*

of substitute assets from low-level intermediaries only for those funds they personally obtained, but not all of the money "involved in the offense." In other words, section 982(b)(2)'s carve-out provides the protection for low-level intermediaries that section 853 did not for the defendant in *Honeycutt*. But for intermediaries who conducted "three or more separate transactions involving a total of $100,000 or more in any twelve month period," Congress authorized a broader forfeiture of all funds "involved in the offense," including those funds a defendant did not personally obtain. The inclusion of section 982(b)(2) demonstrates Congress's intent that money launders falling outside the narrow safe harbor merit broad forfeiture liability beyond what they personally acquired and obtained.[81] Otherwise, Congress would have no need to implement a safe-harbor provision. Thus, section 982(b)(2) allows the government to seek a broader forfeiture from most money laundering defendants, but protects the lower-level intermediary in the money laundering scheme.

The legislative history of section 982 underscores the plain reading of section 982(a)(1) to permit forfeiture of funds that the money launderer did not obtain. The 1988 amendment to section 982(a)(1), which added the "involved in the offense" language, reflected congressional intent to ensure that forfeiture would encompass "the money or other property being laundered (the corpus), any commissions or fees paid to the launderer, and any property used to facilitate the laundering offense."[82] Also in 1988, section 982(b)(2)'s original safe-harbor provision was added because, in its absence, even a one-time money launderer would have been liable for forfeiting substitute assets even for funds she had merely "handled but did not retain."[83] In 1990, Congress amended section 982(b)(2) to narrow the

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[81] *See Bermudez*, 413 F.3d at 307; United States v. Hendrickson, 22 F.3d 170, 175–76 (7th Cir. 1994).

[82] 134 Cong. Rec. S17360 (daily ed. Nov. 10, 1988) (statement of Senator Biden; section-by-section analysis by drafter of H. 5210, predecessor bill to 1988 law); *see Tencer*, 107 F.3d at 1134.

[83] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4375; 134 Cong. Rec. S17360 (daily ed. Nov. 10, 1988) (statement of Senator Biden) ("Without this provision, it might be permissible for a court to order a person who violated a money laundering statute by converting a million dollars to some other form on behalf of another party, to forfeit substitute assets worth a million dollars, even though the launderer had retained only a small portion of the corpus as his fee, and had transferred the remainder of the

intermediary exception to reflect its true intent to protect low-level or occasional money laundering participants, but not the professional money launderer. Thus, Congress limited the safe-harbor provision by adding the current language that allows the substitute asset provisions to apply if "the defendant, in committing the offense or offenses giving rise to the forfeiture, conducted three or more separate transactions involving a total of $100,000 or more in any twelve month period."[84] This amendment made clear Congress's intent that a money laundering forfeiture under section 982(a)(1) encompasses "forfeiture of substitute assets from a professional money launderer who moves hundreds of thousands of dollars" for criminals including drug traffickers, even if the money launderer did not retain the funds, as "[s]uch a person is clearly a professional money launderer who is not deserving of the forfeiture exemption."[85]

Although there is limited case law on the application of *Honeycutt* to money laundering forfeitures under section 982(a)(1), the existing cases support the textual analysis. In *United States v. Alquza*,[86] defendant Alquza was convicted of, among other charges, conspiracy to commit money laundering and concealment money laundering related to illegal cigarette trafficking.[87] As the district court explained, "[e]ssentially, [Alquza] was convicted for his role as a professional and highly paid money launderer who received and laundered millions in

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corpus back to the other party, or his designee, in the course of the offense. Such a result would appear to be unduly harsh.").

[84] Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789, 4835.

[85] Cong. Rec. S6606 (daily ed. May 18, 1990). In the section-by-section analysis of a predecessor bill (S. 2652), Senator Dole explained that the intermediary exception "should be narrowed to reflect its true intent, which was to protect the low-level or occasional participant in a money laundering offense, such as a 'smurf' who carries his employer's money to a bank but retains none of it for himself, from forfeiture of money over which he never exercised exclusive control." Senator Dole explained that the exception "was not intended to preclude forfeiture of substitute assets from a professional money launderer who moves hundreds of thousands of dollars through various businesses and accounts on behalf of other criminals engaged in drug trafficking or other specified unlawful activity."

[86] 722 F. App'x 348 (4th Cir. 2018) (not precedential).

[87] United States v. Alquza, No. 3:11CR373-FDW, 2017 WL 4451146 (W.D.N.C. Sept. 21, 2017), *aff'd,* 722 F. App'x 348 (4th Cir. 2018) (not precedential).

crime proceeds in exchange for $275,000."[88] He was ordered to pay a forfeiture money judgment totaling $6 million, representing the cigarette-trafficking funds he laundered.[89] Alquza filed a *pro se* motion challenging the forfeiture money judgment and the final forfeiture of substitute properties, arguing that the forfeitures were invalid in light of *Honeycutt*.[90] The Fourth Circuit panel affirmed the district court's holding that Alquza's collateral attack on the forfeiture judgment entered against him was untimely and without merit.[91] The court added that "*Honeycutt* addressed only forfeiture under 21 U.S.C. § 853(a)(1)—which provides for joint and several liability for coconspirators in certain drug crimes—and not forfeiture of property 'involved in' money laundering under 18 U.S.C. § 982(a)(1), the basis on which the district court ordered forfeiture."[92] Thus, the court plainly stated that *Honeycutt* did not address forfeitures under section 982(a)(1).

A Fifth Circuit opinion recently applied 982(b)(2) to a money laundering forfeiture. In *United States v. Haro*,[93] the defendant pleaded guilty to one count of conspiracy to engage in money laundering. Haro participated in a conspiracy to launder the drug proceeds from her common law spouse, a member of a Mexican drug cartel. Before conviction, Haro worked as an intermediary for members of the drug cartel, transporting drug proceeds first from the eastern United States to Texas, and then to Mexico. In calculating the sentence, the district court attributed 16 money loads—totaling $2,853,006—to Haro as relevant conduct. The district court ordered forfeiture of a money judgment totaling $1.825 million, which represented the amount of laundered funds attributable to Haro that had not yet been seized by law enforcement. The money judgment was imposed jointly and severally with several coconspirators under 18 U.S.C. § 982(a)(1).[94] Haro appealed her sentence, including the forfeiture money judgment. Applying section 982(b)(2) and reviewing for plain error, the panel rejected Haro's contention that there was insufficient

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[88] *Id.* at *1.
[89] *Id.* at *2.
[90] *Alquza*, 722 F. App'x at 349.
[91] *Id.*
[92] *Id.*
[93] 753 F. App'x 250 (5th Cir. 2018) (not precedential).
[94] The district court issued the forfeiture order prior to *Honeycutt*.

evidence to support the district court's finding that she conducted three or more transactions involving a total of $100,000 or more in a 12-month period. Although Haro raised a *Honeycutt* challenge to her forfeiture money judgment, she did so only in her reply brief, so the court did not consider the argument.[95] For these reasons, the court found defendant was liable for the full amount of the forfeiture money judgment.

The text of subsections 982(a)(1) and (b)(2), legislative history, and the few cases analyzing the statutory provisions after *Honeycutt* support the conclusion that there is broader forfeiture liability for money laundering offenses then other proceeds-based forfeiture statutes.

IV. Forfeiture liability after *Honeycutt*

Following *Honeycutt*, the key question is who "obtained" what during the course of a crime. To date, only a handful of court decisions have addressed this question, but they largely agree that multiple people can "obtain" the same money over the course of the crime, either because they jointly control the enterprise that receives the money or because they each have a hand in a stage of the transaction.

First, several cases have addressed the situation of joint ownership or control over an entity, like a business or corporation, used in a criminal scheme. In *United States v. Masino*,[96] for example, an ex-husband-and-wife team jointly owned and controlled a set of corporations that operated an illegal gambling scheme. Although the corporations were not charged as defendants in the criminal scheme, the record "establishe[d] by a preponderance of the evidence that [the company] Racetrack Bingo and the Masinos are effectively one [and] the same," and the government was therefore entitled to forfeiture of money in the corporation's accounts.[97] Over the course of the scheme, the Masinos charged non-profit organizations above market "rents" for use of their bingo hall, which is prohibited by state law, and thereby "acquired the tainted property by directing its deposit into Racetrack Bingo's account as 'rent.'"[98] The defendants then exercised joint and total control over those corporate accounts and "distribut[ed] the

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[95] *Haro*, 753 F. App'x at 260 n.4.
[96] No. 3:16cr17-MCR, 2019 WL 1045179 (N.D. Fla. Mar. 5, 2019).
[97] *Id.* at *5.
[98] *Id.*

proceeds as salary payments and profit distributions to the[mselves] and their children."[99] The court distinguished this conduct "from *Honeycutt*, where the co-conspirator had no ownership in the business and reaped no personal benefit."[100] The court entered a joint and several money judgment against both defendants in the full amount of the company's bingo proceeds.[101]

A similar situation occurred in *United States v. Peithman*. As discussed above,[102] following Peithman and Elder's convictions on mail fraud, structuring, and drug paraphernalia conspiracy charges, the district court imposed a joint-and-several money judgment for the total cost of the drug paraphernalia in their stores and the potpourri they bought.[103] The court of appeals distinguished *Honeycutt* on the ground that "both Peithman and Elder had ownership interests [in the shops], worked together to operate the businesses, and shared in the proceeds obtained by engaging in criminal activity."[104] Although *Honeycutt* technically "preclude[d] the district court from imposing joint and several liability" under section 853, the court found no error in holding both defendants "equally culpable."[105]

A third example is *United States v. Bikundi*.[106] Florence and Michael Bikundi were convicted of conspiracy and substantive health care fraud and money laundering offenses stemming from their operation of Global Healthcare, Inc. (Global), which provided home health care services funded in part by the federal government.[107] Although the district court found that both defendants had jointly obtained nearly $80 million in proceeds, it divided the approximately $80 million equally between Florence and Michael, reasoning that they were "equally responsible" and should each forfeit half of the funds because they "jointly obtained . . . the illicit funds through their shared

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[99] *Id.*
[100] *Id.* at *9.
[101] *Id.*
[102] *See* section III.B.2, *supra*.
[103] United States v. Peithman, 917 F.3d 635, 650 (8th Cir. 2019).
[104] *Id.* at 651.
[105] *Id.; see also* United States v. Hoffman, 901 F.3d 523, 561 n.27 (5th Cir. 2018) (speculating that defendants declined to invoke *Honeycutt* because all three co-owned the company conducting the scheme and "therefore 'acquired' the ill-gotten tax credits").
[106] 926 F.3d 761 (D.C. Cir. 2019).
[107] *Id.* at 773.

management and control over Global, and they effectively treated the proceeds as joint property."[108] Florence and Michael appealed the forfeiture order, arguing, among other things, that the forfeiture money judgment imposed joint and several liability in violation of *Honeycutt*. The D.C. Circuit disagreed. While declining to say whether *Honeycutt* applied to forfeitures under section 982(a)(7) and section 982(a)(1), the court held that the forfeiture money judgments did not impose joint and several liability but rather represented "an equal division of liability between the two masterminds of the conspiracy."[109] The panel noted that the district court found that both Florence and Michael were "integrally involved with Global's fraudulent operations" and "effectively treated the proceeds [of the scheme] as joint property."[110] As both "jointly obtained" the property and were "equally responsible for the criminal proceeds," the court had no issue with ordering Florence and Michael to each forfeit half of the proceeds.[111] Such an order ensured that neither Florence nor Michael would be ordered to forfeit more than she or he personally obtained.[112]

Although the court acknowledged that both Florence and Michael jointly obtained the property and were equally responsible for the proceeds of the scheme, the court affirmed an order that imposed liability for only approximately half of the criminal proceeds on each defendant. In other words, Florence and Michael each ended up liable for only half of the amount each was found to have obtained. It is unclear from the D.C. Circuit opinion whether the court would have affirmed a forfeiture money judgment that held each defendant liable

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[108] *Id.* at 792. The district court calculated the approximately $40 million forfeiture order for each defendant by ordering Florence and Michael each to forfeit approximately $39.7 million (for the health care fraud offenses under section 982(a)(7)) and $40.0 million (for the money laundering offenses under section 982(a)(1)). These monetary judgments were "to be assessed concurrently," which meant that the money forfeited by each defendant counted toward their forfeiture money judgment for both offenses.

[109] *Id.* at 794.

[110] *Id.*

[111] *Id.* (internal quotations omitted).

[112] *Id.*; *cf.* United States v. Carlyle, No. 18-11486, 2019 WL 2307959 (11th Cir. May 30, 2019) (although court did not decide whether husband and wife jointly obtained property, court held wife possessed and enjoyed the fruits of her own efforts and calculated a $1.4 million forfeiture judgment against her based on documents tied exclusively to her).

for the full $80 million in criminal proceeds, subject to an offset of the amount collected from each defendant.

Second, a more complicated situation occurs when the same money passes through various hands within a conspiracy. *Honeycutt* itself addressed such an example: a drug distribution operation in which "a farmer masterminds a scheme to grow, harvest, and distribute marijuana on local college campuses" and then "recruits a college student to deliver packages."[113] The farmer "pays the student $300 each month from the distribution proceeds for his services."[114] Over the course of the year, "the mastermind earns $3 million," but the student "earns $3,600."[115] "If joint and several liability applied" in this example, the Court continued, "the student would face a forfeiture judgment for the entire amount of the conspiracy's proceeds: $3 million" despite the fact that "he never personally acquired any proceeds beyond the $3,600."[116] Although the Court concluded that the student should not be liable beyond the $3,600, it had no trouble concluding that the farmer-mastermind should nonetheless be liable for the entire $3 million.[117] This is so because although he "might receive payments directly from drug purchasers, or he might arrange to have drug purchasers pay an intermediary such as the college student[,] . . . he ultimately 'obtains' the property—whether 'directly or indirectly.'"[118]

The Western District of Michigan encountered a real-life version of this example in *United States v. Ward*.[119] The court determined that Ward was "closely akin to the hypothetical marijuana mastermind described in *Honeycutt*" because he "grew the marijuana on his property and sold it through his storefronts," "controlled the employees," and "was in charge of maintaining the growing facility on his property."[120] Accordingly, the court held Ward accountable for the entire conspiracy's gross proceeds, despite the fact that some of the

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[113] Honeycutt v. United States, 137 S. Ct. 1626, 1631 (2017).
[114] *Id.*
[115] *Id.*
[116] *Id.* at 1631–32.
[117] *Id.* at 1633.
[118] *Id.*
[119] No. 2:16-cr-6, 2017 WL 4051753 (W.D. Mich. Aug. 24, 2017), *report and recommendation adopted*, No. 2:16-cr-06-01, 2017 WL 3981160 (W.D. Mich. Sept. 11, 2017).
[120] *Id.* at *3.

money went to others for "wages, rent, water, electricity, soil, fertilizer, tools, transportation, etc."[121] To hold otherwise, the court found, would contravene established law—untouched by *Honeycutt*—that forfeiture of gross proceeds, not net profits, is appropriate.[122]

Not every court encountering this issue, however, has come to the same conclusion. In *United States v. Cooper*,[123] the district court in D.C. declined to hold the defendant accountable for the entire amount of money he possessed during a heroin distribution scheme.[124] Cooper acted as a "middle man," taking money from a retail drug dealer, using some of it (minus his commission) to buy heroin from a wholesale supplier, and then delivering the heroin to the retail dealer.[125] Because Cooper gave most of the money to the supplier to buy the drugs, the court determined that he had not "actually acquired" that portion of the funds.[126] The court compared Cooper to the *Honeycutt* "student," not the "mastermind," on the ground that requiring him to forfeit the money he paid to his supplier would require him to forfeit untainted funds.[127] The government may only reach untainted funds, the court noted, through the substitute assets provision of section 853(p).[128]

Cooper's reasoning is flawed. First, the court confused entry of a forfeiture money judgment—which requires determining the amount of the crime's proceeds—with the forfeiture of identified property—which requires use of the substitute assets provision if the property is untainted. The two are not the same; rather, the latter is a means of enforcing the former. The entry of any money judgment will usually result in the (later) forfeiture of untainted assets via the substitute assets provision—because defendants almost inevitably spend the proceeds of their crimes. This does not mean that every forfeiture money judgment runs afoul of *Honeycutt*.

Second, *Cooper* over reads the *Honeycutt* example in two ways. Its decision to compare Cooper to the student, rather than the

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[121] *Id.* (internal quotations omitted).
[122] *Id.*
[123] No. 15-161-08, 2018 WL 6573454 (D.D.C. Dec. 13, 2018).
[124] *Id.* at *4.
[125] *Id.* at *3.
[126] *Id.*
[127] *Id.* at *3, *4.
[128] *Id.* at *3 n.8.

mastermind, largely misses the example's point that the mastermind is liable for the entire $3 million, not $3 million less his expenses in paying the college student.[129] Cooper, as a middleman, was a type of mastermind, not a type of student—he bought supply and resold it at a markup to a retailer (a "student"). At a broader level, too, *Cooper* demonstrates the limitations of *Honeycutt*'s example. The example appears to discuss a wheel-and-spoke conspiracy in which the student is but one of many retailers working for the mastermind.[130] In such a situation, it makes a lot of sense that the Court would limit liability of a single spoke for the activity of those he does not know about and is unconnected to. But in a chain conspiracy, like *Cooper*, each participant is much more aware of and reliant on the other members. And as the joint-ownership cases demonstrate, there is no inherent unfairness or textual limitation to more than one person having "obtained" the same money.

Finally, *Honeycutt* did not change the scope of proceeds forfeitable under the proceeds-based forfeiture statute. Before *Honeycutt*, several circuit courts held that "proceeds" as stated in section 853 meant gross proceeds and not net profits.[131] Circuit courts also reached the same

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[129] *See* Honeycutt v. United States,137 S. Ct. 1626, 1631 (2017) (mastermind liable for the entire amount; mastermind "pays the student $300 each month *from the distribution proceeds* for his services" yet "earns" $3 million in the year, implying $3 million is the gross, not net, proceeds of the scheme) (emphasis added).

[130] *See id.* (scheme operates on multiple "college campuses"; scheme moves roughly 250 kilograms/month; it's hard to imagine a single student able to deliver that much marijuana in retail quantities, let alone one willing to do so for merely $300/month).

[131] United States v. Olguin, 643 F.3d 384, 399 (5th Cir. 2011) (affirming forfeiture order under section 853 ordering forfeiture of gross receipts); United States v. Bucci, 582 F.3d 108, 121–24 (1st Cir. 2009) (approving jury instruction that defined "proceeds" in section 853(a) as "gross proceeds); United States v. Keeling, 235 F.3d 533, 537 (10th Cir. 2000) ("for purposes of § 853, 'proceeds' contemplates gross proceeds and not merely profits"); United States v. McHan, 101 F.3d 1027, 1041–42 (4th Cir. 1996), *abrogated by*, *Honeycutt*, 137 S. Ct. 1626 (gross proceeds forfeitable in drug case); *see also* United States v. Khan, 761 F. App'x 43 (2d Cir. 2019) (not precedential) (forfeitures under criminal forfeiture statute are not limited to profits, but extend to property constituting or derived from any proceeds persons obtain as result of the crime they are convicted of); United States v. Logan, 542 F. App'x 484, 498 (6th Cir. 2013) (not precedential) (affirming district

conclusion regarding the similarly worded forfeiture provisions in section 982[132] and section 1963.[133] This means that the government can forfeit not only the crime's profits, but also the full amount of revenue generated by the criminal activity. If the government could not forfeit the gross proceeds of crime, it would create perverse incentives for criminals to employ complicated accounting measures to shelter the profits of their illegal enterprises. The purpose of forfeiture is to remove property facilitating crime or property produced by crime—all of which is tainted by the illegal activity.[134] While *Honeycutt* did not directly address the definition of proceeds under section 853, the issue has been raised in a few post-*Honeycutt* cases.

In *United States v. Khan*,[135] the district court entered a preliminary order of forfeiture for $4,550, following Khan's conviction for drug

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court's determination that gross proceeds should determine the baseline for calculating the amount of the forfeiture under section 853); United States v. Heilman, 377 F. App'x 157, 212 (3d Cir. 2010) (not precedential) (government is entitled to gross receipts in a drug case).

[132] *See, e.g.,* United States v. Peters, 732 F.3d 93, 102 (2d Cir. 2013) (concluding that "the term 'proceeds' as used in section 982(a)(2) means 'receipts'"); United States v. Poulin, 461 F. App'x 272, 288 (4th Cir. 2012) (not precedential) (forfeiture of gross proceeds is explicit in healthcare fraud cases under section 982(a)(7); defendant must forfeit all funds received from Medicare, not just amount above what he could have received for services actually provided).

[133] United States v. Christensen, 828 F.3d 763, 822 (9th Cir. 2015) ("We agree with the view that 'proceeds' in the RICO forfeiture statute refers to gross receipts rather than net profits."), *cert. denied*, Christensen v. United States, 137 S. Ct. 628 (2017) (Mem) and *cert. denied,* Kachikan v. United States, 137 S. Ct. 2109 (2017) (Mem); United States v. Simmons, 154 F.3d 765, 770 (8th Cir. 1998) (collecting cases and holding that "the better view is the one that defines proceeds as the gross receipts of the illegal activity"; forfeiture is intended to punish all those who receive income from illegal activity, not just those whose criminal activity turns a profit); United States v. DeFries, 129 F.3d 1293, 1315 (D.C. Cir. 1997) (government forfeits gross proceeds in RICO case; no deduction on taxes paid on salary that is subject to forfeiture). *But see* United States v. Genova, 333 F.3d 750, 761 (7th Cir. 2003) (limiting RICO forfeiture under section 1963 to net profits; a person paying a kickback to a corrupt public official is entitled to deduct from the forfeiture the amount of the kickback as well as his office overhead expenses).

[134] *McHan*, 101 F.3d at 1042.

[135] 761 F. App'x 43 (2d Cir. 2019) (not precedential).

distribution.[136] On appeal, Khan challenged the preliminary order of forfeiture, claiming that the district court violated the Supreme Court's holding in *Honeycutt* that a coconspirator may not be held jointly and severally liable for property acquired by a coconspirator, but that Khan did not acquire himself.[137] Khan argued that because he passed along some of the drug proceeds to a superior, he did not acquire the proceeds.[138] The Second Circuit rejected his argument and held that section 853(a)(1) is not limited to profits, but also extends to any property constituting or derived from any proceeds Khan obtained, directly or indirectly, as a result of the crime of conviction.[139] Similarly, in *Ward*, discussed above, the court disagreed with the defendant's contention that *Honeycutt* mandated net profits determine the amount of the forfeiture money judgment.[140] Instead, the court followed Sixth Circuit law, holding that gross proceeds determine the amount of forfeiture.[141] Both of these decisions demonstrate that, even after *Honeycutt*, a defendant is liable for the full amount of the drug proceeds received from customers.

In all, although it has been two years, courts are just starting to grapple with the full range of potential implications from *Honeycutt*, and it remains to be seen exactly where the consensus will land.

V. Collateral review

Any time the Supreme Court issues a criminal law decision, there is much debate over which cases it will apply to: only to cases still pending, not yet final on direct appeal, or also to long-closed cases? Before *Honeycutt*, the courts of appeals had consistently held that defendants could not collaterally attack the monetary components of

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[136] *Id.* at 44.
[137] *Id.* at 47.
[138] *Id.*
[139] *Id.*
[140] United States v. Ward, No. 2:16-cr-6, 2017 WL 4051753, at *3 (W.D. Mich. Aug. 24, 2017), *report and recommendation adopted*, 2017 WL 3981160 (W.D. Mich. Sept. 11, 2017).
[141] *Id.* (citing United States v. Logan, 542 F. App'x 484, 498 (6th Cir. 2013) (not precedential)).

their sentences, including fines, forfeiture orders, and restitution.[142] The reasoning is straightforward. Both statutes defendants could use to bring such collateral attacks, 28 U.S.C. §§ 2255 and 2241, are limited in coverage and scope to claims that challenge the legality of the defendant's "custody" and seek "the right to be released" from custody.[143] Monetary penalties, like forfeiture, do not satisfy the "in custody" requirement of federal habeas statutes.[144] Following *Honeycutt*, courts have adhered to this view.[145] Moreover, courts have repeatedly and regularly denied collateral attacks on final forfeiture orders under *Honeycutt* for a variety of other reasons, including that the motions were untimely and that *Honeycutt* did not excuse collateral attack waivers.[146]

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[142] *See, e.g.*, Kaminski v. United States, 339 F.3d 84, 87 (2d Cir. 2003) (fine and restitution orders not challengeable in a section 2255 proceeding) (collecting cases), *cert. denied*, 540 U.S. 1084 (2003).

[143] *See* 28 U.S.C. § 2255(a) (permitting motions to vacate by "[a] prisoner in custody under sentence of a court . . . claiming the right to be released"); 28 U.S.C. § 2241(c)(1) ("The writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody under or by color of the authority of the United States").

[144] United States v. Ross, 801 F.3d 374, 380 (3d Cir. 2015); *see also* United States v. Finze, 428 F. App'x 672, 677 (9th Cir. 2011) (not precedential) (because a "forfeiture claim . . . is not a claim for release from custody," claim is not cognizable on collateral review); United States v. Thiele, 314 F.3d 399, 400 (9th Cir. 2002) (Section 2255 "is available to prisoners claiming the right to be released from custody. Claims for other types of relief, such as relief from a restitution order, cannot be brought in a § 2255 motion, whether or not the motion also contains cognizable claims for release from custody."); *see also* Blaik v. United States, 161 F.3d 1341, 1342–43 (11th Cir. 1998) (collecting cases); Campbell v. United States, 330 F. App'x 482, 482–83 (5th Cir. 2009) (per curiam) (not precedential) (fine and restitution orders not challengeable in a section 2241 petition); Arnaiz v. Warden, Fed. Satellite Low, 594 F.3d 1326, 1329 (11th Cir. 2010) (per curiam) (restitution order not challengeable in a section 2241 petition).

[145] Lasher v. United States, 17-civ-5925 (NRB), 2018 WL 3979596 (S.D.N.Y. Aug. 20, 2018); United States v. Georgiou, No. 09-88, 2011 WL 1081156, (E.D. Pa. June 19, 2018); United States v. Ball, No. 14-20117, 2017 WL 6059298 (E.D. Mich. Dec. 7, 2017); Bangiyev v. United States, No. 1:14-CR-206, 2017 WL 3599640 (E.D. Va. Aug. 18, 2017).

[146] *E.g.*, United States v. Alquza, 722 F. App'x 348, 349 (4th Cir. 2018) (not precedential) (untimely); United States v. Yancey, 707 F. App'x 342, 344 n.1

VI. Validity of forfeiture money judgments

There has been a renewed interest in the validity of forfeiture money judgments after *Honeycutt*. While there have been several post-*Honeycutt* challenges to forfeiture money judgments, courts have recognized that *Honeycutt* did not address the validity of forfeiture money judgments. *Honeycutt* did, however, address the collection of forfeiture money judgments and the procedures that can be used.

By way of background, every circuit court with criminal jurisdiction has ruled that district courts may enter a money judgment reflecting the total amount of the defendant's forfeiture liability.[147] The individual forfeiture statutes provide the basis for forfeiture liability. While the government normally seeks to forfeit specifically identified tainted assets to satisfy the forfeiture liability, oftentimes a defendant has dissipated his or her assets by concealing them or through conspicuous spending on such things as "wine, women, and song."[148]

(6th Cir. 2017) (not precedential) (*Honeycutt* does not excuse collateral attack waiver).

[147] United States v. Candelaria-Silva, 166 F.3d 19, 42 (1st Cir. 1999);
United States v. Awad, 598 F.3d 76, 78–79 (2d Cir. 2010);
United States v. Vampire Nation, 451 F.3d 189, 202–03 (3d Cir. 2006);
United States v. Blackman, 746 F.3d 137, 145 (4th Cir. 2014);
United States v. Olguin, 643 F.3d 384, 397 (5th Cir. 2011);
United States v. Hampton, 732 F.3d 687, 691–92 (6th Cir. 2013);
United States v. Baker, 227 F.3d 955, 970 (7th Cir. 2000);
United States v. Smith, 656 F.3d 821, 827 (8th Cir. 2011);
United States v. Casey, 444 F.3d 1071, 1073–77 (9th Cir. 2006);
United States v. McGinty, 610 F.3d 1242, 1246–47 (10th Cir. 2010);
United States v. Padron, 527 F.3d 1156, 1162 (11th Cir. 2008);
United States v. Day, 524 F.3d 1361, 1377–78 (D.C. Cir. 2008).

[148] United States v. Ginsburg, 773 F.2d 798, 802 (7th Cir. 1985) ("[A] racketeer who dissipates the profits or proceeds of his racketeering activity on wine, women, and song has profited from organized crime to the same extent as if he had put the money in his bank account. Every dollar that the racketeer derives from illicit activities and then spends on such items as food, entertainment, college tuition, and charity, is a dollar that should not have been available for him to spend for those purposes. In order to truly separate the racketeer from his dishonest gains, therefore, the statute requires him to forfeit to the United States the total amount of the proceeds of his racketeering activity, regardless of whether the specific dollars received from that activity are still in his possession. To require less would seriously

For this reason, section 853(p) provides the court authority to forfeit untainted assets in place of the dissipated tainted assets. The forfeiture money judgment memorializes this amount of uncollected, but owed, forfeiture liability. Sections 982(b) and 2461(c) incorporate the procedures by which the government can collect untainted property in a criminal forfeiture case, while Federal Rule of Criminal Procedure 32.2 provides the court rules that apply to the government's seeking and collecting on a forfeiture money judgment.[149] As a result, the court can impose a forfeiture money judgment that accounts for assets acquired by the defendant but unavailable at the time of sentencing.

Nothing in *Honeycutt* changed the ability of the court to impose a forfeiture money judgment. The Eleventh Circuit rejected a defendant's argument that *Honeycutt* does not permit in personam forfeiture money judgments.[150] The court found that the Supreme Court presumed the continued existence of in personam criminal forfeitures when it stated that section 853 adopted an in personam aspect to criminal forfeiture.[151] The First Circuit came to a similar conclusion, holding that *Honeycutt* did not rule on the validity of money judgments.[152] The district court in Oregon further explained that:

> *Honeycutt* does not espouse a broad rule categorically barring *in personam* money judgments; rather, it prohibited the Government from imposing an *in personam* money judgment against a co-conspirator who never received or possessed profits from his crimes. In other words, *Honeycutt* does not require that Defendant still be in possession of his ill-gotten proceeds, it merely

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undermine the intended deterrent effect of RICO forfeiture; a racketeer would have no incentive to discontinue his racketeering activity if he could freely use the proceeds of that activity to enrich his life up until the moment of his eventual conviction, at which time he would only be required to forfeit whatever was left over.").

[149] *See* FED. R. CRIM. P. 32.2(a), (b)(1)(A), (2)(A), and (2)(C).

[150] United States v. Elbeblawy, 899 F.3d 925, 941 (11th Cir. 2018).

[151] *Id.*

[152] United States v. Gorski, 880 F.3d 27, 40–41 (1st Cir. 2018).

> limits forfeiture to proceeds that he obtained at some point from his crimes.[153]

These opinions confirm that *Honeycutt* did not address the validity of forfeiture money judgments.

But *Honeycutt* did provide some direction on how the government can collect a forfeiture money judgment. The *Honeycutt* Court recognized that section 853(p) is "the sole provision of § 853 that permits the Government to confiscate property untainted by the crime."[154] The Court's position distinguishes an "*in personam* forfeiture judgment" from a "general judgment *in personam*."[155] Because a forfeiture money judgment is not like a "general judgment *in personam*," mechanisms used to collect a general judgment, like the Federal Debt Collection Procedures Act of 1990 (FDCPA), can no longer be used to collect a forfeiture money judgment, as some courts had allowed in the past.[156] In briefings before the Supreme Court, the government has noted that it may continue to accept voluntary payments in satisfaction of a forfeiture money judgment because such payments do not involve any involuntary transfer of the defendant's property.[157] But absent a voluntary payment, the government must satisfy the requirements of section 853(p) to forfeit substitute assets in satisfaction of a forfeiture money judgment.

VII. Conclusion

Although *Honeycutt* significantly affected the government's forfeiture practice, it did not eliminate the government's ability to obtain forfeiture money judgments against defendants for the gross

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[153] United States v. Ford, 296 F. Supp. 3d 1251, 1258 (D. Or. 2017).
[154] Honeycutt v. United States, 137 S. Ct. 1626, 1633 (2017).
[155] United States v. Vampire Nation, 451 F.3d 189, 202 (3d Cir. 2006).
[156] *See, e.g.,* United State v. Hall, 434 F.3d 42, 59 (1st Cir. 2006) ("A money judgment permits the government to collect on the forfeiture order in the same way that a successful plaintiff collects a money judgment from a civil defendant."); United States v. Newman, 659 F.3d 1235, 1242–43 (9th Cir. 2011), *abrogated by*, United States v. Kwok Cheung Chow, No. 17-10246, 2019 WL 2142183 (9th Cir. 2019) ("Because the government sought a money judgment in the first instance, there was no need to seek *substitute* property."); United States v. Coyne, No. 93-253, 2010 WL 56049, at *4 (D.N.J. Jan. 4, 2010) (granting motion for garnishment under the FDCPA).
[157] *See* Gov't Br. in Opp. to Pet. for Certiorari, at *18 & n.4, Lo v. United States, 138 S. Ct. 354 (2017) (No. 15-10219).

proceeds obtained from their offenses, whether that be under section 853 or another proceeds-based forfeiture statute. Further, money laundering forfeiture provides a mechanism to hold a defendant liable for money beyond that which he or she personally obtained during a money laundering offense. Although there has been some direction from the courts on many *Honeycutt*-related issues, it remains to be seen how other circuit courts, and ultimately the Supreme Court, will view these issues.

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Financial Tracing in Asset Forfeiture Cases

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I. Introduction

Your grandmother is on a fixed income, but she tells you she is "so proud of you" and gives you a check for $2,000. She tells you, "use it for something fun!" You deposit it into your bank account, which previously had nothing in it, on a Friday. On Saturday, you get paid your biweekly salary of $2,000, which is directly deposited into the same account. On Monday morning, you pay your rent of $1,500 using a check from your bank account. On Monday afternoon, you think about your grandmother and purchase a Caribbean cruise for $1,500 using your bank account online.

Did you honor your grandmother's request to use the $2,000 for "something fun?" Unless she is a sitting United States district court judge, your grandmother is unlikely to get technical about which dollars you spent on which expense, but the fundamentals of tracing tell us that there is an answer. By applying these principles, we can determine which funds were used for which purchase.

Tracing may not matter to you when it comes to spending your grandmother's gift, but consider an unpleasant scenario where its use is determinative: Sandy Scammer ("Scammer") calls your grandmother pretending to be you. Scammer tells your grandmother you need $10,000 wired to an account because you are in legal trouble and need money for bail. Your grandmother, who loves you dearly, complies and wires the funds to Scammer.

You investigate and find that Scammer received the $10,000 into an account which already had $10,000. Scammer then spent $10,000 on a Caribbean cruise (which was nicer than yours) and then spent $10,000 on a Marc Chagall painting. You catch and prosecute Scammer and, in an effort to obtain compensation for your grandmother, you attempt to forfeit the painting. Whether you can forfeit the painting depends on the quintessential question of this article: which funds were used during each transaction? The answer hinges on the application of tracing principles. The account where the stolen funds entered is

depleted and Scammer has already taken the cruise, but the Marc Chagall painting is a tangible asset that can be found. You would prefer to be able to argue that the funds stolen from your grandmother were used to purchase the painting. You can seize the painting, sell it, and compensate your grandmother for her loss by going through the Money Laundering and Asset Recovery Section (MLARS)'s remission process.[1]

But, can you do that? And why are you entitled to assume the fraud proceeds were used to purchase the painting? Scammer argues those funds were spent on dinners, massages, and piña coladas on the cruise, *before* Scammer bought the Chagall. Scammer's position is that she bought the Chagall with her own funds, unrelated to the fraud. Which position is correct?

The answers to these questions come from the concepts and principles of financial tracing, which are derived from English common law and which are used routinely in a variety of legal contexts.[2] In asset forfeiture, these principles determine the assumptions the government can make when attempting to follow the money. Importantly, the methods available to the government depend on the jurisdiction in which the action is brought.[3]

This article explains those concepts and how they relate to asset forfeiture cases. It reviews when tracing is necessary and walks through some of the basic investigative techniques taken when preparing to trace. It also reviews "easy cases"—those which do not present complicated issues—as well as addresses the complex problem of "commingled funds"—when the proceeds of crime are mixed with untainted or clean funds.[4] This article describes what are known as the "accounting methods," how they work, and when and where they are applicable. It also describes where the accounting methods have been barred and a growing trend in courts. Finally, it describes the various ways in which tracing, and the complications that accompany it, can be avoided.

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[1] *See* ASSET FORFEITURE POLICY MANUAL (2019), Chap.14, Sec.II.A.

[2] *See generally* Peter B. Oh, *Tracing*, 80 TUL. L. REV. 849 (2006) (comparing tracing in securities law with remedial law).

[3] Section IV.C, *infra*.

[4] For a more comprehensive review of the legal issues surrounding commingled funds, see Sean Michael Welsh, *Tracing Commingled Funds in Asset Forfeiture*, 88 MISS. L.J. 179 (2019).

II. When tracing is required in forfeiture

Asset forfeiture is the confiscation by the government[5] of property derived from or used to commit crime.[6] Substantively, there are five bases or "theories" of forfeiture: (1) the property constitutes proceeds traceable to an offense;[7] (2) the property facilitated an offense;[8] (3) the property was involved in an offense;[9] (4) the property was acquired or maintained as part of a racketeering enterprise;[10] or (5) the property belonged to a person or entity who engaged in terrorism.[11] One or more of these bases must be alleged for each asset sought by the government. The application of any of these bases depends on the facts of each case and procedural mechanism chosen by the government. When property represents the proceeds of crime or property traceable to money laundering, "tracing" may be required.

"Tracing," in the context of forfeiture discussed in this article, is defined as "[t]he process of tracking property's ownership or characteristics from the time of its origin to the present[.]"[12] Tracing can be quite difficult and is not called for in every forfeiture case, so it is important to understand when it is called for before discussing how to conduct it.

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[5] This article will discuss the practices and law relating to the federal government of the United States. Any reference to "government" refers to the United States.

[6] *See* Honeycutt v. United States, 137 S. Ct. 1626, 1631 (2017).

[7] *See generally* 18 U.S.C. § 981(a)(1)(C) (civil forfeiture for the proceeds of crimes, including any crime which would constitute "specified unlawful activity" for money laundering); 18 U.S.C. § 982(a)(7) (criminal forfeiture for the proceeds of federal health care fraud).

[8] *See generally* 21 U.S.C. § 853(a)(2) (criminal forfeiture for property used to facilitate drug trafficking); 21 U.S.C. § 881 (civil forfeiture for property used to facilitate drug trafficking).

[9] *See generally* 18 U.S.C. § 981(a)(1)(A) (civil forfeiture for property involved in money laundering); 18 U.S.C. § 982(a)(1) (criminal forfeiture for property involved in money laundering); 18 U.S.C. § 1594(d) (forfeiture for property involved in human trafficking crimes).

[10] *See generally* 18 U.S.C. § 1963 (criminal forfeiture for property constituting the enterprise of racketeering).

[11] *See generally* 18 U.S.C. § 981(a)(1)(G) (civil forfeiture for "[a]ll assets, foreign or domestic" of an individual or entity committing an act of terrorism).

[12] *Tracing*, BLACK'S LAW DICTIONARY (10th ed. 2014).

A. Property that constitutes proceeds

The issue of tracing arises most commonly when the government seeks to forfeit the proceeds of crimes through criminal or civil forfeiture. The forfeiture of proceeds is by far the most widely available type of forfeiture.[13] Proceeds are defined as "property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture[.]"[14] To meet that definition, courts apply a "but for" test.[15] Stated by one court, "if a defendant would not have derived certain funds or property but for committing the criminal offense, then these assets are 'tainted' for purposes of the statute and are subject to forfeiture[.]"[16]

Proceeds obtained directly from an offense are mostly straightforward. A defendant submits a false health care claim and receives the funds by wire—those proceeds were obtained directly from the offense. "But for" the commission of the offense, the defendant would not have received the money.

Proceeds can also be obtained indirectly from the commission of an offense. Indirect proceeds can take the form of property "retained" because of the commission of an offense.[17] For instance, if a defendant

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[13] 18 U.S.C. § 981(a)(1)(C) provides for the forfeiture of proceeds of any activity constituting a "specified unlawful activity" for money laundering under 18 U.S.C. § 1956. Section 1956(a)(7) provides a definition for "specified unlawful activity" which cites to 18 U.S.C. § 1961, which includes a laundry list of federal crimes that constitute racketeering predicates.

[14] 18 U.S.C. § 981(a)(2)(A).

[15] *See* United States v. Jones, 622 F. App'x 204, 207 (4th Cir. 2015) (not precedential) (applying a "but for" test to the forfeiture of drug proceeds); United States v. Hoffman-Vaile, 568 F.3d 1335, 1344 (11th Cir. 2009) (applying a "but for" test to the forfeiture of health care fraud proceeds); United States v. DeFries, 129 F.3d 1293, 1313 (D.C. Cir. 1997) ("Because the but-for test usefully articulates the requirement of a nexus between the targeted property and the racketeering activity, we adopt it."); United States v. Horak, 833 F.2d 1235, 1243 (7th Cir. 1987) ("[O]n remand, the court must determine what portion of Horak's interests would not have been acquired or maintained 'but for' his racketeering activities.").

[16] United States v. Malik, No. CR MJG-16-0324, 2018 WL 4575034, at *1 (D. Md. Sept. 12, 2018).

[17] *See* United States v. Esquenazi, 752 F.3d 912, 936 (11th Cir. 2014) (describing how the lowered debt defendant received in exchange for briber constituted proceeds of FCPA violation); United States v. Torres,

owed taxes and paid a bribe to avoid those taxes, the defendant retained funds as a result of the crime. "But for" the bribe, the defendant would have had to pay the taxes. Likewise, in a mortgage fraud scheme, if a bank was going to foreclose on the defendant's residence, but the defendant submitted false documentation that prevented the foreclosure and convinced the bank the defendant owned the residence outright, the real property would constitute indirect proceeds of the crime. The defendant possessed the residence prior to the criminal conduct, but the defendant kept the property because of the criminal conduct.

Indirect proceeds can also take the form of property obtained collaterally to criminal conduct.[18] This second category includes property which is incidental to the underlying crime; for instance, if a doctor sustains her business by submitting fraudulent documentation but she also legitimately treats real patients, the proceeds from the real patients can be considered indirect proceeds in certain circumstances.[19]

Courts must also determine whether "proceeds" refers to "gross proceeds," all property taken in as a result of the criminal activity, versus "net proceeds," "gross proceeds" less any costs incurred during the commission of the crime.[20] When forfeiture of proceeds is brought

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703 F.3d 194, 199–200 (2d Cir. 2012) (rejecting the argument that forfeiture does not include "retained" proceeds).

[18] *See* United States v. Smith, 749 F.3d 465, 488–89 (6th Cir. 2014) (finding that in business where "fraud touched everything," any legitimate revenue was forfeitable as part of the scheme); United States v. Warshak, 631 F.3d 266, 332 (6th Cir. 2010) (finding that for a business which was "permeated with fraud," any "legitimate" earnings were still proceeds generated directly or indirectly from the fraud); United States v. Reiner, 397 F. Supp. 2d 101, 106 (D. Me. 2005) (rejecting argument that forfeiture does not extend to legitimate receipts of a health club when the club was used as a front for prostitution business and would not have existed at all, but for the illegal activity).

[19] *See Hoffman-Vaile*, 568 F.3d at 1344 (holding that income from private insurance companies was traceable to proceeds of Medicare fraud because "but for" the Medicare fraud, the doctor would not have received these funds).

[20] *See* United States v. Peters, 732 F.3d 93, 101 (2d Cir. 2013) ("We conclude that reading 'proceeds' to mean 'receipts' rather than 'profits' in the context of section 982(a)(2) better vindicates the primary purpose of the statute."); United States v. McHan, 101 F.3d 1027, 1041–42 (4th Cir. 1996) (holding gross proceeds forfeitable in drug case).

pursuant to 18 U.S.C. § 981(a)(1)(C), courts may apply the section 981(a)(2)(B) definition of net proceeds if the case involves "lawful goods or lawful services that are sold or provided in an illegal manner[.]"[21]

B. Property traceable to property involved in money laundering

Tracing also arises in situations where the government is seeking property "traceable to" property involved in money laundering.[22] This is not to be confused with the forfeiture of property "involved in" money laundering, which is a broader concept that includes the proceeds of specified unlawful activity;[23] the funds that are laundered;[24] and untainted funds used to facilitate the laundering activity.[25]

Instead, forfeiture is authorized for property that can be traced back to the money laundering activity after it is completed. For example, imagine Sandy Scammer arranges for the following with Larry Launderer: Sandy earns $100,000 from wire fraud. Sandy writes a check for $100,000 to "Hats for Dogs," a charitable organization set up by Larry that exists in name only and does not perform any charitable

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[21] *See* United States v. Mahaffy, 693 F.3d 113, 137–38 (2d Cir. 2012) (holding that securities fraud constituted lawful conduct engaged in an unlawful manner and that net proceeds applied); United States v. Nacchio, 573 F.3d 1062, 1088–89 (10th Cir. 2009) (holding that insider trading of securities is lawful activity and net proceeds definition applies).

[22] *See* 18 U.S.C. §§ 981(a)(1)(A); 982(a)(1).

[23] *See* United States v. Iacaboni, 363 F.3d 1, 6 (1st Cir. 2004) (finding that gambling proceeds used to promote unlawful activity were forfeitable and involved in money laundering).

[24] *See* United States v. Miller, 911 F.3d 229, 233 (4th Cir. 2018) (holding that property purchased with proceeds is "involved in" money laundering).

[25] *See* United States v. Huber, 404 F.3d 1047, 1056 (8th Cir. 2005); United States v. McGauley, 279 F.3d 62, 77 (1st Cir. 2002) (holding that withdrawal of $243,000 from various bank accounts that contained commingled funds, of which only $55,000 was fraud proceeds, supported forfeiture of entire amount because the clean money was used to conceal or disguise the tainted funds); United States v. Bornfield, 145 F.3d 1123, 1135 (10th Cir. 1998) ("[F]orfeiture of legitimate and illegitimate funds commingled in an account is proper as long as the government demonstrates that the defendant pooled the funds to facilitate, *i.e.*, disguise the nature and source of, his scheme.").

work. Sandy writes in the memo line, "Donation to Hats for Dogs," and later deducts the payment from her taxes as a charitable donation. Larry deposits the check into the Hats for Dogs account which already contained $900,000 of funds Larry is laundering for other individuals. Larry keeps $10,000 as his fee for setting this up and then writes a check to Sandy for $90,000. Larry writes in the memo line "wages," and maintains books that show Sandy is an employee of Hats for Dogs, when in fact, she is not. Sandy receives the $90,000 and purchases a Lamborghini in her own name.

Here, the $100,000 Sandy sends to Larry to launder, the $900,000 of unrelated funds in the Hats for Dogs account, the $10,000 Larry keeps, and the $90,000 sent back to Sandy are all "involved in" money laundering. Each of these transactions constitute the act of money laundering, or concealing "the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity."[26] When Sandy purchases the vehicle, this transaction arguably does not constitute money laundering pursuant to 18 U.S.C. § 1956.[27] Purchasing the vehicle in Sandy's own name does nothing to further conceal the funds. So, while the vehicle is not "involved in" the acts of money laundering, by applying tracing principles it could still be "traceable to" the money laundering. The application is similar to proceeds, but instead of determining whether the source of the funds is a criminal activity enumerated by statute using a "but for" test, the court looks to whether the source was property "involved in" money laundering.

III. Investigative fundamentals of tracing

As a prosecutor, you encounter a situation where it is possible you will seek to forfeit the proceeds of crime or property traceable to money laundering based on the facts of the case and the statutes of which violations are being investigated. Before determining whether tracing is necessary and other legal questions that accompany tracing, how do you receive the financial information that describes the extent of potentially relevant assets?

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[26] 18 U.S.C. § 1956(a)(1)(B)(i).

[27] Although there is a strong argument the transaction constitutes money laundering in violation of 18 U.S.C. § 1957.

There are many ways to investigate financial crimes[28] and many resources available[29] that more fully describe how to conduct a fulsome financial investigation. Not every technique is needed in every investigation. A basic explanation of the financial investigation is necessary, however, to understand how to prove the accounting methods and theory of forfeiture in court.

As part of a financial investigation, the investigator will identify bank accounts believed to have received fraudulent funds in some way.[30] The investigator will obtain the records for those accounts and schedule them, putting them into an accessible format that displays the deposits and withdrawals from the account. This is a necessary step because it demonstrates the sources of funds in the account and the destination of those funds, or how they were used.

Once an account is identified and the investigator identifies the sources and destinations of funds, the investigator then obtains the records for those accounts. In a perfect world with no limits on time or resources, an investigator would obtain the records for every source and every destination. In reality, an investigator identifies major sources of funds and major expenditures, whether they are one-time large transfers or repeated transfers to or from the same account. An investigator might also look for sources or destinations of funds related to the case or identify those to exclude from further investigation.[31] Once the source and destination accounts are identified, the investigator repeats the process for any newly identified accounts. This can occur multiple times until all pertinent sources are identified and until assets, or fruits of the crime, are identified.

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[28] *See* Welsh, *supra* note 4, at 179, 197–200 (providing an example of how financial investigations are conducted).

[29] *See* DAVID MARSHALL NISSMAN, FOLLOW THE MONEY: A GUIDE TO FINANCIAL & MONEY LAUNDERING INVESTIGATIONS (2005).

[30] While it is true that criminals have diversified their income through the use of cryptocurrency and other trade-based money laundering schemes, the majority of criminals rely on financial institutions at some point to access the proceeds of their crimes.

[31] A common example would be if the investigator identified a target's weekly paycheck for legitimate employment. Absent special circumstances, the investigator would not need to obtain the entire payroll records of the employer.

The figure below provides an example of the information that might be gleaned from the bank account Sandy Scammer.

Sandy Scammer's Account			
Date	Source/Destination	Action	Balance
9/1/2019	Beginning Balance	–	$0
9/2/2019	A	+ $5,000	$5,000
9/3/2019	B	+ $5,000	$10,000
9/5/2019	W	– $7,500	$2,500
9/10/2019	C	+ $10,000	$12,500
9/13/2019	X	– $5,000	$7,500
9/14/2019	Y	– $5,000	$2,500
9/15/2019	Z	– $2,500	$0

Ex. 1: Schedule of Sandy Scammer's account

Ex. 1 shows what a scheduled account looks like. The pertinent information includes the date a transaction occurred, the source or destination of funds, the deposit or withdrawal amount, and the balance of the account after that action. In this example, incoming deposits and transfers come from sources A, B, and C and outgoing withdrawals or transfers go to destinations W, X, Y, and Z.

The schedule of the account is the beginning of the process. An investigator looking at Scammer's account would want to obtain records for sources A, B, and C. Are these fraudulent or legitimate sources? Did Scammer transfer funds from a fraudulent business? Are these deposits by victims of fraud? Without more information, an investigator cannot determine what funds are clean[32] or dirty.[33]

Likewise, an investigator would want to determine where the funds went for destinations W, X, Y, and Z. Are these other accounts that still contain the funds? Were these funds used for the purchase of tangible assets that could be recovered? Or, were these expenditures that cannot be recovered?

The financial investigation can provide this information, but it does not end the story of which funds went where. The investigation can tell you that $5,000 were deposited into the account from source A on

[32] Funds not derived from a criminal offense are often referred to as "clean" or "untainted."

[33] Funds derived from a criminal offense are often referred to as "dirty" or "tainted."

September 2, 2019. And, it can tell you $5,000 left the account on September 14, 2019 and went to destination Y. What any investigation cannot tell you is whether those dollars from A were the same sent to Y. To do that, an observer must make multiple assumptions about the funds in the account. Those assumptions are known as the "accounting methods."

IV. Easy cases

Tracing presents many complicated problems,[34] as will be examined in section V, but there are several straight-forward scenarios. While simple, these "easy cases" demonstrate important principles of tracing that are present in almost every case.

A. The deposit of funds

The deposit of proceeds into a bank account does not render the proceeds untraceable.[35] This may seem like a simple proposition, but consider the following: a drug dealer sells cocaine and receives cash in exchange. The cash constitutes the proceeds of the drug transactions. The drug dealer then goes to the bank and deposits the cash into his account, which previously had nothing in it. The bank accepts the cash, sticks it in the teller drawer, and credits the drug dealer's account. The drug dealer no longer has the cash; now he has a balance of a credit at the bank. The cash has been converted to "1's and 0's" maintained by the bank's computer system. The credit is not the exact same thing as the cash. This is in contrast to keeping cash in a safety deposit box at a bank. By using a safety deposit box, the cash remains in the box and remains the same exact item.

Despite the conversion of cash into a credit at a bank, tracing is not defeated. The same holds true whether the funds are received by wire, check, cashier's check, or the deposit of precious metals.

The court in *United States v. Banco Cafetero Panama* described this fully:

> When a customer deposits funds into a bank account, his bank credits the account in an amount equal to the

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[34] *See* United States v. $448,342.85, 969 F.2d 474, 477 (7th Cir. 1992) ("It is easy to imagine difficult problems in associating proceeds with crime.").

[35] *See* United States v. Banco Cafetero Panama, 797 F.2d 1154, 1158 (2d Cir. 1986) ("If the seller of drugs uses the cash he receives to buy a bar of gold or a car, that asset is 'traceable proceeds,' and so is a credit at a bank.").

> deposit. At any given moment, the credit balance of an account is the cumulative result of all transactions affecting the account. Banks are not bailees of their depositors' money, and a depositor may not replevy his money as a specific *res* or follow it into the hands of another bank customer . . . .[36]

While *Banco Cafetero Panama* has been rejected in some jurisdictions, as discussed below, those cases dealt with the issue of "commingled" funds.[37]

This issue is not often directly addressed but it is implicitly applied. Everyone acknowledges that when you receive your paycheck from an employer and deposit that check into your bank account, you receive a credit in your account. That credit is ultimately derived from the employer's check, not from some other source.

B. Purchases, sales, and transfers of funds

Likewise, the transfer of proceeds or the change in form of proceeds does not change their characterization as proceeds.[38] If a defendant obtains $10,000 through wire fraud, deposits the funds into an account, and then transfers the funds through five different banks in accounts that previously had nothing in them, wherever the $10,000 ends up, it remains traceable.[39] Even though banks one through five each have to debit and credit their own books so that the final destination of the funds is now a series of computer signals that is not the same as the original deposit, the funds remain proceeds.

Transfers are functionally the same as deposits.[40] As the court in *Banco Cafetero Panama* stated, "Congress wished to reach proceeds of

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[36] *Id*.

[37] *See* United States v. Voigt, 89 F.3d 1050, 1087 n. 22 (3d Cir. 1996) ("We avoid the problems plaguing other courts that have attempted to devise a workable tracing analysis for tainted property that has been commingled in a bank account with untainted property.").

[38] *See* United States v. Swanson, 394 F.3d 520, 529 n.4 (7th Cir. 2005) (noting that "a change in the form of the proceeds . . . does not prevent forfeiture").

[39] *See generally* United States v. All Funds Presently on Deposit at Am. Express Bank, 832 F. Supp. 542, 548 n. 4 (E.D.N.Y. 1993) (describing how funds are received in one account and then directed to go between two others while remaining traceable).

[40] *See Banco Cafetero Panama,* 797 F.2d at 1159.

drug transactions exchanged through a series of 'intervening' transactions and 'change[s] in form.'"[41]

In a similar fashion, the purchase of an item with proceeds does not change its status as proceeds.[42] The same is true if the item is sold and the proceeds are deposited and then used to purchase something else.[43] The nature of the proceeds remains intact through any purchase, transfer, or sale.

C. Changes in value

Specific assets, whether they are real property, vehicles, stocks, or other items, are subject to appreciation and depreciation. When these assets are purchased or obtained entirely with proceeds that are subject to forfeiture, the item remains proceeds, even if the value changes.[44] The court in *Bentancourt* applied this principle in a stark

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[41] *Id.* at 1161.

[42] *See* United States v. Hawkey, 148 F.3d 920, 928 (8th Cir. 1998) ("[I]f Hawkey misappropriated $10,000 and used $5,000 of those funds to purchase a motorcycle, the motorcycle is 'traceable to' the unlawful monetary transaction and is, therefore, subject to forfeiture.").

[43] *See generally* United States v. One 1997 E35 Ford Van, 50 F. Supp. 2d 789, 806 (N.D. Ill. 1999) (describing tracing of how proceeds were used in land deal, deposited into bank account, and then used to purchase vehicle); United States v. Loe, 49 F. Supp. 2d 514, 522–24 (E.D. Tex. 1999) (describing, in case of forfeiting property traceable to money laundering, how proceeds were used to purchase real property and remained traceable); United States v. 1990 Chevrolet Silverado Pickup Truck, 804 F. Supp. 777, 784 (W.D.N.C. 1992) (describing how defendant used funds traceable to money laundering to purchase vehicle).

[44] *See* United States v. Moses, No. 1:05-CR-133, 2010 WL 3521725, at *7 (D. Vt. Sept. 7, 2010) (holding that the appreciation in the value of real property purchased with drug proceeds is forfeitable); United States v. Hill, 46 F. App'x 838, 839 (6th Cir. 2002) (not precedential) (describing situation where 616 shares of stock were "involved in" money laundering and appreciated to become 9,240 shares; additional shares were "traceable to" property involved in money laundering); *Hawkey*, 148 F.3d at 928 (describing that if defendant misappropriated $10,000 to purchase stock which appreciated to $30,000, entire stock is forfeitable); United States v. One 1980 Rolls Royce, 905 F.2d 89, 91 (5th Cir. 1990) ("[A]ny profits, appreciation, or income from drug money proceeds is forfeitable—profits from tainted proceeds are still tainted."); United States v. Kalish, No. 06 CR 656(RPP), 2009 WL 130215,

case where it determined that the defendant used drug proceeds to purchase a winning lottery ticket, which returned a value of $5,481,462.91.[45] The court found no issue with the fact that a significantly small amount of proceeds was used to purchase the ticket which then substantially increased in value.[46]

V. The problem of commingled funds

A. The distinction of commingled funds

In some instances, a defendant earns all of her income from fraudulent activity. But, in many cases, a defendant earns legitimate income or, at the very least, income derived from other sources.[47] When tainted and untainted funds are mixed and especially when they are then transferred, legitimate questions arise about which funds move at different times. Take the example of a drug dealer who earns $50 in cash from selling cocaine and puts it in his wallet with $50 in cash derived from his legitimate job as a stockbroker. When the drug dealer takes $30 out to pay for dinner, which funds came out? And when he takes out $5 to buy a lottery ticket, which funds did he use?

The problem of commingled funds and why they are distinguished is that money is fungible. Dollars and funds in a bank account do not have unique characteristics. When they are combined, they are treated the same. When, however, the government is attempting forfeiture, it cannot treat them the same. By statute, the government must prove the property traceable to a crime.

B. The accounting methods

To address the problem of commingled funds and to separate that which cannot really be separated, courts crafted and adopted "accounting methods," or a set of rules that parties can apply to

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at *6 (S.D.N.Y. Jan. 13, 2009) (finding securities purchased for $1.7 million that appreciated to $2.4 million traceable).

[45] 422 F.3d 240, 242 (5th Cir. 2005).

[46] *Id.* at 251.

[47] In many cases, a defendant's "other income" is just another fraud scheme. Unless, however, the government is prepared to prove that scheme, and in criminal cases, charge it, it remains "other income."

commingled funds.[48] The following subsections outline where these rules originated, how they came to be applied in asset forfeiture, and how the rules can be used interchangeably. This section also reviews the less often used "pro rata" method and then applies the accounting methods to a brief example.

1. The origin of the accounting methods

One of the first applications of the "accounting methods" to answer the questions raised by commingled funds is *Clayton*'s *Case*, an English common law case from 1816.[49] The question was whether funds remained available to be collected by a creditor, Clayton.[50] Four partners operated a banking business; one of the partners died and the other three became insolvent.[51] The firm collapsed and Clayton sought recovery of funds from the estate of the deceased partner.[52] The court applied a "first-in, first-out" principle, which stated that in a mixed account the first funds to be deposited were assumed to be the first funds withdrawn.[53] Because there had been multiple intervening deposits and withdrawals since the partner had died, the court determined that the creditor could not recover from the estate and the debt was discharged.[54]

Courts modified their approach over time and instead of applying an arbitrary rule that relied on when deposits and withdrawals were made, they crafted rules that allowed parties to make assumptions about the nature of the funds in a particular case. In *In Re Hallet's Estate*, the court applied what became known as the "lowest intermediate balance rule."[55] In an account with commingled funds, the court imputed an honest intention to a trustee holding the funds who was accused of misappropriation.[56] When the trustee spent funds,

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[48] Although referred to as "accounting" methods, the rules applied by courts are really just assumptions made about what is happening to the funds at issue and whether they remain in an account or leave during any given withdrawal.
[49] *See* Devaynes v. Noble (Clayton's Case), 35 Eng. Rep. 781, 793–94 (1816).
[50] *Id.* at 782.
[51] *Id.*
[52] *Id.*
[53] *Id.* at 793.
[54] *Id.* at 794.
[55] *See* Knatchbull v. Hallett, 13 Ch. D. 696 (1880).
[56] *Id.*

the court assumed the trustee intended to spend his own funds first before exhausting the funds of the trust.[57] The trustee's funds remained in the account and were withdrawn last.

The court in *In re Oatway* applied a similar, but opposite principle—in a mixed account that had been used to make purchases but which was otherwise no longer available or recoverable, the court assumed the claimant's funds were invested in a particular transaction that was identifiable and recoverable.[58] In this scenario, the funds that the claimant was attempting to trace were assumed to exit during the purchase of an asset. This is in contrast to the "lowest intermediate balance rule" where the funds were assumed to remain in the account.

In a third case, *In re British Red Cross Balkan Fund*, the court applied what is known as the "pro rata" method, where any given withdrawal is considered proportional to the ratio of funds in the account.[59]

2. *Banco Cafetero* and its application

The first case to address the issue of how to treat commingled funds in forfeiture cases was *United States v. Banco Cafetero Panama*.[60] The question before the court was whether funds in a bank account could be seized as "traceable to" drug trafficking when they were allegedly commingled with funds from legitimate sources.[61] The court analyzed situations where there was no commingling, noting that deposits at banks and transfers between banks did not defeat tracing.[62] For the issue of tracing commingled funds, the court turned to trust law for guidance and the accounting methods.[63] The court described the "lowest intermediate balance rule" (LIBR), which it renamed the "drugs-in, last-out" rule.[64] Applying the LIBR, the amount in an account is traceable up to the amount of deposits of illegal funds into the account, regardless of withdrawals, as long as the balance does not

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[57] *Id.*
[58] *See In re* Oatway, 2 Ch. 356 (1903).
[59] *See* British Red Cross Society v. Johnson, 2 Ch. 419 (1914).
[60] 797 F.2d 1154, 1156 (2d Cir. 1986).
[61] *Id.*
[62] *Id.* at 1161.
[63] *Id.* at 1158–59.
[64] *Id.* at 1159.

drop below the total deposits of illegal funds.[65] For instance, if an account containing $100 was comprised of $50 in clean funds and $50 in dirty funds and $75 was withdrawn, the government could assume the dirty funds exited last. The result would be that $25 in dirty funds remained in the account. If an additional $50 in clean funds were added to the account, they would not replenish the dirty funds and only the $25 in dirty funds would remain.

The court also described what it called the "drugs-in, first-out"[66] rule, which is also referred to as the "proceeds first" rule.[67] Using this rule, the government can assume the dirty funds exited first, so that any withdrawal could be considered to contain dirty funds.[68] So, in an account with $50 in dirty funds and $50 in clean funds where there is a $75 withdrawal to purchase a watch, the government could assume $50 in dirty funds exited first and entered the watch. The government could then attempt to forfeit the watch and ultimately recover $50 in dirty funds from it. The court in *Banco Cafetero* held that either the LIBR or the "proceeds first" rule could be used by the government to prove tracing.[69]

3. Interchangeable application of the methods

The rules articulated by *Banco Cafetero* have been applied by the Second Circuit Court of Appeals,[70] the Fourth Circuit Court of Appeals,[71] as well as district courts in the First Circuit,[72] Second

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[65] *Id.*

[66] *Id.*

[67] *See* Welsh, *supra* note 4, at 196.

[68] *See Banco Cafetero Panama*, 797 F.2d at 1160.

[69] *Id.*

[70] *See* United States v. Walsh, 712 F.3d 119 (2d Cir. 2013).

[71] *See* United States v. Miller, 911 F.3d 229, 234 (4th Cir. 2018) (applying the LIBR without citing to *Banco Cafetero*).

[72] *See* United States v. One Parcel of Real Prop. with Bldgs., Appurtenances and Known as 170 Westfield Drive, Located in the Town of E. Greenwich, Rhode Island, 34 F. Supp. 2d 107, 117 (D.R.I. 1999).

Circuit,[73] Fourth Circuit,[74] Sixth Circuit,[75] Seventh Circuit,[76] and Ninth Circuit.[77]

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[73] *See* United States v. Prevezon Holdings, Ltd., 251 F. Supp. 3d 684, 698 (S.D.N.Y. 2017) (supporting application of *Banco Cafetero* tracing methods); United States v. Approximately Six Hundred & Twenty Thousand Three Hundred & Forty-Nine Dollars & Eighty-Five Cents, No. 13 CV 3966(RJD)(SMG), 2015 WL 3604044, at *4 (E.D.N.Y. June 5, 2015) (applying *Banco Cafetero* tracing methods); United States v. Cosme, No. 13 Cr. 43(HB), 2014 WL 1584026, at *4 (S.D.N.Y. Apr. 21, 2014); *In re* 650 Fifth Ave., No. 08 Civ. 10934(KBF), 2014 WL 1516328, at *30 (S.D.N.Y. Apr. 18, 2014), *vacated and remanded sub nom*. Kirschenbaum v. 650 Fifth Ave. & Related Properties, 830 F.3d 107 (2d Cir. 2016), *vacated and remanded sub nom*. *In re* 650 Fifth Ave. & Related Properties, 830 F.3d 66, 102–06 (2d Cir. 2016) (applying *Banco Cafetero*); United States v. Dupree, No. 10-CR-627 (KAM), 2011 WL 3235624, at *2 (E.D.N.Y. June 2, 2011), *report and recommendation adopted as modified*, No. 10-CR-627 (KAM), 2011 WL 3235637 (E.D.N.Y. July 27, 2011) (noting that *Banco Cafetero* applied for commingling cases but, given the case's lack of commingling, the simple "but for" test applied); United States v. Hatfield, No. 06-CR-0550 (JS), 2010 WL 4340632, at *1–*2 (E.D.N.Y. Oct. 22, 2010) (upholding *Banco Cafetero*); United States v. Capoccia, 1:03-CR-35-01, 2009 WL 2601426, at *11 (D. Vt. Aug. 19, 2009) (endorsing use of the LIBR without citing to *Banco Cafetero*); United States v. Corey, No. 3:04CR34EBB (EBB), 2006 WL 1281824, at *7 (D. Conn. May 9, 2006) (noting that *Banco Cafetero* applies in criminal cases, even though it was a civil forfeiture).

[74] *See* United States v. Miller, 295 F. Supp. 3d 690, 703 (E.D. Va. 2018); United States v. Marshall, No. 5:15-CR-36, 2016 WL 3937514, at *6 (N.D. W. Va. July 18, 2016) (endorsing *Banco Cafetero*, because of the language in Luis v. United States, 136 S. Ct. 1083, 1095 (2016)); United States v. Lewis, No. 2:12-507-RMG, 2014 WL 3630287, at *4 (D.S.C. July 16, 2014) (incorrectly referring to the methods as "First In, First Out" but endorsing *Banco Cafetero*); United States v. $88,029.08, More or Less, in U.S. Currency, Nos. 2:10-1087, 2:11-0101, 2012 WL 4499084, at *4–*5 (S.D. W. Va. Sept. 28, 2012) (applying the LIBR and endorsing *Banco Cafetero*), *aff'd sub nom*. United States v. Hoover, No. 12-2443, 2013 WL 4505293 (4th Cir. Aug. 26, 2013); *In re* Moffitt, Zwerling & Kemler, P.C., 875 F. Supp. 1152, 1160 (E.D. Va. 1995), *aff'd in part, rev'd in part sub nom*. United States v. Moffitt, Zwerling & Kemler, P.C., 83 F.3d 660 (4th Cir. 1996).

[75] *See* United States v. $72,050.00 in United States Currency, No. 08-CV-57-JMH, 2013 WL 4042895 (E.D. Ky. Aug. 8, 2013).

[76] *See* United States v. United States Currency Deposited in Account No. 1115000763247 for Active Trade Co., No. 97-C-1765, 1998 WL 299420,

Few cases discuss applying both the LIBR and the proceeds first rule together and interchangeably. The Fourth Circuit in *United States v. Miller*, however, endorsed this application.[78] In *Miller*, an FBI forensic accountant described her tracing analysis using the LIBR and the proceeds-first method to trace mortgage payments made towards a real property.[79] Citing its prior decision in *Sony Corporation of America v. Bank One*,[80] the Fourth Circuit held that the LIBR-only "circumscribes what can be traced into an account, rather than out of it" and described how any particular withdrawal could be said to contain the tainted funds.[81] Other courts applying the accounting methods according to *Banco Cafetero* implicitly support the idea that the accounting methods can be used interchangeably.[82]

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at *3 (N.D. Ill. May 21, 1998), *aff'd sub nom.* United States v. United States Currency Deposited in Account No. 1115000763247 for Active Trade Co., Located at First Nat. Bank, Chicago, Ill., 176 F.3d 941 (7th Cir. 1999).

[77] *See* United States v. Lindell, No. 13-00512 DKW, 2016 WL 4707976, at *5 (D. Haw. Sept. 8, 2016); United States v. Haleamau, 887 F. Supp. 2d 1051, 1056–57 (D. Haw. 2012); United States v. 2009 Dodge Challenger, No. 03:11-cv-328-MA, 2011 WL 6000790, at *2 (D. Or. Nov. 30, 2011) (outlining the acceptable tracing methods congruent with *Banco Cafetero*); United States v. Real Prop. Located at 6415 N. Harrison Ave., Fresno, Cal. APN: 407-751-08, No. 1:11-cv-00304-OWW-SKO, 2011 WL 2580335, at *3–*4 (E.D. Cal. June 28, 2011) (citing *Banco Cafetero* for tracing requirement); United States v. $3,148,884.40 United States Currency (Seized From Accounts of Bital), 76 F. Supp. 2d 1063, 1066–69 (C.D. Cal. 1999) (discussing and expressing support for the LIBR as outlined by *Banco Cafetero*).

[78] 911 F.3d 229, 234 (4th Cir. 2018).

[79] *Id.* at 234–35.

[80] 85 F.3d 131, 139 (4th Cir. 1996).

[81] *See Miller*, 911 F.3d at 235; *see also* United States v. Miller, 295 F. Supp. 3d 690, 705–06 (E.D. Va. 2018) (stating that the LIBR was not meant to be a "rigid rule," and that the "[D]efendant points to no authority which requires the application of one, and only one, rule through an entire tracing procedure.").

[82] *See* United States v. Walsh, 712 F.3d 119, 124 (2d Cir. 2013) ("We have three 'accounting choices' at our disposal to determine what amount of commingled funds are traceable to criminal activity."); United States v. Banco Cafetero Panama, 797 F.2d 1154, 1159–60 (2d Cir. 1986) (stating that when there is a credit of drug money into an account, the government assumes that "*either*" the tainted funds remain in the account or leave through any withdrawal); United States v. One Parcel of Real Prop.

4. The pro rata method

The court in *Banco Cafetero* considered a third option, which it referred to as the "pro rata" method.[83] Using this "averaging rule," withdrawals would follow the ratio of tainted to untainted funds in the account.[84] In practice this would mean that if an account held $100 in tainted funds and $100 in untainted funds, the ratio would be 1:1. If $50 were withdrawn, that withdrawal would include $25 in clean funds and $25 in dirty funds. Neither party asked the court to consider this method, so the court ultimately declined to consider its availability.[85]

In a non-forfeiture case, the Ninth Circuit Court of Appeals in *United States v. Laykin* cited *Banco Cafetero* in support of the proposition that the pro rata method is to be used when funds are commingled.[86] Despite the endorsement by the Ninth Circuit, district courts in the Ninth Circuit have followed *Banco Cafetero*, but have not applied the pro rata method.

The pro rata method has an obvious appeal because of the sense of fairness it imparts. Instead of the government's choosing between presumptions, one rule is applied equally to all transactions. The difficulty with this method is its practicality. While the 1:1 ratio example provided above is simple enough to explain, it is very easy to develop ratios that result in fractions of cents being considered tainted.

5. Examples

The court in *Banco Cafetero* clearly stated the rules to be used in tracing proceeds in forfeiture. Yet, even the best explanation can become confusing without the application to actual figures. The

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with Bldgs., Appurtenances and Known as 170 Westfield Drive, Located in the Town of E. Greenwich, Rhode Island, 34 F. Supp. 2d 107, 117 (D.R.I. 1999) (stating the government can "choose on a case-by-case basis" between the two methods and is only limited by the amount of illicit deposits in determining which rule applies.); *In re* Moffitt, Zwerling & Kemler, P.C., 875 F. Supp. 1152, 1159 (E.D. Va. 1995) (stating "the government is accorded flexibility to choose among various accounting approaches" and might argue for the application of different rules depending on the circumstances).

[83] *See Banco Cafetero Panama*, 797 F.2d at 1159.

[84] *Id.*

[85] *Id.* at 1159 n.6.

[86] *See* United States v. Laykin, 886 F.2d 1534, 1541 (9th Cir. 1989).

following is a brief application of the rules to the Sandy Scammer case.[87]

Assume the investigator determined the sources and destinations of the funds moving through the Scammer account. Source A is determined to be fraudulently obtained funds. Sources B and C are identified as providing clean funds. The investigator further determines that destinations W, X, and Z are expenses that cannot be recovered, and that destination Y is the purchase of a vehicle, which is recoverable. Ex. 2 demonstrates the revised schedule of the account.

Sandy Scammer's Account			
Date	Source/Destination	Action	Balance
9/1/2019	Beginning Balance	–	$0
9/2/2019	Dirty Funds [A]	+ $5,000	$5,000
9/3/2019	Clean Funds [B]	+ $5,000	$10,000
9/5/2019	Expense [W]	– $7,500	$2,500
9/10/2019	Clean Funds [C]	+ $10,000	$12,500
9/13/2019	Expense [X]	– $5,000	$7,500
9/14/2019	Purchase [Y]	– $5,000	$2,500
9/15/2019	Expense [Z]	– $2,500	$0

Ex. 2: Revised schedule of Sandy Scammer's account

Knowing the sources and destinations of the funds allows the government to allege how the funds actually moved. In order to account for the application of the rules, the government will generally add two columns to a traditional schedule of an account. The underlying numbers will not change because they already reflect what occurred in the account, but additional tracking data will assist the government in analyzing the flow of fraudulent deposits. In the two additional columns, the government should track the balance of fraud proceeds in the account at any given time and what rule was used.

Once the columns are added, the government will need to analyze each transaction to establish the fraud balance. Ex. 3 shows the account after accounting for the deposit on September 2, 2019.

[87] For an extended application, see Sean Michael Welsh, *Tracing Commingled Funds in Asset Forfeiture*, 88 MISS. L.J. 179, 200–05 (2019).

Sandy Scammer's Account					
Date	Source/Destination	Action	Balance	Fraud Balance	Rule Used
9/1/2019	Beginning Balance	–	$0	$0	–
9/2/2019	Dirty Funds [A]	+ $5,000	$5,000	$5,000	–
9/3/2019	Clean Funds [B]	+ $5,000	$10,000		
9/5/2019	Expense [W]	– $7,500	$2,500		
9/10/2019	Clean Funds [C]	+ $10,000	$12,500		
9/13/2019	Expense [X]	– $5,000	$7,500		
9/14/2019	Purchase [Y]	– $5,000	$2,500		
9/15/2019	Expense [Z]	– $2,500	$0		

Ex. 3: Sandy Scammer's account after deposit on September 2, 2019

As Ex. 3 shows, on September 2, 2019, the entire account is comprised of fraud proceeds. No rule is applicable because, at this point, there are no commingled funds. Ex. 4 shows what happened when a clean deposit occurred on September 3, 2019.

Sandy Scammer's Account					
Date	Source/Destination	Action	Balance	Fraud Balance	Rule Used
9/1/2019	Beginning Balance	–	$0	$0	–
9/2/2019	Dirty Funds [A]	+ $5,000	$5,000	$5,000	–
9/3/2019	Clean Funds [B]	+ $5,000	$10,000	$5,000	–
9/5/2019	Expense [W]	– $7,500	$2,500		
9/10/2019	Clean Funds [C]	+ $10,000	$12,500		
9/13/2019	Expense [X]	– $5,000	$7,500		
9/14/2019	Purchase [Y]	– $5,000	$2,500		
9/15/2019	Expense [Z]	– $2,500	$0		

Ex. 4: Sandy Scammer's account after clean deposit on September 3, 2019

As Ex. 4 shows, when clean funds are added to the account, the balance of the tainted funds does not change. No rule is applicable because, although funds are now commingled, there is no withdrawal requiring the use of an assumption. Ex. 5 shows what happens when a transaction does occur.

Sandy Scammer's Account					
Date	Source/Destination	Action	Balance	Fraud Balance	Rule Used
9/1/2019	Beginning Balance	–	$0	$0	–
9/2/2019	Dirty Funds [A]	+ $5,000	$5,000	$5,000	–
9/3/2019	Clean Funds [B]	+ $5,000	$10,000	$5,000	–
9/5/2019	Expense [W]	– $7,500	$2,500	$2,500	LIBR
9/10/2019	Clean Funds [C]	+ $10,000	$12,500		
9/13/2019	Expense [X]	– $5,000	$7,500		
9/14/2019	Purchase [Y]	– $5,000	$2,500		
9/15/2019	Expense [Z]	– $2,500	$0		

Ex. 5: Example of when withdrawal occurs

Ex. 5 is the first application of a tracing rule. Here, the government knows that the withdrawal of funds on September 5, 2019 is an expense that is not recoverable. The government wants to limit the loss of fraud proceeds in Scammer's account and so will apply the LIBR. By doing so, the government assumes the fraud proceeds remain in the account. The clean funds will exit first. In this transaction $7,500 is taken from the account. Using the LIBR accounting method, the $5,000 in clean funds are exhausted first. The transaction, however, must necessarily include $2,500 in fraud proceeds. Therefore, the balance of the account drops to $2,500, all of which are dirty funds. Ex. 6 shows what happens when funds are added back to the account.

Sandy Scammer's Account					
Date	Source/Destination	Action	Balance	Fraud Balance	Rule Used
9/1/2019	Beginning Balance	–	$0	$0	–
9/2/2019	Dirty Funds [A]	+ $5,000	$5,000	$5,000	–
9/3/2019	Clean Funds [B]	+ $5,000	$10,000	$5,000	–
9/5/2019	Expense [W]	– $7,500	$2,500	$2,500	LIBR
9/10/2019	Clean Funds [C]	+ $10,000	$12,500	$2,500	LIBR
9/13/2019	Expense [X]	– $5,000	$7,500		
9/14/2019	Purchase [Y]	– $5,000	$2,500		
9/15/2019	Expense [Z]	– $2,500	$0		

Ex. 6: Funds added back to Sandy Scammer's account

In Ex. 6, $10,000 are added back into Scammer's account. Because this transaction consists of clean funds, the balance of fraud proceeds does not increase. This is an express application of the LIBR. Ex. 7 shows another transfer where the funds cannot be recovered.

Sandy Scammer's Account					
Date	Source/Destination	Action	Balance	Fraud Balance	Rule Used
9/1/2019	Beginning Balance	–	$0	$0	–
9/2/2019	Dirty Funds [A]	+ $5,000	$5,000	$5,000	–
9/3/2019	Clean Funds [B]	+ $5,000	$10,000	$5,000	–
9/5/2019	Expense [W]	– $7,500	$2,500	$2,500	LIBR
9/10/2019	Clean Funds [C]	+ $10,000	$12,500	$2,500	LIBR
9/13/2019	Expense [X]	– $5,000	$7,500	$2,500	LIBR
9/14/2019	Purchase [Y]	– $5,000	$2,500		
9/15/2019	Expense [Z]	– $2,500	$0		

Ex. 7: Transfer of funds cannot be recovered

In Ex. 7, the government will again apply the LIBR to preserve the existence of fraud proceeds in the account. By doing so, when $5,000 is taken from the account containing $12,500, clean funds are withdrawn first. This leaves $5,000 in clean funds in the account and $2,500 in tainted funds, which was the same amount as before. Ex. 8 shows the account when the purchase of the vehicle occurs on September 14, 2019.

Sandy Scammer's Account					
Date	Source/Destination	Action	Balance	Fraud Balance	Rule Used
9/1/2019	Beginning Balance	–	$0	$0	–
9/2/2019	Dirty Funds [A]	+ $5,000	$5,000	$5,000	–
9/3/2019	Clean Funds [B]	+ $5,000	$10,000	$5,000	–
9/5/2019	Expense [W]	– $7,500	$2,500	$2,500	LIBR
9/10/2019	Clean Funds [C]	+ $10,000	$12,500	$2,500	LIBR
9/13/2019	Expense [X]	– $5,000	$7,500	$2,500	LIBR
9/14/2019	Purchase [Y]	– $5,000	$2,500	$0	Proceeds First
9/15/2019	Expense [Z]	– $2,500	$0		

Ex. 8: Sandy Scammer's account with purchase of vehicle on September 14, 2019

In Ex. 8, the government wants to apply the proceeds first method. This is because the vehicle is a recoverable asset. If the vehicle constitutes fraud proceeds, it can be seized, forfeited, and used to compensate victims. The government knows from the schedule of the account that if the fraud proceeds remained in the account using the LIBR, on September 15, 2019, they would necessarily be used on an expense which is not recoverable. In applying the proceeds first method on September 14, 2019, the government assumes the fraud proceeds leave the account first when the $5,000 purchase occurs. This results in all $2,500 in fraud proceeds as well as $2,500 in clean funds being used for the $5,000 expenditure. Ultimately, when the government attempts to forfeit the vehicle, only $2,500 of the vehicle is recoverable.

C. Limitations on the use of accounting methods

The use of the accounting methods has been rejected by the Third Circuit,[88] Fifth Circuit,[89] Tenth Circuit,[90] and Eleventh Circuit Courts

[88] *See* United States v. Stewart, 185 F.3d 112 (3d Cir. 1999); United States v. Voigt, 89 F.3d 1050 (3d Cir. 1996).
[89] *See* United States v. Ayika, 837 F.3d 460, 473–74 (5th Cir. 2016).
[90] *See* United States v. Bornfield, 145 F.3d 1123, 1133 (10th Cir. 1998).

of Appeals,[91] as well as district courts in the First Circuit,[92] Third Circuit,[93] Fifth Circuit,[94] and Seventh Circuit.[95] Before the decision in *Miller*, some district courts in the Fourth Circuit also rejected the accounting methods.[96]

The reasoning for this rejection stems from *United States v. Voigt*.[97] *Voigt* specifically referenced *Banco Cafetero* and rejected its holding.[98] The court in *Voigt* gave the extreme example of adding $500 in untainted funds to $500,000 in tainted funds, stating that tracing

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[91] *See In re* Rothstein, Rosenfeldt, Adler, P.A., 717 F.3d 1205, 1213 (11th Cir. 2013).

[92] *See In re* One Star Class Sloop Sailboat Built in 1930 with Hull No. 721, Named "Flash II", 517 F. Supp. 2d 546, 553 (D. Mass. 2007), *aff'd sub nom.* United States v. One Star Class Sloop Sailboat built in 1930 with hull no. 721, named "Flash II," 546 F.3d 26 (1st Cir. 2008) (applying *Voigt*, 89 F.3d at 1087).

[93] *See* United States v. Tartaglione, No. 15-491, 2018 WL 1740532, at *25–*28 (E.D. Pa. Apr. 11, 2018) (following *Voigt* and *Stewart*); United States v. Neff, 303 F. Supp. 3d 342, 348 (E.D. Pa. 2018) (stating substitute assets are necessary when funds become commingled, following *Voigt*); United States v. Gardenhire, No. 15-87, 2017 WL 6371362, at *9 (W.D. Pa. Dec. 13, 2017) (following *Voigt*; appeal filed); United States v. Little, No. 2:12-CR-539-CDJ-1, 2016 WL 1255626, at *1–*2 (E.D. Pa. Mar. 31, 2016) (following *Voigt*); United States v. Lebed, Nos. CRIM.A 05-362-01, CRIM.A. 05-362-02, 2005 WL 2495843, at *3–*4 (E.D. Pa. Oct. 7, 2005) (following *Voigt*); United States v. Croce, 334 F. Supp. 2d 781, 784 (E.D. Pa. 2004), *rev'd and remanded*, 209 F. App'x 208 (3d Cir. 2006) (not precedential) (following *Voigt*).

[94] *See* United States v. Loe, 49 F. Supp. 2d 514, 522–23 (E.D. Tex. 1999) (holding that commingling did not defeat tracing because there were no intervening withdrawals, and that 52.6% of the real property was traceable and subject to forfeiture).

[95] *See* United States v. Black, 526 F. Supp. 2d 870, 889–90 (N.D. Ill. 2007).

[96] *See* United States v. Louthian, No. 1:12CR00002, 2013 WL 594232, at *6 n.3 (W.D. Va. Feb. 15, 2013); United States v. Poulin, 690 F. Supp. 2d 415, 428–29 (E.D. Va. 2010).

[97] 89 F.3d 1050 (3d Cir. 1996).

[98] *See Voigt*, 89 F.3d at 1087 n. 22 (citing and specifically rejecting United States v. Banco Cafetero Panama, 797 F.2d 1154 (2d Cir. 1986) ("We avoid the problems plaguing other courts that have attempted to devise a workable tracing analysis for tainted property that has been commingled in a bank account with untainted property.")).

would not be possible.[99] The Third Circuit's decision rested on giving effect to the "substitute assets provision,"[100] which provides that property that is not directly forfeitable can be sought for forfeiture when, through an act or omission of the defendant, the property "has been commingled with other property which cannot be divided without difficulty . . . ."[101]

The Third Circuit sought to avoid rendering the substitute assets provision a nullity and so it stated that, "once a defendant has commingled laundered funds with untainted funds—whether in a bank account or in a tattered suitcase—such that they 'cannot be divided without difficulty,' . . . the government must satisfy its forfeiture judgment through the substitute asset provision."[102] In *Voigt*, the court effectively determined that when funds are commingled, they become untraceable.

In *United States v. Stewart*, the Third Circuit limited its holding in *Voigt* by clarifying that it was dicta.[103] The court in *Stewart* clarified that the issue with tracing commingled funds did not arise when the funds were mixed, but when they were mixed and moved.[104] If tainted and untainted funds are combined, but there are few transfers out of the account, the funds can still be traced. The court distinguished *Stewart* from *Voigt* by finding there were not numerous withdrawals requiring application of the substitute assets provision.[105] Therefore, *Voigt* stands only for the proposition that the substitute assets provision must be applied when tainted and untainted funds "cannot be divided without difficulty."[106]

VI. Methods to ease tracing

If you are seeking to forfeit the proceeds of crime or property traceable to money laundering, there is no alternative to tracing, or at least demonstrating an attempt to trace. There are, however, methods that make forfeiture of these types of properties by the government

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[99] *Id.* at 1087.
[100] "Substitute assets" are only available in criminal forfeiture cases, pursuant to 21 U.S.C. § 853(p).
[101] *See Voigt,* 89 F.3d at 1088 (citing 21 U.S.C. § 853(p)(1)(E)).
[102] *Id.*
[103] *See* United States v. Stewart, 185 F.3d 112 (3d Cir. 1999).
[104] *Id.* at 118.
[105] *Id.* at 129.
[106] *Id.* at 130.

easier. These are workarounds to the requirements of "strict" tracing or the legal bar that may arise in some jurisdictions.

A. The use of section 984 in civil cases

Recognizing the difficulty faced by the government in using the accounting methods of *Banco Cafetero*, Congress passed 18 U.S.C. § 984, which relaxed the government's burden of tracing in civil cases.[107] The House Report on the Money Laundering Enforcement Amendments of 1991 discussed the difficulty in tracing commingled funds and cited the decision in *Banco Cafetero*.[108] The report referenced the ability of "clever money launderer[s]" to commingle funds and bring an account to zero, thereby defeating the LIBR.[109] The report referred to this as the "weakness" of the *Banco Cafetero* decision.[110]

To correct this "weakness," section 984 allows the government to seize and forfeit funds remaining in an account even if, under one or more of the accounting methods, the tainted funds would have been depleted. In order to use this provision the action must be commenced within one year of the activity.[111] This provision "gave the government a broad, new power to seize fungible property without regard to its traceability to proscribed conduct[.]"[112] Section 984 only applies to "cash, monetary instruments in bearer form, funds deposited in an account in a financial institution . . . or precious metals[.]"[113] These are assets which are fungible, or which do not have any defining characteristics when mixed with their untainted equivalents. Section 984 also only applies to single accounts.[114]

Consider this example involving section 984: Scammer commits fraud, the proceeds of which are transferred to Account A in the form of a wire for $100,000 on January 1, 2020. On January 2, 2020, Scammer spends all $100,000 on non-recoverable expenditures. Over

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[107] *See* United States v. Haleamau, 887 F. Supp. 2d 1051, 1057–58 (D. Haw. 2012) (describing legislative history leading to enactment of 18 U.S.C. § 984).
[108] *See* H.R. REP. NO. 102-28(I), at 45–48 (1991).
[109] *Id.* at 46–47.
[110] *Id.* at 47.
[111] *See* 18 U.S.C. § 984(a)(1).
[112] United States v. Contents in Account No. 059-644190-69, 253 F. Supp. 2d 789, 793 (D. Vt. 2003).
[113] 18 U.S.C. § 984(a)(1).
[114] *Id.*

the next five months, Scammer earns legitimate income from non-fraudulent sources totaling $200,000 as of May 31, 2020. On June 1, 2020, the government executes a seizure warrant and files a civil complaint against the funds in the account for up to $100,000.

Without the aid of section 984, the government would be required to apply accounting methods from *Banco Cafetero*, demonstrating that the funds seized constitute the same funds that were derived from the original fraud or that they are traceable thereto. This analysis is unnecessary under section 984. The government can seize and forfeit identical property located in the same account.

Functionally, and for the purposes of a seizure warrant, the government can use this provision to measure the fraud over a period of time and seize it. For instance, if the government knows that between January 2020 and March 2020, Scammer earned $400,000 in fraud proceeds and deposited them into Account B, in August 2020, the government can seize "up to" $400,000 from Account B. This is especially useful because receiving up-to-date financial records is nearly impossible.

B. The use of substitute assets

Through criminal forfeiture, the government can forfeit substitute assets—assets belonging to the convicted defendant, but which are not connected to the underlying offense.[115] Substitute assets are available when directly forfeitable property cannot be located upon the exercise of due diligence; has been transferred to a third party; is placed beyond the jurisdiction of the court; is substantially diminished in value; or is commingled with other property which cannot be divided without difficulty.[116] The government must allege one of the factors to forfeit property as a substitute asset. Neither tracing, nor connection to the underlying crime is necessary for substitute assets to be forfeited.

While some might view this as an "alternative" to tracing and a way for the government to avoid the work required to trace, this view is wrong. An asset cannot both be directly forfeitable and a substitute asset.[117] If an asset is traceable to the underlying fraud, it is directly forfeitable as proceeds of the crime and the substitute assets provision

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[115] *See* 21 U.S.C. § 853(p).

[116] *See* 21 U.S.C. § 853(p)(1)(A)–(E).

[117] *See* United States v. Bornfield, 145 F.3d 1123, 1139 (10th Cir. 1998).

would not be available. If it is not traceable to the underlying fraud, the property might still qualify for forfeiture if it meets one of the criteria outlined in section 853(p)(1).

This becomes an issue and tracing is still required because the government must be able to allege that tracing was attempted and could not be accomplished. If tracing could be accomplished, then the asset would be directly forfeitable.

C. Seeking property involved in money laundering

As described in section II.B, one of theories for forfeiture is property "involved in" money laundering.[118] In order to make use of this theory of forfeiture in a criminal case, the government must charge and convict the defendant of money laundering; and in a civil case, must have facts to support money laundering. Using this theory, the government does not need to prove that the property sought by the government is traceable to the proceeds of a crime. Instead, the government may forfeit clean funds "involved in" money laundering, if there are facts to demonstrate how the funds were used to facilitate money laundering.[119]

This eases the government's requirement to trace. Instead of conducting an analysis of which tracing rules are applied when and attempting to determine whether clean or dirty funds remain in an account or were used to purchase an asset, all funds that touch the money laundering activity can be forfeited as being "involved in" the activity. While this benefits the government with an easier burden of tracing, alleging money laundering is not possible in every case. There must be facts to support that there was a scheme to launder and a prosecutor willing to charge money laundering.

D. The use of section 981(k)

Finally, the government need not apply "strict" tracing methods for correspondent bank accounts.[120] Foreign financial institutions that maintain a presence in the United States maintain correspondent

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[118] *See* 18 U.S.C. § 981(a)(1)(A).

[119] *See* United States v. Huber, 404 F.3d 1047, 1056 (8th Cir. 2005).

[120] *See* United States v. Union Bank For Sav. & Inv. (Jordan), 487 F.3d 8, 15 (1st Cir. 2007) ("Interbank accounts, also known as correspondent accounts, are used by foreign banks to offer services to their customers in jurisdictions where the banks have no physical presence, and otherwise to facilitate transactions involving such jurisdictions.").

accounts, accounts linked to those maintained overseas. When the government seeks forfeiture of funds held at a foreign financial institution, the government can seize funds from a correspondent account in the United States without the need to trace to those specific funds.[121] While the government still needs to trace criminal proceeds to the foreign account, the fact that the government is actually taking funds that are not traceable from a correspondent account in the United States does not defeat the forfeiture.

VII. Conclusion

Tracing is a fundamental concept of asset forfeiture, but it is a difficult process, both to undertake, and to explain to a jury or judge. While the "accounting methods" can seem complicated and arcane, they are necessary rules that hold the government to its burden to forfeit only property related to a criminal offense. The complexity presented by tracing problems and the volume of financial documentation needed to support tracing can cause prosecutors and courts to avoid the issues entirely. The result is cases where the accounting methods are rejected in favor of the substitute assets provision, which is not always a viable alternative. Better understanding of tracing by prosecutors will lead to better explanation to the courts and ultimately better outcomes in asset forfeiture.

About the Author

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[121] *See* 18 U.S.C. § 981(k)(2) ("[I]t shall not be necessary for the Government to establish that the funds are directly traceable to the funds that were deposited into the foreign financial institution . . . ."); *Jordan*, 487 F.3d at 16 ("The funds in the interbank account are forfeitable even if those funds have no connection to the forfeitable funds deposited in the foreign account.").

Money Moves: Following the Money Beyond the Banking System

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Innovation in how money is transferred has accelerated exponentially in recent years, with new financial technologies poised to drive a dramatic shift in how consumers pay for goods and services and manage their personal finances. Apple Pay and PayPal/Venmo are just a few examples of alternative payment methods that have already gained wide acceptance. These technologies, however, may pose challenges for law enforcement's ability to detect, address, and prosecute financial crime. To understand how these new technologies work, and therefore how they can be used in investigating and prosecuting financial crimes, law enforcement and prosecutors must understand the basic types of value transfer systems, and how they intersect with these new technologies. With this foundation, even as new and yet unforeseen players enter the system, law enforcement can stay at the speed of industry and, thus, at the speed of financial crime. This article discusses the traditional banking and payment systems currently in use and the law enforcement challenges associated with the shift away from these traditional systems. This article further considers evidence gathering in light of new technologies and trends in the payments ecosystem.[1]

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[1] This article generally will not address any distributed ledger technologies, such as block chain or cryptocurrency, as ways of moving money, given the recent coverage of those topics in this and prior issues of this Journal. *See, e.g.*, Neal B. Christensen & Julia E. Jarrett, *Forfeiting Cryptocurrency: Decrypting the Challenges of a Modern Asset*, 67 DOJ J. FED. L. & PRAC., no. 3, at 155–80; Matthew J. Cronin, *Hunting in the Dark: A Prosecutor's Guide to the Dark Net and Cryptocurrencies*, 66 U.S. ATT'YS BULL., no. 4, 2018, at 65–78; Michele R. Korver et al., *Attribution in Cryptocurrency Cases*, 67 DOJ J. FED. L. & PRAC., no. 1, 2019, at 233–75.

I. Movement to the alternative banking system

Technological innovation has changed the way the world holds and sends money. We are now able to pay businesses and each other faster, more easily, from mobile devices, and at a lower cost. 2020 is projected to be the tipping point at which nonbank payment providers earn more revenue from consumer payments than banks do.[2] Long established in other countries, the concept of conducting most payments through mobile and nonbank providers is quickly gaining traction in the United States.[3] This is not surprising given that, in a given six-month period, 40% of Americans never even go into a bank or credit union,[4] and another 7% of American consumers have no relationship with a bank at all.[5] Between 1995 and 2019, the number of commercial banks and savings institutions declined from just under 12,000 to approximately 5,300.[6]

While the use of alternative banking and payments systems is generally a positive development for consumers, it also raises challenges for law enforcement in investigating financial crimes as evidence and information becomes dispersed among more players. Moreover, a lack of familiarity with new entrants and technologies may discourage law enforcement from fully using them as sources of

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[2] John Stewart, *With Fast-Growing Fintechs Taking a Toll, Banks Will Soon Claim Less than 50% of Payments Revenue*, DIGITAL TRANSACTIONS (Aug. 2018).

[3] Mohammed Badi et al., *Global Payments 2017: Deepening the Customer Relationship*, BOSTON CONSULTING GROUP 1, 6–13 (2017); Frank Martien, *Payments: The First Key Battlefield Signaling Broader Change in US Banking*, ACCENTURE (July 19, 2018), https://bankingblog.accenture.com/payments-first-key-battlefield-signaling-broader-change-us-banking?lang=en_US.

[4] Sheyna Steiner, *Branch Banking Still Popular with Americans*, BANKRATE (Dec. 21, 2015), https://www.bankrate.com/finance/consumer-index/branch-banking-still-strong-among-americans.aspx.

[5] *Id.*; FEDERAL DEPOSIT INSURANCE CORPORATION, 2015 FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS: ECONOMIC SUMMARY 1, 2 (2016).

[6] *Bank Find Data*, FED. DEPOSIT INS. CORP., https://research.fdic.gov/bankfind/.

evidence. Using Apple Pay and Apple Cash as examples, this article will help practitioners anticipate and overcome those challenges.

Challenge 1: The incumbent players, including banks, networks, and card processors, may no longer be the primary source for investigating transactions, gathering evidence, or recovering assets. The data and information needed to build a case now reside with a number of different players or various platforms that are subject to varying levels of regulation or may be located internationally. For example, following the entire money trail on an Apple Cash transaction might require evidence from (1) the credit card or bank account that funds the Apple Cash account (which is actually just an online prepaid card account hosted by GreenDot); (2) GreenDot to show the merchant accepting the payment; and (3) Apple Payments, Inc. to confirm the identity of the Apple Cash account holder.

Challenge 2: New entrants with nascent or less robust compliance programs have stepped in to take on whatever payment traffic the traditional players may have shed through the de-risking process. This article will provide a baseline taxonomy for categorizing what kind of payment provider these new players are and assessing the level of regulation to which they are subject.

Challenge 3: The ease and speed with which money can move may mean that wrongdoers can quickly layer multiple electronic transactions to cover their tracks or make it more difficult to uncover the purchaser's identity. Before the advent of innovations such as Apple Pay and Google Pay, investigators could review a recipient account and see a list of card or bank accounts that were sending money to it, enabling them to quickly uncover which bank to subpoena and ultimately the purchaser. Now, in an Apple Pay transaction, no credit card data—even in encrypted form—is stored on the mobile device, Apple's servers, or the recipient's servers. So, looking at a list of purchasers from given recipient (for example, merchant ID) will no longer enable investigators to discover a purchaser's credit card number, issuer, or identity. Likewise, seizing a device may reveal the credit card issuer, but the issuing bank may not be able to identify the card number and, thus, the list of transactions made through that device.

Similarly, for Google Pay transactions, law enforcement's visibility into the transaction may be limited to seeing only the transfer of funds between a bank and Google Pay; once funds are in the user's Google Pay account, the user may be able to freely transfer to other

Google Pay users, thus creating layers of transactions that are not necessarily visible to law enforcement via a financial institution subpoena.

But, no matter how elaborate the digital money trail becomes, two things remain true: (1) The money had to enter from somewhere, and it has to exit somewhere; and (2) Regulated financial institutions are gatekeepers to those entry and exit points.[7] Even in cases involving digital currency, a financial institution is still involved whenever one digital currency is exchanged for another, or for a fiat currency, and banked, spent, or further distributed.[8]

II. Introduction to the payments ecosystem

Having a solid understanding of the basic taxonomy of payments systems will enable law enforcement and prosecutors to quickly grasp and categorize new entrants they may come across in investigations and forfeiture actions.[9] Even though consumers are using new front-end interfaces to move money, including those that are internet, mobile, and social-media-enabled, there has been relatively little change to the back-end processes that actually move money through the financial system. The same systems that have been used to clear check and credit card transactions remain the infrastructure or "rails" for these newer, shinier, and sometimes speedier trains on them. While the consumer may no longer knowingly be going to a bank to initiate a payment, banks are, nevertheless, gatekeepers to the existing infrastructure, the tried-and-true financial "rails."

In this capacity, the Bank Secrecy Act (BSA) compliance risk continues to fall to banks, credit unions, and other BSA "financial

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[7] Martin Arnold, *Ripple and Swift Slug it Out Over Cross-border Payments*, FIN. TIMES (June 5, 2018), https://www.ft.com/content/631af8cc-47cc-11e8-8c77-ff51caedcde6; Felice Maranz, *Western Union Says It's Testing Transactions With Ripple*, BLOOMBERG (Feb. 14, 2018), https://www.bloomberg.com/news/articles/2018-02-13/western-union-says-it-s-testing-transactions-with-ripple; Press Release, MoneyGram, Ripple and MoneyGram Partner to Modernize Payments (Jan. 11, 2018).

[8] *E.g.*, Memorandum from Fin. Crimes Enf't Network (May 9, 2019); Cronin, *supra* note 1, at 65–78; Korver, *supra* note 1, at 233–62.

[9] *See* ASSET FORFEITURE POLICY MANUAL (2019), Chap.2, Sec.V.F (discussing prepaid access devices, including how to seize the device and the funds associated with it).

institutions," such as money services businesses (MSBs), the banks that enable merchants to accept electronic payments and credit cards, and the networks that transmit credit, debit, and electronic payments. That gatekeeper function may become more difficult, however, as the market adopts features that are popular in other countries, such as social-media-based wallets. These wallets allow merchants to onboard and begin accepting payments instantly, thus bypassing the payment networks that historically had been responsible for merchant monitoring. Moreover, as new entrants play a larger role in transactions, data and information necessary to criminal investigations continues to become more dispersed away from traditional financial institutions.

In the United States, four primary core payment systems transfer value between financial institutions: credit card networks, debit card networks, automated clearing house (ACH) transfers, and wire transfers (which are rarely used by individuals given the high cost).[10] While momentum has built to modernize these "rails" by making them faster, these payment mechanisms will remain the status quo until disrupted.[11] And, it is unclear that consumer demand even exists for payments to be instantaneous, versus more secure or more mobile.

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[10] U.S. DEP'T OF THE TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: NONBANK FINANCIALS, FINTECH, AND INNOVATION 148 (2018); BD. OF GOVERNORS OF THE FED. RESERVE SYS., FEDERAL RESERVE POLICY ON PAYMENT SYSTEM RISK (2017).

[11] BD. OF GOVERNORS OF THE FED. RESERVE SYS., THE U.S. PATH TO FASTER PAYMENTS. FINAL REPORT TWO: A CALL TO ACTION (2017) (For example, the NACHA is working on same-day ACH, which essentially chunks ACH batches into two or three intra-day batches. The clearing house is working on a "Real-time payments" system that connects financial institutions directly and enables them to send real-time messages to accompany payments up to $25,000. But, faster payments solutions must take into account the likely time required to scale new infrastructure and integrate with the existing clearing and settlement infrastructure.).

A. Credit and debit transactions

Credit card acquirers and networks,[12] in addition to issuers, are financial institutions for purposes of the BSA.[13] Their compliance responsibilities include not only developing and implementing a written anti-money laundering program generally but also specifically underwriting and monitoring risk with regard to the merchants whose transactions they introduce onto the "rails" and transmit.[14] A credit card transaction starts when the cardholder presents the card to a merchant to pay for a good or service.[15] The merchant transmits the cardholder's account number and the amount of the transaction to the acquirer, a financial institution that both underwrites the merchant and enables it to accept credit cards, usually by providing the hardware and software necessary to accept cards. The acquiring bank then forwards this information to the card network operator (VISA, MasterCard, American Express, or Discover), requesting authorization for the transaction from the cardholder's bank.

If the card is tied to a valid account that has not reached its credit limit, the issuing bank approves the transaction and sends the authorization back to the acquiring bank via the card network. The issuing bank also sends the transaction amount, minus the interchange fee, which is set by the network, to the acquiring bank. The acquiring bank subtracts its fee, separate from the interchange fee, and forwards the balance to the merchant. Figure 1 below outlines the card network ecosystem.[16]

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[12] "Credit Card Networks" refers to the four major card networks: Visa, MasterCard, American Express, and Discover. Diner's Club also maintains a network with a single-digit market share. *See* Douglas Akers et al., *Overview of Recent Developments in the Credit Card Industry*, 17 NO. 3 FDIC BANKING REV. 23 (2005).

[13] 31 U.S.C. § 5312(a)(2)(L); 31 C.F.R. § 1028.

[14] 31 C.F.R. § 1010.200; Joint Statement on Risk-Focused Bank Secrecy Act/Anti-Money Laundering Supervision 1 (July 22, 2019).

[15] Where a card is not present, such as in an online or phone transaction, a "gateway," or e-commerce payment service, rather than a point-of-sale machine, transmits the card information.

[16] Michael Greco, *Understanding Credit Card Merchant Fees: What Are You Paying for and Who Are You Paying?*, VINDICIA: BLOG (Feb. 26, 2019), https://www.vindicia.com/blog/understanding-credit-card-merchant-fees-what-are-you-paying-and-who-are-you-paying.

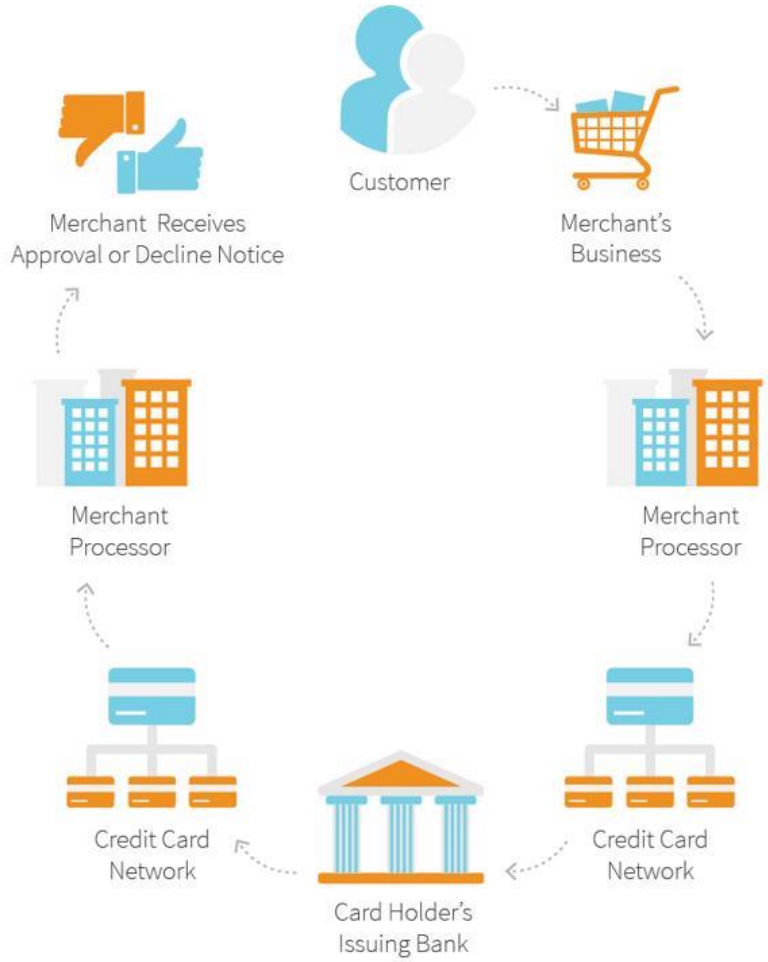

Fig. 1: Card Network Ecosystem

As with credit card transactions, debit card transactions also have financial institutions in the position of the network gatekeeper. Debit cards are essentially ATM cards that can be used on Visa, MasterCard, or other networks, as well as at ATMs.[17] In contrast to a credit card transaction, a debit card transaction posts in real time, meaning that the issuer bears no risk of non-payment but also does not have the opportunity to earn interest on revolving balances. Consolidation among the various debit card networks through the

[17] Akers, *supra* note 12, at 25.

years now means that the three largest debit networks cover approximately 75% of all transactions.[18]

B. ACH transactions

The ACH network is one of the main engines behind payment transfers in the United States. It requires that both the sender and recipient have a traditional depository institution (bank or credit union) account. The ACH network is for use only by depository institutions and tends to carry payments such as direct deposit, government benefits delivery, bill pay, and transfers between consumers and businesses, among others.[19] To start an ACH transaction, an individual or entity provides payment (or debit) instructions to the originating financial institution by providing the recipient's routing and bank account number. The originating financial institution aggregates all payment instructions it has received in a given day into batches before sending the network operator, which then nets and routes payments to receiving financial institutions. The receiving institution, as designated by the routing number provided at the start of the transaction, then credits the recipient's account.

III. Who uses the rails?

A. Peer-to-peer transactions (P2P)

A peer-to-peer platform (for example, PayPal, Venmo, Zelle) enables consumers to send money to other consumers via the ACH, credit card, or the wire transfer networks.[20] Peer-to-peer networks are closed in that they require senders and recipients to have an account on the same platform in order to be able to receive funds. When the sender commences a transaction, the platform first uses the balance that is

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[18] "Visa's Interlink network had a 35% share of the [U.S.] market in 2016, while MasterCard's Maestro had about 20%. First Data's Star Network is the only comparably large operator, with about 20% market share." Yizhu Wang & Christopher Kane, *PIN-Based Payment Companies Could Benefit From Consolidation*, FORBES (May 6, 2018, 12:21 PM), https://www.forbes.com/sites/mergermarket/2019/05/06/pin-based-payment-companies-could-benefit-from-consolidation/#651ecda973e8.

[19] *See generally What is ACH?*, NACHA, https://www.nacha.org/ach-network (last visited Sept. 19, 2019).

[20] U.S. DEP'T OF THE TREASURY, *supra* note 10, at 147.

held on a sender's account and, if the account does not have sufficient funds, the platform then pulls from the sender's linked debit card or bank account in order to fund the transaction.[21] Almost all peer-to-peer entities qualify as money service businesses under the BSA, and have obligations to comply with the BSA/Anti-Money Laundering (AML) requirements discussed below. Figure 2 provides examples of payments and remittances providers.[22]

Fig. 2: Examples of payments and remittances providers

To remain competitive with peer-to-peer payment providers, banks have collaborated to develop their own peer-to-peer network, Zelle. Rather than relying on and paying VISA or MasterCard as their network operator, the banks have contracted with Early Warning Systems to be their network operator. Neither Early Warning nor Zelle ever handles funds during the transaction. Instead, Early Warning transmits messages to participating financial institutions

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[21] *See, e.g.*, *Venmo User Agreement*, VENMO, https://venmo.com/legal/us-user-agreement.

[22] Lea Nonninger & Mekebeb Tesfaye, *Latest Fintech Industry Trends, Technologies and Research from Our Ecosystem Report*, BUS. INSIDER (Dec. 21, 2018), https://www.businessinsider.com/fintech-ecosystem-financial-technology-research-and-business-opportunities-2016-2.

who execute funds transfers via either the ACH or the debit networks.[23] In-network Zelle transactions are cleared and posted in real time, and settlement happens at the end of the day via the ACH network.[24]

The sender's bank is responsible for doing a risk assessment of both the sender and the transaction. Accordingly, the sending bank can set transaction limits for its own customers. The sending bank can also monitor for accounts that exclusively send peer-to-peer payments without ever making normal or brick-and-mortar payments. Zelle users generally initiate a payment in their bank's online interface, but, if their bank chooses to permit out-of-network payments, they can also use the Zelle app to initiate or receive a payment.[25]

B. Digital wallets and the "Pays"

The "Pays"—including, for example, Apple Pay, Google Pay (formerly known as Google Wallet), Samsung Pay, Android Pay, Cash App (formerly Square Cash), and Snapcash—can function either as a digital wallet or as a peer-to-peer network. When acting as a wallet, the "Pays" are just another way to transact over the credit card and debit card networks. They hold and encrypt card credentials to be presented to a merchant when making a purchase through a contactless point of sale. In a contactless transaction, the point of sale hardware reads the card's chip data using radio frequency identification technology. This technology has been around since the early 2000s, and the consumer experience is "tap to pay" or waving a card or device near the card reader.[26] A variety of companies provide mobile wallets, including Apple, Google, and Samsung; merchants such as Starbucks, Walmart, and CVS; and financial institutions such as JPMorgan Chase & Co. and Citibank.[27] Users can remain entirely outside of the traditional banking system by funding a wallet from a

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[23] Lou Anne Alexander, *Key Things to Know About Zelle*, Zelle Network (2018).
[24] U.S. DEP'T OF THE TREASURY, *supra* note 10, at 152.
[25] Lou Anne Alexander, *How Zelle Works: In-Network to Out-of-Network*, Zelle Network (2018).
[26] SQUARE, INC., NFC GUIDE: ALL YOU NEED TO KNOW ABOUT NEAR FIELD COMMUNICATION.
[27] U.S. GOV'T ACCOUNTABILITY OFFICE, FINANCIAL TECHNOLOGY: INFORMATION ON SUBSECTORS AND REGULATORY OVERSIGHT 18 (2017).

source other than a bank account, using their digital wallet for everyday transactions, all while staying "unbanked."[28]

At the point of sale, mobile wallets replace key identifiers such as the card number and user's PIN, if entered, with randomly generated numbers—a process called tokenization. Tokenization provides greater security by ensuring that the card number is not transmitted across the network in a form where it could be intercepted and reused.[29] Consumers' preference for the additional security that mobile wallets offer appears to be driving that adoption. Merchants and card networks also like the security that digital wallets provide (purchasers possess the device, know the password, or authenticate by fingerprint or face identification), which lowers the risk of fraud and, therefore, cost associated with each transaction.

When a user loads a credit, debit, or prepaid card into Apple Pay, for example, Apple sends the details to the card's issuing bank or network, which replaces the card details (number and Card Verification Value[30]) with a series of randomly generated numbers, the token.[31] That random number is sent back to Apple, which programs it into the phone as the Device Authorization Number (DAN) and stores it in the phone's secure element, a tamper-proof chip in the phone that is dedicated to storing payment credentials and biometrics.[32] Each time the user makes a purchase, a one-time-use

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[28] Abrar Al-Heeti, *Apple Card, Venmo Card and PayPal Card: Which Should You Get?*, C-NET (May 29, 2019), https://www.cnet.com/news/apple-card-venmo-card-and-paypal-card-which-should-you-get/.

[29] U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 27, at 18.

[30] This code is a three- or four-digit security code printed on the card. It, in theory, confirms that the card, or its equivalent, was present for the transaction and visually verified by the merchant. CVV numbers, also known as CSC, or CVV2, have become readily available for fraudsters to purchase online.

[31] The issuer does not actually create the series of randomly generated numbers but, rather, subscribes to a service provided by Visa Token Service or MasterCard Digital Enablement Service. *See e.g.*, *All You Need to Know About Tokenization*, VISA, https://usa.visa.com/dam/VCOM/Media%20Kits/PDF/visa-security-tokenization-infographic.pdf.

[32] PAYMENT TOKENIZATION EXPLAINED, SQUARE, https://squareup.com/townsquare/what-does-tokenization-actually-mean.

code, in lieu of the CVV code, is tacked onto that DAN.[33] That one-time-use code is what travels over the network to authorize the transaction.

The "Pays" can also function as peer-to-peer networks to send funds to other registered accountholders on the same "pay" platform. The user sends funds via:

- text (Apple Cash uses iMessage),
- email (Google Pay uses Gmail), or
- other messaging platform (Snapcash uses Snapchat).

Funds are drawn from the sender's "pay" platform account and replenished from a debit or credit card. Once the user accepts the funds to her pay account, there are various means of using the money, including making a contactless payment from the recipient's digital wallet, withdrawing the money using a debit card at ATMs, or transferring it to a bank account.[34]

Apple Cash markets its product, as well as the Apple Card, on privacy. It claims, "Even Apple doesn't know what you bought. Or where. Or how much you paid."[35] That is partially true:

- For the Apple Card, Apple's money-transmitter subsidiary, Apple Payments, Inc., does see, store, and use transaction data, and bears the responsibility for detecting and reporting suspicious activity. But Apple Payments, Inc. does not share that information with Apple, Inc., and it does not analyze or resell users' purchase data for marketing purposes.[36] Similarly, the

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[33] *Apple Pay—Fact Sheet*, INDEP. COMMUNITY BANKERS' ASS'N (2014), https://www.icba.org/docs/default-source/icba/solutions-documents/mobile-payment-toolkit/applepayfactsheetlayout2.pdf?sfvrsn=4.

[34] Because moving money across debit networks or via ACH to another bank account requires a financial institution, Apple has partnered with Green Dot Bank. Because making the funds instantaneously available for use in a debit or ATM transaction creates more risk for the "pay," they tend to charge a fee, 1% for example, for that service. Making the money available to a bank account within one to three business days, by contrast, is free.

[35] *Apple Card Coming This Summer*, APPLE, https://www.apple.com/apple-card/privacy-security/ (last visited Sept. 19, 2019).

[36] *Apple Cash Terms and Conditions*, APPLECASH, https://applecash.greendot.com/termsconditions/#tandc (last visited Sept. 19, 2019); *Apple Pay Security and Privacy Overview*, APPLE, https://support.apple.com/en-us/HT203027 (last visited Sept. 19, 2019).

bank that issues the Apple Card, Goldman Sachs Bank USA, sees purchase data for purposes of processing the transaction.[37]

- For Apple Cash, sometimes known as "ApplePay Cash," Apple contracts with GreenDot to create an account through which the user can store and send cash. Apple Cash is nothing more than a virtual prepaid card.[38]

Like peer-to-peer entities, almost all the "Pays" qualify as money service businesses under the BSA, and have obligations to comply with the BSA/AML requirements discussed below.

C. Prepaid cards

Prepaid cards, including gift cards, and general use prepaid card accounts, use the credit card networks. Gift cards generally can be used at only a single retailer—and are, thus, called "closed loop"—versus General Purpose Reloadable (GPR) cards, which can be used anywhere that accepts credit cards. The retailer generally loads the card at the time of purchase with funds provided by the customer. As is the case with respect to credit and debit card transactions, card acceptance, routing, and settling of prepaid card transactions between merchants and card issuers happen over the card networks.

The different players in a prepaid transaction include the program manager, the issuing depository institution, the card networks, payment processors, and distributors.[39]

- The program manager is a non-bank entity that maintains the accounting for which cards have what balances and is generally responsible for designing, managing, marketing, and operating the card program. Some program managers maintain the databases that contain cardholder account and transaction histories. The contract that the program manager signs with the bank that holds the funds likely will specify whether the bank or the program manager has responsibility for BSA compliance and

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[37] *Apple Card Coming This Summer*, *supra* note 35.

[38] *GreenDot Terms and Conditions for Apple Cash*, GREEN DOT, https://applepaycash.greendot.com/termsconditions.

[39] ASSET FORFEITURE POLICY MANUAL (2019), Chap.2, Sec.V.F (discussing prepaid access devices, including how to seize the device and the funds associated with it).

is, thus, the provider of prepaid access.[40] The largest program managers include GreenDot and Netspend.
- The issuing bank both holds the funds representing the aggregate balance of all of the outstanding prepaid cards and gives program managers the on-ramp to the card networks. The first four to six numbers printed on the card are the bank identification number (BIN) that identifies issuing bank.
- Payment processors authorize transactions and generate account reports.
- Distributors, including retailers (such as Walmart or CVS), money transfer agents, tax preparers, check cashers, and payday lenders, sell and may offer reload services for the cards.[41] If they do sufficient daily volume to meet the definition of a "seller of prepaid access," then they have BSA compliance obligations, including an AML program, Suspicious Activity Report (SAR) reporting, and recordkeeping obligations.[42]

Prepaid products, including GPR cards, differ from traditional checking or savings accounts in that the underlying funds are typically held in a pooled account at a depository institution or credit union. As a result, a card program manager may establish a single account at a depository institution or credit union in its own name, but keep records to show that it is held for the benefit of each individual underlying cardholder. There is a wide variance in the maximum balance that the major card providers permit. Cards may have balance caps ranging from $2,500–$100,000.[43] One of the top

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[40] 31 C.F.R. § 1010.100(ff)(4)(i) (defining a provider of prepaid access as the one participant among the entities engaged in offering a particular prepaid access program that agrees to serve as the contact and source of information for FinCEN, law enforcement and regulators for the particular program).
[41] BUREAU OF CONSUMER FIN. PROT., PREPAID ACCOUNTS UNDER THE ELECTRONIC FUND TRANSFER ACT (REGULATION E) AND THE TRUTH IN LENDING ACT (REGULATION Z) (2016).
[42] 31 C.F.R. § 1010.100(ff)(7).
[43] *See* Cardholder Agreement, GREEN DOT, https://secure.greendot.com/racing/cmsviews/greendot/assets/en-us/cardholder_agreement.pdf; *see also* American Express Prepaid Card Cardholder Agreement, AM. EXPRESS https://www.americanexpress.com/us/prepaid/secure-pay/cardholder-agreement.html.

card providers has no maximum balance, but limits monthly cash deposits to $4,000.[44]

Some cards are active upon purchase, while others require that the user first contact the financial institution that issues the card in order to activate the card by registering. This registration process is what enables the financial institution to fulfill its AML program requirements, as required by the prepaid access rule.[45] Businesses that sell or re-load more than $10,000 in prepaid products to a given user in a given day are subject to the prepaid access rule and must fulfill AML program, SAR filing, and recordkeeping requirements.[46]

Absent registration, a user can spend down the card balances but cannot use the card's full functionality, such as reloading the card or making ATM withdrawals. So a user who is trying to remain unidentified could purchase and load multiple prepaid cards without the distributor (such as, a grocery store or online retailer) ever incurring an obligation to report that suspicious activity. The anonymity afforded by an unregistered prepaid card may make it an ideal tool for crimes such as money laundering and bribery.

Prepaid cards can interact with digital wallets,[47] such as Apple Pay. Users can store their prepaid card credentials in a digital wallet or mobile wallet. Some, but not all, mobile wallets permit a consumer to use a prepaid card to fund digital wallet transactions or to transfer wallet funds out to a prepaid card.[48]

D. Payment processors

A payment processor generally presents claims and debit transfers on behalf of the merchants it serves, collects payments on behalf of those merchants, and settles with the merchants.[49] Payment processors are, generally, non-bank technology companies that

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[44] *See* Chase Liquid Agreement, CHASE, https://www.chase.com/content/dam/chasecom/en/debit-reloadable-cards/documents/chase_liquid_terms_conditions.pdf.

[45] 31 C.F.R. § 1010.100(ff)(4).

[46] Memorandum from the Dep't of Treasury Fin. Crimes Enf't Network (Nov. 2, 2011).

[47] Discussed in section III.B, *supra*.

[48] *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., CONSUMERS AND MOBILE FINANCIAL SERVICES 2016 17 (2016).

[49] Memorandum from the Dep't of Treasury Fin. Crimes Enf't Network (Aug. 27, 2014).

provide credit card processing services to bank clients. They must have a bank sponsor to access the card networks.[50] Traditionally, payment processors grew up to handle the burgeoning flow of payment traffic that banks could no longer handle. Now, the outsourcing model has been turned on its head a bit, as established payment processors have tended to pick their bank or find a small financial institution with which to partner to access the card networks.

The processor essentially stands in the shoes of the acquiring bank or the issuing bank during the authorization, routing, and clearing of card transactions.[51] As a BSA financial institution, it bears compliance risk and responsibilities.

E. Money transfers

The vast majority of cross-border transactions are business-to-business, sent over the SWIFT network.[52] The remaining 10% are remittances, or consumer-to-consumer transfers of small amounts of money.[53] This market has long been serviced by non-bank MSBs, who have compliance and BSA responsibilities.[54] These money-transfer services can also be used domestically.

Digitization is happening in the money transfer services market, as well. While consumers traditionally go to brick-and-mortar locations, such as an agent in a convenience store, more traffic is shifting to internet-only providers, such as Xoom,[55] which have no

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[50] U.S. DEP'T OF THE TREASURY, *supra* note 10, at 220.

[51] KJOS ANN, THE MERCHANT-ACQUIRING SIDE OF THE PAYMENT CARD INDUSTRY: STRUCTURE, OPERATIONS, AND CHALLENGES (2007).

[52] ERNST & YOUNG, #PAYMENTS INSIGHTS. OPINIONS. 12 (2017).

[53] BUREAU OF CONSUMER FIN. PROT., REMITTANCE RULE ASSESSMENT REPORT 64–65 (2018) (MSBs conducted 95.5% of all remittance transactions in 2017, with banks doing 4.2%).

[54] *See, e.g.*, Press Release, U.S. Dep't of Justice, Western Union Admits Anti-Money Laundering and Consumer Fraud Violations, Forfeits $586 Million in Settlement with Justice Department and Federal Trade Commission (Jan. 19, 2017); Press Release, U.S. Dep't of Justice, MoneyGram International Inc. Agrees to Extend Deferred Prosecution Agreement, Forfeits $125 Million in Settlement with Justice Department and Federal Trade Commission (Nov. 8, 2018).

[55] PayPal owns Xoom. *See* XOOM, A PAYPAL SERVICE, https://www.xoom.com/ (last visited Sept. 19, 2019).

brick-and-mortar presence. Facebook has partnered with both MoneyGram and Western Union to integrate "chatbots" into its messenger service, facilitating the initiation of international and domestic transfers by Facebook users directly from Facebook's interface.[56]

IV. Crimes by electronic payments providers and their users

Aside from helping to "follow the money," having an understanding of how electronic payments systems work can help prosecutors develop charges against participants, including new entrants to the payments ecosystem, who fail to fulfill their legal obligations.

A "financial institution" for purposes of the BSA includes most players in the payment ecosystem, going well beyond depository institutions.[57] Specifically, the BSA also covers operators of credit card systems,[58] prepaid access providers,[59] broker dealers,[60] casinos,[61] futures commission merchants,[62] insurance companies,[63] mutual funds,[64] and MSBs.[65] This article will focus on MSBs, which include most peer-to-peer payment providers, digital wallets, and bill payment services.

MSBs generally include "a person wherever located doing business, whether or not on a regular basis or as an organized or licensed business concern, wholly or in substantial part within the United States, in one or more" of the following capacities: (1) dealer in foreign exchange; (2) check casher; (3) issuer of traveler's checks, money orders or stored value; (4) provider of prepaid access; (5) money

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[56] Odilon Almeida, *Messenger and Western Union: Creating Millions of Connections for Cross-Border Money Movement*, WESTERN UNION (Apr. 18, 2017), https://www.westernunion.com/blog/messenger-western-union/.

[57] *See* 31 C.F.R. § 1010.100(t); 31 U.S.C. § 5312(a)(2).

[58] 31 U.S.C. § 5312(a)(2)(L); 31 C.F.R. § 1028.

[59] 31 C.F.R. § 1010.100(ff)(4); 31 C.F.R. § 1010.100(ff)(7); 31 U.S.C.§ 5312(a).

[60] 31 C.F.R. § 1010.100(h); 31 C.F.R. § 1023; 31 U.S.C. § 5312(a)(2)(G).

[61] 31 C.F.R. § 1010.100(t)(5); 31 C.F.R. § 1021; 31 U.S.C. § 5312(a)(2)(X).

[62] 31 C.F.R. § 1010.100(x); 31 C.F.R. § 1026; 31 U.S.C. § 5312(a)(2)(H).

[63] 31 C.F.R. § 1025; 31 U.S.C. § 5312(a)(2)(M).

[64] 31 C.F.R. § 1010.100(gg); 31 U.S.C. § 5312(a)(2)(I).

[65] 31 U.S.C. § 5312(a)(2)(K)–(J); 31 U.S.C. § 5312(a)(2)(R); 31 C.F.R § 1010.100(ff)(5).

transmitter; (6) the U.S. Postal Service; or (7) seller of prepaid access.[66] Most peer-to-peer payment providers, digital wallets, and payment processors are "money transmitters," which include any person that provides money transmission services or is engaged in the transfer of funds, with no minimum transfer threshold.[67]

Whether a person is a money transmitter is a matter of facts and circumstances, and the Treasury's regulations exempt certain activities from the definition of "money transmitter."[68] Within the context of payment processing, FinCEN regulations expressly exclude from the definition of "money transmitter" several types of conduits that may facilitate a transaction but never take legal custody of the funds in whatever form.[69] Examples include communications equipment operators, Fedwire, and armored car services.[70] Notably, persons that accept and exchange substitutes for currency, such as convertible virtual currency, do not qualify for any exceptions to the definition of payment processor, are money transmitters, and accordingly, MSBs.[71]

18 U.S.C. § 1960 (Operating an Unlicensed Money Transmitting Business): Entities and individuals can face criminal consequences for knowingly operating a money transmitting business without a license.[72] Money transmitting, defined as "transferring funds on behalf of the public by any and all means," may include peer-to-peer payment networks, digital wallets, and bill payment services.[73] Money

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[66] 31 C.F.R. § 1010.100(ff).
[67] *See* 31 C.F.R. § 1010.100(ff)(5).
[68] 31 C.F.R. § 1010.100(ff)(5)(ii); *see* Memorandum from the Dep't of Treasury Fin. Crimes Enf't Network (Aug. 27, 2014).
[69] Memorandum from the Dep't of Treasury Fin. Crimes Enf't Network (May 9, 2019).
[70] 31 C.F.R. § 1010.100(ff)(5), *et seq*.
[71] *See* Memorandum from the Dep't of Treasury Fin. Crimes Enf't Network (Nov. 13, 2013).
[72] In 2001, section 1960 was amended to relax the scienter requirement (converting the offense to a general intent crime). *See* Courtney J. Linn, *One-Hour Money Laundering: Prosecuting Unlicensed Money Transmitting Businesses Using Section 1960*, 55 U.S. ATT'YS BULL., no. 5, 2007, at 34; United States v. Dimitrov, 546 F.3d 409 (7th Cir. 2008) ("[I]t is enough that the statute requires a defendant to know the facts that make his conduct illegal—*i.e.*, that he is operating an unlicensed MTB.").
[73] 18 U.S.C. § 1960(b)(2).

transmitters must register with FinCEN[74] and be licensed at the state level, if operating in a state that requires registration.[75] Currently 49 states plus the District of Columbia and Puerto Rico impose some sort of licensing requirement to engage in the business of money transmission or money services.[76] An MSB operating nationwide is currently required to maintain a separate license in each state. States, however, are developing reciprocity programs that could enable a licensee in one state to use its home state's license to do business in other states that sign the reciprocity pact.[77]

Money transmitters face separate criminal liability for conducting a money transmitting business knowing that the money is derived from a criminal offense, or that it is intended to be used for an unlawful purpose.[78]

31 U.S.C. §§ 5318(h) and 5322 (Failure to maintain a BSA compliance program): Within the traditional financial system, banks and credit unions continue to face BSA risk posed by businesses, including MSBs, that bank with them and may be facilitating illegal conduct. The BSA and its implementing regulations require financial

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[74] *MSB Registrant Search*, FIN. CRIMES ENF'T NETWORK, https://www.fincen.gov/msb-state-selector (last visited Sept. 19, 2019).
[75] 31 U.S.C. § 5311, *et seq*.
[76] *See State Contact Information for MSBs*, FIN. CRIMES ENF'T NETWORK, https://www.fincen.gov/sites/default/files/shared/msbstatecontactsfinal.pdf, for a list of states that have enacted some form of licensing requirement for money transmitting business. Forty-one states make information regarding state-licensed MSBs available on an online system, the National Mortgage Licensing System (NMLS). A quick online search can show whether any state enforcement actions are pending against an MSB, as well as provide contact information to subpoena documentation related to the licensee.
[77] In early 2018, seven states (Georgia, Illinois, Kansas, Massachusetts, Tennessee, Texas, and Washington) formed a "compact" which would, in effect, require only a single licensing process to do business in all seven states. This was presented as "the first step among state regulators in moving towards an integrated, 50-state system of licensing and supervision for fintechs." State Regulators Take First Step to Standardize Licensing Practices for Fintech Payments, CONFERENCE OF STATE BANK SUPERVISORS (Feb. 6, 2018), https://www.csbs.org/state-regulators-take-first-step-standardize-licensing-practices-fintech-payments.
[78] 18 U.S.C. § 1960(b)(1)(C) (making it an offense to conduct a money transmitting business knowing that the money is derived from a criminal offense, or that it is intended to be used for an unlawful purpose).

institutions to know their customers' business, the source of their customers' money, and the type of transactions that are typical for their customers. Financial institutions have an obligation to report or, in some cases, to refuse to conduct transactions they find suspicious, those that appear to be from an illegitimate source, have no legitimate business purpose, or are out of character with what they understand their customers' business to be.

Financial institutions subject to the BSA must file currency transaction reports (CTRs) for each deposit, withdrawal, exchange of currency, or other payment or transfer, by, through, or to such institution that involves a transaction in physical currency of more than $10,000.[79] They are also required to file SARs on "any suspicious transaction relevant to a possible violation of law or regulation."[80]

Financial institutions have an obligation to maintain a risk-based compliance program to identify and control for money laundering risk.[81] "Willful" failures to establish or maintain a program can be subject to criminal penalties.[82] While the requirements of an AML program vary depending on the type of financial institution, all financial institutions' AML programs are required, at minimum, to include:

- The development of internal policies, procedures, and controls;
- The designation of a compliance office;
- An ongoing employee training program; and
- An independent audit function to test whether programs are working.[83]

U.S. banks have an additional responsibility to do risk-based customer profiling.[84] Financial institutions are required to identify the natural persons behind the entities that bank with them, understand for what "nature and purpose" the entity is using the bank's services,

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[79] 31 U.S.C. § 5313; 31 C.F.R. § 1010.311.
[80] 31 U.S.C. § 5318(g); 31 C.F.R. § 1010.320.
[81] 31 U.S.C. § 5318(h); Joint Statement on Risk-Focused Bank Secrecy Act/Anti-Money Laundering Supervision, *supra* note 14.
[82] 31 C.F.R. § 1020.320; *see* M. Kendall Day, *Prosecuting Financial Institutions and Title 31 Offenses*, 61 U.S. ATT'YS BULL., no. 5, 2013, at 19.
[83] 31 U.S.C § 5318(h). *See generally* U.S. DEP'T OF JUSTICE CRIMINAL DIV., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS (2019).
[84] Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 91, 29398 (May 11, 2016); 31 C.F.R. § 1010.100, *et seq*.

and monitor that relationship accordingly. The level of risk associated with each customer then should inform the level of monitoring.

A depository institution may decide that past suspicious activity by a depositor or cardholder merits closure of that account. While criminal enterprises might spread their accounts among different depository institutions in order to evade detection and distribute the risk of becoming unbanked should any single bank or credit card issuer close their account, financial institutions are still obligated by law to monitor for and report suspicious transactions.

18 U.S.C. §§ 1956, 1957, the money laundering statutes:[85] Violations of the money laundering statutes require a financial transaction (section 1956) or a monetary transaction (section 1957). Given the breadth of these terms,[86] they likely include most transmissions of proceeds through the payments ecosystem described above.[87] Note that prosecution of a federally insured financial institution[88] for money laundering crimes requires prior authorization from the Money Laundering and Asset Recovery Section (MLARS). In cases where the financial institution involved is a "non-bank financial institution," such as a check-cashing service or a casa de cambio, which is a stand-alone business and not a branch of a larger institution, this requirement does not apply.[89]

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[85] *See* Stephen M. May, *Merger Issues in Money Laundering Cases*, 67 DOJ J. FED. L. & PRAC., no. 3, 2019, at 253–98.

[86] *E.g.*, Financial transaction is defined by 18 U.S.C. § 1956(c)(4) as:

> (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree.

[87] *See* United States v. Herron, 97 F.3d 234, 237 (8th Cir. 1996) (wire transfer through Western Union is a financial transaction); United States v. Brown, 31 F.3d 484, 489 n.4 (7th Cir. 1994) (processing credit card charges involves "payment, transfer, or delivery by, through, or to a financial institution").

[88] *See* 18 U.S.C. § 20.

[89] JUSTICE MANUAL § 9-105.300(4) (Approval Requirements for Money Laundering Cases).

Crimes by electronic payment users: 18 U.S.C. § 1343 (Wire Fraud); 18 U.S.C. § 1344 (Bank Fraud); 18 U.S. § 1028(a) (Aggravated Identity Theft):[90] Absent appropriate monitoring, electronic payment systems can be ideal instruments for criminal wrongdoers. Electronic payment systems operators' diligence in their AML compliance responsibilities becomes all the more important as the following types of scams proliferate:

- *Card trial and error:* Because digital wallets can store numerous stolen credit and debit card credentials, criminals can buy stolen card numbers, load them onto a digital wallet, and quickly cycle through each card until they find credentials that work. Digital wallets can be purely digital, such as Apple Pay, or can be a rewritable EMV[91] chip that can store 30 payment cards (like a physical digital wallet). One example of a rewritable EMV chip is a FUZE card, which has a toggle switch that enables the user to switch among the 30 cards in rapid succession at the point of sale.[92]
- *Layering transactions:* A series of recent Florida cases illustrates how criminals can abuse electronic payment systems and attempt to cover their tracks by doing a rapid series of transactions through various electronic means.[93] There, co-defendants acquired card numbers and other credentials belonging to Capital One cardholders on the dark web. They then linked the credit cards to Apple Pay in order to encrypt the original card numbers and make them more difficult to track back to co-defendants. They then purchased a series of prepaid cards from Walgreens until they maxed out ("busted out") the

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[90] Note: Of these charges, 18 U.S.C. § 1028(a) is not an SUA for purposes of a money laundering charge.

[91] EMV refers to a set of international security standards promulgated by card networks Europay, MasterCard, and Visa. To date, the U.S. has partially adopted EMV-recommended standards, including use of chip-and-pin or chip and signature, at the point of sale. *See generally* PATRICIA MOLONEY FIGLIOLA, CONG. RESEARCH SERV., R43925, THE EMV CHIP CARD TRANSITION: BACKGROUND, STATUS, AND ISSUES FOR CONGRESS (2016).

[92] FUZE CARD, https://fuzecard.com/.

[93] United States v. Wesley, No. 18-cr-14 (M.D. Fla. 2018); United States v. Bishop, No. 3:17-cr-00006 (M.D. Fla 2018).

credit card limits, and sold the prepaid cards off to unsuspecting purchasers.

- *Business ID theft:* Wrongdoers can establish new merchants or impersonate an existing merchant using stolen PII/business credentials. Once they have a merchant ID, they can launder funds by accepting sham "purchases." Conversely, they can generate refunds onto gift cards, and then withdraw the cash from ATMs.[94]
- *Synthetic ID theft:* Perpetrators are increasingly combining fictitious and sometimes real information, such as SSNs and names, to create new identities to defraud financial institutions, government agencies, or individuals.[95] Creating a synthetic identity entails tricking the credit bureaus' own processes and databases into creating a new "person" and then after a few months of cultivating the identity, using it to receive an extension of credit. A fraudster applies for credit from a financial institution using the amalgamated, or synthetic, identity. The financial institution submits an inquiry to one or more of the credit bureaus, who will report that the identity does not have a credit history, thus meriting a denial of credit by the financial institution. After a series of denials, the credit rating agencies will establish a credit file, or record in their databases, for the synthetic identity. The new identity is born, and the fraudsters can eventually get an extension of credit using that new, and very difficult to trace, identity.

V. Future trends

Because financial institutions remain the gatekeepers to the payment rails in the United States, new payment providers will generally still need to partner with depository institutions for access to payment networks. Payment systems that wish to profit from transactions relating to illegal activity will continue to seek out financial institutions with weak compliance systems. While non-bank payment companies may someday have a path toward receiving their

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[94] STATE OF COLORADO, BUSINESS IDENTITY THEFT RESOURCE GUIDE: A GUIDE TO PROTECTING YOUR BUSINESS AND RECOVERING FROM BUSINESS IDENTITY THEFT (2012).

[95] THE FEDERAL RESERVE, PAYMENTS FRAUD INSIGHTS: SYNTHETIC IDENTITY FRAUD IN THE U.S. PAYMENTS SYSTEM (July 2019).

own bank charters from federal or state regulators, no federal regulator has yet granted such a provisional charter, and current pilot programs, such as one from the Office of the Comptroller of the Currency (OCC), require that a fintech company be partnered with a supervised financial institution to be eligible.[96] In addition, depository institutions that are either struggling due to declining deposits or growing quickly without building out compliance systems commensurate to the risk may tend to partner with emerging payment systems, with the worst players finding their way to the weakest compliance programs.

Existing payments players will add functionality that will enhance the customer experience, but also may enhance risk. For example:

- New products provided by the card networks will enable card users to "push" payments to recipients, as opposed to the current model where merchants start the authorization process and "pull" the payment from the card.[97] This change has the potential of making the network operators' risk monitoring task, which currently focuses on merchants, far more difficult.
- Digital wallets are developing new mechanisms, such as debit cards that can do contactless transactions and ATM withdrawals, to enable their users to spend digital wallet funds. PayPal, Venmo, Square, and Apple currently offer such cards.[98] With such a card, a user who does not want to hold funds in a depository institution can just use a digital wallet account for everyday transactions.

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[96] *See, e.g.*, Press Release, Lydia Beyoud, Jack Dorsey's Square Faces Local Headwinds in Bank Charter Bid (May 7, 2019); Press Release, PYMNTS.com, OCC Seeks Public Comment On Innovation Pilot Program (May 27, 2019) ("[E]ntities eligible for the pilot program include OCC-supervised financial institutions, a roster of companies that engage third parties . . . Third parties, such as FinTechs, may not independently submit a proposal for the proposed pilot program.").

[97] BUREAU OF CONSUMER FIN. PROT., PREPAID ACCOUNTS UNDER THE ELECTRONIC FUND TRANSFER ACT (REGULATION E) AND THE TRUTH IN LENDING ACT (REGULATION Z) 104 (2016).

[98] Abrar Al-Heeti, *Apple Card, Venmo Card and PayPal Card: Which should you get?*, C-NET (May 29, 2019), https://www.cnet.com/news/apple-card-venmo-card-and-paypal-card-which-should-you-get/.

- Virtual currency exchanges may develop point-of-sale capabilities that enable the user to convert digital coin to U.S. dollars at the register.[99]
- Peer-to-peer payment networks, such as Venmo, are enabling users to send payments by scanning the recipient's QR code, a square grid-shaped barcode which can be read by an imaging device such as a cell-phone camera. The sender need not even know the username or identity of the recipient as long as the sender phone scans the QR code produced by the recipient.[100]
- Payments may also become faster: ACH payments, which currently settle only once after close of business, may be divided into multiple batches that settle intra-day.[101] Fedwire and other Federal Reserve payment facilities may be available 24/7.[102]

While these features of U.S.-based providers may enable individuals to move money more quickly or with different risk shifting, they are still somewhat different from non-bank payment systems currently in use abroad.

Banks will remain involved somewhere in the transaction: While these features of U.S.-based providers may enable individuals to move money more quickly or with different risk shifting, they still involve a bank in the role of introducing the transaction onto the network, issuing cards, or holding merchant funds acquired from purchasers. The bank-centric nature of the U.S. market is not expected to change any time soon, despite the fact that other countries have adopted payment systems that grew up centered around industries other than financial services, such as mobile phone networks.

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[99] *E.g.*, *Introducing Flexacoin*, FLEXA, https://medium.com/flexa/introducing-flexacoin-b4c8099e3a91.

[100] This model is also in use by China's Ant Financial (which transmits funds via AliPay) and Tencent (which transmits funds via WeChat). A recipient, such as a shopkeeper, displays a code that customers scan with their mobile phones to initiate payment. Or a customer's WeChat or Alipay account can generate a unique, one-time code that the retailer scans to complete the transaction.

[101] *Same Day ACH Resource Center*, NACHA, https://www.nacha.org/content/same-day-ach-resource-center (last visited Sept. 19, 2019).

[102] Federal Reserve Board, Federal Reserve Announces Plan to Develop a New Round-the-clock real-time payment and settlement service to support faster payments (Aug. 5, 2019).

Some countries around the globe with less developed banking networks skipped checks and cards and went straight to mobile-device-driven payments as their main payment mechanism.

- In China, for example, the majority of all payments are made with smartphones. Social media platforms Ant Financial (AliPay) and Tencent (WeChat) have established dominant positions by offering consumers mobile wallets and financial services, including money-market accounts, investment advice and short-term loans.[103] Merchants that lack a point-of-sale device can simply post a piece of paper with their QR code near the register at which customers point their phones' cameras to execute payments in reverse. This is an extremely low-cost means of onboarding merchants, but it creates a great deal of risk for the payment network, which no longer has enough information about the merchant to do appropriate risk monitoring. The Chinese government is attempting to address this lack of visibility by standing up a government-run clearinghouse that will track payment traffic.[104]
- In Africa and the Middle East, it is the telecom and cell phone providers who have acted as financial service providers. One such telecom has developed a grassroots financial services system, M-PESA, which allows users to transfer value, pay bills, and receive microfinancing using their mobile phone account instead of a bank account.[105] Users originally traded in their excess airtime as a proxy for money transfer. This swapping of airtime credit quickly evolved into a system for value transfer in Kenya and Tanzania, and M-PESA has since expanded to Afghanistan, South Africa, India, and Albania.[106] Mobile network

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[103] *What The Largest Global Fintech Can Teach Us About What's Next In Financial Services*, CBINSIGHTS (Oct. 4, 2018), https://www.cbinsights.com/research/ant-financial-alipay-fintech/.
[104] John Engen, *Lessons From a Mobile Payments Revolution*, AM. BANKER, https://www.americanbanker.com/news/why-chinas-mobile-payments-revolution-matters-for-us-bankers.
[105] Press Release, Vodafone Group, Vodafone Marks 10 Years of the World's Leading Mobile Money Service, M-Pesa (Feb. 21, 2017).
[106] *Why Does Kenya Lead the World in Mobile Money?*, THE ECONOMIST (Mar. 2, 2015), https://www.google.com/amp/s/amp.economist.com/the-economist-explains/2015/03/02/why-does-kenya-lead-the-world-in-mobile-money.

operators Safaricom and Vodacom (the sub-Saharan subsidiary of Vodaphone) distribute SIM cards that enable users to make payments and transfer money to vendors and family members using SMS messages.[107] For a transaction to take place, both parties have to exchange each other's phone numbers because the phone numbers act as account numbers. Users with no bank accounts can deposit cash at an M-PESA kiosk, usually located within a grocery or convenience store. The depositor enters the kiosk attendant's "agent number," and the agent uses her mobile device to credit the depositor's account for the amount of cash.[108] Cash collected from M-PESA depositors is deposited in insured bank accounts held by the mobile carrier, for example Safaricom in Kenya. To combat fraud, Safaricom mandates that users of a Safaricom SIM card who want to register for M-PESA do so with a valid government ID such as the Kenyan National ID card or a passport. This way, each transaction is marked with the identification of the party transferring, paying, depositing or withdrawing money from an account.

In both of these examples above, transferring value is as simple as sending a text message, and there is no traditional "bank" involved in the transaction. It is expected that banks will remain involved in such transactions, especially given mobile phone providers' unsuccessful foray into letting consumers make purchases that would bill to their cell phone accounts.[109] Before 2015, consumers could purchase apps, ringtones, games, books, movies, and music, and the purchases appeared as charges on consumers' cell phone bills. Wireless carriers tended to outsource payment processing and collection for these purchases but, problematically, were failing to monitor chargebacks and consumer disputes related to these charges, resulting in a series

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[107] Murithi Mutiga, *Kenya's Banking Revolution Lights a Fire*, N.Y. TIMES (Jan. 20, 2014), https://www.nytimes.com/2014/01/21/opinion/kenyas-banking-revolution-lights-a-fire.html.

[108] Chris Weller, *A Mobile Banking Service is Transforming How the Poor Transfer Money—Here's How it Works*, BUSINESS INSIDER (Dec. 16, 2017), https://www.businessinsider.com/mpesa-transforming-how-poor-people-use-money-walk-thru-2017-12.

[109] *See, e.g.*, CFPB v. Sprint Corp., No. 14-cv-9931 (S.D.N.Y Dec. 1, 2014); FTC v. AT&T Mobility LLC, No. 1:14-cv-3227 (N.D. Ga. Dec. 8, 2014).

of settlements by the major wireless carriers with the Federal Trade Commission and the Consumer Financial Protection Bureau.[110]

But U.S. telecom providers may yet get back into financial services as payment processors or digital wallets, given the ubiquity of mobile devices and demand for financial services among the unbanked. T-Mobile is again trying a financial services play, this time with a bank behind it. T-Mobile MONEY offers its users a bank account where most services can be performed by mobile phone. The FDIC insured account is held by Customers Bank, which issues the user a debit card to use at ATMs and points of sale.[111] T-Mobile MONEY is essentially no different than a bank's mobile interface; what is novel is that the cellular provider is bringing its users to the bank, as opposed to the bank's developing a mobile front end.

Investigators and prosecutors seeking information regarding payments made in foreign countries or where the evidence may reside abroad should consider the following potential questions:

- Is the potential evidence held by a "financial institution" or a "provider" of stored communications?
- If it is a provider, does it have records located in both the U.S. and abroad?
- If it is a financial institution, does it have a branch in the U.S.?
- If it is a financial institution, does it have a correspondent bank.

First, under the 2018 Clarifying Lawful Overseas Use of Data Act (CLOUD Act), section 2703 warrants can be used to compel service providers located in the United States to produce information stored on servers located abroad.[112] To the extent that information is sought

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[110] *See, e.g.*, Press Release, Consumer Fin. Protection Bureau, CFPB Takes Action to Obtain $120 Million in Redress from Sprint and Verizon for Illegal Mobile Cramming (May 12, 2015).

[111] *Terms and Conditions and Related Disclosures*, T-MOBILE, https://www.t-mobilemoney.com/en/terms.html (last visited Sept. 19, 2019).

[112] "A [service provider] shall comply with the obligations of this chapter to preserve, backup, or disclose the contents of a wire or electronic communication and any record or other information pertaining to a customer or subscriber within such provider's possession, custody, or control, regardless of whether such communication, record, or other information is located within or outside of the United States." United States v. Microsoft

from a U.S. payments provider that also offers services abroad, the Stored Communications Act provides a clear path forward.

Second, a financial institution or provider located exclusively abroad, the Office of International Affairs (OIA) in the Criminal Division can advise regarding the various foreign treaties, including Mutual Legal Assistance Treaties (MLATs) and tax treaties, and requests available with foreign countries. There are two nontreaty methods for obtaining foreign bank records. First, a *Bank of Nova Scotia* subpoena can be used to obtain record located in overseas branches of banks that have branches in the United States. Note, that OIA approval is required according to the guidelines set out in the Justice Manual.

A second, and far more rarely approved, method for obtaining foreign bank records involves the use of 31 U.S.C. § 5318(d), a provision of the USA PATRIOT Act. This permits law enforcement agents to obtain bank record of a foreign bank that has a correspondent bank account in the United States. Once a section 5318(d) subpoena is served on the correspondent bank located in the U.S., the foreign bank is then required to supply the records of the U.S. correspondent.[113]

VI. MLARS and the Bank Integrity Unit (BIU) as your strategic partner

Under the Justice Manual, MLARS is charged with "supervisory authority" over BSA investigations and prosecutions.[114] To meet that charge, in 2010, MLARS established the BIU, which is a unit of

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Corp., 138 S. Ct. 1186, 1187–88 (2018) (citing CLOUD Act § 103(a)(1) (codified at 18 U.S.C. § 2701, *et seq.*)).

[113] *See* 31 U.S.C. § 5318(d).

[114] JUSTICE MANUAL § 9-79.200 ("The Money Laundering and Asset Forfeiture Section of the Criminal Division has supervisory authority over the Bank Records and Foreign Transactions Act. Assistant United States Attorneys should keep the Department of Justice advised respecting the developments in important Bank Secrecy Act cases as they arise."). Note, however, that MLARS's advance approval of BSA prosecution is required only where a federally insured financial institution (18 U.S.C. § 20) "would be named as a defendant, or in which a financial institution would be named as an unindicted co-conspirator or allowed to enter into a Deferred Prosecution Agreement or Non-Prosecution Agreement." JUSTICE MANUAL § 9-105.300(4) (Approval Requirements for Money Laundering Cases).

prosecutors whose mission specifically includes investigating and prosecuting financial institutions for BSA violations, among other federal crimes. The BIU is also charged with investigating and prosecuting financial institutions for violations of other criminal laws, including the International Emergency Economic Powers Act, Trading with the Enemy Act, and money laundering statutes. The BIU often works with U.S. Attorneys' Offices on these cases, in addition to a long list of domestic federal and state banking regulators, FinCEN and the Office of Foreign Assets Control as well as international law enforcement and regulatory partners.

One of the reasons for creating such a specialized unit is that prosecuting financial institutions and related individuals can be a difficult and time-consuming endeavor. For example, criminal violations of the BSA require proof not only that misconduct occurred, but also that defendants act "willfully," meaning the defendant understood its obligations under the law and deliberately chose to violate the law, demonstrated a flagrant organizational indifference, or was willfully blind.[115] Proof of this scienter often requires prosecutors to engage in lengthy investigations that involve numerous interviews and voluminous document reviews. Even then, prosecutorial discretion may counsel against bringing criminal cases that do not involve egregious or systemic failures. Lastly, many criminal investigations of financial institutions are carried out in parallel with both domestic and international criminal, civil, and regulatory agencies, which raises its own set of issues.[116]

The experiences and expertise compiled by the BIU over the past decade has been invaluable with respect to investigating not only traditional financial institutions for possible BSA violations, but also new entrants to the payments ecosystem, including digital currency exchanges and payment providers. This experience and expertise has also been important in working with both traditional and new financial institutions in collecting information and evidence relevant

[115] United States v. Bank of New England, N.A., 821 F.2d 844, 854–59 (1st Cir. 1987).

[116] CRIMINAL RES. MANUAL § 2464 (citing Mem. on Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings (Jan. 30, 2012)).

to white collar investigations. MLARS and BIU should be counted as a resource for law enforcement in such cases.[117]

VII. Conclusion

New financial technologies for making payments and moving funds, like Apple Pay and Venmo, are no longer novelties, but they now have gained wide acceptance among U.S. consumers. Newer financial products that promise to make payments even faster, easier, and cheaper are already on the horizon, and the pace of innovation in this sector shows no sign of slowing down. The downside of increased customer convenience in moving funds quickly and easily is the enhanced opportunities that financial criminals now have to commit their crimes and quickly spirit away proceeds via the payment networks. Costs of monitoring the networks and transactions that flow through them had traditionally been borne by banks and other regulated financial institutions. As new non-bank payment companies and other historically unregulated players enter the payments markets, investigators and law enforcement should maintain a current understanding of where in the payment transaction a given investigation subject or witness fits, how to gather useful potential evidence regarding the transaction and the individuals behind it, and how to fill information gaps as transactions increase in complexity. MLARS attorneys in the BIU stand ready to lend expertise and resources in appropriate cases.

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[117] While not the focus of this article, financial technologies that involve virtual currency remain the 500-pound gorilla when it comes to AML and other criminal threats to our U.S. financial system. To address this threat, in 2017, MLARS established a Digital Currency Initiative, which provides law enforcement with legal support and guidance on prosecutions and forfeitures involving digital payments and cryptocurrency. Along with our partners at the Department of Justice (Department)'s Computer Crimes and Intellectual Property Section, MLARS: (1) advises federal prosecutors and agents on complex questions of law related to digital payments and cryptocurrency to inform charging decisions and prosecutorial, seizure, and forfeiture strategies, particularly as relating to money laundering activities; (2) provides training to encourage and enable more investigators, prosecutors, and Department agencies to pursue such cases; and (3) develops and disseminates policy guidance on various aspects of digital payments and cryptocurrency, including seizure and forfeiture.

About the Authors

Elizabeth Boison is a Trial Attorney in the Bank Integrity Unit. She joined the Department in 2017 following service in various roles, including Enforcement Attorney and Senior Counsel to the Deputy Director at a federal banking regulator. In those roles, she developed the agency's enforcement approach to digital wallets, prepaid cards, and mobile payments and counseled the no-action letter committee regarding applications from fintech innovators. Before joining the government, she was a litigation and international investigations associate at an international law firm, Online Banking Product Manager at a large bank, and the Director of Strategic Partnerships at a ground-floor internet startup that offered credit card and loyalty rewards in the form of fractional ownership in securities.

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Editor's Note: In September 2018, the Deputy Attorney General's Office released a complete revision of the United States Attorneys' Manual and renamed it the Justice Manual. As part of this revision process, all Resource Manuals associated with the Justice Manual, including the Criminal Resource Manual cited herein, were not revised. They will eventually be archived for historical purposes only. The policy memo now contained in Criminal Resource Manual § 2464 will eventually be incorporated into the Justice Manual.

The Intersection of State and Federal Law in Asset Forfeiture Cases: Concurrent Jurisdiction, Turnover Orders, and Emerging State Law Trends

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I. Introduction

The Asset Forfeiture Program has witnessed unprecedented growth over the last three decades due to the expansion of seizure and forfeiture authority to punish criminals and deprive them of the fruits of their crimes. With this growth, however, comes the potential for in rem jurisdictional conflicts, especially when a seizure for federal forfeiture is conducted by state and local law enforcement. This article addresses seizures by state and local law enforcement, the concurrent jurisdiction doctrine, and the case law centering on its application involving in rem or quasi in rem jurisdictional issues involving seizures, and trends in state legislation arising from the intersection of federal asset forfeiture and federal, state, and local seizures.

II. Seizures by state and local law enforcement

When state and local law enforcement seize an asset for federal forfeiture, it increases the likelihood of an in rem jurisdictional conflict between the state and federal legal systems. These seizures generally fall in two categories: (1) seizure for adoptive forfeiture (commonly referred to as "adoptions"), that is, a seizure of property under state law, without federal oversight or involvement, in which

state and local law enforcement request that a federal agency take the seized asset into its custody and proceed to forfeit the asset under federal law;[1] and (2) seizures by state and local law enforcement that are the result of a joint federal-state investigation or were coordinated with federal authorities as part of an ongoing federal investigation.[2] The sections below address each type of seizure by a state and local law enforcement officer and its potential to implicate the concurrent jurisdiction doctrine.

A. Seizures for adoptive forfeiture

The practice of adoption has existed since the early 1900s,[3] but its usage increased in the 1980s with the enactment of the Comprehensive Crime Control Act of 1984.[4] The Act dramatically expanded the forfeiture laws by permitting the forfeiture of property used to facilitate a criminal offense,[5] creating the Department of Justice Assets Forfeiture Fund,[6] and authorizing the Attorney General and the Secretary of the Treasury to share federally forfeited property with participating state and local law enforcement agencies.[7] The early guidance on equitable sharing specifically allowed for

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[1] ASSET FORFEITURE POLICY MANUAL (2019), Chap.3, Sec.II.A.
[2] ASSET FORFEITURE POLICY MANUAL (2019), Chap.3, Sec.II.B.1.
[3] *See* United States v. One Ford Coupe Auto, 272 U.S. 321, 325 (1926) (recognizing adoptive forfeitures as appropriate); Madewell v. Downs, 68 F.3d 1030, 1037 (8th Cir. 1995) ("A federal agency may adopt the seizure of property seized by another agency . . . ."); United States v. One 1992 Ford Mustang GT, 73 F. Supp. 2d 1131, 1137 (C.D. Cal. 1999) (same); Ivester v. Lee, 991 F. Supp. 1113, 1119 (E.D. Mo. 1998) (quoting *Madewell*, 68 F.3d at 1037); *see also* 28 C.F.R. §§ 8.3–8.5.
[4] Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2052 (codified at 28 U.S.C. § 524); Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2052 (1984) (codified at 21 U.S.C. § 881(e)(1)(A); 19 U.S.C. § 1616a(c); 18 U.S.C. § 981(e)(2)); *see also* DEP'T OF JUST., ASSETS SEIZURE & FORFEITURE: DEVELOPING AND MAINTAINING A STATE CAPABILITY, APP. B: A GUIDE TO EQUITABLE SHARING OF FEDERALLY FORFEITED PROPERTY FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES (Mar. 1994).
[5] 21 U.S.C. § 881(a)(7) (authorizing forfeiture of real property used or intended to be used to commit or to facilitate the commission of a drug offense).
[6] 28 U.S.C. § 524(c).
[7] 21 U.S.C. § 881(e)(1)(A); 18 U.S.C. § 981(e)(2); 31 U.S.C. §§ 9705(b)(4)(A), (b)(4)(B).

sharing in adoption cases with state and local law enforcement agencies that participated in the seizure of an asset that led to federal forfeiture.[8]

The Civil Asset Forfeiture Reform Act of 2000 (CAFRA) codified the practice of adoptions and extended the deadline for commencing an administrative forfeiture proceeding to 90 days in adoptive forfeiture cases.[9] This provided the state or local law enforcement agency with additional time to transfer the property to federal law enforcement.[10] The statute, however, did not address situations where the state or local agency would be required by state law to obtain a "turnover order"—a judicial order releasing the property from the jurisdiction of a state court before the property is turned over to federal law enforcement for federal forfeiture.[11]

In 2017, the Department of Justice (Department) issued Attorney General Order No. 3946-20171 authorizing federal adoption of all types of assets seized lawfully by state or local law enforcement under their respective state laws whenever the conduct giving rise to the seizure violates federal law.[12] This order also lifted the restrictions previously imposed by the Attorney General in 2015.[13] The

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[8] DEP'T OF JUST., GUIDE TO EQUITABLE SHARING FOR STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT AGENCIES (2018); DEP'T OF JUST., THE ATTORNEY GENERAL GUIDELINES ON SEIZED AND FORFEITED PROPERTY Ch. V. (1990).

[9] Codified at 18 U.S.C. § 981; 18 U.S.C. § 983(a)(1)(A)(iv).

[10] Before CAFRA, Department policy required that seizures be presented for federal adoption within 30 days. United States v. $639,470.00 U.S. Currency, 919 F. Supp. 1405, 1413–14 (C.D. Cal. 1996). The time limit could be extended for good cause, however, and failure to meet it would not necessarily be grounds for dismissal of the forfeiture action. *Id.*

[11] *See, e.g.*, 18 U.S.C. § 981(b)(2)(C) (civil forfeiture statute includes an exemption to the warrant requirement if "the property was lawfully seized by a State or local law enforcement agency and transferred to a Federal agency").

[12] *See* Att'y Gen. Order No. 3946-2017, Federal Forfeiture of Property Seized by State and Local Law Enforcement Agencies (2017).

[13] On January 16, 2015, the Department issued Attorney General Order No. 3488-2015, limiting situations in which participants in the Department's Asset Forfeiture Program were authorized to adopt assets seized by state or local law enforcement under state law, in order for the property to be forfeited under federal law. Pursuant to this order, agencies were permitted to adopt the forfeiture of only those assets seized by state or local law enforcement agencies that directly impacted public safety concerns, namely

Department of the Treasury (Treasury) issued a substantially similar directive on July 26, 2017.[14]

The updated adoption policy established several safeguards designed to ensure sufficient evidence of criminal activity associated with a federal adoptive forfeiture.[15] In particular, legal counsel at the federal agency adopting the seized property must review all seizures for compliance with law, especially seizures made pursuant to an exception to the Fourth Amendment's warrant requirement.[16] State and local law enforcement agencies seeking federal adoption of seized assets must provide information about the probable cause justifying the seizure to assist federal legal counsel in this review process.[17] Most importantly, state and local agencies are required to certify to the Department that they have obtained a turnover order, if necessary, and that the adoption request complies with their state laws.[18] This requirement is critical to ensure that in rem jurisdiction by the state over the asset has been relinquished.

Only an attorney outside the chain-of-command of operational officials (that is, the agency's office of chief counsel or other legal unit)

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firearms, ammunition, explosives, and property associated with child pornography. The order prohibited the adoption of all other property, such as vehicles, valuables, and cash, unless one of the exceptions set forth in the policy was applicable. *See* Att'y Gen. Order No. 3488-2015, Prohibition on Certain Federal Adoptions of Seizures by State and Local Law Enforcement Agencies (2015).

[14] *See* Treasury Exec. Office for Asset Forfeiture, Dep't of the Treasury, TEOAF Directive No. 34—Policy Regarding the Federal Adoption of Seizures by State and Local Law Enforcement Agencies (2017).

[15] The new policy also requires that adoptions of cash in amounts equal to or less than $10,000 may require additional safeguards. Those adoptions are permissible where the seizure was conducted: (1) pursuant to a state warrant; (2) incident to arrest for an offense relevant to the forfeiture; (3) at the same time as a seizure of contraband relevant to the forfeiture; or (4) where the owner or person from whom the property is seized makes admissions regarding the criminally derived nature of the property. If a federal agency seeks to adopt cash equal to or less than $10,000, and none of these safeguards are present, then the agency may proceed with the adoption only if the United States Attorney's Office (USAO) first concurs. *See* ASSET FORFEITURE POLICY MANUAL (2019), Chap.3, Sec.II.A.

[16] *Id.*

[17] *Id.*

[18] *Id.*

may approve a request for adoption.[19] When reviewing an adoption request the attorney must verify that:

(1) the property is subject to federal forfeiture;
(2) the state or local law enforcement agency has provided sufficient information about the probable cause determination justifying the seizure;
(3) the property is not subject to the jurisdiction of a state court;
(4) there is no other legal impediment to a successful forfeiture action; and
(5) the state or local law enforcement agency has certified that the adoption complies with state law and that the appropriate state turnover order has been obtained, if applicable.[20]

This review process is essential to ensure that the federal government does not take custody of an asset until all state requirements have been met and the state no longer has in rem jurisdiction over the asset. As discussed later in the article, many states have enacted laws that prohibit state and local law enforcement from transferring an asset to federal law enforcement for federal adoption or that impose restrictions for when an asset can be transferred to federal law enforcement for forfeiture.

B. Seizures as part of a joint investigation

Joint investigative seizures are not adoptive seizures by definition, but they still may trigger concurrent jurisdiction conflicts depending on the laws of the state where the seizure occurred. Joint investigative seizures typically fall into two categories: (1) a seizure by a state or local law enforcement officer made pursuant to his or her authority as a credentialed and deputized federal law enforcement officer; and (2) a seizure by a state or local law enforcement officer as part of a joint investigation.[21]

Federal statutes authorize federal law enforcement agencies to deputize state, tribal, and local law enforcement officers to carry out certain federal functions, such as executing warrants, making arrests,

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[19] *Id.* at Chap.3, Sec.II.B.2.
[20] *Id.*
[21] *Id.* at Chap.3, Sec.II.B.1.

and seizing property.[22] These deputized task force officers (TFOs) are a force-multiplier for federal investigations, as federal law enforcement agencies lack the staff to deploy large teams of federal agents on every federal investigation.[23]

Department policy recognizes a seizure by a federal TFO as a federal seizure only if the following three conditions are present: (1) the TFO was a credentialed, deputized federal law enforcement at the time of the seizure; (2) the TFO was assigned to a task force operated by a federal law enforcement agency at the time of the seizure; and (3) the TFO's actions and authorizations for those actions at the time of seizure were related to task force duties and were not conducted solely pursuant to duties and authorizations as a state or local law enforcement agent.[24]

If these factors are absent, it does not necessarily mean that the seizure does not qualify as a federal seizure. State and local law enforcement agencies routinely work together with federal law enforcement on joint investigations without formal TFO designation. In those cases, Department policy will recognize a seizure as a federal seizure under the following circumstances:

- Seizure is made at the direction of, or in coordination with, a sworn federal law enforcement officer in conjunction with a pre-existing federal criminal investigation; or
- Seizure is made as part of a pre-existing joint federal-state or federal-local criminal investigation in which a federal law enforcement agency is actively participating for the purpose of pursuing federal criminal charges against one or more specific persons or entities; or
- Seizure is made as part of a pre-existing joint federal-state or federal-local criminal investigation in which a federal law enforcement agency is

[22] *See* 21 U.S.C. § 878.

[23] TFOs currently double the ranks of DEA staff. DEA task forces are staffed by over 2,200 DEA special agents and over 2,500 state and local officers. *See Task Forces*, UNITED STATES DRUG ENF'T ADMIN., https://www.dea.gov/task-forces (last visited Sep. 10, 2019).

[24] ASSET FORFEITURE POLICY MANUAL (2019), Chap.3, Sec.II.B.1.a.

> actively participating and the seizure arose from the joint investigation.[25]

Generally, for a state or local seizure to be considered a joint investigative seizure, a federal law enforcement agency must have: (1) had advance notice of the seizure; (2) concurred that the seizure was appropriate and in furtherance of the goals of the investigation; and (3) had an open federal criminal investigation.[26] These requirements ensure that joint investigations encompass only federally sanctioned investigative priorities.

If these factors are not present, then an asset seized by a state or local law enforcement officer must be adopted by a federal law enforcement agency before a federal criminal or civil forfeiture case may proceed.

Seizures made pursuant to federal investigations may be conducted by federal agents, state and local law enforcement officers serving on a federal task force, or state and local law enforcement officers who are acting pursuant to a joint federal-state investigation. Seizures made by federal law enforcement pursuant to federal law do not raise concurrent jurisdiction issues, as the seized assets remain exclusively under federal jurisdiction. When federal law enforcement agencies investigate a crime in tandem with state and local agencies, however, state jurisdiction over an asset may be triggered in a variety of ways.

III. The concurrent jurisdiction doctrine

The concurrent jurisdiction doctrine addresses whether more than one court may assert jurisdiction over a specific asset, or res, at the same time.[27] Whether concurrent jurisdiction exists depends upon the type of jurisdiction being asserted by each court. A court's assertion of in personam jurisdiction does not preclude the assertion of jurisdiction by another court or agency.[28] It has long been established, however,

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[25] *Id.* at Chap.3, Sec.II.B.1.b.

[26] *Id.*

[27] United States v. Jerabek Personal Property Specifically Described As: A 2008 Dodge Charger, 2014 WL 932055, at *7 (E.D.N.C. Mar. 10, 2014) (citing United States v. $174,206.00 in U.S. Currency, 320 F.3d 658, 661 (6th Cir. 2003)).

[28] City of Concord, N.C., v. Robinson, 914 F. Supp. 2d 696, 709 (M.D.N.C. 2012).

that the court that first asserts in rem or quasi in rem jurisdiction[29] over property does so to the exclusion of all other courts "to avoid unseemly and disastrous conflicts in the administration of our dual judicial system."[30]

Forfeiture of assets related to criminal activity may occur in either criminal cases or civil actions, or, in some state systems, a hybrid of the two.[31] In the federal system, criminal forfeiture proceedings are in personam proceedings, while civil forfeiture proceedings are in rem proceedings.[32] State forfeiture statutes broadly follow the same dichotomy, but whether any given state statute operates in personam or in rem can be determined only after close review of the statute and court decisions applying and interpreting it.[33]

Where a court declares, however, that its jurisdiction over an asset is in rem, the court's determination may itself preclude another court from reaching an independent determination of that issue. In several recent cases, state courts have concluded that their jurisdiction was in rem, and have ordered state agencies to return seized assets to a claimant notwithstanding that the assets had already been provided to federal authorities for federal adoptive forfeiture proceedings.

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[29] Quasi in rem jurisdiction is defined as "an action brought against the defendant personally, with jurisdiction based on an interest in property, the objective being to deal with the particular property or to subject the property to the discharge of the claims asserted." Schmidt v. Fidelity Nat'l Title Ins., Co., 2008 WL 5082860, at *10 n.3 (D. Haw. Nov. 26, 2008) (citing BLACK'S LAW DICTIONARY, 8th ed. 2004).

[30] Penn Gen. Casualty Co. v. Pennsylvania *ex rel.* Schnader, 294 U.S. 189, 195 (1935).

[31] For example, Missouri's forfeiture law permits civil forfeiture of assets, but forbids forfeiture where a related criminal case has been brought unless there is a conviction. MO. ANN. STAT. §§ 513.607, 513.617 (West).

[32] United States v. Lazarenko, 476 F.3d 642, 647 (9th Cir. 2007); Via Mat Int'l South Am., Ltd. v. United States, 446 F.3d 1258, 1264 (11th Cir. 2006).

[33] *See City of Concord, N.C.*, 914 F. Supp. 2d at 706–07 (analyzing a North Carolina forfeiture statute and state cases law to conclude that the statute is in personam).

A. Concurrent jurisdiction may be maintained where the basis for at least one court's jurisdiction is in personam

Even where one court has exercised in rem jurisdiction over an asset, another court is not thereby precluded from exercising in personam jurisdiction in a case that might involve that same asset.[34] Likewise, a court's invocation of in personam jurisdiction over an asset does not prevent another court from later exercising in rem jurisdiction over that same asset. Thus, concurrent jurisdiction may be maintained in those situations.

In *City of Concord, N.C., v. Robinson*, the issue presented was whether the federal government could assert civil in rem jurisdiction over $17,600 seized by the Concord Police Department.[35] After the Concord Police recovered the $17,600; marijuana; and digital scales in a search of Robinson's hotel room, the state charged Robinson with Possession with Intent to Sell or Deliver Marijuana.[36] The Concord Police Department provided the money to the FBI for adoption for federal forfeiture, and an administrative forfeiture proceeding was initiated.[37]

In the meantime, Robinson requested the return of the seized money in the state criminal case.[38] Unaware of the federal forfeiture proceedings, the district attorney agreed to the return, and the superior court judge ordered it.[39] The superior court judge concluded that the money should not have been provided to the FBI for federal forfeiture without an order from the state court, and ordered that the money be returned to Robinson.[40] The City then filed a declaratory judgment action in federal court.[41]

The federal district court noted that "it is clear that a federal court can only assert in rem jurisdiction over drug proceeds if the state courts have not already exercised in rem or quasi in rem jurisdiction

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[34] *See id*. at 707.
[35] *Id.* at 700–01.
[36] *Id.* at 701.
[37] *Id.*
[38] *Id.* at 701.
[39] *Id.*
[40] *Id.* at 701–02.
[41] *Id.* at 702.

over the money."[42] But "[s]o long as a state court has not exercised in rem jurisdiction over the proceeds, the federal government may adopt seized property, even if the party transferring it was without authority to release it."[43] The question then became whether the North Carolina state court was exercising in rem jurisdiction over the $17,600, either in connection with the motion to return property or in connection with the forfeiture appurtenant to the criminal case.[44] The district court, after a thorough analysis of the North Carolina statutes and relevant cases, concluded that the state court's jurisdiction was in personam.[45] Consequently, the district court concluded that the federal forfeiture was a valid one, and that the state court lacked jurisdiction to determine that it was not.[46]

In a footnote, the court noted that if the North Carolina state court "at any time had clearly stated that it had in rem jurisdiction, this might be a more difficult issue."[47] This is so because a court has "jurisdiction to decide whether it has jurisdiction," and that determination cannot be collaterally attacked in another court.[48] This footnote has proven prescient, given more recent state court cases discussed below in subsection C.

In *United States v. $174,206.00 in U.S. Currency*, the Sixth Circuit examined Ohio law to conclude that the state court's jurisdiction over the funds at issue arose in a criminal case and was clearly in personam.[49] Thus, "there was nothing to prevent the federal district court from asserting jurisdiction over the currency."[50] The United States District Court reached a similar result for the Eastern District of New York, which concluded that the New York state statute authorizing the forfeiture of real property was an in personam statute that did not prevent of the United State from filing an in rem civil forfeiture action as to the same real property.[51]

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[42] *Id.* at 705.
[43] *Id.* at 706.
[44] *Id.* at 709.
[45] *Id.* at 708–12.
[46] *Id.* at 713.
[47] *Id.* at 711 n.12.
[48] *Id.*
[49] 320 F.3d 658, 661 (6th Cir. 2003).
[50] *Id.*
[51] United States v. Real Property and Premises Located at 249–20 Cambria Avenue, Little Neck, New York, 21 F. Supp. 3d 247, 252 (E.D.N.Y. 2014).

Conversely, the Eighth Circuit found no bar to concurrent jurisdiction where the federal forfeiture proceeding was included in a criminal case and was therefore in personam, even though the state of Arkansas was actively pursuing an in rem state court forfeiture action concerning the same property.[52]

B. The first court to obtain in rem jurisdiction over an asset does so to the exclusion of all other courts

It is a well-settled principle that the first court to obtain in rem jurisdiction over an asset does so to the exclusion of all other courts.[53] Thus, courts cannot maintain concurrent in rem jurisdiction and must wait for an asset to be released from the jurisdiction of the first court before in rem jurisdiction can again be asserted. This principle has crucial implications for adoptive forfeitures, as the assertion of in rem jurisdiction by one court, whether the court is state or federal, prevents the assertion of in rem jurisdiction by any other court, at least while the first case remains pending.

A key issue in adoptive forfeiture cases, and one that yields very mixed results, is determining when a state court has actually asserted in rem jurisdiction over an asset. In *United States v. $12,390*, the Eighth Circuit determined that the Missouri state courts had not obtained in rem jurisdiction over $12,930 in cash seized during the execution of a state search warrant, where no drugs were recovered, and the state filed neither a criminal case nor a forfeiture action.[54] Thus, "the fact that [the DEA] had taken possession of the money and initiated the requisite paperwork for administrative forfeiture" was "determinative" of the case, as no Missouri state court had asserted jurisdiction over the funds before the DEA started the federal administrative forfeiture proceeding.[55]

A Massachusetts state court came to a similar conclusion in *Rufo v. Commonwealth*.[56] In *Rufo*, Massachusetts police arrested Rufo for driving while intoxicated and found $38,692 in United States

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[52] United States v. Caruthers, 765 F.3d 843, 844–45 (8th Cir. 2014).
[53] *See* Penn Gen. Casualty Co. v. Pennsylvania *ex rel.* Schnader, 294 U.S. 189, 195 (1935).
[54] 956 F.2d 801, 805–06 (8th Cir. 1992).
[55] *Id.* at 805.
[56] 708 N.E.2d 947 (Mass. 1999).

currency, handguns, and cocaine in a briefcase recovered from the car.[57] The police turned the funds over to the DEA for adoptive forfeiture, while in the state criminal case the trial judge held that the search of the briefcase was an illegal search.[58] Rufo moved for return of the $38,692, and the state court granted the motion notwithstanding the federal forfeiture action.[59]

The Massachusetts appellate court reversed. The court noted that if the funds had been taken pursuant to a search warrant, Massachusetts' state law provides that such property is held "under the direction of the court," and thus may arguably be subject to the state court's in rem jurisdiction.[60] Seizure of property without a warrant, however, did not confer judicial control over the property, or create in rem jurisdiction, in the absence of a specific state statute providing for judicial control over the property.[61] Thus, the appellate court vacated the trial court's orders requiring the state police to return the seized funds to Rufo.[62]

In contrast, a federal district court in the Northern District of California granted a motion to dismiss a federal forfeiture action where the asset had been seized pursuant to the authority of a California state court-issued search warrant.[63] Noting that courts had taken "somewhat inconsistent approaches to the question of whether property seized pursuant to the execution of a state court issued search warrant is within the in rem jurisdiction of that court," the district court held that the applicable California statute provided that property seized in a search warrant was seized on behalf of the issuing court, which maintained control over the disposition of the property.[64] Thus, the state court maintained in rem jurisdiction over the property, to the exclusion of the federal court.[65]

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[57] *Id.* at 948
[58] *Id.*
[59] *Id.*
[60] *Id.* at 948–49.
[61] *Id.*
[62] *Id.*
[63] United States v. $25,000 in United States Currency, 2003 WL 22159054 (N.D. Cal. Sept. 16, 2003).
[64] *Id.* at *4.
[65] *Id.* at *5; *see also* United States v. $490,920 in U.S. Currency, 911 F. Supp. 720, 725 (S.D.N.Y. 1996) (New York's statutory scheme relating

One prominent example of a state law that creates state court in rem jurisdiction is a transfer order requirement. Transfer orders, also called turnover orders, are state law provisions that require the approval of a state judge before a state agency may provide a state-seized asset to a federal agency for adoptive forfeiture.[66]

Missouri has a long-standing strict turnover order statute passed shortly after the events described in *United States v. $12,390*. In *Karpierz v. Easley*, state officers (including federally deputized TFOs) recovered $34,029 in U.S. currency and marijuana while executing a state search warrant.[67] The money was provided directly to the DEA for federal forfeiture after the warrant was executed, and it was eventually federally forfeited.[68] The Missouri state court held that the money had been seized by state officers, and consequently those officers were not free to provide the funds directly for federal forfeiture absent the entry of a transfer order by a Missouri state court judge.[69] Because the state statute deemed that seizures by state officers deputized as federal TFOs remained state seizures, the transfer order requirement continued to apply despite the involvement of a TFO.[70] The court reversed the trial court's denial of relief and remanded for a determination of whether the plaintiff had a cause of action to recover the value of the funds federally forfeited following the transfer order violation.[71]

One issue that arises is precisely when the state court's in rem jurisdiction terminates such that a federal court may assert jurisdiction. Some courts have suggested that the state court's jurisdiction continues in order to effect the specific provisions of the state court order that concludes the proceedings. The district court in *United States v. $22,155.00 in U.S. Currency* held that the state

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to search warrants is jurisdictional in nature, federal adoptive forfeiture cannot proceed until the state court relinquishes jurisdiction).

[66] *$490,920 in U.S. Currency*, 911 F. Supp. at 724–25.

[67] 31 S.W.3d 505, 508 (Mo. App. W. Dist. 2000).

[68] *Id.* at 510.

[69] *Id.* at 509–10.

[70] *Id.* at 509, n.6. The appellate court noted that a law review article had questioned the constitutionality of the TFO provision under the Supremacy Clause. The court, however, stated that constitutional issues in Missouri were reserved for the Supreme Court. The Supremacy Clause issue has never been resolved.

[71] *Id.* at 510–11.

court's in rem jurisdiction extended until the sheriff had effectuated the state court's order to return the funds to a trustee for the defendant's child.[72] In so holding, the district court followed a series of Seventh Circuit decisions that recognized state court jurisdiction as extending though the return of the seized property.[73]

These holdings, however, are in tension with the federal government's authority to adjudicate federal forfeiture issues. Several courts have recognized that a state court cannot adjudicate the federal government's interest in a forfeitable asset, or preclude federal forfeiture once the state court has relinquished jurisdiction. Thus, at the very least, a state court return order cannot prevent immediate re-seizure of property for forfeiture by federal authorities. In addition, it is questionable whether in rem jurisdiction would extend to the completion of a return of property in every instance, as such a determination may depend on the precise reason for the return and the specific provisions of any governing state statutes.

C. Examples of recent state court decisions concerning assets sought for federal adoptive forfeiture

A number of recent state court decisions have dealt with issues arising from attempted adoptive forfeitures of assets seized by state officers. As discussed in *City of Concord, North Carolina*, these cases have often turned on the state court's assertion that its own jurisdiction is in rem.

Little v. Gaston concerned a state search warrant signed and executed by an Alabama state officer who was also a DEA TFO.[74] During the search the officer recovered $7,050, which he included on a property receipt for the state court warrant return.[75] The officer then placed the money in a DEA envelope and took the money to the DEA office.[76] The United States initiated a civil forfeiture action against the

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[72] 821 F. Supp. 424, 425–26 (S.D. W. Va. 1993).
[73] *See* United States v. $79,123.49 in United States Cash and Currency, 830 F.2d 94 (7th Cir.1987); *see also* United States v. One 1987 Jeep Wrangler, 972 F.2d 472, 479 (2d Cir. 1992); U.S. v. One Black 1999 Ford Crown Victoria LX, 118 F. Supp. 2d 115, 117 (D. Mass 2000).
[74] 232 So. 3d 231, 232 (Ala. Civ. App. 2017).
[75] *Id.*
[76] *Id.*

funds and obtained a federal seizure warrant for them.[77] In the meantime, Gaston filed a civil suit in state court seeking the return of the funds, although the federal court denied her motion to dismiss the federal proceeding for lack of jurisdiction.[78]

The state court granted Gaston relief in her civil case, and Little, the seizing officer, appealed.[79] The Alabama Civil Court of Appeals affirmed. It held that the state statute concerning seizure impliedly granted continuing in rem jurisdiction to the issuing court because it required the state officer to retain the property seized pursuant to the warrant subject to a further order of the court.[80] In doing so, the appellate court distinguished prior Alabama precedent holding that no state court in rem jurisdiction existed over warrantless seizures, declaring that property taken pursuant to a seizure warrant is within the issuing court's in rem jurisdiction from the moment of seizure.[81] Consequently, the appellate court upheld the trial court's order requiring the state of Alabama to return $7,050 to Gaston.[82]

The state appellate court acknowledged that previous to its own decision, the federal court had determined that it, not the state court, had jurisdiction over the $7,050, based in part on the federal court's reading of prior Alabama precedents.[83]

This case is a prime example of the type of "unseemly and disastrous conflict" the Supreme Court sought to avoid in *Penn General*. Arguably, the federal court's declaration of its own in rem jurisdiction, which occurred first in time, should have been binding on the Alabama courts, especially because, as the Alabama appellate court recognized, the federal court's decision was a reasonable one based on the Alabama state court precedents pre-dating *Gaston*. Perhaps in recognition of this issue, the appellate court found that the state had waived the argument that the state court had to give effect to the federal court's assertion of jurisdiction.[84]

In effect, the Alabama appellate court created a transfer order requirement for assets seized pursuant to an Alabama state search

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[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.* at 235.
[81] *Id.*
[82] *Id.* at 236.
[83] *Id.* at 237.
[84] *Id.*

warrant. From the federal perspective, a provision of an asset for adoption by federal authorities in violation of a state transfer order requirement does not invalidate the federal forfeiture, or give rise to a federal due process violation.[85] Thus, the federal court's forfeiture of the $7,050 seized from Gaston was lawful. The practical problem created by the Alabama state court decisions was that the state law enforcement agency was obliged to pay $7,050 to Gaston even though the seized funds were no longer available to it, and the payment would therefore have had to come out of its own budget, at the expense of its operational mission.

Similar issues arose two years later in the Utah case of *Savely v. Utah Highway Patrol*.[86] In 2016, a Utah state trooper stopped Savely on Interstate 80 and seized 52 bundles of cash totaling almost $500,000.[87] No state forfeiture proceeding was filed, but in January 2017, a federal magistrate judge issued a seizure warrant for the money.[88] In February 2017, Savely filed a motion in state court seeking return of the seized money.[89] The state trial court initially indicated it would grant Savely's motion, and the Utah Highway Patrol stopped payment on the check to the DEA representing the seized cash.[90] The federal magistrate then issued a second warrant for the funds, and the State of Utah moved in the state court to reconsider the grant of the return of property motion.[91] The trial court granted the state's motion to reconsider and denied Savely's motion on the ground that the federal court had been the first to assert in rem jurisdiction over the seized cash.[92] Savely appealed to the Utah Supreme Court.[93]

The issue presented by the appeal was whether the state court gains in rem jurisdiction over a seized asset immediately at the time of the seizure, or only when a state forfeiture action is actually filed with the court.[94] After a thorough review of the prior case law, the Utah

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[85] *See* Madewell v. Downs, 68 F.3d 1030, 1037–40 (8th Cir. 1995).
[86] 427 P.3d 1174 (Utah 2018).
[87] *Id.* at 1176.
[88] *Id.* at 1177.
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.* at 1178.

Supreme Court concluded that a state statutory scheme might create in rem jurisdiction "without issuing a warrant and before any filing has been made in the court" in two circumstances: "*[i]n rem* jurisdiction is exercised from the moment the statutory scheme places custody and control over the *res* in the state court or otherwise restricts transfer without a turnover order."[95] The court then analyzed Utah's statutory scheme.

While noting that the statutory scheme was "ambiguous" as to when a state court's jurisdiction over an asset attached, the court concluded that where property was held for forfeiture (as opposed to as evidence) the Utah statute vested jurisdiction in the state court, even in the absence of a court filing, in part because of law's turnover order requirement.[96] The court stated that it was not clear precisely when state court in rem jurisdiction over property held for forfeiture would begin, but held that it must start no later than when the state served a notice of intent to seek forfeiture.[97]

The Utah Highway Patrol provided Savely with a notice of intent to seek forfeiture at the time he was stopped and the seizure was made.[98] As a result, the Supreme Court determined that the state court's in rem jurisdiction started then, and could not be later defeated by the federal seizure warrant which, by the court's analysis, was second in time.[99] The state's failure to file a forfeiture action was not relevant, because the state court retained jurisdiction to entertain a motion to return the seized property under state law, as it did here.[100]

Savely is a thoughtful opinion that provides a helpful roadmap to the issues that arise with federal adoption in states that have passed transfer order statutes or other statutes, such as those pertaining to the search warrant process, that may arguably vest a state court with "lurking" in rem jurisdiction, that is to say, jurisdiction that exists in the absence of a formally filed court case. The *Savely* opinion does not foreclose the possibility that circumstances will exist, in Utah and elsewhere, where the state statutory scheme does not create "lurking" jurisdiction, for example, where a forfeiture case is presented to a state prosecutor and declined.

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[95] *Id.* at 1177.
[96] *Id.* at 1182–83.
[97] *Id.* at 1183.
[98] *Id.*
[99] *Id.* at 1184.
[100] *Id.*

But the most important takeaway is that federal law enforcement must stay current on state forfeiture laws, and both state and federal authorities should be respectful of each other's processes. Lost in the procedural shuffle of the *Savely* case is the single fact that the Utah Highway Patrol had substantial reason to conclude that the almost $500,000 they seized was, in fact, proceeds of crime being transported for the benefit of a criminal organization. A tug of war over state and federal jurisdiction, as in *Savely*, ultimately detracts from important shared law enforcement goals,[101] where communication and cooperation might better advance those goals.

In this regard, a recent Indiana case, *Lewis v. Putnam County Sheriff's Department*,[102] is a puzzling one. Alvin Lewis was pulled over for a traffic stop and a dog sniff alerted to $77,000 in cash located in a secret compartment in the vehicle.[103] Lewis disclaimed any interest in the seized cash.[104] The State sought and received a transfer order for federal adoption from the trial court.[105] Lewis appealed, and the Indiana appellate court reversed the issuance of the turnover order.

The appellate court concluded that under Indiana state law, in order to obtain the transfer order, the state had to show a link between the seized cash and a crime, and it concluded that here "there is *no evidence whatsoever that a crime occurred.*"[106] The appellate court seemed to believe that the state was relying solely on the amount of money seized to demonstrate criminality,[107] but the court ignored, in addition to the large sum of cash found, the positive dog sniff, the fact that the money was found in a secret compartment, the well-known fact that narcotics traffickers generally do not transport drugs and large sums of money together, the recovery of scales from the car, and Lewis's admission that he "might have" been in narcotics-related trouble before along with other oddities in his statement. In short,

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[101] Indeed, the second primary goal of the asset forfeiture program is "[t]o promote and enhance cooperation among federal, state, local, tribal, and foreign law enforcement agencies." U.S. DEP'T OF JUSTICE: THE OFFICE OF THE ATT'Y GEN., THE ATTORNEY GENERAL'S GUIDELINES ON THE ASSET FORFEITURE PROGRAM 1 (2018).

[102] 125 N.E.3d 655 (Ind. Ct. App. 2019).

[103] *Id*. at 657.

[104] *Id*.

[105] *Id*.

[106] *Id*. at 659.

[107] *Id.*

these facts are highly typical of cases in which cash is found to be directly tied to narcotics trafficking, and the appellate court's contrary and abbreviated conclusion to the contrary is difficult to parse.

Moreover, the cash had already been provided to federal authorities for forfeiture when the turnover order was issued, thereby possibly vesting in rem jurisdiction over the seized cash with the federal court. The state appellate court simply required the State of Indiana to pay back to Lewis an equivalent amount of the seized funds, but without any discussion of the possibility that it had no jurisdiction to enter such an order.[108] Ultimately, a decision such as this one punishes law enforcement for complying with state transfer order laws and disincentivizes legitimate and productive cooperation between state and federal authorities to stem the flow of criminally-derived proceeds.

IV. Emerging state legislation and concurrent jurisdiction challenges

In recent years, some state lawmakers have introduced forfeiture-related bills in an effort to change state forfeiture laws and expand protections for owners, while a handful of state legislatures have entirely abolished civil forfeiture or required an accompanying criminal conviction.[109] On its own, the abolition of state civil forfeiture does not affect federal forfeiture authorities. Emerging state forfeiture legislation trends, however, will require federal law enforcement personnel to become intimately familiar with the mechanics of state law in every jurisdiction where they plan to seize assets.

The restriction of adoptive forfeiture is a recurring theme in state forfeiture legislative proposals. Critics view the relationship between federal adoptions and federal equitable sharing as an effort by state and local law enforcement to circumvent state forfeiture laws and obtain forfeiture proceeds from the federal government that they might not receive under their state forfeiture framework.[110]

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[108] *Id*. at 660.

[109] *E.g.*, NEB. REV. STAT. ANN. § 28-1603 (West 2019); N.M. STAT. ANN. § 31-27-4 (West 2019); N.C. GEN. STAT. ANN. § 90-112 (West 2018).

[110] *See Model Anti-Circumvention Forfeiture Law: Protecting State Sovereignty from Federal Forfeiture Overreach*, INSTITUTE FOR JUSTICE (June 4, 2019).

Statistics compiled by the Department's Asset Forfeiture Program reveal that adoptions comprise only three percent of the total value of all federal forfeitures. Approximately 90% of all federal adoptive forfeitures are firearms, ammunition, and explosives—all of which are destroyed at the conclusion of the forfeiture proceeding.[111] The remaining 10% of adoptive forfeitures involve cash and vehicles that have a strong nexus to criminal activity.[112] In 78% of such cash and vehicle seizures, there is an accompanying arrest or warrant as well as a seizure of illegal drugs and contraband. In 40% of such cases, there is an admission of criminal activity.[113]

Some states have placed outright bans on the transfer of certain assets to the federal government for the purposes of forfeiture.[114] Other states have placed conditions on asset transfers to the federal government, permitting transfers only for non-drug violations or transfers over a certain amount.[115]

A growing number of states require state prosecutors to seek a turnover order from a state judge before transferring an asset seized by a state or local officer to the federal government. State turnover order requirements have long been a staple of state forfeiture law.[116] They provide a predictable procedural path to release assets from one sovereign to another with appropriate judicial oversight. If federal prosecutors file actions in cases where a turnover order has not been

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[111] *Asset Forfeiture Program: Focusing on Community Safety, Adoptions Since July 19, 2017 by Asset Type*, U.S. DEP'T OF JUST., https://www.justice.gov/afp (last visited Sept. 19, 2019).

[112] *Asset Forfeiture Program: Adopted Cash/Vehicle Seizures Since July 19, 2017—Circumstances of Seizure Highlight Criminal Nexus*, U.S. DEP'T OF JUST., https://www.justice.gov/afp (last visited Sept. 19, 2019).

[113] *Id.*

[114] "State law enforcement authorities shall not refer seized property to a Federal agency seeking the adoption by the Federal agency of the seized property. Nothing under this chapter shall prohibit the Federal Government or any of its agencies from seeking Federal forfeiture of the same property under any Federal forfeiture law." 42 PA. CONS. STAT. ANN. § 5807.1 (West 2017).

[115] *E.g.*, OHIO REV. CODE ANN. § 2981.14(B) (West 2017); CAL. HEALTH & SAFETY CODE § 11471.2(B) (West 2017).

[116] *E.g.*, ARK. CODE ANN. § 5-64-505(d) (West 2019); COLO. REV. STAT. ANN. § 16-13-307(2.5) (West 2012); IND. CODE ANN. § 34-24-1-9 (West 2019); MO. ANN. STAT. § 513.647 (West 2019); N.Y. CRIM. PROC. LAW § 690.55 (McKinney 2019).

obtained, the federal forfeiture action may be dismissed for lack of in rem jurisdiction.[117] In some jurisdictions, the transferring agency could be subject to a civil penalty or treble damages.[118] Turnover order requirements present unique challenges for ongoing investigations, especially if the federal government is not ready to make public the nature of its covert investigation. For example, Utah law currently requires state prosecutors to seek a turnover order when transferring seized assets to the federal government. The state prosecutor must show that the conduct giving rise to the investigation or seizure is interstate in nature and sufficiently complex to justify the transfer, the property may only be forfeited under federal law, or pursuing forfeiture under state law would unreasonably burden prosecuting attorneys or state law enforcement agents.[119] These disclosure requirements could cause federal prosecutors to avoid seeking federal forfeiture of assets seized by state law enforcement in the early stages of a case, even if those assets could eventually compensate victims.[120]

Some state legislative proposals render the turnover order requirement meaningless. Legislators have proposed "non-circumvention" clauses that prohibit any transfer to the federal government, even one with judicial authorization, if the transfer would circumvent protections that claimants are afforded under state law.[121] The same states have added new rights and protections for

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[117] *See* United States v. One 1979 Chevrolet C-20 Van, 924 F.2d 120, 123 (7th Cir. 1991); United States v. One 1987 Mercedes Benz Roadster 560 SEC, 2 F.3d 241, 244–45 (7th Cir. 1993).

[118] "Penalty for violations. Any person acting under color of law, official title or position who takes any action intending to conceal, transfer, withhold, retain, divert or otherwise prevent any moneys, conveyances, real property, or any things of value forfeited under the law of this State or the United States from being applied, deposited or used in accordance with the requirements of this section shall be subject to a civil penalty in an amount treble the value of the forfeited property concealed, transferred, withheld, retained or diverted. Nothing in this subsection shall be construed to impair judicial immunity if otherwise applicable." OR. CONST. ART. XV, § 10(14).

[119] UTAH CODE ANN. § 24-4-114 (West 2019).

[120] Federal law permits the Attorney General to grant petitions for remission to help compensate victims of a crime underlying a federal forfeiture. *See* 21 U.S.C. § 853(i)(1); 28 C.F.R. pt. 9. Most state forfeiture laws do not have these authorities.

[121] *See* N.M. STAT. ANN. § 31-27-11 (West 2015); UTAH CODE ANN. § 24-4-114(1)(d) (West 2019).

claimants such as increased burdens of proof, claimant-favorable burden shifting, and post-seizure and proportionality hearings that go beyond the claimant protections of CAFRA and other federal statutes. In practice, every transfer to the federal government in these states would necessarily circumvent those protections. At least two states have enacted legislation with anti-circumvention clauses, and more states have similar proposals pending.[122] In the states with the strictest non-circumvention clauses, it may be impossible for state law enforcement to relinquish jurisdiction of assets to the federal courts at all.

As outlined in the *Little v. Gaston* discussion above, even when state law does not explicitly require a turnover order, some sort of affirmative relinquishment of in rem jurisdiction may still be required in order to proceed with federal forfeiture. Before completing the transfer of an asset from state to federal custody, federal agents and prosecutors must ask: (1) has the state taken some sort of action that would give its courts the ability to direct the disposition of an asset (such as issuing a seizure warrant or notice of intent to seek forfeiture, filing a forfeiture complaint, or addressing a claim), and (2) if so, what is required for courts in that state to affirmatively relinquish their jurisdiction so that federal agents may re-seize the asset?

When is an asset considered to be subject to the in rem jurisdiction of a state court? The cases discussed in section III above demonstrate that there is no universal answer to this question. Every state has its own unique statutory scheme that may not clearly define the exact point in time that a state court exercises in rem jurisdiction. While some states explicitly describe the procedures that state prosecutors must take to initiate a judicial forfeiture, other state laws are silent. If the state forfeiture laws are silent, federal courts have held that there must be a document filed in state court in order for the state to establish in rem jurisdiction over the seizure, as warrantless seizure alone by state law enforcement does not automatically convey in rem jurisdiction upon state courts.[123] Alabama courts have held that in

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[122] *See* N.M. STAT. ANN. § 31-27-11(B) (West 2015); UTAH CODE ANN. § 24-4-114 (West 2019).

[123] *See* Penn Gen. Cas. Co. v. Commonwealth of Penn., 249 U.S. 189, 196 (1935); *see also* Cont'l Bank & Trust Co. v. Apodaca, 239 F.2d 295, 297 (10th Cir. 1956) ("Courts have long since resolved the conflict between state and federal courts of concurrent jurisdiction involving the same subject

rem jurisdiction attaches once a state law-enforcement officer executes a state search warrant, and that officer has an imperative duty to retain possession of the currency until ordered otherwise by the trial court.[124]

Recent state-level legislation pushed back the timeline and established state jurisdiction over an asset at the time of seizure, rather than at the time of a court filing.[125] Other proposals go even further, attempting to exercise jurisdiction over every seizure made by state and local law enforcement officers, regardless if they are working in their capacity as federal task force officers.[126]

As discussed above, *Savely v. Utah Highway Patrol* is the inevitable outcome of this in rem goalpost-shifting. This case gives federal prosecutors a preview of what to expect as more states amend their forfeiture laws. Litigants have increasingly enlisted the state court system to seek relief from completed federal forfeitures, and courts have gone so far as to order state and local law enforcement to disgorge their federal equitable sharing receipts to the claimants.[127] Obtaining a civil judgment against a state or local law enforcement agency based on its equitable sharing receipts is a novel remedy. State legislators have introduced taxpayer standing provisions encouraging similar lawsuits, but these proposals have yet to become law.[128] Any recovery from these lawsuits imposes costs, as the settlement must be

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matter by decreeing that the first court whose jurisdiction and processes is invoked by the filing of a suit, is treated as in constructive possession of the res and authorized to proceed in the cause.").

[124] Little v. Gaston, 232 So.3d 231, 232 (Ala. Civ. App. 2017).

[125] *See* ARIZ. REV. STAT. ANN. § 13-4306 (2017).

[126] *See* H.B. 444, 100th Gen. Assemb., 1st Reg. Sess. (Mo. 2019).

[127] *See* United States v. Ninety Six Thousand Three Hundred Seventy ($96,370.00) Dollars in U.S. Currency, No. 3:14-cv-356-WHA, 2015 WL 4937546 (M.D. Ala. Aug. 17, 2015) (federal government obtained a final order of forfeiture, but sheriff's office ordered to disgorge equitable sharing payment to the claimant); Lewis v. Putnam Cty. Sheriff's Dep't, 125 N.E.3d 655 (Ct. App. Ind. 2019) (Indiana court ordered sheriff's office to pay $77,000 to a claimant, finding that the state failed to show that it was entitled to a turnover order under Indiana law).

[128] *See* S 0229, Gen. Assemb., Jan. Sess. (R.I. 2019); H.B. 5721, Gen. Assemb., Jan. Sess. (R.I. 2019); H.D. 1024, 191st General Court (Mass. 2019).

paid with appropriated funds obtained from the jurisdiction's taxpayers.[129]

Finally, some state legislative proposals address the federal equitable sharing funds that state and local law enforcement receive. After payment of eligible victims and any forfeiture-related expenses, the equitable sharing of net forfeiture proceeds is explicitly permitted by federal statute to encourage cooperation between the state and local agencies and federal law enforcement agencies.[130] Much like federal highway funds or federal grants, federal equitable sharing funds may only be used for discrete purposes permitted by the federal government.[131] Notably, federal equitable sharing funds must be held in a separate account by the jurisdiction that receives them, with any expenditures reported back to the Department and included in the receiving jurisdiction's single audit.[132] If a state enacts a statute directing federal equitable sharing funds to its general treasury or other non-law enforcement account, the law enforcement agencies in that state will be disqualified from further participation in the program. State and local law enforcement in New Mexico and the District of Columbia are currently suspended from participation in the equitable sharing program due to similar statutory provisions.[133]

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[129] The use of equitably shared funds to pay court judgments or settlement costs is prohibited under the rules of the equitable sharing program. *See* DEP'T OF JUST., *supra* note 4.

[130] 21 U.S.C. § 881(e)(3).

[131] Federal equitable sharing payments are federal financial assistance, and as such, are subject to certain requirements regarding their maintenance, expenditure, and reporting, including the Single Audit Act Amendments of 1996 and the OMB Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance). In May 2012, a Catalog of Federal Domestic Assistance (CFDA) number was issued for Equitable Sharing Program funds. 2 C.F.R. § 200, Subparts A, B (excluding Sections 200.111–200.113), D (only Section 200.303 and 200.330–200.332), and F (Audit Requirements). *See* DEP'T OF JUST., *supra* note 4.

[132] *See id.*

[133] Proceeds from the sale of forfeited property received by the state from another jurisdiction shall be deposited in the general fund. N.M. STAT. ANN. § 31-27-7(C) (West 2015); D.C. CODE ANN. § 41-310(a)(3) (West 2015) ("(a) When property is declared forfeited pursuant to § 41-305(c) or § 41-308, the District shall: . . . (3) Beginning October 1, 2018, deposit in the General Fund of the District of Columbia the currency and sale proceeds received by a

Oregon agencies were suspended from the federal equitable sharing program in 2001 but rejoined the program on a limited basis in 2003.

Rather than opting out of the federal equitable sharing program entirely, an increasing number of states have placed narrowly tailored restrictions on equitable sharing payments received by state and local law enforcement. For example, California prohibits its law enforcement agencies from receiving funds from certain federal civil forfeitures conducted pursuant to the federal Controlled Substances Act when there is no related criminal conviction, and the federal offense is analogous to similar California offenses.[134] Wisconsin now requires a related federal or state criminal conviction before a law enforcement agency may accept forfeited proceeds, subject to certain exceptions.[135] And Colorado requires a related federal or state

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District agency from any state or federal agency pursuant to a multiple-jurisdiction or shared forfeiture program.").

[134] "Except as provided in this subdivision and in subdivision (c), a state or local law enforcement agency participating in a joint investigation with a federal agency shall not receive an equitable share from the federal agency of all or a portion of the forfeited property or proceeds from the sale of property forfeited pursuant to the federal Controlled Substances Act unless a defendant is convicted in an underlying or related criminal action of an offense for which property is subject to forfeiture as specified in Section 11470 or Section 11488, or an offense under the federal Controlled Substances Act that includes all of the elements of an offense for which property is subject to forfeiture as specified in Sections 11470 and 11488. In any case in which the forfeited property is cash or negotiable instruments of a value of not less than forty thousand dollars ($40,000) there shall be no requirement of a criminal conviction as a prerequisite to receipt by state or local law enforcement agencies of an equitable share from federal authorities." CAL. HEALTH & SAFETY CODE § 11471.2(b) (West 2017).

[135] "If there is a federal or state criminal conviction for the crime that was the basis for the seizure, the agency may accept all proceeds. If there is no federal or state criminal conviction, the agency may not accept any proceeds, except that the agency may accept all proceeds if one of the following circumstances applies and is explained in the report submitted under this subsection: (a) The defendant has died. (b) The defendant was deported by the U.S. government. (c) The defendant has been granted immunity in exchange for testifying or otherwise assisting a law enforcement investigation or prosecution. (d) The defendant fled the jurisdiction. (e) The property has been unclaimed for a period of at least 9 months." WIS. STAT. ANN. § 961.55(1r) (West 2018).

criminal case to exist before Colorado law enforcement may accept equitably shared proceeds.[136]

V. Practice pointers

Important do's and don'ts for government prosecutors and agents when handling seizures by state and local law enforcement include:

- Federal law enforcement must stay current on state forfeiture laws.
- Both state and federal authorities should be aware and respectful of each other's processes.
- Federal law enforcement should meet with state prosecutors, TFOs, and agents to discuss general seizure strategy in your state.
- Communication concerning the forfeiture process and seized assets is critical. Law enforcement agents should keep their respective state and local agencies, state prosecutors, federal agencies, and federal prosecutors informed at all times. Law enforcement agents should seek guidance from appropriate legal counsel, which may include a state prosecutor, state agency counsel, federal agency counsel, or a federal prosecutor, as needed.
- If a case will proceed federally from the outset, federal agents should seize the property pursuant to federal warrants. Using state search and seizure warrants may trigger state court jurisdiction over assets seized under those warrants.
- Federal prosecutors should always work with state and local prosecutors to get a turnover order in states that require it—be mindful of explicit and implicit turnover requirements.
- Law enforcement agents and agencies should be aware of all deadlines and time limits within the forfeiture process in both state and federal law, and ensure that they comply with those deadlines.

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[136] "A seizing agency or participant in any joint task force or other multijurisdictional collaboration shall accept payment or distribution from a federal agency of all or a portion of any forfeiture proceeds resulting from adoption or a joint task force or other multijurisdictional collaboration only if the aggregate net equity value of the property and currency seized in a case is in excess of fifty thousand dollars and a forfeiture proceeding is commenced by the federal government and relates to a filed criminal case." COLO. REV. STAT. ANN. § 16-13-306.5(1) (West 2017).

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Forfeiting Cryptocurrency: Decrypting the Challenges of a Modern Asset

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I. Introduction

"Bitcoin Criminals Set to Spend $1 Billion on Dark Web This Year"[1]

"Cuba 'Studying Cryptocurrency' to Dodge US Sanctions, Says Gov't"[2]

"Your Sloppy Bitcoin Drug Deals Will Haunt You for Years"[3]

These headlines illustrate cryptocurrency's increasingly important role in the modern criminal's arsenal. Law enforcement must keep pace because, while cryptocurrency's legitimate uses are many (and growing), it also arises in a variety of criminal activities. Cryptocurrency's status as the preferred payment method on darknet marketplaces is already notorious, but prosecutors can further expect to encounter cryptocurrency when investigating a wide range of other offenses, such as those involving ransomware attacks, child exploitation, and schemes to defraud the elderly. Moreover, prosecutors are likely to find criminals who use the fruits of their crimes to purchase cryptocurrency—much as they would with luxury

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[1] Olga Kharif, *Bitcoin Criminals Set to Spend $1 Billion on Dark Web This Year*, BLOOMBERG (July 1, 2019, 2:57 PM EDT), https://www.bloomberg.com/news/articles/2019-07-01/bitcoin-criminals-set-to-spend-1-billion-on-dark-web-this-year.

[2] William Suberg, *Cuba 'Studying Cryptocurrency' to Dodge US Sanctions, Says Gov't*, COINTELEGRAPH (July 3, 2019), https://cointelegraph.com/news/cuba-studying-cryptocurrency-to-dodge-us-sanctions-says-govt.

[3] Andy Greenberg, *Your Sloppy Bitcoin Drug Deals Will Haunt You for Years*, WIRED (Jan. 26, 2018, 6:00 AM), https://www.wired.com/story/bitcoin-drug-deals-silk-road-blockchain/.

vehicles, jewelry, and other baubles. In other words, cryptocurrency offers yet another way for criminals to profit from the harm they inflict on others.

For prosecutors combatting these dangers, asset forfeiture is a powerful tool—advancing the government's mission to help restore property to victims, punish wrongdoers, and deprive illicit organizations of their ill-gotten gains.[4] Moreover, the search for forfeitable assets can aid the criminal investigation, such as by identifying conduct that supports additional charges and sentencing enhancements, or by leading to the discovery of other targets who laundered funds or were otherwise instrumental to the underlying crime.

Yet, forfeiting cryptocurrency poses challenges. Given the complex array of laws and policies that govern forfeiture, overwhelmed prosecutors may neglect or misunderstand how to wield this tool—particularly when dealing with a relatively novel asset like cryptocurrency. This article seeks to help prosecutors avoid those pitfalls by providing them with a basic understanding of how to approach asset forfeiture when cryptocurrency is involved.[5]

II. Cryptocurrency

A. An introduction to cryptocurrency

Cryptocurrency is a type of virtual asset that can be quickly transmitted directly between parties, across national borders, and often without the need for a facilitating third party like a traditional

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[4] *See* Kaley v. United States, 571 U.S. 320, 323 (2014) (describing how forfeiture serves to punish the wrong-doer, deter future illegality, lessen the economic power of criminal enterprises, compensate victims, improve conditions in crime-damaged communities, and support law enforcement activities such as police training).

[5] *See generally* STEFAN D. CASSELLA, ASSET FORFEITURE LAW IN THE UNITED STATES (2d ed. 2013) [hereinafter CASSELLA]; ANDRES M. ANTONOPOULOS, MASTERING BITCOIN: PROGRAMMING THE OPEN BLOCKCHAIN (2d ed. 2017) [hereinafter ANTONOPOULOS]; NICK FURNEAUX, INVESTIGATING CRYPTOCURRENCIES: UNDERSTANDING, EXTRACTING, AND ANALYZING BLOCKCHAIN EVIDENCE (2018) [hereinafter FURNEAUX]; ARVIND NARAYANAN ET AL., BITCOIN AND CRYPTOCURRENCY TECHNOLOGIES: A COMPREHENSIVE INTRODUCTION (2016) [hereinafter NARAYANAN ET AL.]; Shirley U. Emehelu, *A Shot in the Dark: Using Asset Forfeiture Tools to Identify and Restrain Criminals' Cryptocurrency*, 66 DOJ J. FED. L. & PRAC., no. 5, 2018, at 81.

financial institution. Cryptocurrency can be lawfully used to buy goods and services, exchanged for fiat currency[6] or other cryptocurrency, or held as an investment, to list just several of many applications.

Cryptocurrency is generally not issued by any government or bank. Rather, it is often generated and controlled through software operating on a decentralized, peer-to-peer network of computers across the world. Because cryptocurrency—like many fiat currencies—is typically not backed by physical assets (such as gold), its value tends to derive from other factors and market forces. Most cryptocurrencies operate via a "blockchain," a record (or ledger) of every transaction ever conducted that is distributed throughout the network, making it highly difficult—if not impossible—for anyone to retroactively alter the record to their benefit (for example, to fraudulently claim to still possess funds they're already spent). There are thousands of cryptocurrencies in use, including Bitcoin, Ethereum, Bitcoin Cash, and Monero.[7] While many cryptocurrencies operate on public blockchains—which offer investigators unique investigative tools, discussed below—others operate in such a way as to conceal transactions.[8]

This article's focus is Bitcoin, which was introduced in 2008 and is today the most widely used cryptocurrency.[9] The technology underlying Bitcoin utilizes "public key cryptography," a mathematical algorithm that generates a pair of unique, corresponding keys: the "public key" and the "private key." These components form the "public address," which is used to send and receive bitcoins and can be shared with whomever wants to send bitcoins to that address. Meanwhile, the corresponding "private key" is required to transfer bitcoins sent to the

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[6] Fiat currency is government-issued currency, such as the U.S. Dollar, Euro, or Yen.

[7] *See Cryptocurrency List*, COINLORE, https://www.coinlore.com/all_coins (last visited July 12, 2019).

[8] This latter category is commonly referred to as "privacy coins" or "anonymity-enhanced cryptocurrencies."

[9] *See* Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System* (Oct. 2008). Since Bitcoin is both a cryptocurrency and a protocol, capitalization differs. Accepted practice is to use "Bitcoin" (singular with an uppercase letter B) to label the protocol, software, and community, and "bitcoin" (with a lowercase letter b) to label units of the cryptocurrency. That practice is adopted here.

public address.[10] To the untrained eye, these keys and addresses appear to be long strands of random letters and numbers (see Figure 1 below).[11]

A Bitcoin public address has been analogized to the mailing address of a locked post office (P.O.) box.[12] Whomever the P.O. box belongs to can share that mailing address freely. For example, a company can list their P.O. box's mailing address on invoices so customers know where to send their envelopes full of cash. The company need not worry that customers could then open the P.O. box (and take the cash inside), because that would require the means to unlock the box, such as a physical key. A Bitcoin private key functions like that physical key: whomever controls it controls all funds that have been deposited into the associated public address. In other words, "[s]toring bitcoins is all about storing and managing Bitcoin secret keys."[13]

Recognizing how private keys work is critical to understanding the initially bewildering array of cryptocurrency-related hardware, software, and service providers—many of which have developed in response to users' varied preferences regarding their willingness to cede control of their private keys (and thus their cryptocurrency) to third parties.

B. Cryptocurrency wallets

Bitcoin users typically have a "wallet," which is simply a tool to manage public and private keys—and thus control funds. There are four main types of wallets: paper, hardware, software, and hosted. These vary widely in terms of sophistication. For example, a "paper wallet" might simply be a handwritten list of corresponding public and private keys—though actually spending the bitcoins associated with the paper wallet's keys would require inputting the keys into a device that could connect to the internet and interface with the blockchain.[14]

"Hardware wallets," meanwhile, are physical devices often small enough to place on a keychain. They may not only store keys but also

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[10] ANTONOPOULOS, *supra* note 5, at 56.

[11] In lieu of a public key, the recipient of a bitcoin transfer may provide a QR code—a matrix barcode that is a machine-readable optical label.

[12] Matthew J. Cronin, *Hunting in the Dark: A Prosecutor's Guide to the Dark Net and Cryptocurrencies*, 66 U.S. ATTY'S BULL., no. 4, 2018, at 65.

[13] NARAYANAN ET AL., *supra* note 5, at 76.

[14] Similarly, the public and private key pairs may be memorialized on a digital text file, email, or similar medium.

display the wallet's bitcoin balance, connect to the internet to conduct transfers, and have added security features (such as requiring a PIN to access). Hardware wallets and paper wallets are the proverbial bags of cash hidden under a mattress; while the funds within are relatively safe from unauthorized use, they can be more difficult to spend and—if the wallet is misplaced or stolen—may be irretrievable.[15]

"Software wallets" refer to applications that users can install on a smartphone or other digital device to store keys and transfer bitcoins. Like hardware wallets, they can often be set up to require a username and password to access. Importantly, many of the companies that provide software wallets for download do not store or otherwise have access to their users' private keys. Rather, the private keys are stored on the device where the wallet application is itself installed. As with paper and hardware wallets, if the device on which the software wallet application is installed is lost, and there are no backup copies of the private keys, the funds within the software wallet may be forever lost.

Paper, hardware, and software wallets are typically considered "unhosted" (or "non-custodial"), meaning that users alone have access to the private keys—and thus control how their bitcoins are spent. Conversely, a "hosted" (or "custodial") wallet is controlled by a third party, often a company with a cloud-based, encrypted wallet platform hosted on the company's servers (whether in the United States or abroad). Users may be able to access the provider's platform through various digital devices, much like a traditional online banking experience. While hosted wallet users may be able to conduct transactions more easily than unhosted wallet users, they face the risk that the third-party host could lose users' funds due to theft or human error. Wallet-hosting service providers include cryptocurrency exchanges, which allow their customers, for a fee, to exchange cryptocurrency for fiat currency or other cryptocurrencies.

While prosecutors are most likely to encounter paper, hardware, software, or hosted wallets, new technologies, services, and providers are constantly emerging. Because these developments may

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[15] An estimated 17%–23% of all bitcoins have been permanently lost due to human error. Jeff John Roberts & Nicolas Rapp, *Exclusive: Nearly 4 Million Bitcoins Lost Forever, New Study Says*, FORTUNE (Nov. 25, 2017), https://fortune.com/2017/11/25/lost-bitcoins/.

significantly affect how to successfully investigate, seize, and forfeit cryptocurrency, prosecutors are strongly advised to seek guidance from the Money Laundering and Asset Recovery Section (MLARS) and the Computer Crimes and Intellectual Property Section (CCIPS).

III. Asset forfeiture fundamentals

A. Developing a theory of forfeiture

The forfeiture of any asset, including cryptocurrency, must be authorized under a federal statute; there is no common law of forfeiture. Unfortunately, there is no single statute or place in the federal code that authorizes all forfeitures. Rather, forfeiture law is a patchwork of numerous and often interdependent provisions.

Early in an investigation, prosecutors should develop a theory of forfeiture—that is, determine the underlying crime and what the corresponding statutes permits the government to forfeit. This review can sometimes be complex and lead to counterintuitive results. For example, prosecutors may discover that the crime at issue does not have corresponding forfeiture authority or perhaps gives rise to a narrower scope of forfeiture than otherwise similar crimes.[16] Prosecutors who are unfamiliar with these analyses should consult with their office's asset forfeiture coordinators or MLARS.

Fortunately, the crimes that prosecutors are likely to encounter in cases involving cryptocurrency offer powerful forfeiture authority. These include wire and mail fraud, which allows the forfeiture of "proceeds" of the crime;[17] drug trafficking, which allows the forfeiture

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[16] For example, at least one court has held that the government may forfeit property "involved in" a violation of 18 U.S.C. § 1960 (regarding operation of an unlicensed money transmission business), but it may only forfeit the "proceeds" of a *conspiracy* to violate section 1960, which is charged under 18 U.S.C. § 371. *See* United States v. Lord, N. 15-00240-01/02, 2017 WL 2919026, at *3 (W.D. La. July 7, 2017).

[17] 18 U.S.C. § 981(a)(1)(C) (via 28 U.S.C. § 2461(c)); 18 U.S.C. § 982(a)(2)(A). Several circuits have adopted the "but-for" test to determine whether property constitutes proceeds of an offense—*i.e.*, would the defendant not have obtained the property but for the illegal activity. United States v. DeFries, 129 F.3d 1293, 1333 (D.C. Cir. 1997); United States v. Angiulo, 897 F.2d 1169, 1213 (1st Cir. 1990); United States v. Ofchinick, 883 F.2d 1172, 1183 (3d Cir. 1989); United States v. Porcelli, 865 F.2d 1352, 1365 (2d Cir. 1989); United States v. Horak, 833 F.2d 1235, 1242–43 (7th Cir. 1987).

of proceeds and property that facilitated the crime;[18] and money laundering, which allows the forfeiture of all property "involved in" the crime.[19] Moreover, the applicable statutes generally authorize the forfeiture of a broad variety of assets, including complex or intangible assets, such as businesses, securities, and medical licenses. Thus, though prosecutors may be aware of the different manners in which various governmental entities classify cryptocurrency—such as a "commodity" or "security"[20]—those distinctions should have no bearing on the forfeitability of cryptocurrency per se.

B. Three forms of forfeiture

There are three forms of federal forfeiture proceedings with which prosecutors must be familiar: administrative, criminal judicial, and civil judicial. A brief overview of each follows.

1. Administrative forfeiture

Many federal law enforcement agencies are authorized to forfeit assets via an administrative procedure. In practice, this means that an agency seizes the asset, provides notice to potential claimants, and processes any claims made to the asset. If the claims are timely and otherwise legally valid, the agency refers the claim to the U.S. Attorney's Office, which then has 90 days to commence criminal or civil judicial forfeiture proceedings, reach a settlement, or return the asset.[21] But if the agency receives no timely or otherwise valid claims,

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[18] 21 U.S.C. § 853(a); *see also* 21 U.S.C. § 881(a).
[19] 18 U.S.C. § 982(a)(1); 31 U.S.C. § 5317(c).
[20] For example, the Commodity Futures Trading Commission (CFTC) has designated bitcoins as a "commodity," subjecting it to the CFTC's jurisdiction. Commodity Futures Trading Commission, *A CFTC Primer on Virtual Currencies* (Oct. 17, 2017). Meanwhile, the Internal Revenue Service (IRS) has issued guidance that bitcoins are "property" that is reportable on income tax returns. Internal Revenue Service, *IRS Virtual Currency Guidance: Virtual Currency Is Treated as Property for U.S. Federal Tax Purposes; General Rules for Property Transactions Apply* (Mar. 25, 2014). Moreover, the Securities and Exchange Commission (SEC) has issued guidance noting that, depending on the facts and circumstances of a transaction, certain digital assets may be "securities." *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO*, Sec. and Exch. Comm'n (Release No. 81207, July 25, 2017).
[21] 18 U.S.C. § 983(a)(3).

it may complete the forfeiture of the asset without judicial involvement.[22]

Administrative forfeiture should be pursued whenever possible and practical. In general, agencies may administratively forfeit all property subject to forfeiture under federal law, except for real property and personal property valued at greater than $500,000. If the personal property is a "monetary instrument," however, the agency may administratively forfeit it regardless of its value.[23] A "monetary instrument," as defined by statute and the implementing regulations, includes, for example, fiat currency, traveler's checks, various forms of bearer paper, and "similar material."[24] For the purposes of administrative forfeiture, cryptocurrency is not a "monetary instrument," and so only cryptocurrency valued at less than or equal to $500,000 may be forfeited administratively.[25] By contrast, cryptocurrency valued at *any* amount may be judicially forfeited (in the manners described below). For purposes of determining whether it may be administratively forfeited, cryptocurrency's value is determined at the date of seizure.[26]

2. Criminal judicial forfeiture

Criminal forfeiture refers to the forfeiture of property as part of the sentence in a criminal case.[27] It is, therefore, an in personam action against the defendant.[28] Only a convicted defendant's interest in the relevant property can be forfeited, and even then only when convicted

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[22] *See* 18 U.S.C. § 983(a)(1), (2); 19 U.S.C. § 1602, *et seq*.
[23] *See* 18 U.S.C. § 983(a)(1), (2); 19 U.S.C. § 1602, *et seq*.; 19 U.S.C. § 1607(a).
[24] *See* 31 U.S.C. § 5312(a)(3); 31 C.F.R. § 1010.100(dd); *see also* ASSET FORFEITURE POLICY MANUAL (2019), Chap.5, Sec.II.A.
[25] ASSET FORFEITURE POLICY MANUAL (2019), Chap.5, Sec.II.A.
[26] *See* 19 U.S.C. § 1606 (providing that the determination of the domestic value of the merchandise is made by "the appropriate customs officer"); 19 C.F.R. § 162.43 (defining "domestic value" as "the price at which such or similar property is freely offered for sale at the time and place of appraisement, in the same quantity or quantities as seized, and in the ordinary course of trade"); *see also* ASSET FORFEITURE POLICY MANUAL (2019), Chap.5, Sec.II.A., n.5.
[27] Libretti v. United States, 516 U.S. 29, 39–41 (1995).
[28] United States v. Vampire Nation, 451 F.3d 189, 202 (3d Cir. 2006).

of an offense that authorizes the forfeiture of that property.[29] A criminal forfeiture proceeding starts by adding a forfeiture allegation to a charging document (and the failure to do so may later preclude forfeiture).[30]

Criminal forfeiture may take the form of: (1) forfeiture of specific assets; (2) forfeiture of "substitute property," if the directly forfeitable assets are unavailable; and (3) an in personam money judgment against the defendant.[31] Specific assets are those directly traceable to the offense of conviction, also known as tainted property. When the tainted property is not available for forfeiture due to the defendant's acts or omissions, the government may seek to forfeit a defendant's untainted (or "substitute") property—but only up to the value of the unavailable tainted property.[32] In the absence of forfeitable tainted property, the government may seek a money judgment representing the value of the tainted property.[33] The money judgment thereby establishes the value of property the government may seek to forfeit as substitute assets under 21 U.S.C. § 853(p).

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[29] United States v. Padilla-Galarza, 886 F.3d 1 (1st Cir. 2018) (noting that where defendant was convicted of controlled substance offenses, government agreed forfeiture based on child pornography crimes under 18 U.S.C. § 2253 should be excised from the written judgment); United States v. Davenport, 668 F.3d 1316, 1320 n.7 (11th Cir. 2012) (holding that where defendant pleads to a crime that does not give rise to forfeiture, she is not subject to the forfeiture order, but becomes a third party with the right to oppose the forfeiture in the ancillary proceeding). Statutes referencing crimes for which criminal forfeiture is available include 18 U.S.C. § 982 and 21 U.S.C. § 853(a), among others. Additionally, 28 U.S.C. § 2461(c) authorizes criminal forfeiture whenever an offense has civil forfeiture authority.

[30] *See* FED. R. CRIM. P. 32.2(a) ("A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute."). Because criminal forfeiture is part of the defendant's sentence, it may be brought under the same statute of limitations as the underlying crime. *See* CASSELLA, *supra* note 5, at 400.

[31] United States v. Newman, 659 F.3d 1235, 1242–43 (9th Cir. 2011).

[32] 21 U.S.C. § 853(p)(1)–(2).

[33] *See* United States v. Casey, 444 F.3d 1071, 1073–77 (9th Cir. 2006); *see also* United States v. Olguin, 643 F.3d 384, 397 (5th Cir. 2011) (citing *Casey* and collecting cases).

3. Civil judicial forfeiture

A civil forfeiture proceeding begins when the government files a complaint in rem. The cases are captioned, for example, *United States v. Approx. 89.9270303 Bitcoins, More or Less*,[34] because the property itself is the defendant. The government then provides notice of the complaint to those who may have an interest in the property, who can then file a claim and answer to the complaint—making the claimant the true opposing party.

Civil forfeiture, like administrative forfeiture, does not depend on a criminal conviction; the government may file the complaint before, after, or in the absence of a related criminal prosecution.[35] This means the government may civilly forfeit the property even if, for example, the defendant dies while awaiting trial or is a fugitive.[36] The latter scenario may be particularly relevant to cryptocurrency investigations where the defendant is overseas and unlikely to be extradited to face charges in the United States.[37] Because civil forfeiture proceedings are against property, however, there is no opportunity for money judgments or to forfeit substitute property—the property in the suit must be the tainted property itself.[38]

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[34] No. 5:18CV998 (W.D. Tex.), ECF No. 1.

[35] For civil forfeiture proceedings, the statute of limitations is the later of "five years after the time when the alleged offense was discovered, or . . . within 2 years after the time when the involvement of the property in the alleged offense was discovered, whichever was later." 19 U.S.C. § 1621.

[36] For example, following the apparent suicide of Alexandre Cazes, the alleged creator of the darknet marketplace AlphaBay, while he was in custody in Thailand, the U.S. Attorney's Office for the Eastern District of California filed a civil forfeiture complaint against high-value assets that belonged to Cazes, including cryptocurrency. Press Release, U.S. Dep't of Justice, Alphabay, the Largest Online 'Dark Market,' Shut Down (July 20, 2017).

[37] Additionally, the "fugitive disentitlement doctrine," provided for under 28 U.S.C. § 2466, allows the court to refuse the claim of any individual who knows there is a warrant for their arrest but attempts to avoid criminal prosecution by leaving the United States, refusing to enter or reenter the United States, or otherwise evading the jurisdiction of the court in which a criminal case is pending against that person.

[38] One exception is under 18 U.S.C. § 984, which allows for the civil forfeiture of narrow categories of fungible, untainted assets so long as two conditions are met: (1) the government commences a civil forfeiture action within one

Civil forfeiture proceedings still require, however, that the government prove, by a preponderance of the evidence, that a crime occurred and that the property has the requisite nexus to the crime.[39] For example, if the crime at issue is drug trafficking, the applicable civil forfeiture statute allows the government to forfeit a broad variety of assets, including "things of value" furnished in exchange for drugs.[40] A claimant can attempt to refute that the property is actually forfeitable, or otherwise defeat the forfeiture, by demonstrating that he is an innocent owner with no reason to know of the criminal connection (among other defenses to forfeiture).[41]

Claimants for civil forfeiture generally do not have right to appointed counsel.[42] If the claimant prevails, however, then the government may have to pay the claimant's "reasonable" attorney's fees.[43]

IV. Tracing

Tracing is the process of following the money. As described above, the government may have multiple theories of forfeiture, depending on the underlying crime and the corresponding forfeiture authority. When seeking to forfeit the "proceeds" of a crime, however, the government must prove that the property it seeks to forfeit is directly traceable to the crime. For example, if a drug trafficker receives bitcoins for selling heroin on a darknet marketplace, those bitcoins are forfeitable as proceeds of the offense—as would be any property that the trafficker later acquires with the bitcoins, such as cash or other property. But that does not mean that *all* bitcoins held by the trafficker are necessarily forfeitable—no more than it means that any and all other property belonging to the trafficker was necessarily derived from selling drugs.

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year of the offense; and (2) the property is found in the same location where tainted property once was. Unfortunately, cryptocurrency does not appear to fall within the narrow category of assets referenced in section 984.

[39] 18 U.S.C. § 983(c)(1).

[40] *See* 21 U.S.C. § 881.

[41] *See* 18 U.S.C. § 983(d).

[42] *But see* 18 U.S.C. § 983(b) (providing that a person with standing to contest a civil judicial forfeiture proceeding may be entitled to appointed counsel if, for example, the person is represented by appointed counsel in a related criminal case).

[43] *See* 28 U.S.C. § 2465(b)(1).

Tracing helps ensure that the government only seizes and forfeits property that has the requisite connection to a crime. Meanwhile, of course, criminals are doing whatever they can to disrupt the government's tracing efforts—such as by creating shell accounts, using overseas banks, and comingling tainted with untainted funds. These challenges predate cryptocurrency, and over the years, courts have developed various tracing methods that prosecutors should be familiar with.[44] But coupled with those methods are powerful investigative tools unique to cryptocurrency, discussed below.

A. Tracing cryptocurrency

Cryptocurrency, despite the purported anonymity it grants criminals, provides law enforcement with an exceptional tracing tool: the blockchain.[45] While the blockchain's historical ledger will not list the names of parties to transactions, it provides investigators with ample information about how, when, and how much cryptocurrency is being transferred.[46] Moreover, this information is publicly available; no subpoenas or warrants are required to obtain it.

When tracing bitcoins, law enforcement can use various free, open-source tools to review transactions, including Blockchain Explorer.[47] For example, and as depicted in Figure 1, the blockchain will reveal information about a transaction including the date and time it occurred, the originating public address(es), the destination public address(es), the amount of bitcoins transferred, and the transaction hash (an identification number uniquely associated with that particular transaction). Moreover, clicking on the originating or destination addresses allows investigators to review other transactions involving those addresses—that is, to follow the money.

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[44] *See generally* Sean M. Welsh, *Tracing Commingled Funds in Asset Forfeiture*, 88 MISS. L.J. 179 (2019).

[45] *See generally* FURNEAUX, *supra* note 5, at 175–97.

[46] Determining who cryptocurrencies belong to is largely beyond the scope of this article. *See* Michele R. Korver et al., *Attribution in Cryptocurrency Cases*, 67 DOJ J. FED. L. & PRAC., no. 1, 2019, at 233.

[47] *Block Explorer*, BLOCKCHAIN, https://www.blockchain.com/btc/tx/e87f138c9ebf5986151667719825c28458a28cc66f69fed4f1032a93b399fdf8 (last visited July 15, 2019).

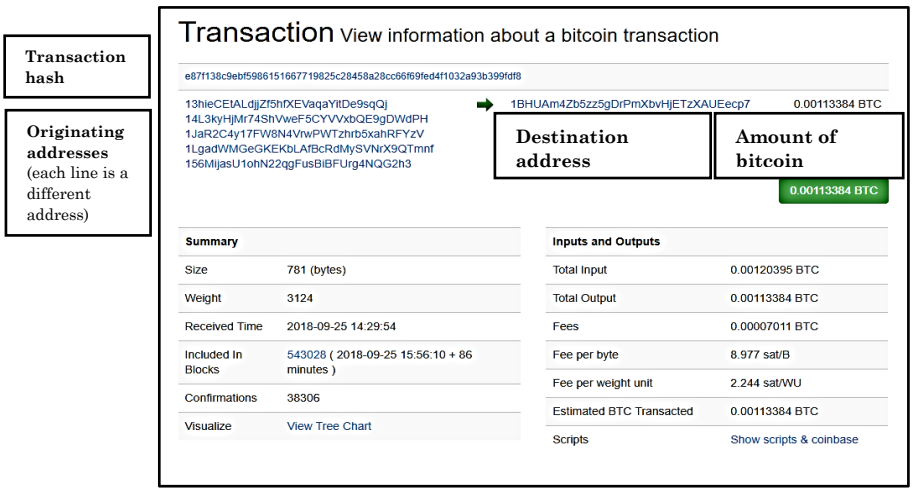

Fig. 1: Bitcoin transaction depicted in blockchain explorer

This publicly available information, however, is only as helpful as the ability to understand, analyze, and put it in context. When investigators combine blockchain data with information gathered elsewhere during the investigation—such as the target's public address, perhaps recovered while reviewing the seized electronic devices and communications—they can form powerful insights into how the target maintains his funds or who his victims are.

Commercially available tools can also help, as they offer more robust analytic tools—such as the ability to recognize multiple addresses that may belong to the same user. For example, because the initiator of a transfer must have the private key for an originating public address, when multiple public addresses are used to simultaneously fund a transaction (as depicted in Figure 1), it is likely that the same user controls each of the originating addresses. Advanced analytics tools can comb through the blockchain, looking for such commonalities among transactions. Moreover, the tools may be able to alert investigators to transactions involving public addresses believed to be associated with darknet marketplaces or other criminal enterprises.

Analytics tools can also help the government explain to the court how it traced cryptocurrency to criminal activity. For example, many tools can create visual representations of transaction patterns that would be extraordinarily difficult to represent using text alone. Prosecutors should consult with CCIPS to anticipate and prepare for the challenges that may stem from the use of this software, such as

protecting proprietary algorithms or other sensitive information from public disclosure.[48]

B. Tracing tips and tricks

Prosecutors attempting to trace cryptocurrency are encouraged to keep the following recommendations in mind.

First, prosecutors should be attentive to whether the investigation reveals evidence of money laundering. As previously mentioned, the nature of the underlying crime will determine the government's forfeiture theory. Money laundering gives rise to a broader scope of forfeiture than most other offenses by allowing the government to forfeit all property "involved in" the money laundering offense. This includes both the tainted proceeds of the offense and "untainted" funds that are comingled with tainted funds in an effort to conceal the latter.[49] While this does not completely eliminate the need for tracing—the government must still prove that the transaction satisfied the elements of a money laundering offense and that the assets had a nexus to that offense—it allows the government to forfeit property that might otherwise be concealed too well to forfeit solely on a proceeds theory.

Services have also emerged to further exploit the anonymizing features of cryptocurrency technology, and criminals have used these services to launder funds. For example, "tumblers" or "mixers" can conceal the origin and destination of tainted cryptocurrency. These services aggregate funds intended for certain multiple recipients and send funds to those recipients from different originators within the same pool, making it more difficult to know who sent funds to whom. Commercially available tools, like those discussed above, may be able to help break through this obfuscation logjam. But even where they cannot, evidence of a target's use of tumbler services can serve as a strong indication of money laundering.

Second, tracing challenges can also be overcome by demonstrating that the target lacked a legitimate source of income or other wealth when they acquired cryptocurrency—increasing the likelihood that

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[48] Korver et al., *supra* note 46, at 247.

[49] United States v. Huber, 404 F.3d 1047, 1056, 1058 (8th Cir. 2005) ("Forfeiture under section 982(a)(1) in a money-laundering case allows the government to [forfeit] all property 'involved in' the offense, including the money or other property being laundered (the corpus), and any property used to facilitate the laundering offense.") (internal quotations omitted).

the cryptocurrency was unlawfully obtained. When investigating a target's finances, investigators should look to tax and employment records, as well as for evidence of cryptocurrency mining, business income, inheritances, gambling proceeds, loans, savings, settlements, and government welfare payments. Relatedly, a target may claim that the cryptocurrency (or other property to be forfeited) came from a pre-offense cash hoard, or that they otherwise acquired it *before* the offense. This claim in turn may be refuted with evidence of low earnings or other indebtedness such as bankruptcy, repossessions, installment buying, high credit-card debt, receipt of public assistance, and overdraft notices. Relatedly, for many drug crimes forfeiture statutes provide a rebuttable presumption that any property of a person convicted of such crimes is forfeitable if the government can establish, by a preponderance of the evidence, that: (1) the person obtained the property during, or within a reasonable time after, the period of the crime; and (2) there was no likely source for the property other than the drug crime.[50]

Third, whether it is to defense counsel, the court, or a jury, the government must ultimately explain how it traced forfeitable cryptocurrency to a crime. These technical and unfamiliar transactions can be challenging to put to paper. Screenshots of Blockchain Explorer (such as that in Figure 1) can provide some bearing and insight into what investigators looked at during their analysis. From there, simple, easy-to-follow tracing charts—much like charts prosecutors would use at trial to explain traditional financial transactions—are key to explaining the flow of cryptocurrency from wallet to wallet. Keeping the charts as clean and simple as possible is key. For example, instead of merely providing a long list of cumbersome, difficult-to-parse transaction or wallet numbers, prosecutors can use the first or last several digits of each, such as that depicted in Figure 2.

[50] 21 U.S.C. § 853(d).

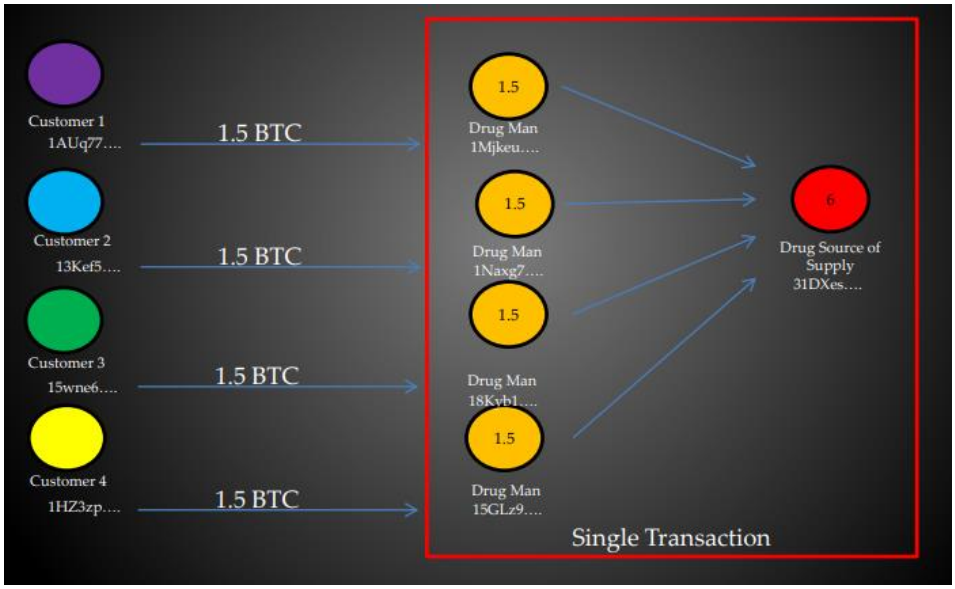

Fig. 2: Example of a simplified depiction of cryptocurrency transfers

Finally, even if the government's tracing analysis does not result in the successful identification and seizure of tainted cryptocurrency, it may pay other dividends. For example, the tracing analysis may uncover evidence of money laundering, obstructive acts, or other conduct that can form the basis of additional charges or sentencing enhancements. Moreover, through tracing, the government can gather evidence that may later be used to calculate the defendant's total ill-gotten (and now unavailable) gains—thus serving as the basis for a money judgment and later the forfeiture of substitute property.

V. Seizing cryptocurrency

Of course, knowing how to trace and forfeit cryptocurrency may be academic if the government is unable to seize it. Here, prosecutors must be especially mindful. To return to the earlier analogy, consider the myriad ways in which a company that receives customers' payments via a P.O. box might secure the physical key needed to unlock that box. Perhaps the sole copy of the key is hidden in the company president's office. Or multiple copies of the key are given to trusted employees to keep on their persons. Maybe the company keeps the key in a safe deposit box in the United States (or overseas). To a prosecutor seeking to seize that key—and ultimately the box's contents—these scenarios obviously require different approaches.

Similar prudence is necessary when attempting to seize cryptocurrency.

A. Legal authority for seizing forfeitable assets

Investigators may seize cryptocurrency with a search warrant that provides authority to seize cryptocurrency, a forfeiture seizure warrant, or another method that otherwise comports with the government's obligations under the Fourth Amendment (for example, seizing cryptocurrency with the owner's consent).[51] When seizing cryptocurrency via a search warrant, the supporting affidavit should establish probable cause that the cryptocurrency is located at the place to be searched and has the requisite nexus to the relevant criminal activity. Attachments should also provide explicit authority for the United States to transfer seized cryptocurrency to a government-controlled wallet.[52] This process is described in greater detail below.

Forfeiture seizure warrants, meanwhile, come in two forms: civil and criminal. Both civil and criminal seizure warrants must be supported by affidavits establishing there is probable cause to believe that the property to be seized is forfeitable under an applicable statute.[53] In order to obtain a criminal seizure warrant, however, the government must additionally demonstrate that a protective order—provided for under 21 U.S.C. § 853(e)—may not be sufficient to assure the availability of the property for later forfeiture proceedings. To make this showing, an affidavit might describe, for example, how quickly cryptocurrency can be irretrievably transferred by persons with access to the private key who may not be in custody or otherwise known to the government.

The type of warrant used does not limit the mode of forfeiture; property seized civilly may be forfeited criminally, and vice versa.[54] Property seized with a search warrant may also be forfeited either way, as can property seized for reasons unrelated to forfeiture—for

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[51] ASSET FORFEITURE POLICY MANUAL (2019), Chap.2, Sec.V.B.

[52] Prosecutors are encouraged to contact MLARS and CCIPS for guidance on drafting warrant attachments.

[53] Generally, 18 U.S.C. § 981(b) provides authority for civil seizure warrants and 21 U.S.C. § 853(f) and 18 U.S.C § 982(b)(1) provide authority for criminal seizure warrants.

[54] *See* CASSELLA, *supra* note 5, at 96.

example, because it is evidence of a crime or contraband.[55] If the government, however, seizes property using a civil seizure warrant only and the prosecutor later wishes to pursue criminal forfeiture proceedings, the prosecutor may need to file a motion for a court order authorizing the continued retention of an asset under the criminal forfeiture statutes.[56] Prosecutors should consider using a hybrid warrant—one that cites both civil and criminal forfeiture statutes—to avoid this situation.

Unlike most search warrants, forfeiture seizure warrants may authorize the seizure of property located outside the district in which the warrant was issued. For example, civil seizure warrants "may be issued . . . by a judicial officer in any district in which a forfeiture action against the property may be filed . . . and may be executed in any district in which the property is found . . . ."[57] Similarly, as to criminal seizure warrants, courts may issue such warrants "without regard to the location of any property which may be subject to forfeiture."[58] These provisions also allow seizure warrants to serve as the basis for a Mutual Legal Assistance Treaty (MLAT) request when seizing cryptocurrency would require taking action in a foreign nation discussed further below.[59]

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[55] *See* ASSET FORFEITURE POLICY MANUAL (2019), Chap.2, Sec.III.C.

[56] When the government commences a criminal forfeiture proceeding containing an allegation that certain property is subject to forfeiture, and the government has already seized that property by administrative or civil forfeiture process, the government must "take the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute." 18 U.S.C. § 983(a)(3)(B)(ii)(II).

[57] 18 U.S.C. § 981(b)(3). A civil forfeiture action may be filed in, among other locations, "the district in which any of the acts or omissions giving rise to the forfeiture occurred," 28 U.S.C. § 1355(b)(1)(A), or "any district where [the forfeitable property] is found." 28 U.S.C. § 1395(b).

[58] 21 U.S.C. § 853(*l*).

[59] Prosecutors seeking to seize or restrain property located abroad should first obtain a probable cause finding from a U.S. court regarding the forfeitability of the property at issue. ASSET FORFEITURE POLICY MANUAL (2019), Chap.8, Sec.VII; *see also* Jack de Kluiver, *International Forfeiture Cooperation*, 61 U.S. ATTY'S BULL., no. 5, 2013, at 36.

B. The location of the cryptocurrency will determine the seizure method

Prosecutors are most likely to encounter forfeitable cryptocurrency that is held in one of three manners: (1) "locally," such as where a target stores their private keys on a paper, hardware, or software wallet in their possession; (2) in a wallet hosted by a U.S.-based institution (like a registered exchange); or (3) in a wallet that is hosted, or whose private keys are otherwise located, outside of the United States.

1. Locally held cryptocurrency

In some cases, the target will hold private keys associated with forfeitable cryptocurrency locally, meaning in their possession. For instance, the target may keep a paper or hardware wallet in her pocket or hidden behind a picture frame in her home. Or perhaps she maintains a software wallet on a desktop computer. The point in time at which law enforcement learns of locally held cryptocurrency will guide how best to pursue its seizure. In all cases, however, prosecutors and agents should act fast given how quickly and easily the target—or anyone else who has the private keys—can transfer the cryptocurrency before law enforcement can seize it.

To begin with, often investigators will not know that the target holds forfeitable cryptocurrency until "takedown" occurs. For example, suppose agents execute a warrant to search and seize documents and electronic devices within a target's home, but until that point the government was unaware of any forfeitable cryptocurrency in the target's possession (and thus the warrant was silent as to cryptocurrency). Nevertheless, during the search agents discover evidence of cryptocurrency usage.

In this scenario—and assuming that there is probable cause to believe that the newly discovered cryptocurrency is forfeitable—prosecutors are advised to quickly obtain a separate, follow-on forfeiture seizure warrant. The warrant and affidavit should explicitly describe the theory of forfeiture, and their description of the cryptocurrency should reflect the manner in which it is held, for example "all cryptocurrencies stored on, or accessible via, two Ledger Nano hardware wallets seized from [premises]" or "any and all bitcoins stored in the Mycelium wallet belonging to [target] and accessible on her Android phone." The seizing agency should have

additional protocols regarding the mechanics of the seizure itself (discussed in part below).

Conversely, sometimes investigators will suspect—before takedown—that the target owns forfeitable cryptocurrency and that the premises or devices to be searched will contain private keys (or recovery seeds, as discussed below). Here, prosecutors should include authorization to seize cryptocurrency within the attachment of their standard Rule 41 search warrant (as well as supplemental language in the affidavit, such as background information on cryptocurrency, a more detailed description of the intended seizure method, etc.). Prosecutors are encouraged to contact MLARS and CCIPS for guidance on preparing appropriate warrants.

When drafting these provisions, prosecutors should address in advance the numerous ways in which the target may store their cryptocurrencies. For example, it may be prudent to seek seizure authority for the following: (1) any and all representations of cryptocurrency public keys or addresses, whether in electronic or physical format; (2) any and all representations of cryptocurrency private keys, whether in electronic or physical format; and (3) any and all representations of cryptocurrency wallets or their constitutive parts, whether in electronic or physical format. That said, if prosecutors are seeking to seize *all* cryptocurrency that may be discovered via the search of a premises or device, the affidavit should establish probable cause to believe that *all* such cryptocurrency is forfeitable—which may be challenging if the target is known to have legitimate sources of income or other, lawful means to acquire cryptocurrency.

Prosecutors should also consider seeking authority in their premises and device warrants to seize "recovery seeds." In brief, some wallet types are capable of generating multiple public and private key pairs that all derive from single source (a "seed" or "root"), much like branches growing from a tree trunk.[60] This seed may be represented by a mnemonic code of 12–24 words, known as a "recovery seed phrase." Whoever has the recovery seed phrase can use it to reconstitute the entire wallet on a separate device and thereby recover any cryptocurrency within the wallet.[61] This means, for example, that if a target's phone contains a software wallet application, simply

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[60] These are known as "deterministic" or "hierarchical deterministic" wallets.
[61] FURNEAUX, *supra* note 5, at 103.

placing the phone in airplane mode will not prevent anyone with a copy of the recovery seed phrase—such as a coconspirator, spouse, or other confidant of the target—from emptying the wallet. In a similar vein, however, it may be possible for law enforcement to recover a seed phrase from a software wallet while the phone remains in airplane mode, meaning that the seizure can take place without reconnecting the phone to the internet.

2. Wallets hosted by U.S.-based institutions

The most straightforward and familiar manner of seizing cryptocurrency is from an account or wallet hosted by a U.S.-based institution—typically, an exchange. Here, law enforcement should serve a seizure warrant on the exchange itself, much as they would serve a warrant on a bank for funds in an account.[62] Accordingly, the warrant should authorize the seizure of cryptocurrency—either a specific amount or "any and all funds" as appropriate—"contained in the [exchange name] account held in the name of [target]." Some exchanges located outside of the United States may have U.S. offices or U.S. points of contact and will accept service of U.S. seizure warrants.[63]

While seizing cryptocurrency from a U.S.-based exchange is relatively simple, prosecutors should keep several points in mind. First, exchanges may impose limits on how large of a withdrawal their customers can conduct at any one time. If agents tried to log into the customer's account and transfer the funds to a law enforcement wallet directly, the exchange may block or otherwise impede that transfer. But if a seizure warrant is served on an exchange directly—notifying the exchange that the withdrawal is a lawful seizure—then the exchange may waive the transactional limits and be able to assist in other ways.

Second, the amount of cryptocurrency to be seized should be described with specificity in warrants and later forfeiture pleadings.[64] For example, bitcoin amounts should be described down to all eight

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[62] ASSET FORFEITURE POLICY MANUAL (2019), Chap.2, Sec.V.B.

[63] *Id.*

[64] Describing the cryptocurrency with specificity will also aid the government's efforts to provide notice of forfeiture proceedings to potentially interested parties. *See also* ASSET FORFEITURE POLICY MANUAL (2019), Chap.5, Sec.III.C.1 (comparing the notice requirements as to civil and criminal judicial forfeiture proceedings).

decimal points. Similarly, to avoid inadvertently seizing cryptocurrency from the account of an exchange customer who happens to have the same name as the target, prosecutors may wish to include additional identifying information in the warrant caption, such as portions of the target's birth date or social security number.

Finally, if the government seeks to seize cryptocurrency held at an exchange with a *criminal* seizure warrant, it must establish that a protective order may not be sufficient to preserve the cryptocurrency for forfeiture.[65] As with traditional financial institutions, however, the government can often demonstrate that a protective order, served upon the institution, may not be sufficient—for example, because of how easily funds could still be dissipated, or because the institution may not have effective mechanisms in place to ensure compliance with the protective order.[66] The same will often be true of cryptocurrency exchanges. However, in those cases where the government cannot make that showing, prosecutors should consider instead seeking a *civil* forfeiture seizure warrant, which does not require demonstrating the insufficiency of a protective order.[67]

3. Seizing cryptocurrency held outside of the United States

Finally, prosecutors may encounter forfeitable cryptocurrency held overseas—that is, the relevant private keys or the entity that hosts the wallet are located outside of the United States. This can present a

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[65] *See* section V.A, *supra*; *see also* United States v. Weichman, No. 2:14-cr-93, 2016 WL 5929254 (N.D. Ind. Oct. 12, 2016) (holding that to obtain a seizure warrant for an E-Trade account and the cash value of insurance policies, government must show only that seized funds may not be available for forfeiture if a restraining order is used; it not required to show that a restraining order absolutely would not be sufficient).

[66] *See* CASSELLA, *supra* note 5, at 99; *see also* United States v. Swenson, No. 1:13-cr-00091-BLW, 2013 WL 3322632 (D. Idaho July 1, 2013) (holding that the court is entitled to infer from the inherent fungibility and transferability of money in a bank account that a restraining order would be inadequate); United States v. Dupree, 781 F. Supp. 2d 115 (E.D.N.Y. 2011) (determining that the government may satisfy section 853(f) by showing that some of the criminal proceeds deposited into a bank account have already been depleted because that illustrates that the funds not only could be moved, but that some of them already have been moved).

[67] *See* section V.A, *supra*.

number of legal and policy concerns because efforts to obtain assets or evidence within another nation's borders without authorization can constitute a violation of that nation's sovereignty or criminal law.[68]

Sometimes it will be abundantly clear that the cryptocurrency is held overseas. For example, the target may store their hardware wallet in another country, or the target may have an account or wallet hosted by third-party institution that lacks a presence in the United States. In these instances, prosecutors are strongly advised to consult with the Office of International Affairs (OIA), as an MLAT request will likely be required to pursue seizure and forfeiture.[69]

Unfortunately, it is not always obvious that cryptocurrency is held outside of the United States. A number of software wallets operate by interfacing with the wallet provider's servers, which may be located overseas. This means that, even where agents have seized a target's phone in the United States, discovered a software wallet application on the phone, know the log-in credentials that would allow them to liquidate the wallet's contents, *and* have a warrant, seizure may still not be permissible because it would require accessing a foreign server. Here too, prosecutors are advised to consult with OIA, MLARS, and CCIPS for guidance on which software wallet providers have overseas servers that interface with users' wallets and how to proceed in such instances.

Finally, if prosecutors are ultimately unable to seize cryptocurrencies held overseas, they may seek a repatriation order in criminal case. Under 21 U.S.C. § 853(e)(4), district courts may order a defendant to repatriate property that may be seized and forfeited. Failure to comply with a repatriation order is punishable as a civil or criminal contempt of court and may also result in an enhancement of the defendant's sentence under the obstruction of justice provision of the sentencing guidelines.[70] Where seeking this relief, however, prosecutors should consult with OIA and MLARS to ensure that the repatriation of assets will not violate foreign law.

VI. Storage and disposition

In advance of seizure, investigators should set up a law enforcement-controlled wallet into which the seized cryptocurrency

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[68] JUSTICE MANUAL § 9-13.510.

[69] *See also* ASSET FORFEITURE POLICY MANUAL (2019), Chap.8, Sec.VII.

[70] 21 U.S.C. § 853(e)(4)(B).

will be transferred. Proper planning not only allows law enforcement to seize cryptocurrency before it can be dissipated but will also prevent costly mistakes—such as inadvertently sending seized cryptocurrency to the wrong public address, rendering it irretrievable by law enforcement (or anyone else).

The seizing agency should, therefore, have a wallet for temporary storage of seized cryptocurrency. Agencies typically set up one or more wallets for each seizure. Regardless of the cryptocurrency wallet type, upon seizure the cryptocurrency should be immediately transferred to the agency-controlled wallet. It is best practice to conduct the transfers using a clean computer, meaning a dedicated, password-protected computer that has not been connected to Department of Justice (Department) or agency networks. The cryptocurrency should be held in "cold storage" wallets—that is, wallets that are not connected to the internet, for example, an encrypted, offline device—until it is transferred to a U.S. Marshals Service (USMS)-controlled wallet.

The USMS provides cryptocurrency storage and disposition services for all federal agencies—including those who do not participate in the Asset Forfeiture Fund and therefore typically store and dispose of assets independently. Before a seizure, the seizing agency should request a cryptocurrency wallet or address from the USMS Complex Assets Group. The USMS handles a wide variety of cryptocurrencies, but not all; investigators are encouraged to first check whether USMS provides support with regard to the type of cryptocurrency at issue.

Prosecutors should not be tempted to request a cashier's check or wire transfer from a cryptocurrency exchange (as they normally would from a bank). Even if the exchange has the ability to convert cryptocurrency into U.S. dollars and send the dollars to the government, Department policy is to keep assets in the same form as they were at seizure and not liquidated until a final order of forfeiture is entered or an administrative forfeiture is complete.[71]

Sometimes, because of the volatility of the cryptocurrency markets, defendants want the government to sell seized cryptocurrency while awaiting trial or sentencing. If all parties with a potential ownership interest in the cryptocurrency agree, prosecutors may seek a court order allowing the government to sell the cryptocurrency before obtaining a final order of forfeiture and then hold the proceeds in trust

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[71] ASSET FORFEITURE POLICY MANUAL (2019), Chap.2, Sec.V.B.

until the end of the forfeiture process. This is termed an "interlocutory order." The prosecutor would file a motion with the court to allow early sale under Federal Rule of Criminal Procedure 32.2(b)(7). Before seeking an interlocutory sale, however, prosecutors are required to consult with MLARS.[72] Liquidation of cryptocurrency through an interlocutory order should be executed according to the policies of the agency and the USMS.

Finally, prosecutors should be aware of the forfeiture implications of a cryptocurrency "fork." A fork occurs when adaptations are made to a blockchain's underlying software and protocols—for example, to decrease the amount of time needed to process transactions. Some forks, known as "hard forks" result in the creation of a new blockchain—and thus a new cryptocurrency—that is incompatible with the historical blockchain from which it derived.[73] For example, in August 2017, Bitcoin experienced a hard fork that resulted in the creation of a new and separate form of cryptocurrency: Bitcoin Cash. This means that whomever had custody of, say, one bitcoin at the time of the hard fork continued to retain that underlying bitcoin but also obtained one unit of the newly derived bitcoin cash—which may have a much different market value.[74]

How do hard forks implicate forfeiture? If a hard fork occurs while the government has custody of forfeitable cryptocurrency, the new "forked" cryptocurrency is now also forfeitable (and in the government's custody) given that it was necessarily derived from the originally tainted asset—not unlike forfeitable livestock in USMS custody that gives birth to offspring. Prosecutors must ensure, however, that the applicable forfeiture pleadings address this development. For example, a plea agreement may seek a defendant's consent to not only forfeit criminally derived bitcoins but also all derivative cryptocurrencies that were created as a result of a hard fork. The forfeiture order should specifically name those forked cryptocurrencies, for example "5.36591645 units of bitcoin, 5.36591645 unit of bitcoin cash," etc.

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[72] *Id.*

[73] *See* FURNEAUX, *supra* note 5, at 58–59.

[74] As of writing, the market value of one bitcoin is approximately $10,583, while the value of one unit of bitcoin cash is approximately $292.

VII. Conclusion

As criminals increasingly turn to cryptocurrency as a means to commit, conceal, and profit from their offenses, law enforcement must be prepared to respond. By familiarizing themselves with this burgeoning asset, prosecutors can more effectively hold accountable those who would exploit the promises of cryptocurrency and blockchain technology for nefarious ends. Although cryptocurrency can present new and interesting challenges in asset forfeiture, the building blocks remain the same. By remaining forceful and nimble, prosecutors and investigators can thus strip wrongdoers of the fruits of their crimes, bring some measure of comfort to victims, and advance the Department's mission to do justice.

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Alternative Remedies: Statutory Remedies Available to Seize and Restrain Assets

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Seizing or restraining assets is essential to preserving assets for forfeiture and criminal restitution. Assets that are not seized or restrained early in a criminal investigation are frequently spent, concealed, or transferred beyond the reach of federal authorities. This article will examine the statutory authority available to seize and restrain assets prior to sentencing in a federal criminal case, so the government can maximize the preservation of assets for asset forfeiture and criminal restitution.

Federal asset forfeiture law provides prosecutors with essential tools to seize, restrain, and forfeit assets. Forfeiture authorities are the means most commonly used to seize or restrain assets. The government's ability to seize or restrain assets pre-conviction is, however, limited to property that is directly forfeitable, typically because it constitutes proceeds of crime, was used to facilitate crime, or was involved in money laundering. Property that is not directly forfeitable, often referred to as substitute property, cannot be seized or restrained pre-conviction.

Pre-judgment remedies other than asset forfeiture are more limited, but can provide important tools in certain cases. One option is to pursue an injunction against fraud under the provisions of 18 U.S.C. § 1345. This statute expressly provides for the restraint of assets that are not proceeds of the crime in cases involving banking law violations or Federal health care offenses. Additional remedies are available after a defendant has been convicted. These options include a post-conviction order under the All Writs Act to preserve assets for criminal restitution, and a post-conviction restraint of property under 21 U.S.C. § 853(g).

Collectively, these statutory remedies can be used to maximize asset forfeiture and the collection of criminal restitution.

I. Federal asset forfeiture authorities

A. Overview

The U.S. Supreme Court has issued several decisions emphasizing the essential role of asset forfeiture in federal law enforcement and upholding the government's broad statutory authority to seize and restrain forfeitable assets pre-conviction. These decisions, several of which analyze the interplay between the statutory authority to seize and restrain assets and a defendant's Sixth Amendment right to counsel, have important implications for the restraint of "untainted" property which is available post-conviction under asset forfeiture law, or through other non-forfeiture remedies.

The Court has recognized the strong governmental interest in obtaining full recovery of all forfeitable assets:

> Forfeitures help to ensure that crime does not pay: They at once punish wrongdoing, deter future illegality, and "lessen the economic power" of criminal enterprises . . . . The Government also uses forfeited property to recompense victims of crime, improve conditions in crime-damaged communities, and support law enforcement activities like police training.[1]

In 1989, the Supreme Court issued two decisions emphasizing the broad reach of the asset forfeiture statutes, despite claims that the assets were needed to pay criminal defense counsel. In *United States v. Monsanto*,[2] the court held that 21 U.S.C. § 853 authorizes the entry of a pretrial order freezing assets in the defendant's possession, even where the defendant seeks to use those assets to pay an attorney. The court found no exception in section 853 for assets a defendant intends to use to pay an attorney:

> [T]he language of § 853 is plain and unambiguous: all assets falling within its scope are to be forfeited upon conviction, with no exception existing for the assets used to pay attorney's fees—or anything else, for that matter. . . . Congress could not have chosen stronger

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[1] Kaley v. United States, 571 U.S. 320, 322 (2014) (citing Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 630 (1989) ("Forfeiture provisions are powerful weapons in the war on crime.")).

[2] 491 U.S. 600 (1989).

> words to express its intent that forfeiture be mandatory in cases where the statute applied, or broader words to define the scope of what was to be forfeited.[3]

Given the express language of the statute, the court rejected the Second Circuit's approach that a district court may employ "traditional principles of equity" before restraining a defendant's use of forfeitable assets, stating that "[t]his reading seriously misapprehends the nature of the provisions in question."[4] The court determined that a pretrial restraining order as to assets a defendant intends to use to pay an attorney is consistent with the Fifth and Sixth Amendments of the Constitution, relying on its decision in *Caplin & Drysdale, Chartered v. United States*,[5] a decision issued by the Court on the same day.[6]

In *Caplin & Drysdale*,[7] the Supreme Court determined that 21 U.S.C. § 853(a) authorizes the forfeiture of assets that a defendant intends to use to pay an attorney. Relying on its decision in *Monsanto*, the Court again rejected the petitioner's statutory claim that a court has equitable discretion to exempt assets that a defendant intends to use to pay criminal counsel.[8] The Court further determined that forfeiture of such assets is consistent with the Fifth and Sixth Amendments. The Court's decision was based, in part, on the relation-back doctrine codified in 21 U.S.C. § 853(c), which provides that "[a]ll right, title, and interest in [property subject to forfeiture] vests in the United States upon commission of the act giving rise to forfeiture under this section."[9] "A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice."[10] The Court emphasized the strong governmental interests at stake:

> It is our view that there is a strong governmental interest in obtaining full recovery of all forfeitable

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[3] *Id.* at 606–07.
[4] *Id.* at 612.
[5] 491 U.S. 617 (1989).
[6] *Monsanto,* 491 U.S. at 614.
[7] 491 U.S. at 617.
[8] *Id.* at 623.
[9] 21 U.S.C. § 853(c).
[10] *Caplin & Drysdale*, 491 U.S. at 626.

> assets, an interest that overrides any Sixth Amendment interest in permitting criminals to use assets adjudged forfeitable to pay for their defense. Otherwise, there would be an interference with a defendant's Sixth Amendment rights whenever the Government freezes or takes some property in a defendant's possession before, during, or after a criminal trial.[11]

The holdings of *Caplin & Drysdale* and *Monsanto* have been reaffirmed by the Court in subsequent decisions.[12]

As *Caplin & Drysdale* makes clear, the applicability of the relation-back doctrine and whether the government has a vested interest in the property are important considerations in the Sixth Amendment analysis.[13] Sixth Amendment issues often arise when the government is seeking to restrain untainted property that was not involved in or traceable to the criminal conduct. As discussed further below, untainted property can be restrained in certain cases under 18 U.S.C. § 1345, a separate statute which authorizes a civil injunction against ongoing fraud, or based on a post-conviction order under the All Writs Act restraining property in anticipation of a restitution order to be entered at sentencing.

Untainted property can also be restrained post-conviction under asset forfeiture law. *Caplin & Drysdale* and *Monsanto* both construed 21 U.S.C. § 853(a), which relates to the forfeiture of directly forfeitable property. The government can forfeit untainted substitute property in a federal criminal case pursuant to 21 U.S.C. § 853(p). Although the government can forfeit substitute property post-conviction, the pre-conviction seizure or restraint of substitute property is not authorized. Until recently there was a circuit split on this issue, with most circuits holding the pre-conviction restraint of substitute

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[11] *Id.* at 631.

[12] *See* Kaley v. United States, 571 U.S. 320, 338 (2014); Luis v. United States, 136 S. Ct. 1083 (2016).

[13] This distinction played an important role in the Supreme Court's holding in the subsequent decision in *Luis v. United States*, where the Court held in a case arising from the application of 18 U.S.C. § 1345 that the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment. *See* note 103, *infra*, and accompanying text.

property was not authorized.[14] While the Fourth Circuit had allowed such restraints, it recently overruled its prior decisions on this issue.[15] The government can, however, restrain substitute property post-conviction based on 21 U.S.C. § 853(g), a separate forfeiture statute which provides a court with broad authority to enter orders needed to ensure the availability of property for forfeiture, which can include the restraint of substitute property. The applicability of the Sixth Amendment to the restraint of untainted property through asset forfeiture authority or other means is discussed further below.

The standard that must be applied by a court to seize or restrain property under asset forfeiture authority is well settled. The Supreme Court's precedents hold that the government is statutorily authorized to restrain directly forfeitable property pre-conviction based on a showing of probable cause. "[A]ssets in a defendant's possession may be restrained . . . based on a finding of probable cause to believe that the assets are forfeitable."[16] The probable cause standard also applies to the seizure of property.[17] "Probable cause, we [the Supreme Court] have often told litigants, is not a high bar: It requires only the "kind of 'fair probability' on which 'reasonable and prudent [people,] not legal technicians, act.'"[18]

B. Seizure warrants

Congress has enacted civil and criminal statutes authorizing the seizure and restraint of forfeitable assets. Criminal seizure and restraint authority is contained in 21 U.S.C. § 853. Although section 853 is the criminal drug forfeiture provision, the procedural aspects of

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[14] United States v. Parrett, 530 F.3d 422, 430–32 (6th Cir. 2008) (Section 853(e) does not authorize the district court to restrain or to take any other action to preserve substitute assets prior to the entry of an order of forfeiture); United States v. Gotti, 155 F.3d 144, 149 (2d Cir. 1998); United States v. Field, 62 F.3d 246, 249 (8th Cir. 1995); United States v. Ripinsky, 20 F.3d 359, 363 (9th Cir. 1994); *In re* Assets of Martin, 1 F.3d 1351, 1357–58 (3d Cir. 1993); United States v. Floyd, 992 F.2d 498, 501 (5th Cir. 1993).

[15] United States v. Chamberlain, 868 F.3d 290 (4th Cir. 2017).

[16] *Monsanto*, 491 U.S. at 615.

[17] *See, e.g.,* United States v. $8,850 in U.S. Currency, 461 U.S. 555 (1983); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

[18] Kaley v. United States, 571 U.S. 320, 338 (2014) (citing Florida v. Harris, 568 U.S. 237 (2013) (quoting Illinois v. Gates, 462 U.S. 213, 231, 238 (1983))).

the statute are incorporated by reference by other forfeiture statutes and generally apply to all federal criminal forfeitures.[19] Criminal seizure warrants are authorized by 21 U.S.C. § 853(f) and are to be issued "in the same manner as provided for a search warrant." Criminal seizure warrants may be issued based on a showing that there is probable cause the asset is subject to forfeiture, "and that [a restraining order] may not be sufficient to assure the availability of the property for forfeiture."[20] The court may consider a probable cause determination made by the grand jury in determining whether a seizure warrant should be issued.[21]

Civil seizure warrants are authorized by 18 U.S.C. § 981(b).[22] This section expressly authorizes the seizure of property that is subject to forfeiture either by the Attorney General, or by the Secretary of the Treasury or the U.S. Postal Service for cases under their jurisdiction. Seizures are made "in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure[.]"[23] Unlike criminal seizure warrants under 21 U.S.C. § 853(f), civil seizure warrants do not require that a restraining order would be insufficient to preserve the property.[24] A district court has jurisdiction to enter a civil or criminal seizure warrant or restraining order irrespective of the location of the property.[25]

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[19] *See, e.g*, 18 U.S.C. § 982(b)(1) (incorporating the provisions of section 853); 28 U.S.C. § 2461(c) (same). Comparable procedural provisions are contained in the criminal RICO statute. 18 U.S.C. § 1963.

[20] 21 U.S.C. § 853(f).

[21] United States v. Lewis, No. 04-403 (JNE/SRN), 2006 WL 1579855, at *8 (D. Minn. June 1, 2006) (in determining whether there was probable cause for a seizure warrant under section 853(f), "it is relevant that a federal grand jury found probable cause to charge" defendant with the offense giving rise to the seizure and forfeiture of the property).

[22] The seizure procedures in 18 U.S.C. § 981(b) are incorporated by reference by other forfeiture statutes. *See, e.g.*, 21 U.S.C. § 881(b).

[23] 18 U.S.C. § 981(b)(2).

[24] *See, e.g.*, United States v. Dupree, 781 F. Supp. 2d 115, 131–32 (E.D.N.Y. 2011) (unlike section 853(f), which governs seizure warrants in criminal cases, there is no requirement in section 981(b) that a restraining order might be inadequate to preserve the property for forfeiture).

[25] 21 U.S.C. § 853(l) (criminal); 18 U.S.C. § 981(b)(3) (civil) ("[A] seizure warrant may be issued pursuant to this subsection by a judicial officer in any district in which a forfeiture action against the property may be filed . . . and may be executed in any district in which the property is found[.]").

The government may seek a dual seizure warrant citing both criminal and civil authority. Often this is used as a proactive approach to complying with the statutory requirements of 18 U.S.C. § 983. In many instances, administrative forfeiture proceedings will be commenced by a federal agency after personal property is seized. When a timely and valid claim is filed with the seizing agency, the seizure is referred to the appropriate U.S. Attorney's Office, which then has 90 days to commence judicial forfeiture proceedings.[26] Judicial forfeiture proceedings can be started by filing a civil forfeiture action, by including the seized property in a criminal indictment, or both. When the government chooses to commence criminal forfeiture proceedings as to the property without also commencing a parallel civil judicial forfeiture proceeding, the government must "take the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute."[27] A dual warrant may be used to address this issue and avoid the need to restrain the property under the criminal forfeiture statutes when criminal forfeiture is the only forfeiture proceeding that is commenced as to seized property. The government may also apply for a housekeeping order pursuant to 21 U.S.C. § 853(e) to maintain custody of the property during the criminal case.[28]

Warrantless seizures are also authorized. A seizure may be made without a warrant if a civil forfeiture complaint has been filed and "the court issued an arrest warrant in rem pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims[.]"[29] A warrantless seizure may also be made where there is probable cause for the seizure and the seizure "is made pursuant to a lawful arrest or

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[26] 18 U.S.C. § 983(a)(3)(A).

[27] 18 U.S.C. § 983(a)(3)(B)(ii)(II).

[28] *See, e.g.*, *In re* 2000 White Mercedes ML 320 Five-door SUV, VIN 4JGAB54EXYA197469, 220 F. Supp. 2d 1322, 1326 n.5 (M.D. Fla. 2001).

[29] 18 U.S.C. § 981(b)(2)(A). These rules are now known as the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. Supplemental Rule G is the basic procedural rule governing federal civil forfeiture actions. Arrest warrants in rem are issued to bring the subject property under the jurisdiction of the federal court. Warrants are either issued by the clerk of court, if the property is already in the government's possession, or by the court "on finding probable cause," if the property "is not in the government's possession custody, or control and is not subject to a judicial restraining order." FED. R. CIV. P. Supp. R. G(3)(b).

search" or "another exception to the Fourth Amendment warrant requirement would apply[.]"[30]

Seizure warrants are not available for real property. In *United States v. James Daniel Good Real Property*,[31] the Supreme Court ruled that real property may not be seized unless exigent circumstances are present. This holding has been incorporated into 18 U.S.C. § 985, which provides that absent exigent circumstances "real property that is the subject of a civil forfeiture action shall not be seized before entry of an order of forfeiture[.]"[32] A civil forfeiture action involving real property is commenced by filing a complaint for forfeiture, posting a notice of forfeiture on the property, and serving notice on the property owner.[33] The government also typically files a notice of lis pendens in the county property records, which is not considered a legal restraint.[34] A court can authorize the seizure of real property prior to the entry of an order of forfeiture based on exigent circumstances.[35]

C. Restraining orders

1. Criminal restraining orders

Federal asset forfeiture law authorizes courts to issue criminal or civil restraining orders to preserve the availability of property for forfeiture. Criminal restraining orders are authorized by 21 U.S.C. § 853(e) and can be issued either pre- or post-indictment. Section 853(e) provides that "[u]pon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property" for forfeiture.[36] The most common type of restraining order is issued post-indictment, or contemporaneously with the return of an indictment, under section 853(e)(1)(A). The restraining order may be issued ex parte, and there

[30] 18 U.S.C. § 981(b)(2)(B).
[31] 510 U.S. 43 (1993).
[32] 18 U.S.C. § 985(b)(1)(A).
[33] 18 U.S.C. § 985(c)(1).
[34] 18 U.S.C. § 985(b)(2).
[35] 18 U.S.C. § 985(d), (e).
[36] 21 U.S.C. § 853(e)(1).

is no right to a pre-restraint hearing.[37] The standard for issuing a restraining order is probable cause. There are two parts to the probable cause determination: probable cause to believe the defendant committed the underlying crime, and probable cause to believe the property is connected to that crime.[38] The court may rely on the grand jury's determination of probable cause in determining whether a restraining order should issue.[39] The issuance of a restraining order is mandatory when the government makes the requisite showing.[40]

Whether a post-restraint hearing is required on a post-indictment restraining order and, if so, what the nature of the hearing should be, are issues that have engendered considerable litigation.[41] This issue was left open by the Supreme Court in *Monsanto*, which declined to consider whether the Due Process Clause requires a hearing before a pretrial restraining order can be imposed.[42] While different circuits have adopted different tests, the prevailing rule is referred to as the *Jones-Farmer* test.[43] Under this test, a defendant is entitled to a

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[37] *See, e.g.*, United States v. E-Gold, Ltd., 521 F.3d 411, 417 (D.C. Cir. 2008) (agreeing with *Monsanto* that no pre-restraint hearing is required); United States v. Holy Land Found. for Relief & Dev., 493 F.3d 469, 475 (5th Cir. 2007) (en banc) ("[A] court may issue a restraining order without prior notice or a hearing[.]"); United States v. Monsanto, 924 F.2d 1186, 1193 (2d Cir. 1991) ("[N]otice and a hearing need not occur before an ex parte restraining order is entered [under] section 853(e)(1)(A)."); United States v. Bissell, 866 F.2d 1343, 1352 (11th Cir. 1989) (same).

[38] Kaley v. United States, 571 U.S. 320, 323–24 (2014).

[39] *Id.* at 330 ("If judicial review of the grand jury's probable cause determination is not warranted (as we have so often held) to put a defendant on trial or place her in custody, then neither is it needed to freeze her property.").

[40] *Monsanto*, 491 U.S. at 612–13 (the word "may" in section 853(e) means only that the district court may enter a restraining order if government requests it, but not otherwise, and that it is not required to enter the order if a bond or other means exists to preserve the property; it "cannot sensibly be construed to give the district court[s] discretion to permit the dissipation of the very property [that section 853(a)] requires be forfeited upon conviction").

[41] A full discussion of this issue is beyond the scope of this article.

[42] *Id.* at 615 n.10.

[43] United States v. Farmer, 274 F.3d 800, 804–05 (4th Cir. 2001) (following *Jones*; same two-part test applies where property defendant says he needs to hire counsel in criminal case has been seized or restrained in related civil forfeiture case); United States v. Jones, 160 F.3d 641, 647 (10th Cir. 1998)

post-restraint hearing only if she makes a sufficient showing that she has no funds other than the restrained assets to hire counsel of choice, and that there is a bona fide reason to believe that the restraining order should not have been entered. A defendant is not entitled to challenge the grand jury's probable cause determination as to the underlying criminal charges.[44]

Criminal restraining orders can also be issued prior to the filing of an indictment or information under section 853(e). Under 21 U.S.C. § 853(e)(2), the government may obtain a temporary restraining order good for up to 14 days based upon a showing that "there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture . . . and that provision of notice will jeopardize the availability of the property for forfeiture."[45] The order can be extended "for good cause shown" or by consent of the party against whom it is entered. A hearing on the restraint must be held "at the earliest possible time and prior to the expiration of the temporary order."[46]

Under 21 U.S.C. § 853(e)(1)(B), the government may obtain a restraining order prior to the filing of an indictment or information good for up to 90 days, unless extended "for good cause shown" or "unless an indictment or information" has been filed.[47] The restraining order can be issued after notice to the parties "appearing to have an interest in the property and opportunity for a hearing[.]"[48] The government must establish that there is a "substantial probability

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(defendant has initial burden of showing that he has no funds other than the restrained assets to hire private counsel or to pay for living expenses, and there is bona fide reason to believe the restraining order should not have been entered).

[44] *Kaley*, 571 U.S. at 326 (the defendant cannot challenge grand jury's finding of probable cause with respect to the underlying crime).

[45] 21 U.S.C. § 853(e)(2); *see, e.g.*, *In re* Restraint of Bowman Gaskins Fin. Group, 345 F. Supp. 2d 613, 617–18 (E.D. Va. 2004) (under section 853(e)(2), government is entitled to a 10-day temporary restraining order if it establishes probable cause to believe that a crime was committed, that the property to be restrained would be subject to forfeiture if the wrongdoer is convicted, and that issuing the temporary restraining order without notice is necessary to preserve the property).

[46] 21 U.S.C. § 853(e)(2).

[47] 21 U.S.C. § 853(e)(1)(B).

[48] *Id.*

that the United States will prevail on the issue of forfeiture" and that "failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture[.]"[49] The government must also show that the need to preserve the availability of the property "outweighs the hardship on any party against whom the order is to be entered." The Supreme Court's holding in *Monsanto* applies equally to pre-indictment restraining orders.[50]

The government may also obtain an order requiring the defendant to repatriate assets. A pretrial restraining order "may order a defendant to repatriate any property that may be seized and forfeited, and to deposit that property pending trial in the registry of the court, or with the United States Marshals Service or the Secretary of the Treasury, in an interest-bearing account[.]"[51] Defendant's failure to comply is punishable as a civil or criminal contempt, and may result in a sentencing enhancement under the obstruction of justice provision of the Federal Sentencing Guidelines.[52]

2. Civil restraining orders

Federal law authorizes civil restraining orders under the provisions contained in 18 U.S.C. § 983(j). The civil restraining order provisions are used much less frequently than the criminal restraining order provisions. "Upon application of the United States," the court has broad authority to "enter a restraining order or injunction, require the execution of satisfactory performance bonds, create receiverships, appoint conservators, custodians, appraisers, accountants, or trustees, or take any other action to seize, secure, maintain, or preserve the availability of property subject to civil forfeiture[.]"[53] The civil restraining order provisions are substantially similar to the criminal

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[49] 21 U.S.C. § 853(e)(1)(B)(i).

[50] *In re Restraint of Bowman Gaskins Financial Group*, 345 F. Supp. 2d at 627–28 (*Monsanto* applies equally to pre-indictment orders; that the target of grand jury investigation wants to use the money to hire counsel is no reason to object to a restraining order if there is probable cause to believe the property is forfeitable).

[51] 21 U.S.C. § 853(e)(4)(A).

[52] 21 U.S.C. § 853(e)(4)(B).

[53] 18 U.S.C. § 983(j)(1).

provisions.[54] Civil restraining orders can be issued pre-complaint,[55] post-complaint,[56] and 14-day temporary restraining orders are also authorized.[57] Civil restraining orders are issued based on a showing of probable cause,[58] and the Supreme Court's decision in *Monsanto* is equally applicable to civil restraining orders.[59] Restraining orders entered pursuant to section 983(j) have been used to execute a writ of entry to inspect real property subject to civil forfeiture.[60]

D. Restraining orders and appointment of a federal receiver under 18 U.S.C. § 1956(b)

The two primary federal money laundering provisions are contained in 18 U.S.C. §§ 1956 and 1957. In addition to prescribing criminal penalties, section 1956(b)(1) contains a provision authorizing civil

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[54] United States v. Melrose East Subdivision, 357 F.3d 493, 499 (5th Cir. 2004) (applying section 853(e) case law to section 983(j) restraining order).
[55] 18 U.S.C. § 983(j)(1)(B).
[56] 18 U.S.C. § 983(j)(1)(A).
[57] 18 U.S.C. § 983(j)(3).
[58] United States v. Real Property at 1407 N. Collins St., Arlington, TX, 901 F.3d 268 (5th Cir. 2018) ("Government may restrain property prior to trial when there is probable cause to [believe] the property is forfeitable" (citing Kaley v. United States, 571 U.S. 320 (2014) (grand jury indictment establishes probable cause to believe defendant committed offense permitting forfeiture, requiring in addition only a showing of probable cause that the property at issue has requisite connection to the crime))).
[59] *Melrose East Subdivision*, 357 F.3d 493 at 500 (applying *Monsanto* to section 983(j) restraining order).
[60] United States v. 40 Acres of Real Prop., No. 08-0117-WS-C, 2008 WL 565333, at *1 (S.D. Ala. Feb. 27, 2008) (section 983(j)(1) authorizes a court to issue a writ of entry to inspect real property, appraise its value and inventory its contents; if a complaint has been filed, no prior notice or hearing is required; that the government has not yet posted the property nor served the owner with the complaint doesn't matter);
United States v. Residence and Real Property Located at 24227 Gulf Bay Road, No. 06-0426-WS-C, 2006 WL 2091764, at *2 (S.D. Ala. July 25, 2006) (same).

penalties for certain violations[61] of section 1956 and 1957.[62] Section 1956(b)(3) provides that "[a] court may issue a pretrial restraining order or take any other action necessary to ensure that any bank account or other property held by the defendant in the United States is available to satisfy a judgment under this section."[63] This provision is limited to restraining property that may be needed to satisfy a civil monetary penalty under section 1956(b)(1), although the same property could also be subject to seizure or restraint based on the asset forfeiture statutes.[64] Courts also have statutory authority to appoint a receiver under the provisions of section 1956(b)(4), which provides that a court may appoint a receiver "to collect, marshal, and take custody, control, and possession of all assets of the defendant, wherever located, to satisfy a civil judgment under this subsection, a forfeiture judgment under section 981 or 982, or a criminal sentence under section 1957 or subsection (a) of this section, including an order of restitution to any victim of a specified unlawful activity."[65] The restraining order and authority to appoint federal receivers in section 1956(b) are rarely used, given the availability of the other statutory provisions discussed above. A receiver may also be appointed under 21 U.S.C. § 853(e) or (g), or in a civil forfeiture case pursuant to 18 U.S.C. § 983(j).[66] Section 1956(b)(4) was used in one case to appoint

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[61] Civil penalties are authorized for "[w]hoever conducts or attempts to conduct a transaction described in subsection (a)(1) or (a)(3), or section 1957, or a transportation, transmission, or transfer described in subsection (a)(2) . . . ." 18 U.S.C. § 1956.

[62] A civil penalty is authorized for not more than the greater of "the value of the property, funds, or monetary instruments involved in the transaction" or $10,000. 18 U.S.C. § 1956(b)(1)(A), (B).

[63] 18 U.S.C. § 1956(b)(3).

[64] 18 U.S.C. § 1956(b)(3) was cited in support of the asset restraint imposed by the court in *United States v. Swenson*, although the restraint was primarily based on the federal asset forfeiture statutes. No. 1:13-cr-00091-BLW, 2013 WL 3322632 (D. Idaho July 1, 2013). The *Swenson* court subsequently used the All Writs Act to support the continued restraint of certain assets after the defendant was acquitted of a money laundering charge at trial. *Id.*; *see* note 74, *infra*, and accompanying text.

[65] 18 U.S.C. § 1956(b)(4)(A).

[66] *See, e.g.*, *In re* Monthly Payments Int'l Reg'l Ctr., LLC Is Obligated to Make, Nos. 5:12MJ1029, 5:12MJ1018, 5:12MJ1019, 2013 WL 183866 (N.D. Ohio Jan. 17, 2013) (where government agrees to release forfeitable funds to allow business to remain afloat in the hope of maximizing the value

a claims administrator to assist the court with identifying and providing notice to persons who might have an interest in filing a claim in a civil forfeiture action.[67]

E. Post-conviction restraint of property

A significant limitation of the asset forfeiture statutes is that untainted property—that is, property not connected to the crime, commonly referred to as substitute property—cannot be restrained pre-conviction. Once a defendant has pleaded guilty or been convicted at trial, however, the court has broad authority under 21 U.S.C. § 853(g) to enter any order necessary to protect the government's interest in property subject to forfeiture, including substitute assets. Section 853(g) by its terms applies "[u]pon entry of an order of forfeiture," and can therefore not be used for a pre-conviction restraint of assets. Once a forfeiture order has been entered, the court "may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited."[68] Orders under section 853(g) can be very useful post-conviction, especially in the time window between conviction and

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of assets ultimately subject to forfeiture, court uses section 853(e) to appoint Special Master to monitor the business); United States v. Guerra, No. 09-20547-CR, 2012 WL 426028, at *1 (S.D. Fla. Feb. 9, 2012) (appointing a receiver under section 853(g) to assist in the valuation and liquidation of the forfeited assets of two LLCs).

[67] United States v. Value of Certain E-Metal Accounts. at E-Gold, Ltd., No. 11-cv-01530-ELH, 2011 WL 3678921, at *1 & n.2 (D. Md. Aug. 19, 2011) (appointing claims administrator in a civil forfeiture case under 18 U.S.C. § 1956(b)(4) to take custody of defendant property and send notice to tens of thousands of potential claimants).

[68] 21 U.S.C. § 853(g).

sentencing.[69] Section 853(g) can be used to restrain substitute assets post-conviction.[70]

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[69] United States v. Kirtland, No. 10-10178-03-WEB, 2011 WL 3624997, at *2 (D. Kan. Aug. 17, 2011) (section 853(g) authorizes court to enjoin defendant and wife from transferring property government wants to forfeit as substitute assets; order may be issued notwithstanding state court judgment approving the transfer as part of a divorce settlement); United States v. Peterson, No. 04 Cr. 752(DC), 2010 WL 2331990, at *2 (S.D.N.Y. June 9, 2010) (court issues section 853(g) order enjoining third party from encumbering forfeited real property and directing him to maintain the property and keep mortgage current, pending resolution of third party's claim in the ancillary proceeding); United States v. MacInnes, 223 F. App'x 549, 552 (9th Cir. 2007) (not precedential) (district court has authority under section 853(g) to set aside foreclosure sale and to enjoin other activity to protect government's interest in criminally forfeited property); United States v. McCorkle, 143 F. Supp. 2d 1311, 1318 (M.D. Fla. 2001) (under section 853(g), court may authorize the Attorney General to seize property named in preliminary order or take any other action to preserve government's interest, without regard to the location of property).

[70] United States v. Scully, 882 F.3d 549 (5th Cir. 2018) (post-judgment restraining order to preserve untainted assets for restitution does not violate Sixth Amendment); United States v. Brown, No. 10-cr-0420-WDQ, 2011 WL 1344177, at *1 (D. Md. Feb. 28, 2011) (court may use section 853(g) to restrain substitute assets until court rules on government's Rule 32.2(e) motion to add the assets to the order of forfeiture); United States v. Browne, 552 F. Supp. 2d 1342, 1344–45 (S.D. Fla. 2008) (noting without discussion that court issued an order restraining defendant's substitute property while his appeal was pending, and that it remained restrained until the government moved to forfeit it as a substitute asset when the conviction was affirmed); United States v. Kilbride, No. CR 05-870-PHX-DGC, 2007 WL 2990116, at *2 (D. Ariz. Oct. 11, 2007) (court freezes defendant's commingled bank account so that government may file a motion under section 853(p) to forfeit the untainted funds as substitute assets); United States v. Wittig, No. 03-40142-JAR, 2007 WL 1875677, at *3 (D. Kan. June 27, 2007) (noting that following conviction "the Court imposed a post-verdict restraining order to restrain forfeited assets and potential substitute assets"); United States v. Salvagno, No. 502-CR-051 (LEK/RFT), 2006 WL 2546477, at *16 (N.D.N.Y. Aug. 28, 2006) (if government wants to prevent a defendant from transferring property, post-conviction, to third parties, so that it can forfeit the property as substitute assets, it may obtain a post-conviction restraining order); United States v. Wahlen, 459 F. Supp. 2d 800, 803 (E.D. Wis. 2006) (noting that court issued a post-conviction order

II. Restitution remedies

There is no general statutory authority authorizing the pre-sentencing restraint of assets to be applied to a restitution order to be entered at sentencing. The tools of the Federal Debt Collection Procedures Act for enforcing a criminal judgment generally cannot be employed before a restitution judgment has been entered by the court. Consequently, the asset forfeiture laws provide the most effective means to preserve assets for ultimate distribution to victims. Once the defendant has been convicted and is pending sentencing, however, the All Writs Act has been used to restrain the defendant's assets so that they will be available for criminal restitution.

The All Writs Act enables federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[71] In *United States v. Catoggio*, the court noted that "[t]here is no logic to the position that the Court is powerless to enter a restraining order after a jury has found a defendant guilty of participating in a large-scale fraud simply because sentencing has been delayed."[72] Similarly, the Eighth Circuit has stated: "[w]e agree that a sentencing court has jurisdiction to enforce its restitution order and may use the All Writs Act, when necessary and appropriate, to prevent the restitution debtor from frustrating collection of the restitution debt."[73] Courts have therefore granted post-conviction restraining orders to preserve assets to be used to satisfy a restitution order that will be entered at sentencing.[74] Courts

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restraining property forfeitable as substitute assets); United States v. Neal, No. CRIM.A. 03-35-A, 2003 WL 24307070, at *5 (E.D. Va. Sept. 29, 2003) (substitute assets may be restrained as soon as jury returns a special verdict for a money judgment); United States v. Numisgroup Int'l Corp., 169 F. Supp. 2d 133, 138 (E.D.N.Y. 2001) (Second Circuit's decision in *Gotti*, holding that section 853(e) does not authorize the pretrial restraint of substitute assets, does not preclude the post-conviction restraint of such assets under separate statutory authority).

[71] 28 U.S.C. § 1651.

[72] 698 F.3d 64, 68 (2d Cir. 2012) (citing United States v. Ross, No. 92 CR 1001 (JSM), 1993 WL 427415 (S.D.N.Y Oct. 15, 1993)).

[73] United States v. Yielding, 657 F.3d 722, 727 (8th Cir. 2011).

[74] United States v. Swenson, No. 1:13-CR-91-BLW, 2014 WL 2506300 (D. Idaho June 3, 2014); *Yielding*, 657 F.3d at 727; *Catoggio*, 698 F.3d at 68; United States v. Sullivan, No. 5:09-CR-302-FL-1, 2010 WL 5437243 (E.D.N.C. Nov. 17, 2010); United States v. Abdelhadi, 327 F. Supp. 2d 587

have rejected defendant's arguments that post-conviction asset restraints based on the All Writs Act violate the Sixth Amendment.[75]

Plea agreements provide an opportunity to obtain the defendant's agreement as to how assets will be handled. Plea agreements can be used creatively to, for example, obtain an asset preservation agreement, to require the defendant to deposit assets with the clerk of court to be applied to a restitution order, to require asset disclosures, and to require the defendant to agree to an asset interview or deposition. These measures are also essential tools in the government's asset recovery efforts.

III. Injunctions against fraud: 18 U.S.C. § 1345

A. Overview of 18 U.S.C. § 1345

The federal government has a powerful tool in 18 U.S.C. § 1345 to obtain an injunction against ongoing fraud or dissipation of assets. The anti-fraud injunction statute[76] allows the Attorney General to commence a civil action in federal court to enjoin ongoing fraud. The statute is limited by its terms to violations of certain statutes, including violations of the fraud offenses in chapter 63 of the

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(E.D. Va. 2004); United States v. Runnells, 335 F.Supp.2d 724, 725–26 (E.D. Va. 2004); *Numisgroup*, 169 F. Supp. 2d at 138 (restraint of assets where "sentencing and a substantial Order of Restitution is imminent" and defendant has virtually no other assets); *Ross*, 1993 WL 427415; United States v. Gates, 777 F. Supp. 1294, 1296 n.4 (E.D. Va. 1991) ("If a trial court does not have authority to order a defendant, post-conviction but prior to sentencing, not to dispose of his assets, then the court is without any meaningful ability to impose a proper sentence under the guidelines and to fulfill the intent and mandate of Congress that a financially able defendant pay fines and costs of prosecution, incarceration, and supervised release or probation. In effect, the court's inability to prevent a convicted defendant from disposing of his assets prior to sentencing would create a situation in which it would only make sense for, and legal counsel would so advise, any defendant with assets to 'dispose of' or transfer them for 'safekeeping.'"); *see also* United States v. Marin, No. 15-CR-252 (PKC), 2018 WL 5282873 (E.D.N.Y Oct. 24, 2018) (denying defendant's request for release of cash bond).

[75] *See* note 123, *infra*, and accompanying text.

[76] 18 U.S.C. § 1345.

United States Code;[77] 18 U.S.C. § 287 (false, fictitious or fraudulent claims); 18 U.S.C. § 371 (insofar as the violation involves a conspiracy to defraud the United States or a federal agency); 18 U.S.C. § 1001, banking law violations;[78] and Federal health care offenses.[79] A proceeding under section 1345 is a separate civil action and cannot be brought as a motion in a pending criminal case.[80]

An injunction under section 1345 is an equitable remedy, and courts have broad discretion over the terms of the injunction:

> Section 1345 affords the Court broad equitable authority. Specifically, it provides that the Court may "take such other action, as is warranted to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought." And this section provides the Court with the flexibility and the power to impose relief necessary to protect the public.[81]

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[77] The fraud offenses in chapter 63 of the U.S. Code include mail fraud (18 U.S.C. § 1341); fictitious name or address (18 U.S.C. § 1342); wire fraud (18 U.S.C. § 1343); bank fraud (18 U.S.C. § 1344); health care fraud (18 U.S.C. § 1347); securities and commodities fraud (18 U.S.C. § 1348); failure of corporate officers to certify financial reports (18 U.S.C. § 1350); and fraud in foreign labor contracting (18 U.S.C. § 1351). The term "scheme or artifice to defraud" is defined in 18 U.S.C. § 1346.

[78] Banking law violations are defined in 18 U.S.C. § 3322(d).

[79] Federal health care offenses are defined in 18 U.S.C. § 24.

[80] United States v. Jones, 652 F. Supp. 1559 (S.D.N.Y 1986) (denying government's motion under section 1345 in criminal case to restrain assets for restitution; "If the Government wishes to pursue this matter . . . it must institute a civil proceedings[sic], as § 1345 specifically requires.").

[81] United States v. Narco Freedom, Inc., 95 F. Supp. 3d 747, 761 (S.D.N.Y 2015) (quoting 18 U.S.C. § 1345(b) and citing United States v. Payment Processing Ctr., 461 F. Supp. 2d 319, 323 (E.D. Pa. 2006) and United States v. William Savran & Assocs., 755 F. Supp. 1165, 1182 (E.D.N.Y. 1991)); United States v. Weingold, 844 F. Supp. 1560, 1573 (D.N.J. 1994) ("Section 1345 has been held to vest the federal courts with power to decree broad remedial preliminary relief").

There is a split in the circuits as to the government's burden of proof in seeking an injunction under section 1345.[82] Some courts[83] have held that a section 1345 injunction can be entered based upon a showing of probable cause, while other courts[84] have held that the government

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[82] *See Narco Freedom, Inc.*, 95 F. Supp. 2d at 755 (recognizing split of authority on burden of proof under section 1345, but holding that the government had met its burden of proof under either standard); United States v. Ritchie Special Credit Invs., 620 F.3d 874, 836 (8th Cir. 2010) ("The federal courts are split on the proper standard of proof required before a § 1345 injunction may issue, and our court has yet to decide its standard."); United States v. Speqtrum, Inc., No. 10-02111 (HHK), 2011 WL 13273345, at *1 n.1 (D.D.C. Feb. 7, 2011) (noting split of authority as to standard of proof) (citing cases).

[83] United States v. Maven Infotech PVT. Ltd., No. 19-cv-60570-BLOOM/Valle, 2019 WL 2008661 (S.D. Fla. Mar. 7, 2019); United States v. CLFE, Inc., No. 14-CV-6792 (SJF)(GRB), 2014 WL 12543797 (E.D.N.Y Dec. 19, 2014) (following *Savran*); United States v. Hoffman, 560 F. Supp. 2d 772, 777 (D. Minn. 2008); *Payment Processing Ctr.*, 461 F. Supp. 2d at 323; United States v. Fang, 937 F. Supp. 2d 1186, 1197 (D. Md. 1996) ("[T]he 'reasonable probability' standard of conventional preliminary injunction analysis equates with 'probable cause' and that it applies in the present case."); *William Savran & Assocs.*, 755 F. Supp. at 1177 ("To support an application for a preliminary injunction under 18 U.S.C. § 1345, the Government must demonstrate that 'probable cause' exists to believe that the defendant is currently engaged or about to engage in a fraudulent scheme violative of either the mail, wire or bank fraud statutes") (following *Belden*); United States v. Davis, No. 88-1705CIV-ARONOVITZ, 1988 WL 168562 (S.D. Fla. Sept. 23, 1988); United States v. Belden, 714 F. Supp. 42, 45–46 (N.D.N.Y. 1987).

[84] United States v. Williams, 476 F. Supp. 2d 1368, 1376 (M.D. Fla. 2007) ("[T]he United States need only prove [the elements of section 1345] by a preponderance of the evidence."); United States v. Sriram, 147 F. Supp. 2d 914, 938 (N.D. Ill. 2001) ("The Court believes that to establish a likelihood of success as required by Section 1345, the Government must show by a preponderance of the evidence that a predicate fraud offense has been or is being committed."); United States v. Barnes, 912 F. Supp. 1187, 1194 (N.D. Iowa 1996) ("[Section] 1345 requires the government to show *by the preponderance of the evidence*, not merely probable cause to believe, that a fraud is being committed[.]"); United States v. Quadro Corp., 916 F. Supp. 613, 617 (E.D. Tex. 1996) ("For the reasons cited in the *Brown* and *Barnes* decisions, this court concurs with the conclusion of the Sixth Circuit that § 1345 requires the government to prove in civil actions by

must establish the basis for the injunction by a preponderance of the evidence. One court applied a hybrid standard of proof.[85] To obtain an injunction under section 1345, the government must make a showing of ongoing fraud, or at least ongoing dissipation of assets.[86] At least one court has ruled that once the government has established a criminal violation, the burden shifts to the defendant to demonstrate that the assets at issue are not the proceeds of fraud.[87]

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preponderance of the evidence that mail fraud or wire fraud is being committed, or is about to be committed."); United States v. Brown, 988 F.2d 658, 663 (6th Cir. 1993) ("We adopt the traditional [preponderance of the evidence] standard of proof for section 1345."); *see also* United States v. Legro, 284 F. App'x 143 (5th Cir. 2008) (not precedential) (declining to decide what standard of proof applies because the government satisfied the more demanding preponderance of the evidence standard).

[85] *Weingold*, 844 F. Supp. at 1571–73 ("[T]he Government must demonstrate by a preponderance of the evidence that probable cause exists to believe that the defendants are currently engaged or about to engage in a fraudulent scheme violative of 18 U.S.C. § 1341.").

[86] United States v. Thomas, No. 18-CV-1104 (PKC) (LB), 2019 WL 121678 (E.D.N.Y Jan. 7, 2019); United States v. CLGE, Inc., No. 14-CV-6792 (SJF)(GRB), 2014 WL 12543797 (E.D.N.Y Dec. 19, 2014); United States v. Gupta, No. 11-3329, 2011 WL 3841684 (C.D. Ill. Aug. 30, 2011) ("Although the fraudulent scheme is over, Dr. Gupta is allegedly dissipating assets traceable to his fraud"); *Payment Processing Ctr.*, 435 F. Supp. 2d at 467; *Fang*, 937 F. Supp. 1186 (fraud must be ongoing or "likely to reoccur"); United States v. Quadro Corp., 928 F. Supp. 688 (E.D. Tex. 1996); *Barnes*, 912 F. Supp. at 1196 ("Both *Weingold* and *Savran* hold that the statute requires proof of an *on-going* fraudulent scheme, and this court finds these conclusions to be more sound."); *William Savran & Assocs.*, 755 F. Supp. at 1178 ("Injunctive relief is authorized under section 1345 only when the alleged fraudulent scheme is ongoing and there exists a threat of continued perpetration; the statutory equitable remedy is not available for solely past violations"); *Belden*, 714 F. Supp. at 45–46 (government's request of injunction denied without prejudice given lack of showing the fraudulent scheme was ongoing).

[87] *William Savran & Assocs.*, 755 F. Supp. at 1183–84 (Once government shows the amount of proceeds deposited to a commingled account, the burden shifts to the defendant to demonstrate "by a fair preponderance of the credible evidence" that the amounts on deposit are not proceeds); *see also* United States v. American Therapeutic Corp., 797 F. Supp. 2d 1289, 1291 (S.D. Fla. 2011) ("Once the government establishes the existence of the statutory violation, the burden shifts to the defendants to show that . . . the

An anti-fraud injunction sought by the United States is different in important respects from a preliminary injunction sought by private parties in a typical civil case. Most courts have held that the traditional test for the issuance of a temporary injunction under Federal Rule of Civil Procedure 65 does not apply where the government is seeking an injunction pursuant to a federal statute that was enacted to protect the public and authorizes injunctive relief.[88] Courts have therefore held that the government is not required to make the traditional showing of irreparable harm when seeking a section 1345 injunction.[89] Similarly, courts have held that no showing

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wrong will not be repeated." (citing United States v. Sene X Eleemosynary Corp., 479 F. Supp. 970, 981 (S.D. Fla. 1979))).

[88] *Maven Infotech PVT. Ltd.*, 2019 WL 2008661, at *1 (following *Livdahl*); *American Therapeutic Corp.*, 797 F. Supp. 2d at 1291 (Where an injunction is authorized by statute, "the Government does not have to show irreparable harm or balance the parties interests. Instead, the requirements for injunctive relief are met when the government establishes that defendants have violated the statute and ... [there] exists some cognizable danger of recurrent violation.") (cleaned up) (internal citations omitted); United States v. Livdahl, 356 F. Supp. 2d 1289, 1290–91 (S.D. Fla. 2005) (because 18 U.S.C. § 1345 and 21 U.S.C. § 301, *et seq*. both "expressly authorize injunctive relief, no specific finding of irreparable harm is necessary, no showing of the inadequacy of other remedies at law is necessary, and no balancing of the interests of the parties is required prior to the issuance of a preliminary injunction"); *Sriram*, 147 F. Supp. 2d at 935–37 ("Although the question is a close one, the Court agrees with the prevailing weight of authority that to prove an entitlement to a preliminary injunction under Section 1345, the Government need not prove all of the elements traditionally required by Rule 65."); United States v. Medina, 718 F. Supp. 928, 930 (S.D. Fla. 1989); *see also CLFE, Inc.*, 2014 WL 12543797, at *5; Burlington Northern Ry. Co. v. Blair, 957 F.2d 599, 601–02 (8th Cir. 1992) ("It is a well-established rule that where Congress expressly provides for injunctive relief to prevent violations of a statute, a plaintiff does not need to demonstrate irreparable harm to secure an injunction.").

[89] *Thomas*, 2019 WL 121678, at *6 (irreparable harm to the public is presumed where statutory conditions for injunctive relief are met) (following *Savran*); United States v. Narco Freedom, Inc., 95 F. Supp. 2d 747, 754 (S.D.N.Y 2015) ("But when, as here, a statute authorizes the government to seek preliminary injunctive relief but does not specifically require proof of irreparable harm, no such showing is required.") (collecting cases); United States v. Hoffman, 560 F. Supp. 2d 772, 776 (D. Minn. 2008) (threat

of the inadequacy of other remedies at law is necessary.[90] Other courts, however, have applied the traditional Rule 65 factors, often taking into account the fact that section 1345 expressly authorizes the entry of an injunction against ongoing fraud.[91]

An action under section 1345 is a civil proceeding and is governed by the Federal Rules of Civil Procedure. If, however, an indictment has been returned, discovery is governed by the Federal Rules of Criminal Procedure.[92] Thus, a court may limit discovery where an indictment

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of substantial injury may substitute for irreparable harm); *Williams*, 476 F. Supp. 2d at 1377 ("Once illegal activity is clearly demonstrated by a plaintiff under 18 U.S.C. Section 1345, the remaining equitable factors of continuing irreparable injury, the balance of hardships to the parties, and the public interest are presumed to weigh in favor of granting injunctive relief"); *Livdahl*, 356 F. Supp. 2d at 1290–91; *Quadro Corp.*, 916 F. Supp. at 617 ("Irreparable harm need not be demonstrated because so long as the statutory conditions are met, irreparable harm to the public is presumed." (citing *William Savran & Assocs.*, 755 F. Supp. at 1179)); *Barnes*, 912 F. Supp. at 1195 ("This court concludes that 'irreparable harm' is not required, because the statute itself states the ground upon which injunctive relief can be granted").

[90] *Livdahl*, 356 F. Supp. 2d at 1290–91 (no showing of the inadequacy of other remedies is required); *Fang*, 937 F. Supp. at 1199 ("when a criminal statute provides for injunctive relief, once the illegal activity is demonstrated, irreparable harm is presumed; there is no need to demonstrate the inadequacy of a remedy at law").

[91] United States v. Uintah Valley Shoshone Tribe, No. 2:17-cv-1140-BSJ, 2018 WL 4222398 (D. Utah Sept. 5, 2018); United States v. James, No. 5:14-cv-387-Oc-30PRL, 2015 WL 7351394 (M.D. Fla. Nov. 20, 2015) (following *Williams* and applying Rule 65 factors); *Gupta*, 2011 WL 3841684, at *2–*3 (citing *Hoffman* and *Williams*); *Hoffman*, 560 F. Supp. 2d at 777 (analyzing Rule 65 factors without discussion of their applicability); *Williams*, 476 F. Supp. 2d at 1377 (applying Rule 65 factors in evaluating government's request for injunctive relief under section 1345); *Fang*, 937 F. Supp. at 1196 (applying Rule 65 factors as modified by the language of section 1345; "In the Court's view, with only slight adaptation, not only does conventional preliminary injunction analysis apply; it is very much up to the job."); *Barnes*, 912 F. Supp. 1187 (applying Rule 65 factors as modified by language of statute).

[92] 18 U.S.C. § 1345(b).

has been returned to prevent discovery that would not be available in the criminal case.[93]

Courts frequently appoint receivers to assist with implementing injunctions under section 1345. Section 1345(a)(2)(B)(ii), which applies to banking law violations and Federal health care offenses, authorizes the court to "appoint a temporary receiver to administer such restraining order." Section 1345 receivers can be vested with the authority the court deems proper, including the authority to file bankruptcy petitions.[94] As noted above, receivers can also be appointed under the asset forfeiture statutes.

Section 1345 authorizes a civil action for injunctive relief, and does not contain provisions relating to the disposition of funds that are restrained by the court. Given the broad equitable discretion authorized by section 1345, courts have ordered that restrained funds be applied to restitution,[95] and that defendants disgorge their ill-gotten gains.[96] Assets restrained under a section 1345 injunction can also be addressed through civil or criminal forfeiture proceedings or through criminal restitution.

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[93] United States v. Esformes, No. 16-23148-CV-KMW, 2018 WL 3617311 (S.D. Fla. July 20, 2018) (granting government's motion to quash subpoenas and limit witness testimony at preliminary injunction hearing).

[94] United States v. Narco Freedom, Inc., No. 14-cv-8593 (JGK), 2015 WL 9302833 (S.D.N.Y Dec. 21, 2015) ("[T]here are several instances where a district court that had previously appointed a receiver expanded the authority of the receiver to include the power to file for Title 11 protection and initiate a bankruptcy case.") (citing cases).

[95] United States v. Grasso, 500 F. Supp. 2d 511, 514 (E.D. Pa. 2007) (addressing claims to funds frozen under section 1345 after restitution paid to victims); United States v. Durham, 86 F.3d 70, 71 n.2 (5th Cir. 1996) ("Under § 1345 and inherent equitable power, a district court may distribute seized funds to fraud victims."); United States v. CenCard, 724 F. Supp. 313 (D.N.J. 1989) (granting summary judgment for government in action under 18 U.S.C. § 1345 and granting government's motion requesting that restrained funds be used to pay restitution).

[96] United States v. Zambrana, No. 09-21736-Civ-Moreno (S.D. Fla. Dec. 11, 2009) (granting default judgment and ordering defendants to disgorge the full amount of their ill-gotten gains in the amount of $12,667,949.87); *see also* Fed. Trade Comm'n v. Gem Merchandising, 87 F.3d 466, 468 (11th Cir. 1996) ("[T]he unqualified grant of statutory authority to issue an injunction . . . carries with it the full range of equitable remedies, including the power to . . . compel disgorgement of profits.").

B. Restraint of assets under 18 U.S.C. § 1345

One of the primary benefits of an injunction under section 1345 is that an injunction restraining assets may be obtained. Restraint of property is expressly authorized by section 1345(a)(2):

> If a person is alienating or disposing of property, or intends to alienate or dispose of property, obtained as a result of a banking law violation (as defined in section 3322(d) of this title) or a Federal health care offense or property which is traceable to such violation, the Attorney General may commence a civil action in any Federal court—
>
> (A) to enjoin such alienation or disposition of property; or
>
> (B) for a restraining order to—
>
> (i) prohibit any person from withdrawing, transferring, removing, dissipating, or disposing of any such property or property of equivalent value; and
>
> (ii) appoint a temporary receiver to administer such restraining order.[97]

This section was added by Congress in 1990 "to enhance the Justice Department's ability to protect property and assets from being dissipated and to expand the remedies available under 18 U.S.C. § 1345."[98] Section 1345(a)(2) is limited by its terms to banking law violations and Federal health care offenses. Other sections of 1345 do not expressly authorize the restraint of assets. Given the broad remedial purpose of section 1345, however, courts have consistently held that asset restraints are authorized even where

[97] 18 U.S.C. § 1345(a)(2).

[98] United States v. Petters, No. 08-5348 ADM/JSM, 2010 WL 4736795, at *3 (D. Minn. Nov. 16, 2010).

section 1345(a)(2) is not implicated.[99] Courts have limited asset freezes in such cases to assets that are traceable to illegal conduct.[100]

The authority to restrain "property of equivalent value" authorized by section 1345(a)(2) is especially important since it authorizes the pre-conviction restraint of property that is not traceable to illegal conduct.[101] As noted above, untainted or substitute property cannot be

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[99] United States v. Payment Processing Ctr., LLC, 435 F. Supp. 2d 462, 464 (E.D. Pa. 2006) ("[Section] 1345 authorizes broad injunctive relief, including property restraints, for any violation of chapter 63 of the United States Code, such as mail and wire fraud, regardless whether the offense constitutes a banking law violation or health care fraud."); United States v. Fang, 937 F. Supp. 2d 1186, 1193–94 (D. Md. 1996) (Section (a)(1)(A) of section 1345—the portion that deals with non-banking, non-health care frauds—authorizes injunctions against ongoing or likely to recur criminal acts and "may be used to freeze assets."); United States v. Barnes, 912 F. Supp. 1187, 1198 (N.D. Iowa 1996) (The "freezing of assets is within the scope of a § 1345 preliminary injunction" even in non-banking cases that are not within section 1345(a)(2).) (following *Brown*); United States v. Weingold, 844 F. Supp. 1560, 1573 (D.N.J. 1994); United States v. Brown, 988 F.2d 658, 663 (6th Cir. 1993) ("[A]sset freezes in cases not involving banking-law violations continue to be within the scope of 18 U.S.C. § 1345 after the statute was amended in 1990.").

[100] United States v. Cacho-Bonilla, 206 F. Supp. 2d 204, 209 (D.P.R. 2002) (Substitute property cannot be restrained under section 1345; "the plain language of the statute limits the receivers' reach to the property obtained as a result of the violation or traceable thereto."); *Barnes*, 912 F. Supp. at 1198 (following *Brown*, but holding that all of defendant's assets in listed bank accounts are subject to restraint as all are related to the alleged bank fraud); United States v. Quadro Corp., 916 F. Supp. 613, 619 (E.D. Tex. 1996) (declining asset freeze as the government had not shown any specific assets which were proceeds of the fraud scheme; "The district court may freeze only those assets [which the government has proven by a preponderance of the evidence] to be related to the alleged fraud." (citing *Brown*, 988 F.2d at 664)); *Brown*, 988 F.2d at 664 ("The district court may only freeze assets that might be forfeitable to the United States in the event that fraud is established at trial"; case remanded to district court for determination of which assets were traceable to the alleged fraud).

[101] United States v. American Therapeutic Corp., 797 F. Supp. 2d 1289, 1293 (S.D. Fla. 2011) ("[I]t is entirely proper for the government to enjoin not just the dissipation of the Defendants' assets that are traceable to the fraud but also any property of equivalent value."); United States v. Sriram, 147 F. Supp. 2d 914, 947 (N.D. Ill. 2001) (health care fraud case; "Once again,

restrained pre-conviction under federal asset forfeiture law. Section 1345 partially fills this gap by authorizing the pre-conviction restraint of untainted assets. Thus, for example, in *United States v. Petters*,[102] the court upheld the restraint of untainted assets in a case involving banking law violations, based on the express language of section 1345(a)(2)(B).

The government's ability to restrain "property of equivalent value" was limited by the Supreme Court in *Luis v. United States*.[103] Silas Luis was charged with health care fraud, including paying kickbacks and conspiracy to commit health care fraud. The government claimed the defendant had fraudulently obtained close to $45 million, and brought an action under 18 U.S.C. § 1345 to restrain approximately $2 million in remaining assets, which the government agreed were untainted funds.[104] As discussed above, in *Monsanto* and *Caplin & Drysdale* the Supreme Court held that the forfeiture and pretrial restraint of "tainted" property, that is, property traceable to illegal activity, is authorized by statute and does not violate the Sixth Amendment.[105] The *Luis* court noted that "both *Caplin & Drysdale* and *Monsanto* relied critically upon the fact that the property at issue was 'tainted,' and that title to the property therefore had passed from the defendant to the Government before the court issued its order freezing (or otherwise disposing of) the assets."[106] In contrast, the property at issue in *Luis* was untainted, "*i.e.,* it belongs to the

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we begin with statutory language, which states that what may be frozen is 'property which is traceable' to the predicate violation, or if that property is unavailable, property 'of equivalent value'"; government may not restrain treble damages under False Claims Act); United States v. DBB, Inc., 180 F.3d. 1277, 1283–84 (11th Cir. 1999) (district court may freeze assets of "equivalent value" to fraud proceeds, without regard to whether the specific assets are traceable to the fraud; reversing district court determination that United States must trace any asset to be restrained to underlying fraud).

[102] No. 08-5348 ADM/JSM, 2010 WL 4736795 (D. Minn. Nov. 16, 2010).

[103] 136 S. Ct. 1083 (2016).

[104] *Id*. at 1087–88.

[105] Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989); United States v. Monsanto, 491 U.S. 600 (1989).

[106] *Luis*, 136 S. Ct. at 1090; 21 U.S.C. § 853(c) ("All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section.").

defendant, pure and simple."[107] This distinction was critical to the Court's holding that "the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment."[108] The holding in *Luis* has not been applied retroactively.[109]

Section 1345 provides an equitable remedy and courts have broad discretion over the terms and scope of the injunction. Prior to *Luis*, courts frequently, but not universally, released funds for attorney's fees or living expenses.[110] In *United States v. Speqtrum, Inc.*, the court noted that "'[t]he award of attorneys' fees in such cases is firmly entrusted to the discretion of the district court.' . . . [T]he Court has the authority to release frozen funds 'in the interest of fundamental fairness if wrongdoing is not yet proven and the restrained property is

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[107] *Luis*, 136 S. Ct. at 1090.

[108] *Id.* at 1088.

[109] United States v. Hopkins, 920 F.3d 690, 704 (10th Cir. 2019) (*Luis* recognized a new right but the decision is not retroactively applicable); United States v. Patel, No. 5:11-CR-00031, 2018 WL 6579989 (W.D. Va. Dec. 13, 2018) (collecting cases); United States v. Sadiq, No. 16-12900, 2017 WL 3457175 (E.D. Mich. Aug. 11, 2017).

[110] United States v. Price, No. 1:18CV00027, 2018 WL 4927269 (W.D. Va. Oct. 11, 2018); United States v. Sharma, No. H-09-409S, 2010 WL 11454455 (S.D. Tex. Jan. 7, 2010) (authorizing release of $2,760,000 for attorney's fees and related costs of defense); United States v. Petters, No. 08-5348 ADM/JSM, 2009 WL 803482, at *3–*5 (D. Minn. Mar. 25, 2009) (one of several orders approving payment of attorney's fees and living expenses); United States v. Payment Processing Ctr., LLC, 439 F. Supp. 2d 435, 441 (E.D. Pa. 2006) (holding that some funds frozen under section 1345 may be released for attorney's fees if defendant submits financial disclosures justifying use of restrained funds); United States v. Liner, 97 F. App'x 74, 75 (8th Cir. 2004) (not precedential) (affirming scope of injunction and noting that district court had allowed some funds for living expenses); United States v. Fang, 937 F. Supp. 2d 1186, 1202 (D. Md. 1996) ("[W]hatever magnitude of funds might be frozen, the Court enjoys broad discretion to make allowances for a defendant's needs for living expenses, counsel fees, and the like."); United States v. Barnes, 912 F. Supp. 1187, 1198 (N.D. Iowa 1996) (asset freeze subject to an allowance for monthly business expenses).

a defendant's only means of securing counsel.'"[111] Courts have denied requests for the release of funds, frequently basing such denials at least in part on an insufficient showing that the funds were needed to pay for counsel of choice.[112] Courts since *Luis* have continued to demand a showing that the release of restrained assets is needed to pay for counsel.[113]

Luis has implications in the asset forfeiture context. *Luis* did not change the rule that directly forfeitable property may be seized or restrained pre-conviction, even where it is claimed that the assets are needed to pay for criminal defense counsel.[114] The government is not,

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[111] No. 10-2111 (JEB), 2012 WL 517526 (D.D.C. Feb. 16, 2012) (citing United States v. Jamie, No. 2:10-cv-00498, 2011 WL 145196, at *1 (S.D. W.Va. Jan. 18, 2011)).

[112] *Id.* (Pre-*Luis* decision; denying without prejudice defendant's request for release of funds based on lack of sufficient showing funds were needed to pay counsel) (citing *Jamie*, 2011 WL 145196, at *1 (Pre-*Luis* decision; Courts have broad discretion to manage the timing of injunctions; "The award of attorneys' fees in such cases is firmly entrusted to the discretion of the district court.")).

[113] *Patel*, 2018 WL 6579989, at *4 (in *Luis* the Supreme Court held that the Sixth Amendment is implicated only if forfeited substitute assets are needed for trial counsel; where petitioner had already paid counsel a sufficient retainer to defend him in criminal proceedings, *Luis* is not applicable); United States v. Balsiger, 910 F.3d 942 (7th Cir. 2018) (distinguishing *Luis*; no Sixth Amendment violation for district court's refusal to lift lis pendens on defendant's untainted residence, where defendant sold residence for $1.5 million eight months before trial, giving him sufficient funds to hire counsel of choice); United States v. Marshall, 754 F. App'x 157 (4th Cir. 2018) (not precedential) (*Luis* does not apply if defendant did not need the restrained funds to retain counsel; defendant was represented by the counsel of his choice at trial, and therefore had no need for the funds seized from his account, even though it turned out that the funds were untainted).

[114] United States v. Li, No. 3:16-CR-00194, 2018 WL 1299724 (M.D. Pa. Mar. 13, 2018) (pretrial motion for return of seized property was properly denied because there had been a probable cause finding by a grand jury, which rendered the seized property "tainted" so *Luis* was not applicable); United States v. Hernandez-Gonzalez, No. 16-20669-CR-SCOLA/TORRES, 2017 WL 2954676 (S.D. Fla. June 26, 2017); United States v. Lindell, No. 13-00512 DKW, 2016 WL 470976 (D. Haw. Sept. 8, 2016) (*Luis* does not apply to "tainted" funds that are subject to forfeiture); United States v. Gordon, 657 F. App'x 773, 778 (10th Cir. 2016) (not precedential) (*Luis* inapplicable where the restrained assets were directly

however, limited to forfeiting directly forfeitable assets in a criminal case. A criminal case is an in personam action, and the government can obtain a forfeiture money judgment and forfeit untainted substitute property pursuant to 21 U.S.C. § 853(p). *Luis* issues have arisen in several cases where a convicted defendant claimed that assets were needed to pay counsel, including attorney's fees on appeal. Courts have ruled in the forfeiture context that *Luis* is not implicated where the substitute assets are not needed to pay counsel.[115] Prior to the Supreme Court's decision in *Luis*, one court permitted a defendant to use assets subject to forfeiture as substitute property to pay for criminal defense counsel.[116]

Courts have also distinguished the pretrial restraint of untainted assets at issue in *Luis* from post-conviction asset restraints. In *United States v. Scully*, a defendant convicted of federal charges challenged a restraining order imposed to preserve assets for restitution and forfeiture, relying in part on the *Luis* decision.[117] By the time the defendant sought to vacate the restraining order, he had been sentenced and a statutory lien under 18 U.S.C. § 3613(c) had arisen based on the restitution ordered at sentencing. The court stated that "[t]he Government's lien on Scully's funds is superior to Scully's

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forfeitable); *see also* United States v. Lacy, 378 F. Supp. 3d 814 (D. Ariz. 2019) (government's seizure of attorney trust accounts did not violate defendants' Sixth Amendment right to counsel, distinguishing *Luis*); United States v. Jones, 844 F.3d 636 (7th Cir. 2016) (rejecting defendant's challenge based on *Luis* to pretrial forfeiture restraint of assets since, under Seventh Circuit precedent, the defendant could have but failed to request hearing on the asset restraint).

[115] *Gordon*, 657 F. App'x at 778 (assuming arguendo that *Luis* applies, it is not implicated because the defendant did not need the restrained assets to retain his counsel of choice); *Patel*, 2018 WL 6579989 (*Luis* holds that the Sixth Amendment is implicated only if forfeited substitute assets are needed for trial counsel); *Lindell*, 2016 WL 4707976 (noting where defendants commingled proceeds of fraudulent Ponzi scheme and money laundering with business' operating funds, all funds in accounts are tainted and retention of funds was not a Sixth Amendment violation under *Luis*; court denied post-appeals motions to release funds from accounts for payment of living expenses and counsel fees and to return "untainted" funds).

[116] United States v. Tardon, 56 F. Supp. 3d 1309, 1323 (S.D. Fla. 2014) ("Defendant should be permitted to recover enough non-traceable assets to satisfy the $104,308.73" owed to criminal defense counsel).

[117] 882 F.3d 549 (5th Cir. 2018).

alleged Sixth Amendment interest in using them to pay appellate counsel."[118]

Similarly, in *United States v. Marshall*, the court held that the defendant was not entitled to use forfeited substitute assets to hire appellate counsel.[119] The court noted that *Caplin & Drysdale* and *Luis* taken together "firmly establish that the right to use forfeited funds to pay for counsel hinges upon ownership of the property at issue—here the credit union funds forfeited after conviction as § 853(p) substitute assets."[120] Title to the credit union funds had vested in the government upon issuance of the district court's forfeiture order following conviction.[121] The court in *Marshall* further stated:

> When all is said and done, *Caplin & Drysdale* and *Luis* confirm that Marshall simply has no property interest or title in the credit union funds which he wishes to use to pay appellate counsel. Marshall has no constitutional entitlement to use substitute assets postconviction to hire his counsel of choice.[122]

Other courts have reached similar conclusions in the post-conviction context, including cases applying the All Writs Act to restrain assets post-conviction.[123]

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[118] *Id.* at 553.
[119] United States v. Marshall, 872 F.3d 213 (4th Cir. 2017).
[120] *Id.* at 220.
[121] *Id.* at 220–21.
[122] *Id.* at 221.
[123] United States v. Catoggio, 698 F.3d 64, 69 (2d Cir. 2012) (pre-*Luis* decision rejecting claim that court's refusal to release funds to pay for counsel violated the Sixth Amendment; *Monsanto* applies "with 'even greater force' here because Ageloff had already pled guilty to both the underlying fraud and later to attempting to launder its proceeds from his prison cell" (citing United States v. Numisgroup Int'l Corp., 169 F. Supp. 2d 133, 139 (E.D.N.Y. 2001))); United States v. Swenson, No. 1:13-CR-91-BLW, 2014 WL 2506300 (D. Idaho June 3, 2014) (pre-*Luis* decision rejecting Sixth Amendment challenge to post-conviction asset restraint based on All Writs Act); United States v. Marin, No. 15-CR-252 (PKC), 2018 WL 5282873, at *4 (E.D.N.Y Oct. 24, 2018) ("Rather, where, as here, the defendant has been convicted of a crime that could result in the imposition of forfeiture, fines, and restitution [28 U.S.C. § 2044] treats a defendant's bail money like "robber's loot", which must be returned to the victim."); *Numisgroup*, 169 F. Supp. 2d at 138 (pre-*Luis* decision denying request for release of funds

As *Marshall* demonstrates, when the government's title vests becomes an important consideration in applying *Luis* to the forfeiture of substitute property. Under the relation-back doctrine codified in 21 U.S.C. § 853(c), the government's title to directly forfeitable property "vests in the United States upon the commission of the act giving rise to forfeiture . . . ." Courts have reached different conclusions as to how the relation-back doctrine applies to substitute property. Courts have held that the government's title to substitute property vests at the time of the offense giving rise to forfeiture,[124] when a grand jury indictment is returned with a notice of forfeiture,[125] when the defendant transferred traceable funds to third parties,[126] when the defendant is convicted,[127] or when the preliminary order of

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restrained for restitution under All Writs Act; "the Court finds that the reasoning in *Monsanto* applies with even greater force where we are past the pretrial proceedings and the defendants have been convicted.").

[124] United States v. McHan, 345 F.3d 262, 271–72 (4th Cir. 2003) (relation back doctrine applies to substitute assets and vests title in government as of the date of offense), *called into question by* United States v. Chamberlain, 868 F.3d 290 (4th Cir. 2017); United States v. Derochemont, No. 8:10-cr-287-T-24-MAP, 2011 WL 6319293, at *3 (M.D. Fla. Dec. 15, 2011) (following *McHan*; the relation back doctrine gave government a vested interest in the residence government forfeited as a substitute asset, thus forcing defendant's wife to file her claim under section 853(n)(6)(B)); United States v. Wittig, 525 F. Supp. 2d 1281, 1288 (D. Kan. 2007) (following *McHan*; government's interest in substitute assets vests at the time of the offense); United States v. Woods, 436 F. Supp. 2d 753, 755 (E.D.N.C. 2006) (following *McHan*; because the relation back doctrine applies to substitute assets, government was entitled to file a lis pendens on real property named as a substitute asset even though the property was titled in a third party's name; the third party may contest the forfeiture in the ancillary proceeding); United States v. Ivanchukov, 405 F. Supp. 2d 708, 712 (E.D. Va. 2005) ("[T]he government's interest in substitute assets, like its interest in tainted assets, vests at the time the act giving rise to forfeiture is committed.").

[125] United States v. Peterson, 820 F. Supp. 2d 576, 585 (S.D.N.Y. 2011) (vesting occurs when grand jury indictment is returned with notice of forfeiture).

[126] United States v. Preston, 123 F. Supp. 3d 108 (D.D.C. 2015) (government's interest in substitute assets arose when defendant transferred traceable funds to third parties).

[127] United States v. Kramer, No. 1:06-cr-200-ENV-CLP, 2006 WL 3545026 (E.D.N.Y. Dec. 8, 2006) (vests when defendant is convicted).

forfeiture is filed.[128] There is good authority that the government's title to substitute property vests, at the latest, upon entry of the preliminary order of forfeiture. At least at the point the government's title has vested, a defendant's claim under *Luis* that funds are needed to pay counsel should be rejected.

C. Comparison of asset forfeiture and 18 U.S.C. § 1345

There are significant differences between the seizure or restraint of assets under the federal asset forfeiture laws and an action for injunctive relief under 18 U.S.C. § 1345. Federal asset forfeiture law provides the United States with its most powerful tools to seize and restrain assets pre-conviction. Once seized or restrained, the assets can be forfeited through administrative, civil, or criminal forfeiture proceedings. Forfeited assets can be used for a variety of purposes authorized by Congress, including compensation of crime victims. Forfeiture is mandatory, broad in scope, and applies to a wide range of federal criminal violations. As *Caplin & Drysdale*, *Monsanto*, and subsequent cases have made clear, directly forfeitable assets may be seized pre-conviction based on probable cause and can be forfeited even where it is claimed that the assets are needed to pay criminal defense counsel. In most instances, federal asset forfeiture law provides the most effective means of seizing, forfeiting, and disposing of tainted assets.

There are instances where an injunction under 18 U.S.C. § 1345 provides a useful statutory remedy to supplement the asset forfeiture statutes. Substitute property cannot be restrained pre-conviction

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[128] United States v. Egan, 654 F. App'x 520 (2d Cir. 2016) (not precedential) (claim of third party that acquired interest in substitute assets after preliminary order of forfeiture was filed did not have an interest superior to government's because government's title vested with the filing of the preliminary order of forfeiture); United States v. Espada, 128 F. Supp. 3d 555 (E.D.N.Y. 2015) (petitioner with irrevocable interest in husband's pension plan had superior interest to government, whose interests vests with the filing of the preliminary order of forfeiture); United States v. Jennings, No. 5:98-CR-418, 2007 WL 1834651, at *4 (N.D.N.Y. June 15, 2007) (substitute assets vested in government on the order granting the motion to substitute assets).

under federal asset forfeiture law.[129] Section 1345 offers the significant benefit of authorizing the pre-conviction restraint of untainted property, "property of equivalent value," although this authority is limited to cases involving banking law violations or Federal health care offenses. Thus, section 1345 can be useful where illegal proceeds have been dissipated or cannot be located, but the respondent has untainted property available for restraint. Section 1345 can also be useful where, at a preliminary stage of the investigation, the government does not have sufficient evidence as to which assets are traceable to the alleged illegal conduct. And section 1345 expressly authorizes an order enjoining fraudulent conduct or dissipation of assets. Section 1345, however, applies to a much narrower range of violations than asset forfeiture law.

An injunction under section 1345 is an equitable remedy, and courts have considerable discretion as to the scope of the injunction, including whether funds should be released for attorney's fees or living expenses. This is especially true post-*Luis*. In contrast, asset restraints under the asset forfeiture laws are not equitable remedies, and restrained assets are not subject to release for attorney's fees or living expenses. In *Monsanto*, the Supreme Court expressly rejected the approach taken by the circuit court that "traditional principles of equity" be employed in interpreting the scope of an asset restraint under 21 U.S.C. § 853(e).[130] "This reading seriously misapprehends the nature of the provisions in question."[131] Given the broad language of section 853(e), the statute could not be construed to exempt assets that a defendant intended to use to pay defense counsel. "Whatever discretion Congress gave the district courts in §§ 853(e) and 853(c), that discretion must be cabined by the purposes for which Congress created it: 'to preserve the availability of property . . . for forfeiture.'"[132]

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[129] The situation is different post-conviction. If the defendant has been convicted, but not yet sentenced, substitute property can be restrained under 21 U.S.C. § 853(g) or an asset restraint may be obtained under the All Writs Act to preserve assets for restitution.

[130] United States v. Monsanto, 491 U.S. 600, 612 (1989).

[131] *Id*.

[132] *Id*. at 613.

There are additional differences between an asset seizure or restraint under the federal asset forfeiture laws and an action for injunctive relief under 18 U.S.C. § 1345:

- *Applicability:* The asset forfeiture statutes apply to a much broader range of criminal violations. The applicability of 18 U.S.C. § 1345 is more limited.
- *Standard of proof:* The standard of proof for an asset forfeiture seizure or restraint is probable cause. The standard of proof under section 1345 varies (probable cause or preponderance of the evidence) and under section 1345 courts may apply the Rule 65 factors.
- *Available restraints:* Seizure warrants or restraining orders are authorized under forfeiture law. Section 1345 authorizes injunctive relief only.
- *Access to grand jury materials:* Grand jury materials can be used for criminal asset forfeiture restraints, and grand jury materials can be used in civil asset forfeiture cases as authorized by 18 U.S.C. § 3322.[133] Grand jury material cannot be used in section 1345 actions except pursuant to an order under Federal Rule of Criminal Procedure 6(e).
- *Hearing requirements:* Under section 1345 "[t]he court shall proceed as soon as practicable to the hearing and determination of such action."[134] A hearing may or may not be required for a forfeiture restraining order, depending upon the type of restraining order. A hearing is typically required on a post-indictment forfeiture restraining order only if the defendant satisfies the *Jones-Farmer* test.[135]
- *Nature of remedy:* An action under section 1345 is an action for injunctive relief, and the statute does not address the disposition of restrained assets. Federal asset forfeiture law provides authority to forfeit seized or restrained assets through administrative, civil, or criminal forfeiture proceedings, and there are detailed procedural rules applicable to such proceedings. Once forfeited, assets may be remitted to owners, lienholders, or victims through the procedures contained at

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[133] Under 18 U.S.C. § 3322(a) grand jury material may be disclosed "for use in connection with any civil forfeiture provision of Federal law."
[134] 18 U.S.C. § 1345(b).
[135] *See* note 43, *supra*, and accompanying text.

28 C.F.R. part 9, or may be used for other purposes authorized by 28 U.S.C. § 524(c).[136]

Often, the strict rules limiting the release of forfeitable assets established in *Caplin & Drysdale* and *Monsanto* are advantageous to the government. But the flexibility afforded by an injunction under 18 U.S.C. § 1345 can be beneficial in certain cases. Complex federal criminal cases often generate extensive legal proceedings which necessitate creative and flexible solutions. For example, in *United States v. Petters*,[137] Minnesota businessman Thomas Petters was convicted of fraud, conspiracy, and money laundering charges. Petters owned numerous businesses, including Petters Group Worldwide LLC (PGW), Sun Country Airlines, the Polaroid Corporation, Fingerhut, and Petters Company, Inc. (PCI).[138] The fraud scheme came to light on September 8, 2008 when a Petters employee confessed to government authorities that she had assisted Petters with perpetrating a multi-billion dollar Ponzi scheme. Under the scheme, investors were told that their money would be used to purchase electronic goods that were then sold for profit to large retailers such as Sam's Club and Costco.[139] In fact, few if any such transactions ever occurred. Over the next 16 days, an employee secretly recorded multiple conversations with Petters. Search warrants were obtained based on these conversations and other evidence, which were executed on September 24, 2008.[140] Petters was convicted at trial and was sentenced to 50 years' imprisonment. Numerous assets were forfeited from Petters and several co-defendants, and Petters was ordered to pay a $3,522,880,614 forfeiture money judgment.

The government used a multi-faceted approach to recover assets for victims in the *Petters* case. In light of the massive scope of the fraud,

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[136] 28 U.S.C. § 524(c) establishes the Department of Justice Assets Forfeiture Fund.

[137] 663 F.3d 375 (8th Cir. 2011). The facts set forth above are contained in the Eighth Circuit's decision. There are numerous orders issued in the section 1345 action outlining the procedural history of the case. *See, e.g.*, Kelley v. JPMorgan Chase & Co., No. 10-cv-04999 (SRN/HB), 2018 WL 1720913 (D. Minn. Apr. 9, 2018); United States v. Ritchie Special Credit Invs., Ltd. et al., 620 F.3d 847 (8th Cir. 2010).

[138] *Petters*, 663 F.3d at 379.

[139] *Id.*

[140] *Id.*

the complexity of Petters' business ventures, and the limited financial investigation as of September 24, 2008, the government commenced an action under 18 U.S.C. § 1345 in early October 2008. The court issued a broad injunction freezing Petters' assets and those of his associated companies including PCI and PGW, thereby preserving the assets for victim restitution and potential forfeiture. Petters committed a massive fraud, but also operated numerous legitimate businesses. The court appointed a receiver "vested with the powers necessary to take immediate custody, control, and possession of the assets of the estates in receivership."[141] The receiver was vested with broad authority to "[c]oordinate with representatives of the United States Attorney's office and Court personnel as needed to ensure that any assets subject to the terms of this Order are available for criminal restitution, forfeiture, or other legal remedies in proceedings commenced by or on behalf of the United States."[142]

Complex fraud cases with related bankruptcy proceedings can result in competing claims for a limited pool of assets, since the same assets may simultaneously be subject to forfeiture and part of a bankruptcy estate.[143] The receivership order authorized the receiver to continue to operate legitimate businesses operated by Petters, including, for example, Sun Country Airlines. The *Petters* receiver was vested with the authority to file bankruptcy petitions, and filed Chapter 11 bankruptcy proceedings for PCI, PGW, and other businesses associated with Petters.[144] The receiver was appointed to serve as the bankruptcy trustee for PCI and PGW in the jointly-administered bankruptcy estates.[145]

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[141] *Ritchie Special Credit Investments*, 620 F.3d at 850; United States v. Petters, et al., No. 08-5348 ADM/JSM, 2009 WL 4806993 (D. Minn. Dec. 4, 2009) (Memorandum Opinion and Order).

[142] *Ritchie Special Credit Investments*, 620 F.3d at 851.

[143] *See* Alice W. Dery & Jennifer Bickford, *Transferring Forfeited Assets to Victims through Remission, Restoration, and Restitution*, 67 DOJ J. FED. L. & PRAC., no. 3, 2019, at 219–34 (discussion of forfeiture and bankruptcy).

[144] *In re* Petters Company, Inc. No. 08-45257, 2017 WL 2799878 (Bankr. D. Minn. Dec. 14, 2017). Other Petters-related businesses also filed for bankruptcy. *See e.g.*, *In re* Polaroid Corp., 472 B.R. 22 (Bankr. D. Minn. 2012); *In re* Petters Co. Inc., 557 B.R. 711 (Bankr. D. Minn. 2016).

[145] The Eighth Circuit affirmed this appointment, rejecting a claim that it was a conflict of interest for the section 1345 receiver to also serve as a bankruptcy trustee. *Ritchie Special Credit Investments*, 620 F.3d at 847.

The United States, receiver, and bankruptcy trustees entered into a coordination agreement.[146] The agreement was intended "to maximize recovery to victims and creditors and minimize receivership and bankruptcy expenses through the coordination of their respective efforts for the victims and creditors."[147] The agreement recognized that many assets were subject to competing claims from bankruptcy and asset forfeiture and also recognized the significant overlap between victims and creditors. The agreement generally provided that individual assets personally owned by the defendants, or transferred by the defendants to third parties, would be forfeited by the United States. The corporate assets of PCI, PGW, and other Petters-related companies involved in the pending bankruptcy cases would be resolved in bankruptcy court.

The *Petters* case illustrates that a flexible approach may be needed in complex fraud cases. Multiple remedies were used to marshal assets for victims. These included asset forfeiture, an injunction under 18 U.S.C. § 1345, and bankruptcy. The coordination agreement substantially eliminated competing claims between asset forfeiture and bankruptcy for a limited pool of assets. The government pursued criminal forfeiture as a part of the criminal indictments, forfeiting many assets directly or as substitute property pursuant to forfeiture money judgments entered by the district court. The receiver assisted in these efforts by recovering substantial assets under the section 1345 injunction, in part based on litigation pursued by the receiver under the Minnesota Uniform Voidable Transactions Act.[148] The receiver turned substantial funds over to the government for forfeiture based on the criminal convictions, which were paid out to victims of the fraud scheme. Additional funds have been distributed through the bankruptcy proceedings. The coordinated efforts successfully recovered hundreds of millions of dollars for victims and creditors.

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[146] Coordination Agreement Among Plaintiff United States of America, The Receiver, Chapter 11 Trustee of Petters Group Worldwide, LLC, Chapter 11 Trustee of Petters Company Inc., Et Al., And Chapter 7 Trustee of Polaroid Corporation, Et. Al. N/K/A PBE Corporation et al., United States v. Petters, et al., No. 08-cv-05348 (D. Minn. Nov. 25, 2009), ECF No. 1351.

[147] *Id.*

[148] MINN. STAT. §§ 513.41–513.51.

IV. Conclusion

The United States has powerful statutory remedies available to seize and restrain assets. In most instances asset forfeiture law provides the most effective means to seize and restrain assets. The asset forfeiture statutes are broadly worded and, especially when the property to be restrained is directly traceable to criminal conduct, there is no Sixth Amendment bar which precludes the restraint. Each case is different, however. Depending upon the circumstances of the case, and the stage of the case where the restraint is being sought, other remedies may be available. These remedies include restraint of assets under 18 U.S.C. § 1345, a post-conviction order under the All Writs Act to preserve assets for criminal restitution, and a post-conviction restraint of property under 21 U.S.C. § 853(g). When used in a coordinated manner based on a thorough financial investigation, these remedies can maximize the government's ability to seize and restrain assets for asset forfeiture and restitution.

About the Author

James S. Alexander is an Assistant United States Attorney in the District of Minnesota where he served as the Asset Forfeiture Coordinator from May 2002–September 2017. He has litigated a wide variety of criminal and civil asset forfeiture cases. From October 2017 to the present, he has served as the Asset Forfeiture and Money Laundering Coordinator at the Executive Office for United States Attorneys. Before joining the Department, he was an Assistant Attorney General with the Minnesota Attorney General's Office from September 1985–April 2002.

Transferring Forfeited Assets to Victims Through Remission, Restoration, and Restitution

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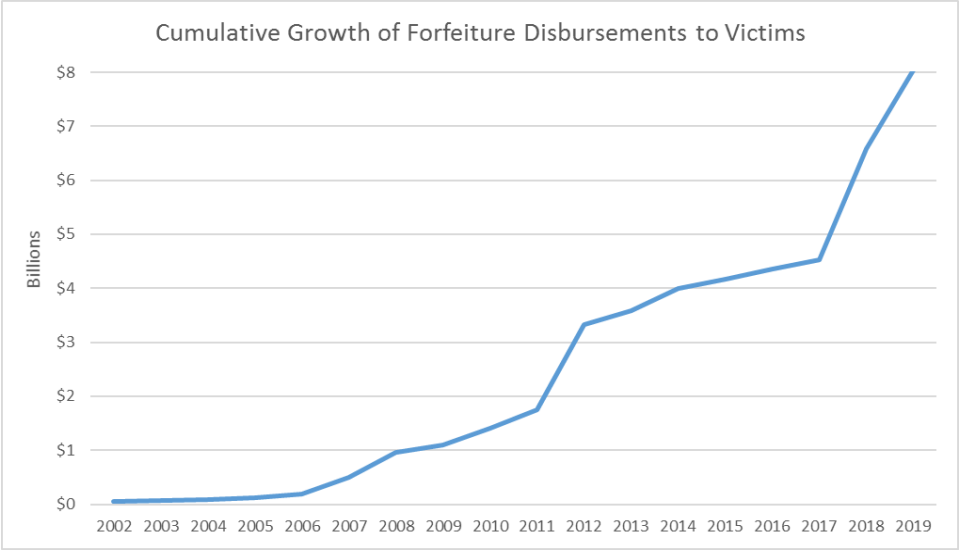
I. Introduction

As Congress has expanded the number of crimes for which forfeiture is available or mandated, forfeiture has become the principal tool by which the government recovers criminal proceeds, facilitating property, and the instrumentalities of crime and returns these assets to victims of crime. From 2002 to the present, the government transferred more than $8 billion to victims.[1] The graph below shows the growth of forfeiture disbursements to victims over that period.

[1] *See, e.g.,* Press Release, U.S. Dep't of Justice, Department of Justice Compensates Victims of Bernard Madoff Fraud Scheme with Funds Recovered Through Asset Forfeiture (Nov. 9, 2017); Press Release, U.S. Dep't of Justice, Department of Justice Begins Second Distribution of Funds Recovered Through Asset Forfeiture Totaling $1.2 Billion to Compensate Victims of Bernard Madoff Fraud Scheme (Apr. 12, 2018); Press Release, U.S. Dep't of Justice, Department of Justice Begins Third Distribution of Funds Recovered Through Asset Forfeiture to Compensate Victims of Bernard Madoff Fraud Scheme (Nov. 29, 2018); Press Release, U.S. Dep't of Justice, Department of Justice Begins Fourth Distribution of Funds Recovered Through Asset Forfeiture to Compensate Victims of Bernard Madoff Fraud Scheme (July 31, 2019).



Growth of forfeiture disbursements 2002 to present

Returning forfeited funds to victims has been a key part of the Department of Justice's (Department) Asset Forfeiture Program. The revised 2018 *Attorney General Guidelines on the Asset Forfeiture Program* states that one of the primary goals of the forfeiture program is to "recover[ ] assets that may be used to compensate victims," and "[w]henever possible, prosecutors should use asset forfeiture to recover assets to return to victims of crime . . . ."[2] Further, all Department employees are required to "make their best efforts to see that crime victims are notified of, and accorded, the rights described in" the Crime Victims' Right Act,[3] which includes the "right to full and timely restitution as provided in law."[4]

Forfeiture has played a critical role in assisting victims in several recent high-profile financial fraud cases. For example, in the Bernard Madoff securities fraud case, the government seized and forfeited more than $4 billion from Madoff and others and is currently

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[2] DEP'T OF JUSTICE, OFFICE OF THE ATTORNEY GEN., ATTORNEY GENERAL'S GUIDELINES ON THE ASSET FORFEITURE PROGRAM Part V. D (2018).
[3] 18 U.S.C. § 3771(c)(1).
[4] DEP'T OF JUSTICE, OFFICE OF THE JUSTICE PROGRAMS, OFFICE FOR VICTIMS OF CRIMES, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE Art. V.H. (2011 ed., rev. May 2012) (citing 18 U.S.C. § 3771(a)(6)).

remitting the funds to approximately 40,000 of Madoff's investor-victims.[5] The Department anticipates that when it completes the *Madoff* remission, his victims will recover more than 65% of their losses. The victims' appreciation for the government's assistance is reflected in messages like the following received from one of the *Madoff* victims:

> Your commitment to righting this horrific injustice makes me have faith again in our judicial system and humanity. I'd love nothing more than to thank each and every one of you in person. Please know you are making an enormous difference in so many people's lives.[6]

In addition to *Madoff*, the Money Laundering and Asset Recovery Section (MLARS) has coordinated several other recent significant victim recoveries, including:

- The government civilly forfeited $586 million paid by Western Union Company for its role in a facilitating a fraud scheme involving persons posing as victims' family members needing assistance or promising prizes or job opportunities. In the scheme, victims were directed to send money through Western Union to purportedly help their relative or claim their prize. The government is currently evaluating petitions received from over 180,000 victims in advance of distributing funds. (U.S. Attorney's Office (USAO) for the Middle District of Pennsylvania).[7]
- David H. Brooks, the now-deceased founder of a company that supplied body armor to the U.S. military and law enforcement agencies, forfeited more than $143 million as a result of his accounting fraud and manipulation of the company's stock prices. The government distributed these funds to thousands of

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[5] *See, e.g.,* United States v. $7,206,157,717 on Deposit at JPMorgan Chase Bank, N.A., in the Accounts Set Forth on Schedule A, 1:10-cv-09398 (S.D.N.Y. 2010); United States v. $1,700,000,000 in United States Currency, 1:14-cv-00063 (S.D.N.Y. 2014).

[6] *See Notes to MVF*, MADOFF VICTIM FUND, www.madoffvictimfund.com (last visited July 22, 2019).

[7] *See* Press Release, U.S. Dep't of Justice, Western Union Admits Anti-Money Laundering and Consumer Fraud Violations, Forfeits $586 Million in Settlement with Justice Department and Federal Trade Commission (Jan. 19, 2017).

Brooks' investor-victims. (USAO for the Eastern District of New York).[8]

- AMG Services, a payday lender, conducted a scheme involving false disclosures and unauthorized fees to customers. The government obtained agreements for the civil forfeiture of more than $500 million from U.S. Bank and two tribal organizations. The forfeited funds were included in a $505 million distribution made by the Federal Trade Commission. (USAO for the Southern District of New York).[9]
- The government recently made remission payments totaling nearly $17 million to 364 victims of a Ponzi scheme perpetrated by Thomas J. Petters. (USAO for the District of Minnesota).[10]

The government returns seized or forfeited funds to victims through three avenues: remission, restoration, and restitution. *Remission* occurs when the Attorney General exercises discretion to transfer forfeited funds to victims of the crime underlying the forfeiture. *Restoration* occurs when the Attorney General authorizes the transmittal of forfeited funds to a criminal court to be applied towards satisfaction of the defendant's restitution order. *Restitution* is when a court orders a criminal defendant to compensate the victim for losses caused by the defendant's crime; at times this is satisfied with forfeited funds.

II. Forfeiture and restitution: mandatory for most federal crimes

For most federal crimes, Congress has mandated that courts order forfeiture of any property involved in or traceable to the offense.[11]

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[8] *See* Press Release, U.S. Dep't of Justice, Government Forfeits More Than $143 Million in Fraud Proceeds Seized from David H. Brooks (Nov. 5, 2018).
[9] *See* Press Release, Fed. Trade Comm'n, FTC and DOJ Return a Record $505 Million to Consumers Harmed by Massive Payday Lending Scheme (Sept. 27, 2018).
[10] *See* Press Release, U.S. Dep't of Justice, Victims of Tom Petters Ponzi Scheme Receive Initial Distribution Of More Than $16 Million In Forfeited Funds (Aug. 13, 2018).
[11] 18 U.S.C. § 982(a)(1) (The court "*shall order* that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.") (emphasis added); *see also* 28 U.S.C. § 2461(c) ("If the defendant is convicted of the offense giving rise to

Similarly, the Mandatory Victims Restitution Act of 1996 (MVRA) requires the sentencing court to order restitution for property crimes in which an identifiable victim has incurred a pecuniary loss.[12] While the MVRA provides prosecutors with powers to attach a defendant's assets for payment of restitution after conviction, by that time it is often too late because the defendant may have dissipated or hidden assets prior to conviction. Forfeiture statutes provide strong pretrial asset preservation tools that augment the restitution process and ensure that ill-gotten assets are preserved for victims.

In addition to facilitating recovery for victims, principal goals of forfeiture include depriving criminals of the proceeds of crime and promoting cooperation among federal, state, local, tribal, and foreign law enforcement agencies.[13] Restitution, on the other hand, is intended to compensate victims for losses incurred as a result of the underlying crime. While forfeiture and restitution serve distinct purposes, these purposes converge in cases involving victims.

III. Petitions for remission

The Attorney General (acting through MLARS), or the seizing agency, may exercise discretion to remit forfeited funds to persons who have incurred a pecuniary loss directly caused by the offense underlying the forfeiture, or a related offense.[14] A "related offense" includes an offense committed "as part of the same scheme or design, or pursuant to the same conspiracy, as was involved in the offense for which forfeiture was ordered."[15]

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the forfeiture, the court *shall order* the forfeiture of the property as part of the sentence in the criminal case.") (emphasis added);
United States v. Newman, 659 F.3d 1235, 1240 (9th Cir. 2011) ("The mandatory nature of that phrase ['shall order' in the criminal forfeiture statutes] is clear: When the government has met the requirements for criminal forfeiture, the district court must impose criminal forfeiture, subject only to statutory and constitutional limits.").

[12] 18 U.S.C. § 3663A(a)(1), (b)(1).

[13] DEP'T OF JUSTICE, OFFICE OF THE ATTORNEY GEN., ATTORNEY GENERAL'S GUIDELINES ON THE ASSET FORFEITURE PROGRAM Part II (2018).

[14] 28 C.F.R. §§ 9.2, 9.8(b)(1).

[15] 28 C.F.R. § 9.2.

A. Eligible persons

A "person" eligible for remission may be an individual, partnership, corporation, joint business enterprise, estate, or other legal entity capable of owning property. In addition, a federal, state, or local governmental agency may be eligible for remission.

A person cannot qualify for remission if he or she:

- Knowingly contributed to or benefited from the offense underlying the forfeiture or was willfully blind to it;
- Has been compensated or has recourse to other reasonably available assets or compensation (for example, litigation or insurance); or
- Seeks recovery for torts that are associated with the offense but are not the bases for the forfeiture.[16]

B. Eligible losses

The amount of a victim's eligible pecuniary loss is limited to the fair market value of the property as of the date of the occurrence of the loss.[17] The most common types of compensable losses arise from Ponzi schemes, telemarketing scams, investment fraud, and the like, in which the victim gives money voluntarily to the perpetrator in the expectation of receiving a return. Other kinds of eligible losses may arise from embezzlement, theft, and crimes of false pretenses, such as fraudulent loan applications. Less obvious types of compensable losses may include unreimbursed expenses incurred by a victim for counseling and other forms of medical treatment that arise directly from the criminal offense.

The following types of non-pecuniary losses are not generally eligible for remission:[18]

- Losses not directly resulting from the underlying offense or a related offense (for example, lost wages from missed work)
- Interest forgone (for example, fraudulent proceeds promised in an investment scheme)
- Collateral expenses incurred to recover lost property (for example, attorney's fees or investigative expenses)

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[16] 28 C.F.R. § 9.8(b), (c).
[17] 28 C.F.R. § 9.8(c).
[18] *See* 28 C.F.R. § 9.8(b)(1), (c).

- Physical injuries or damage to property
- Pain and suffering

A successful petition requires documentary evidence of a pecuniary loss. Acceptable evidence includes cancelled checks, receipts, bank statements, and invoices.[19] Losses may also be substantiated through records seized from the perpetrator. In calculating a victim's pecuniary loss, any money previously returned to, or recovered by, the victim must be subtracted from the loss amount. A victim need not show that his or her specific funds are among the funds forfeited in order to establish eligibility. All funds and property forfeited in a case, less government expenses, are generally available to compensate eligible victims on a pro rata basis.

C. The remission process

To seek remission, a victim must complete a petition for remission and submit it to the U.S. Attorney for the judicial district where the forfeiture was completed, or to the seizing agency in an administrative forfeiture.[20] The Department's public website provides a sample petition and instructions for completing and filing a petition online.[21] Following the seizure or forfeiture of property, to the government may notify known potential victims in writing via postal or electronic mail of the opportunity to request remission. Unidentified or unknown victims may receive general publication notice through traditional media or the internet.[22]

The seizing agency is responsible for adjudicating petitions for assets forfeited administratively. In judicial forfeitures, the Chief of MLARS or her designee is responsible for adjudicating petitions.[23] If a remission petition is denied, the petitioner may request reconsideration from MLARS or the seizing agency within 10 days of receipt of the denial notification.[24] A request for reconsideration must present evidence not previously submitted, or must demonstrate a

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[19] 28 C.F.R. § 9.8(b)(1).
[20] 28 C.F.R. § 9.4(e).
[21] *See Petitions*, FORFEITURE.GOV, https://www.forfeiture.gov/FilingPetition.htm (last visited July 22, 2019).
[22] *See, e.g., Public Notices of Forfeiture*, FORFEITURE.GOV, https://www.forfeiture.gov/Default.htm (last visited July 22, 2019).
[23] 28 C.F.R. §§ 9.4(g), 9.1(b)(3).
[24] 28 C.F.R. § 9.4(k).

clear basis to conclude that the original denial was erroneous. Reconsideration requests are decided by an official different from the one who decided the original petition.

In multiple-victim cases, forfeited funds are usually insufficient to fully compensate all eligible victims. In such cases, the funds are generally distributed to the victims on a pro rata basis in accordance with the amount of loss suffered by each victim.[25] The ruling official, however, has discretion to give priority to particular victims in appropriate circumstances.[26] For example, victims who have incurred extreme financial hardship as a result of the underlying offense may be compensated ahead of victims who experienced lesser degrees of harm. Victims always receive priority claim to forfeiture proceeds over requests for equitable sharing, official use, and other law enforcement purposes.[27] Only if all eligible victims associated with a forfeiture have been fully compensated may any surplus proceeds be shared with federal, state, local, or tribal law enforcement agencies.[28]

IV. Restoration

A USAO, in its sole discretion, may request that MLARS apply forfeited funds towards satisfaction of a criminal restitution order through a process called "restoration." After consultation with the seizing agency, the USAO must certify to MLARS that the victim or victims listed in the restitution order (1) are the only known victims of the offense underlying the forfeiture; (2) suffered a specific monetary loss directly attributable to the crime; (3) have no reasonable access to other sources of recovery; and (4) were not complicit in the offense or willfully blind to it.[29] To qualify for restoration, the restitution order must include all known victims, and the victims must generally satisfy the remission eligibility requirements.[30]

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[25] 28 C.F.R. § 9.8(f).

[26] *Id.*

[27] DEP'T OF JUSTICE, OFFICE OF THE ATTORNEY GEN., ATTORNEY GENERAL'S GUIDELINES ON THE ASSET FORFEITURE PROGRAM Sec. V.G. (2018).

[28] The government's administrative expenses incident to the forfeiture, sale, or other disposition of the property are deducted before making any amount available for any use, including victim compensation. 28 C.F.R. § 9.9(a). Typically, government expenses represent a small fraction of the total forfeiture proceeds.

[29] ASSET FORFEITURE POLICY MANUAL (2019), Chap.14, Sec.2.B.3.

[30] *See Id.* at Sec.2.B.2–B.3.

Cases involving human trafficking have special provisions concerning disposition of forfeited funds. Congress has directed that all property forfeited under 18 U.S.C. § 1594 (human trafficking) *shall* be used to pay any restitution ordered in the criminal case.[31] Thus, MLARS will process restoration requests in such cases regardless of whether the victims' losses meet the regulatory requirements for remission. If no restitution order exists in a human trafficking case, MLARS will consider a petition for remission that seeks, for example, lost wages as the victim's pecuniary loss. In non-human trafficking cases involving victims who are awarded restitution for non-pecuniary losses such as physical or emotional injuries that are not compensable under the remission regulations, the USAO may request that the court order that funds seized but not finally forfeited be paid directly towards the satisfaction of the defendant's restitution obligation.[32] This pre-forfeiture procedure can be used if the seized property is liquid and there are no third-party claimants to the seized funds.[33]

If there is more than one victim and insufficient forfeited proceeds to pay full restitution, the restitution order generally must specify that funds are to be distributed to victims pro rata in order to qualify for restoration.[34] Private victims, however, may take priority over government victims.[35] Direct victims also take priority over third parties, such as insurance carriers that provided compensation to the victim.[36] Forfeited funds that are restored to the victim are generally credited against the defendant's restitution obligation. The defendant, however, is still obligated to pay any restitution not covered by the forfeited funds. The possibility of restoration may give a defendant additional incentive to accept forfeiture as part of a plea agreement or stipulation. Such agreement or stipulation cannot, however, commit the Attorney General to granting restoration. It may only state that the U.S. Attorney will request that the Attorney General approve

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[31] *See* 18 U.S.C. § 1594(f)(1).

[32] *See* DEP'T OF JUSTICE, OFFICE OF THE JUSTICE PROGRAMS, OFFICE FOR VICTIMS OF CRIMES, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE Art. Ch. V, Sec. H.2(a) (2011 ed., rev. May 2012).

[33] *See id*.

[34] *See* 18 U.S.C. § 3664(i).

[35] *Id.*

[36] 18 U.S.C. § 3664(j)(1).

restoration. The final decision regarding remission or restoration always rests with the Attorney General.[37]

V. Which distribution process to use?

In criminal cases, the USAO may need to choose between initiating remission or restoration. Restoration is generally preferable in cases in which a restitution order accounts for all victims and accurately reports their loss amounts. In multiple-victim cases, restoration is usually faster and more efficient than remission because it eliminates the need for each victim to file a petition and for the government to review each petition. In addition, funds forfeited in administrative, civil, or criminal forfeiture matters can all be included in a single restoration request and transferred together to the clerk of court for distribution to the victim(s).

If, on the other hand, there is no criminal case or restitution order, or the restitution order is not complete or is otherwise defective, remission should be used to ensure that all victims receive full and timely compensation. Because remission is not subject to the time constraints imposed by the Federal Rules of Civil or Criminal Procedure or by the court, a more deliberate search for potential victims and review of their petitions is generally possible. In complex multiple-victim criminal cases, it may be more efficient to request that the court approve a remission process in lieu of restitution.[38] The government took this course in *Madoff*.

In appropriate cases, MLARS may use a hybrid process that includes restoration along with petitions for remission. For example, in some complex cases, additional victims may be identified after entry of a restitution order, and it may not be feasible or practicable to vacate or amend the restitution order to include these victims. A hybrid restoration-remission process may be used based on such

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[37] 21 U.S.C. § 853(i)(1); 28 C.F.R. § 9.1(b)(2) (delegating remission authority to the Chief of MLARS); Order No. 2088-97 Delegation of Authority to Restore Forfeited Property or Take Other Action to Protect the Rights of Innocent Persons in Civil and Criminal Forfeitures, 1997 WL 34775450 (O.L.C.) (restoration authority has been delegated to the Chief of MLARS); United States v. Pescatore, 637 F.3d 128, 137 (2d Cir. 2011) (finding the Attorney General has discretion to choose between restoration of forfeited funds to victims and retention of funds); ASSET FORFEITURE POLICY MANUAL (2019), Chap.14, Sec.2.B.3.

[38] 18 U.S.C. § 3663A(c)(3)(A).

factors as: (1) the number of victims included in, and omitted from, the restitution order; (2) the reasons victims were not initially identified (for example, through no fault of their own); and (3) the amount of net forfeiture proceeds available for distribution to the victims.

Many cases with multiple victims have assets forfeited both administratively and judicially. In such cases, the administrative agency should await MLARS's decisions on remission to ensure consistency and to coordinate disbursements. In criminal cases, the USAO and the case agent should consult and coordinate with MLARS early in the case regarding strategies for compensating victims.

VI. Large multiple-victim cases

With the advent of the internet and other technological advances in communications, it is increasingly common for criminals to victimize hundreds or thousands of victims from around the world in a single scheme. Due to the large number of potential victims, government in-house noticing of victims, petition review, and disbursement to victims may not be feasible. Consequently, the Department and MLARS have arranged to employ private claims administration firms to provide support for petition processing in such cases. These firms are experienced in mass tort and fraud litigation and have worked with federal regulatory agencies such as the Securities and Exchange Commission and Federal Trade Commission. The contractor assists the USAO and MLARS with the design of notices and petitions, handles all contact with victims through toll-free hotlines and websites, processes petitions, makes remission recommendations, and distributes funds to victims. The contractor's fees are deducted from the forfeited assets prior to distribution to victims.[39] Due to internal efficiencies and the absence of legal fees and expenses, the contractor's fees are typically a small fraction of the forfeited funds available for distribution.

USAOs handling a civil or criminal forfeiture in cases involving many potential victims (generally 100 or more) should contact MLARS to determine the need for and availability of administrative support. MLARS will provide a questionnaire regarding the underlying facts, amount and nature of assets, number of potential victims, status of forfeitures, etc. When appropriate, MLARS will award a contract to a claims administrator through a competitive bid process.

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[39] 28 C.F.R. § 9.9(c).

VII. Forfeiture and bankruptcy

In larger financial fraud cases, it is not uncommon for the perpetrator or his creditors to initiate bankruptcy proceedings. The USAO should work with the court-appointed bankruptcy trustee to ensure that the interests of victims and creditors are each protected. Bankruptcy has two principal goals: to provide honest but unfortunate debtors with a fresh start, and to facilitate orderly payment of debts to creditors. A key difference between bankruptcy and forfeiture is that forfeiture provides recovery for victims who may not qualify as creditors in a bankruptcy proceeding. In prosecuting civil or criminal cases involving both forfeiture and bankruptcy, government attorneys should be aware of the differences between the two regimes in order to leverage both for maximum recovery for victims.

Crime victims' interests are typically better protected if a defendant's assets are forfeited rather than administered through the bankruptcy estate. Congress provided that criminal defendants must compensate their victims for the full amount of the loss caused by the criminal conduct, without regard to the defendant's economic circumstances or creditors.[40] Because criminal forfeiture does not provide a recovery for a defendant's unsecured creditors unless they are also victims of the crime, victims stand to recover a larger share of their losses through forfeiture than in bankruptcy.

In addition, the forfeiture process is generally more cost efficient than bankruptcy. In forfeiture, the only expenses that are taken from assets forfeited in a particular case are actual out-of-pocket costs associated with the storage and liquidation of the assets, and in some larger cases, the costs of evaluating petitions for remission and the distribution of funds to victims. The remaining costs are paid from agency accounts.[41] Because of internal efficiencies, the direct costs associated with the remission process are typically a small fraction of the forfeiture recoveries.

By contrast, creditors in a bankruptcy case are compensated pursuant to a statutory priority scheme under which all of the debtor's secured and unsecured debts to creditors, lenders, suppliers, and employees, as well as administrative expenses and attorney fees, may

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[40] 18 U.S.C. § 3664(f)(1)(A).

[41] *See* 28 U.S.C. § 524(c)(1)(E); 31 U.S.C. § 9705(a)(1)(E).

be taken from recovered assets ahead of crime victims.[42] Because most bankruptcies recover substantially less than the amount lost by secured and unsecured creditors, victims may be left with little or no recovery. Indeed, in some bankruptcy cases the administrative expenses alone can render an estate "administratively insolvent," meaning that only the professional fees and other costs of administration are paid.

In cases involving foreign assets, governments and international law enforcement agencies are generally more receptive to assisting with a forfeiture action than with a purely civil process like bankruptcy. With defendants increasingly transferring criminal proceeds into and out of foreign jurisdictions, a United States court order can be highly persuasive in convincing a foreign court or government to assist in recovering assets. Moreover, forfeiture empowers the government to recover certain assets that may not be reachable by the bankruptcy estate. For example, the "relation-back doctrine" vests title to property in the United States retroactive to the time of the offense underlying the forfeiture,[43] which is not available in bankruptcy law.

On the other hand, a bankruptcy trustee has some powers not available to the government in a forfeiture action. For example, the trustee may investigate and recover a variety of claims against third parties, including preference claims under 11 U.S.C. § 547(b) and actions to avoid certain transfers, such as payments the debtor made to third parties shortly before seeking bankruptcy protection.[44] A trustee can also engage in broad examinations of the "acts, conduct, or property or to the liabilities and financial condition of the debtor."[45] In addition, bankruptcy can be more effective in dealing with complicated business assets. The Bankruptcy Code provides a process to collect accounts receivables, to handle payroll and employee benefits, to sell office equipment, to transfer intellectual property, and to reject leases. The Bankruptcy Code also facilitates the sale of assets free and clear of any liens or interests.[46] Assistant United States Attorneys handling

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[42] *See* 11 U.S.C. § 507.
[43] *See* 21 U.S.C. § 853(c).
[44] 11 U.S.C. § 547.
[45] FED. R. BANKR. P. 2004(b).
[46] 11 U.S.C. § 363(f).

forfeiture cases involving bankruptcy and victims may wish to consult Alice W. Dery's article, *Interplay Between Forfeiture and Bankruptcy*.[47]

VIII. Practice pointers

Important do's and don'ts for government prosecutors, agents, and support staff handling victim cases include the following:

- **DO** keep victims advised of case status through the Victim/Witness Unit, USAO or contractor website, and other forms of communication such as email or postal mail.
- **DO** coordinate with your Financial Litigation Unit and court probation office to identify all potential victims.
- **DO** tell victims that claim processing in larger cases is time-consuming and that distribution will likely take one year or more after the remission petition deadline has passed.
- **DO** assure victims that all forfeited funds will be distributed to victims after deduction of government expenses.
- **DO** weigh all possible options for distribution to victims, for example, remission, restitution, or restoration. Obtaining the optimal outcome for the victim is the primary goal, regardless of which tools are used.
- **DO** ask MLARS for help and guidance. MLARS will provide a procedural checklist for restoration and remission cases and can provide additional assistance as needed.
- **DON'T** tell victims that they will receive a specific dollar amount or a certain percentage of their loss. The calculation of each victim's recovery is not known until all petitions and requests for reconsideration are processed and the funds are ready to be distributed.
- **DON'T** tell victims to expect remission payments by a particular date. Unforeseen factors can delay distribution, such as discovery of additional victims or judicial appeals of forfeiture orders.
- **DON'T** try to do everything in-house in larger cases. Attempting to handle a large, multiple-victim case with limited resources can delay remission and ultimately increase government costs.

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[47] Alice W. Dery, *Interplay Between Forfeiture and Bankruptcy*, 66 U.S. ATT'YS BULL., no. 2, 2018, at 117.

- **DON'T** make equitable sharing or official-use commitments in victim cases. Victims have priority over equitable sharing and official use requests.

IX. Conclusion

One of the most rewarding aspects of serving in law enforcement is the opportunity to help victims of crime. Victims are often embarrassed or remorseful about their victimization and are genuinely grateful for any recovery they may receive. It is not unusual to receive thank you notes from victims after they have received remission or restoration payments. The following are some additional messages[48] received from victims in the *Madoff* case:

> After 10 years of struggles and pain you gave me the chance to live again. . . . I would like to Thank You . . . for the efforts you have been putting together all these years in recovering what was stolen and bringing back true justice to its rightful owners.
>
> Thanks so much for caring about us, and all the other victims. . . I honestly had gotten to the point that I didn't think anyone cared about us at all; but your kindness, and caring, is beyond any expectations.
>
> It's great to see how U.S. Justice is able to manage the compensation on a global scale, here us being in Germany. Next to efficient communication via electronic media, it builds trust how customer in the financial markets are protected by U.S. government.
>
> I just wanted to thank you, your organization, your laws, your public servants and in general your country, for all the time, dedication and determination in trying to recover value for investors involved in the Madoff scam worldwide, regardless their nationality, creed and origin. Pursuing justice, domestically and abroad is one

[48] *Notes to MVF*, MADOFF VICTIM FUND, www.madoffvictimfund.com (last visited July 22, 2019).

of the things that make your country great. You all should be very proud of it.

Victims across the world receive forfeited funds obtained as a result of cooperation between prosecutors and law enforcement agencies. The ability to seize and restrain assets for civil or criminal forfeiture, provides victims recovery that would otherwise have been unavailable. Prosecutors and agents are encouraged to contact forfeiture experts across the country to ensure all steps are taken to preserve criminal proceeds early in a case to increase the potential recovery for crime victims.

About the Authors

Alice W. Dery is Chief for the Program Management and Training Unit in the MLARS, Criminal Division, and is responsible for critical nationwide law enforcement initiatives and Department programs, including the transfer of forfeited funds to victims of crime, the United States Victims of State Sponsored Terrorism Fund, and the Equitable Sharing Program. Prior to serving in her current position, Ms. Dery has held several positions in MLARS including Deputy Chief of the Policy and Training Unit, and the Program Management and Strategic Planning Unit; Assistant Chief of the Legal Policy Unit; Assistant Chief of the State and Local Liaison Unit; and Special Counsel to the Section Chief. Since joining the Department in 1986, Ms. Dery has received numerous Department awards. Most recently, Ms. Dery was selected as a John Marshall Award recipient in Support of Litigation for *Honeycutt v. United States* Criminal Forfeiture Case Guidance and the John C. Keeney Award for Exceptional Integrity and Professionalism by the Assistant Attorney General of the Criminal Division.

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Money Laundering Venue

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I. The basics

Questions of venue in criminal cases "are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed."[1] In any criminal prosecution, proper venue is a constitutional right, and venue must be proper for each count of a multi-count indictment.[2]

Except when not committed within any district, federal offenses must be prosecuted "in a district where the offense was committed."[3] This is just as true for money laundering offenses in violation of 18 U.S.C. § 1956 or § 1957 as for any other federal offense.[4]

Determining just where an offense was committed is not always simple. Money laundering offenses have their own specific venue statute, 18 U.S.C. § 1956(i), which is the starting place for that determination.[5] That statute provides:

> (i) Venue.—
>
> (1) Except as provided in paragraph (2), a prosecution for an offense under this section or section 1957 may be brought in—

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[1] United States v. Johnson, 323 U.S. 273, 276 (1944).

[2] *E.g.*, United States v. Bowens, 224 F.3d 302, 308 (4th Cir. 2000).

[3] FED. R. CRIM. P. 18; *see also* U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI.

[4] Strictly speaking, section 1957 does not describe a form of money laundering, but rather criminalizes engaging in monetary transactions in property derived from specified unlawful activity. For convenience, however, this article adheres to the common practice of referring to the offenses described in both sections 1956 and 1957 as "money laundering" offenses.

[5] As the court noted in *Bowens*, "[w]hile the venue rule—trial in the district where the crime is committed—seems straightforward, the place of the crime can be difficult to determine. Of course, Congress can prevent some of that difficulty by including an express venue provision in a criminal statute." 224 F.3d at 308.

(A) any district in which the financial or monetary transaction is conducted; or
(B) any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted.

(2) A prosecution for an attempt or conspiracy offense under this section or section 1957 may be brought in the district where venue would lie for the completed offense under paragraph (1), or in any other district where an act in furtherance of the attempt or conspiracy took place.

(3) For purposes of this section, a transfer of funds from 1 place to another, by wire or any other means, shall constitute a single, continuing transaction. Any person who conducts (as that term is defined in subsection (c)(2)) any portion of the transaction may be charged in any district in which the transaction takes place.

II. Substantive money laundering

A. Venue lies in any district in which the financial or monetary transaction is conducted

Under 18 U.S.C. § 1956(i)(1)(A), a prosecution for a substantive money laundering offense may be brought in any district in which the "financial transaction" (section 1956) or the "monetary transaction" (section 1957) was conducted. That makes sense, of course, because conducting a transaction is the *actus reus* of these offenses.

Some money laundering offenses occur solely within one district. Where the transaction at issue began, continued, and ended within one district, venue for a substantive money laundering offense does not lie in any other district.[6]

[6] *See* United States v. Cabrales, 524 U.S. 1, 8 (1998) ("In the counts at issue, the Government indicted Cabrales for transactions which began, continued, and were completed only in Florida. Under these circumstances, venue in Missouri is improper.") (citation and internal quotation marks omitted);

By statute, "any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed."[7] In short, venue lies where any *part* of the money laundering offense took place. The Supreme Court has recognized that, where the launderer transports money across state lines, money laundering may be a continuing violation that is triable in more than one place;[8] and the money laundering statute provides that "a transfer of funds from 1 place to another, by wire or any other means, shall constitute a single, continuing transaction."[9] Accordingly, "[a]ny person who conducts . . . any portion of the transaction may be charged in any district in which the transaction takes place."[10] Furthermore, "conduct[ing]" a financial transaction, by definition, "includes initiating, concluding, or participating in initiating, or concluding a transaction."[11]

For example, where a defendant in California caused his fraud proceeds to be cleared through New York for transmission to an

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United States v. Stewart, 256 F.3d 231 (4th Cir. 2001) (where defendant picked up and delivered money within California and had never been to Virginia, did not know anybody in Virginia, and had never received any telephone calls from Virginia, venue in Virginia was improper).

[7] 18 U.S.C. § 3237.

[8] *See Cabrales*, 524 U.S. at 8.

[9] 18 U.S.C. § 1956(i)(3); Guerrero Clavijo v. United States, 242 F. Supp. 3d 57, 62–63 (D. Mass. 2017) (concluding that counts in which money laundering transactions were charged "from start point to end point," including multiple subtransactions within single count, were not duplicitous, in part because they were consistent with section 1956(i)(3), which provides that transfer of funds from one place to another constitutes "a single, continuing transaction").

[10] 18 U.S.C. § 1956(i)(3).

[11] 18 U.S.C. § 1956(c)(2); *see*, *e.g.*, United States v. Golb, 69 F.3d 1417, 1427 (9th Cir. 1995) (venue proper in district in which defendant traveled and made phone calls to arrange financial transaction, thereby "initiating" and "participating in initiating" financial transaction within meaning of 18 U.S.C. § 1956(c)(2)); United States v. Liersch, No. 04CR02521, 2005 WL 6414047, at *6 (S.D. Cal. May 2, 2005) (venue proper in district where defendant gave instructions to wire transfer money from Switzerland to Austria, because "conducting a financial transaction" includes initiating transaction).

account in the Cayman Islands, venue was proper in the Southern District of New York, since some of the conduct occurred in New York.[12] Likewise, where a Canadian citizen caused fraud proceeds to be wire-transferred from a bank account he controlled in Toronto to a bank account in Chicago, venue was proper in the Northern District of Illinois: The monetary transaction was "conducted" in that district because it was "concluded" there.[13]

In 1998, in *United States v. Cabrales*,[14] the Supreme Court addressed the question of whether venue lay in Missouri for counts charging that transactions in Florida violated sections 1956 and 1957, where the source of the money was illegal sales of cocaine in Missouri. Noting that Cabrales was "charged in the money-laundering counts with criminal activity 'after the fact' of an offense begun and completed by others,"[15] the Court held that sections 1956 and 1957 "interdict only the financial transactions (acts located entirely in Florida), not the anterior criminal conduct that yielded the funds allegedly laundered."[16] As the Court observed the following year, "[t]he existence of criminally generated proceeds [is] a circumstance element of the offense," and "the proscribed conduct—defendant's money laundering activity—occurred after the fact of an offense begun and completed by others."[17] Simply put, substantive money laundering consists of financial transactions, not the antecedent criminal activity that generated the proceeds that were laundered.

B. Venue lies in any district where prosecution for the specified unlawful activity could be brought if the defendant participated in the transfer of the proceeds of the specified unlawful activity from that district to the district where the transaction is conducted

Once one accepts that the *actus reus* of money laundering offenses is the transaction, and the occurrence of the underlying specified

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[12] United States v. Peterson, 357 F. Supp. 2d 748, 752 (S.D.N.Y. 2005).
[13] United States v. Black, 469 F. Supp. 2d 513, 540–41 (N.D. Ill. 2006).
[14] 524 U.S. 1 (1998).
[15] *Id*. at 7.
[16] *Id*.
[17] United States v. Rodriguez-Moreno, 526 U.S. 275, 280 n.4 (1999) (citing *Cabrales*, 524 U.S. at 7) (internal quotation marks omitted).

unlawful activity (SUA) is merely a "circumstance element" of the money laundering offense, the holding of *Cabrales* seems wholly predictable and uncontroversial. The opinion also contained dicta, however, referring to a situation not before the Court in which venue might exist: money laundering, the Supreme Court said, "arguably might rank as a 'continuing offense,' triable in more than one place, if the launderer acquired the funds in one district and transported them into another."[18]

A few years after that decision, Congress enacted subsection 1956(i), the statutory venue provision for money laundering, which went into effect on October 26, 2001.[19] Among other things, that provision codified the Supreme Court's dicta in *Cabrales*, providing that, in addition to "any district in which the financial or monetary transaction is conducted,"[20] a money laundering prosecution may be brought in "any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted."[21]

In *United States v. Myers*,[22] the Sixth Circuit noted that "Myers committed the underlying crimes, interstate transportations of stolen vehicles, in the Western District of Michigan because he stole three motor homes in that district and transported the stolen motor homes away from that district before selling them and thereby laundering the proceeds of his thefts."[23] Under the portion of *Cabrales* that constitutes its holding, one would not expect venue to lie in the Western District of Michigan, since no part of the laundering transaction occurred in that district. "Under the plain text of the money-laundering statute," however, "criminal venue lay in the Western District of Michigan . . . not only for the interstate

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[18] *Cabrales*, 524 U.S. at 8.
[19] USA PATRIOT Act of 2001, Pub. L. No. 107-56, Title X, § 1004, 115 Stat. 392 (Oct. 26, 2001).
[20] 18 U.S.C. § 1956(i)(1)(A).
[21] 18 U.S.C. § 1956(i)(1)(B).
[22] 854 F.3d 341 (6th Cir. 2017).
[23] *Id.* at 349.

transportation of stolen vehicles, but also for substantive money laundering and money-laundering conspiracy."[24]

As the *Myers* court noted, when Myers transported the stolen motor homes out of Michigan, they were "proceeds" of his interstate vehicular thefts as that term is used in the money laundering statutes.[25] "Once outside of Michigan, Myers completed the laundering of those 'proceeds' by using the stolen motor homes' clone titles to sell them to unsuspecting dealers and by withdrawing the sale money in cash."[26] Applying the language of the venue provision to these facts, the court concluded that "[b]ecause Myers was properly prosecuted in Michigan for the 'underlying' interstate transportation of stolen vehicles, and because Myers then 'participated' in transferring the thefts' 'proceeds' out of Michigan before selling them, Myers was also properly prosecuted in Michigan for his concealment money laundering."[27] A few district courts have reached the same conclusion on similar facts.[28]

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[24] *Id.*; *see also* United States v. Nichols, 416 F.3d 811, 824 & n.7 (8th Cir. 2005) (defendant who caused money obtained by fraud in Missouri to be transported to California could properly be prosecuted in Missouri for laundering the fraud proceeds in California).

[25] *Myers*, 854 F.3d at 349 (citing 18 U.S.C. § 1956(c)(9)). Myers argued that the term "proceeds" should be limited to "money or other property obtained from a financial transaction involving the stolen motor homes." *Id.* at 350. The court pointed out that that argument "not only contravenes the plain text of the quoted venue provision, but also renders the provision largely meaningless"; if the financial transaction had to occur *before* the proceeds were transferred, "venue under (B) would effectively be no broader than venue under (A), rendering (B) superfluous." *Id.*

[26] *Id.* (internal quotation marks omitted).

[27] *Id.* at 350 (citing 18 U.S.C. § 1956(i)(1)(B)).

[28] *E.g.*, United States v. Jefferson, 562 F. Supp. 2d 695, 704–05 (E.D. Va. 2008) (indictment alleged that defendant, having knowingly participated in transfer of proceeds of criminal activity from Eastern District of Virginia to Louisiana, caused three monetary transactions in violation of 18 U.S.C. § 1957 to occur; venue was therefore proper in Eastern District of Virginia), *vacated in part on other grounds*, 674 F.3d 332 (4th Cir. 2012); United States v. Wittig, 425 F. Supp. 2d 1196, 1219–22 (D. Kan. 2006) (venue for money laundering proper in District of Kansas based upon transfer by defendant of stock acquired in Kansas to investment account in New York, where charged transaction occurred), *rev'd on other grounds sub nom.* United States v. Lake, 472 F.3d 1247 (10th Cir. 2007).

The *Myers* court also held that the "statutory extension of venue" effected by section 1956(i)(1)(B) "does not violate the U.S. Constitution's two provisions guaranteeing local prosecution."[29] The court reasoned that the Supreme Court has "repeatedly approved as constitutionally permissible the prosecution of a crime in a district in which the crime was committed only in part."[30] While, in concealment money laundering, the "ultimate criminal act that is prohibited is conducting a financial transaction involving the proceeds of some form of unlawful activity to conceal the proceeds' illegal source," in order to conduct that transaction "the launderer must ordinarily have possession of the unlawful proceeds to be laundered."[31] It follows, the court said, that the criminal act of conducting the prohibited financial transaction includes the antecedent act of obtaining possession of the unlawful proceeds.[32] Accordingly, Myers' concealment money laundering "was committed in part in the Western District of Michigan, where he gained possession of the proceeds of specified unlawful activity."[33] Accordingly, Myers was properly and constitutionally prosecuted for the whole crime in that district.[34]

Sometimes the facts are not as straightforward. In *United States v. King*,[35] the government contended that venue lay in the Western District of Oklahoma for 13 transactions in illegal gambling proceeds that did not occur within that district. Funds from over 40 states, including funds originating in the Western District of Oklahoma, were aggregated in Panama and then returned to the United States, where they were involved in the charged transactions. The funds were commingled in Panama, however, and the government was not able to show that any *particular* funds that originated in the Western District of Oklahoma were present in any *particular* transaction.[36]

"[V]enue under § 1956(i)(1)(B)," the district court explained, "depends on the answers to two questions: (1) Were the tainted

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[29] 854 F.3d at 349.
[30] *Id.* at 351.
[31] *Id.* (internal quotation marks and alteration omitted).
[32] *Id.*
[33] *Id.* (internal quotation marks omitted).
[34] *Id.* ("[W]here a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done." (quoting United States v. Lombardo, 241 U.S. 73, 77 (1916))).
[35] 259 F. Supp. 3d 1267 (W.D. Okla. 2014).
[36] *Id.* at 1279–80.

proceeds transferred from the venue district (the sending district) to the district where the laundering transaction was conducted (the receiving district)? (2) Did the defendant participate in the transfer of the laundered proceeds from the sending district to the receiving district?"[37] The government was unable to show that the charged defendants participated in "*the* transfer"—the *particular* transfer—from the Western District of Oklahoma of "*the* proceeds"—the *particular* proceeds—involved in those transactions, as required by section 1956(i)(1)(B).[38] Accordingly, the government fell short as to both of the requirements of that section: "The government has not shown that the tainted proceeds that were laundered in the receiving districts were transferred to those districts from the Western District of Oklahoma," and "[t]he government has not shown that the charged defendants participated in the transfer of the laundered proceeds from this district to the receiving districts where the charged transactions occurred."[39]

The government's position in *King* was not bolstered by section 1956(i)(3), which provides that a transfer of funds from one place to another constitutes "a single, continuing transaction."[40] The government had not alleged "that identifiable funds originating from the Western District of Oklahoma were transferred" from that district "and then were included in any of the charged substantive money laundering transactions."[41] For purposes of section 1956(i)(3), "if there is no identifiable transfer of tainted funds *discernibly connected with the charged laundering transaction* from one place to another place, there can be no 'continuing transaction' for purposes of this provision . . . ."[42]

C. Unless some aspect of the laundering of the proceeds also occurred there, venue does not lie in the district where the SUA was committed

Cabrales resolved (in the negative) the question of whether venue for a money laundering count can be based on the locus of the SUA

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[37] *Id*. at 1284.
[38] *Id*.
[39] *Id*. at 1286.
[40] *Id*. (quoting 18 U.S.C. § 1956(i)(3)).
[41] *Id*. at 1287.
[42] *Id*.

alone, but it did not directly address whether the rule would be different if the defendant were charged with, or personally committed, the SUA there. As the Supreme Court interpreted the money laundering statutes in *Cabrales*, however, they do "not proscribe 'the anterior criminal conduct that yielded the funds allegedly laundered.'"[43] Thus, it could be reasoned that the commission of the SUA does not form part of those offenses and therefore could not—regardless of whether the defendant personally committed the SUA—support venue for those offenses.

A couple of courts, in isolated, non-precedential decisions, have nevertheless distinguished *Cabrales* on the ground that it did not involve a defendant charged with committing the SUA.[44] It is true, as discussed below, that section 1956(i) is non-exclusive, and venue might lie in circumstances not referenced in that section. On the other hand, subsection 1956(i)(1)(A) expressly limits venue based upon the locus of the SUA to cases in which an additional condition is present, namely that "the defendant participated in the transfer of the proceeds of the specified unlawful activity from [the district where the SUA was committed] to the district where the financial or monetary transaction is conducted." It is reasonable to infer from that statutory language that venue cannot be based upon the locus of the SUA unless that additional condition is met. Furthermore, this conclusion is consistent with the principle that the commission of the SUA is a "circumstance element" and not "an essential conduct element" of the money laundering offense.[45]

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[43] United States v. Rodriguez-Moreno, 526 U.S. 275, 280 n.4 (1999) (quoting United States v. Cabrales, 524 U.S. 1, 7 (1998)).

[44] United States v. Aronds, 210 F.3d 373, *11–*12 (6th Cir. Mar. 14, 2000) (unpublished table decision) (dicta); United States v. Anderson, No. 05-249, 2006 WL 1580023, at *1 (D. Minn. June 5, 2006); United States v. Shepard, No. 01-10116-02-JTM, 2004 WL 1752592, at *3 (D. Kan. Aug. 3, 2004). These courts concluded that money laundering charges may be brought in the district where the defendant was charged with committing the SUA even though the financial transactions occurred elsewhere, a conclusion that likely will not withstand scrutiny.

[45] *See* United States v. Villarini, 238 F.3d 530, 533–36 (4th Cir. 2001) (although defendant had embezzled money in Virginia, she could not be prosecuted in Virginia for money laundering transactions that occurred in Florida; "the mere fact that proceeds were criminally generated in a particular district is not sufficient, standing alone, to establish proper venue

III. Conspiracy

The money laundering venue statute provides that a prosecution for an attempt or conspiracy offense under section 1956 or 1957 "may be brought in the district where venue would lie for the completed offense . . . or in any other district where an act in furtherance of the attempt or conspiracy took place."[46] In *Whitfield v. United States*,[47] the Supreme Court assumed that venue would also lie where the unlawful agreement was reached, pursuant to the default rule that venue lies in the district where the offense was committed.[48]

A. "Where venue would lie for the completed offense"

Venue for a money laundering conspiracy charge lies wherever it would lie for the completed substantive offense.[49] In *Myers*, for example, the Court of Appeals for the Sixth Circuit observed that proper venue lay in the Western District of Michigan for the money laundering conspiracy count because "proper venue lay in the Western District of Michigan for Myers's substantive money laundering."[50] The discussion above concerning venue for substantive money laundering accordingly applies equally to money laundering conspiracies.

In *Whitfield*, the Supreme Court stated that section 1956(i) authorizes venue for money laundering conspiracy prosecutions in "the district in which venue *would* lie *if* the completed substantive money laundering offense had been accomplished."[51] This raises interesting questions, not yet addressed in the case law: Does this mean that if coconspirators in District X merely *agreed* to take action

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in that district for a charge of laundering the money.");
United States v. Mikell, 163 F. Supp. 2d 720, 738–40 (E.D. Mich. 2001) (because "the nature of the money laundering crime is the financial transaction, not the anterior criminal conduct," and "[t]he existence of the anterior criminal activity is only a 'circumstance element' of the money laundering, not one of the essential conduct elements of the offense, . . . the existence of the anterior criminal activities in this district is not sufficient, in itself, to warrant a finding of proper venue.") (citation omitted); *see also* United States v. Knight, 822 F. Supp. 1071, 1076 (S.D.N.Y. 1993).

[46] 18 U.S.C. § 1956(i)(2).

[47] 543 U.S. 209 (2005).

[48] *Id*. at 218.

[49] 18 U.S.C. § 1956(i)(2).

[50] 854 F.3d at 354.

[51] 543 U.S. at 218.

in District Y, venue would lie in District Y (where venue *would* lie *if* the substantive offense had been completed) even if none of the coconspirators ever did anything at all in District Y? Is the mere agreement that it *would* take place there, standing alone, sufficient? What if no particular location was specified in the agreement, but a particular location was simply likely? (Say, coconspirators in District X would likely have sent a wire transfer from Bank A, and Bank A's wire transfer department is located in District Z. Is there venue in District Z?)

On the face of the statute, at least with the gloss added by the Supreme Court in *Whitfield*, it appears likely that, in cases in which the evidence supports it, the answer to these questions should be yes: Venue lies where it *would* lie *if* the object of the conspiracy were completed as the coconspirators planned it. One district court has expressly so held, relying upon the principle that venue in criminal conspiracy cases lies where the illegal activity was "intended to have an effect."[52] Further case law is necessary to flesh out what proof is sufficient to show that an action that never occurred *would* have occurred in a particular place. Such case law may be difficult to come by: While prosecutors *can* pursue money laundering conspiracy charges based upon a bare agreement unaccompanied by any action at all, they rarely do—and conspirators who took action in furtherance of an agreement in the same district where they reached that agreement would likely be prosecuted in that district, even if they planned to launder the money in some other district.

B. "Where an act in furtherance of the attempt or conspiracy took place"

No overt act need be alleged or proven under section 1956(h), the money laundering conspiracy statute.[53] Under section 1956(i)(2), however, such an act can support venue for a money laundering conspiracy charge.[54] Furthermore, "[t]hat venue provision is not

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[52] United States v. Firtash, No. 13 CR 515, 2019 WL 2568569, at *4–*5 (N.D. Ill. June 21, 2019) (holding that, because object of conspiracy was transaction with company whose principal place of business was in Chicago, "the charged conspiracy was intended to have an effect in the Northern District of Illinois," and indictment accordingly alleged proper venue; and holding foreseeability of connection to district not required).

[53] *Whitfield*, 543 U.S. at 218–19.

[54] *E.g.*, *Myers*, 854 F.3d at 354.

unconstitutional because a conspiracy is a continuing offense that is committed everywhere the overt acts are committed."[55]

In *Whitfield*, in an opinion concluding that Congress did not intend that an overt act be required to prove a money laundering conspiracy under 18 U.S.C. § 1956(h), the Supreme Court rejected an argument that the reference in the venue subsection to "an act in furtherance of the attempt or conspiracy" implied that Congress intended that such an act be required.[56] Among other things, the Court noted that section 1956(i) uses permissive rather than exclusive language ("*may* be brought"), suggesting that the provision was intended to supplement rather than supplant the default venue rule.[57] In conclusion, the Court stated that "Congress appears merely to have confirmed the availability of this alternative venue option"—the district where an overt act took place—in money laundering conspiracy cases, not mandated proof of an overt act.[58]

Many more acts are in *furtherance* of a conspiracy than are part of the offense that is the *object* of the conspiracy. Accordingly, venue may be proper for a conspiracy charge where it would not be proper for a substantive charge. The types of overt acts that have been held sufficient to form the basis for venue for money laundering conspiracy charges include a coconspirator's providing of materially false information to the DEA;[59] "lulling" communications aimed at concealing money laundering sent to a company in the district;[60] telephone calls made from the district in furtherance of the conspiracy, even if those calls were "de minimis in context" and "completely legal";[61] travel originating in the district for the purpose of transporting proceeds derived from illegal drug sales out of the country;[62] and acts aimed at obtaining the proceeds from trafficking in illegal narcotics, because earning revenue from drug trafficking is part of the overall money laundering conspiracy.[63]

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[55] *Id*.
[56] *Whitfield*, 543 U.S. at 217–18.
[57] *Id*.
[58] *Id*. at 218.
[59] United States v. Acherman, 140 F. Supp. 3d 113, 118 (D. Mass. 2015).
[60] United States v. Georgiadis, 819 F.3d 4, 11 (1st Cir. 2016).
[61] United States v. Day, 700 F.3d 713, 727 (4th Cir. 2012).
[62] United States v. Beddow, 957 F.2d 1330, 1336 (6th Cir. 1992).
[63] United States v. Green, 599 F.3d 360, 371–72 (4th Cir. 2010); *see*

Every case cited in the footnotes to the previous paragraph involved overt acts conducted by *coconspirators* of the defendant alleging improper venue. Most, but not all, courts of appeals that have considered the issue to date have held that venue lies where an overt act occurred regardless of whether it was reasonably foreseeable to the defendant that an overt act would be committed in that district.[64] Defendants who have no direct connection with a particular district—and who could not be prosecuted for substantive money laundering in that district—can be prosecuted there for conspiracy if coconspirators engaged in acts in furtherance of the charged conspiracy in that district. Similarly, defendants can be prosecuted in

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United States v. Logan, 542 F. App'x 484, 493 (6th Cir. 2013) (not precedential) ("That Firempong never entered Michigan is immaterial, because his co-conspirators did for the purpose of selling the drugs that produced the proceeds that Firempong laundered."); United States v. Sax, 39 F.3d 1380, 1390 (7th Cir. 1994) (funds used for charged acts of money laundering were proceeds of drug sales in Central District of Illinois, which "is sufficient to confer proper venue . . . .").

[64] Under *Pinkerton*, members of conspiracies are responsible for the reasonably foreseeable criminal acts of their coconspirators that are committed within the scope of and in furtherance of the conspiracy. Pinkerton v. United States, 328 U.S. 640, 647–48 (1946). If venue based upon the commission of overt acts followed *Pinkerton* principles, reasonable foreseeability would be required. As of this writing, however, only one circuit requires that it "have been 'reasonably foreseeable' to each defendant charged with the conspiracy that a qualifying overt act would occur in the district where the prosecution is brought." United States v. Kirk Tang Yuk, 885 F.3d 57, 69 (2d Cir. 2018). Other courts of appeals disagree. *See*, *e.g.*, United States v. Renteria, 903 F.3d 326, 329–30 (3d Cir. 2018) ("[W]e decline to adopt a reasonable foreseeability requirement to establish venue in conspiracy cases under § 3237(a)."); United States v. Gonzalez, 683 F.3d 1221, 1226 (9th Cir. 2012) ("Simply put, section 3237(a) does not require foreseeability to establish venue for a continuous offense."); United States v. Johnson, 510 F.3d 521, 527 (4th Cir. 2007) (as to venue statute for securities offenses, declining "the invitation to judicially engraft a mens rea requirement onto a venue provision that clearly does not have one"). Like the statutes interpreted by these courts, the money laundering venue statute does not expressly require that the locus of the overt act committed by a coconspirator be reasonably foreseeable, and most courts probably will not "judicially engraft" that requirement.

a district where a third party carried out instructions that furthered the conspiracy.[65]

As discussed above, venue for *substantive* money laundering offenses probably cannot be based solely on the fact that the SUA occurred in the charging district, even if the defendant personally committed the SUA there. A different question is whether the commission of the SUA itself can constitute an overt act supporting venue for money laundering *conspiracy* charges.[66] In *Cabrales*, in ruling that the locus of the SUA was not a proper place for trial of the substantive money laundering offenses at issue, the Supreme Court distinguished cases in which conspiracy is charged, thereby leaving this question open: "Notably, the counts at issue do not charge Cabrales with conspiracy; they do not link her to, or assert her responsibility for, acts done by others."[67]

Where an overt act can be said to further the money laundering conspiracy, even if it *also* forms a part of the SUA—such as the purchase of drugs with drug proceeds, which may be an act in furtherance of both a drug *and* a money laundering conspiracy—venue for the money laundering conspiracy will likely be proper where that overt act took place.[68] On the other hand, commission of the SUA

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[65] *See*, *e.g.*, United States v. Sanchez, No. 3:16-cr-00136, 2018 WL 4760844, at *3–*4 (W.D.N.C. Oct. 2, 2018) (upholding venue for money laundering charges in district where Western Union processed wire transfers sent by victims).

[66] *See* cases cited, *supra* note 64.

[67] United States v. Cabrales, 524 U.S. 1, 7 (1998); *see* United States v. Lanza, No. 3:03CR00025, 2006 WL 344955, at *2 (W.D. Va. Feb. 10, 2006) (distinguishing *Cabrales*, noting that "the defendants' reliance on *Cabrales* is misplaced, because that case explicitly avoids the issue of venue in a money laundering conspiracy").

[68] In *Lanza,* the defendants argued that "because the underlying crime cannot provide venue for the substantive charge of money laundering, acts in furtherance of the underlying fraud, such as soliciting investors in Virginia, cannot provide the basis for venue in a money laundering conspiracy." 2006 WL 344955, at *3. The court did not agree: "The fact that an action forms part of the underlying crime does not immunize it from also forming part of the money laundering conspiracy." *Id*. The conspirators in that case who had committed the underlying fraud allegedly caused investors in Virginia to send funds to an account held in a phony name in New York; if so, a factfinder could find they "demonstrated an intent to conceal the source and ownership of the funds and thus took the first step in the money laundering

standing alone will likely not be found to be an overt act supporting venue for a money laundering conspiracy charge.

C. "The district where the offense was committed"

In *Whitfield*, the Supreme Court assumed that, although not explicitly referenced in section 1956(i), the default rule that venue lies "where the offense was committed" applies to money laundering conspiracy charges.[69] "For a conspiracy prosecution under the common law rule," the Court explained, "the district in which the unlawful agreement was reached would satisfy this default venue rule."[70]

In most cases, the facts fall within one or both prongs of section 1956(i) as well, but if *nothing* occurred in a particular district except that the agreement—the gravamen of the conspiracy charge—was reached there, venue, as the Supreme Court assumed in *Whitfield*, would nevertheless lie there. While there is currently little case law in this area, this is almost certainly the correct result: If the crime *is* the agreement, and no overt act is required, then venue must be available in the district where the agreement was reached, especially since in some cases venue cannot be based on the locus of (nonexistent) overt acts.

IV. Procedural issues

While proper venue is a constitutional right, objections to venue can be waived.[71] Venue is not an essential element of money laundering offenses, but it is a question of fact that must be proven to the jury by a preponderance of the evidence.[72]

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conspiracy as well as furthering underlying fraud." *Id.* Since it was alleged that an overt act furthering the money laundering conspiracy occurred in Virginia, venue was proper in Virginia for the money laundering conspiracy charge, even if the named defendants took no action in Virginia.

[69] Whitfield v. United States, 543 U.S. 209, 218 (2005); *see also* United States v. Portillo, No. 09 cr. 1142, 2014 WL 97322, at *3 (S.D.N.Y. Jan. 8, 2014) ("The venue provision of Section 1956 is non-exclusive, and venue for a money laundering conspiracy offense may also be determined by reference to the general venue provision for continuing offenses found in Title 18, United States Code Section 3237(a).").

[70] *Id.* (citing Hyde v. Shine, 199 U.S. 62, 76 (1905)).

[71] *E.g.*, United States v. Mikell, 163 F. Supp. 2d 720, 739–40 (E.D. Mich. 2001).

[72] United States v. Sax, 39 F.3d 1380, 1390 (7th Cir. 1994).

"Defendants have the right to be tried in the proper forum, not the right to be *charged* with the proper venue."[73] An indictment that does not set forth sufficient allegations to establish venue is, however, subject to pretrial challenge, as is an indictment in which a defect in venue is apparent on its face.[74] If such objections are not raised prior to trial, they are waived.[75]

On the other hand, where the indictment alleges proper venue, but the proof at trial fails to support the venue allegation, an objection to venue may be raised at the close of evidence.[76] Put another way, "a venue challenge may be timely raised in a motion for acquittal at the close of the government's case when the defect in venue is not apparent on the face of the indictment."[77]

Inclusion in indictments of facts supporting venue can help forestall both frivolous challenges to venue (challenges that likely would not be brought if defense counsel understood the government's position) and belated challenges to venue (challenges that will be waived because the alleged defect was apparent on the face of the indictment). Factual allegations supporting venue are especially valuable where venue is based upon something other than the locus of the charged transaction, since in such cases the basis for venue probably will not otherwise be apparent.[78]

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[73] Carbo v. United States, 314 F.2d 718, 733 (9th Cir. 1963) (emphasis added); *see also* United States v. Votteller, 544 F.2d 1355, 1361 (6th Cir. 1976); FED. R. CRIM. P. 7(c)(1); FED. R. CRIM. P. 18.

[74] United States v. Black Cloud, 590 F.2d 270, 272 (8th Cir. 1979).

[75] United States v. Collins, 372 F.3d 629, 633 (4th Cir. 2004); *Black Cloud*, 590 F.2d at 272.

[76] *Collins*, 372 F.3d at 633.

[77] United States v. Huy Chi Luong, 468 F. App'x 710, 712 (9th Cir. 2012) (not precedential) (citing United States v. Ruelas-Arreguin, 219 F.3d 1056, 1060 (9th Cir. 2000)).

[78] *See*, *e.g.*, United States v. Jefferson, 562 F. Supp. 2d 695, 705 (E.D. Va. 2008) ("because defendant is alleged to have participated in the transfer of the proceeds of bribery from the Eastern District of Virginia to the Eastern District of Louisiana," venue was proper in Eastern District of Virginia), *vacated in part on other grounds*, 674 F.3d 332 (4th Cir. 2012); United States v. Lanza, No. 3:03CR00025, 2006 WL 344955, at *3 (W.D. Va. Feb. 10, 2006) (allegations in indictment clarified that "overt acts touching Virginia furthered both the underlying fraud and the money laundering conspiracy"); United States v. Sapyta, 390 F. Supp. 2d 563, 566–67 (W.D. Tex. 2005) (describing as "too ambiguous and confusing" government's

Rule 21(b) of the Federal Rules of Criminal Procedure permits, upon the defendant's motion, the transfer of a proceeding or particular counts of an indictment "to another district for the convenience of the parties, any victim, and the witnesses, and in the interest of justice."[79] In cases in which neither the defendant nor the charged conduct have a close connection to the district where the charges were brought, such motions can be expected and may well be granted.[80]

About the Author

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theory of venue "that cannot be discerned from the reading of [the money laundering count] of the indictment as presently formulated").

[79] FED. R. CRIM. P. 21(b).

[80] *E.g.*, United States v. Robinson, No. 8:15CR178, 2018 WL 3201802, at *1–*5 (D. Neb. June 29, 2018) (granting motion to change venue under Rule 21(b); although venue for money laundering conspiracy charge was proper in district where traffic stop occurred and bulk currency was seized, most of the relevant events occurred in California, most of the witnesses were located in California, the original documentary evidence was located in California, and none of defendants had any meaningful connection to Nebraska).

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Merger Issues in Money Laundering Cases

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I. Introduction

The most commonly used money laundering statutes, 18 U.S.C. §§ 1956(a)(1) and 1957, require the government to prove the transactions involved "proceeds" of specified unlawful activity (SUA).[1] When Congress, however, passed the Money Laundering Control Act of 1986 creating the money laundering statutes, it failed to define the term proceeds.[2]

This requirement that the money laundering transaction involve "proceeds" has led to two separate "merger" issues that have resulted in extensive litigation.[3] The first merger issue, commonly referred to as "traditional merger," raises the question—are there proceeds? You must have proceeds before you can launder proceeds. The Supreme Court in *United States v. Santos* identified the second merger issue, raising the question—do we have one offense or two?[4]

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[1] Specified unlawful activity is defined in 18 U.S.C. § 1956(c)(7). It is frequently referred to as the "predicate offense" or "underlying criminal activity" that generated the proceeds involved in the money laundering offense.

[2] Proceeds need not be money. *See, e.g.*, United States v. Meade, 677 F. App'x 959 (6th Cir. 2017) (not precedential) (rejecting defendant's argument stolen motorcycles are not "proceeds"; proceeds is not limited to monetary instruments and funds, but includes all property obtained through unlawful activity); United States v. Carcione, 272 F.3d 1297 (11th Cir. 2001) (stolen diamond is SUA proceeds).

[3] Where the same act or series of acts constitutes a violation of two distinct statutory provisions, charging both offenses may implicate what is often called the "merger issue." Merger is often viewed as an aspect of double jeopardy and the test of merger is whether violating one statute necessarily involves violating the other. If the defendant's conduct actually comprises only one crime, the two separate felonies are said to "merge" and consistent with the Double Jeopardy Clause the court will only impose one punishment.

[4] 553 U.S. 507 (2008).

This *Santos* merger issue arises when the transaction charged as money laundering involves payment of an essential expense of the SUA so that the defendant necessarily commits money laundering without any additional conduct. Prosecutors must understand both merger issues in order to comply with Department of Justice (Department) policy and avoid appellate issues.

II. Key concept: you must have proceeds before you can launder proceeds

Before discussing merger issues, it is important to first understand a fundamental concept related to money laundering. The first inquiry in most money laundering cases is to determine whether the SUA generated proceeds before the money laundering transaction and whether the money laundering transaction actually involved those criminally derived proceeds. In *United States v. Carucci*, the defendant, a real estate broker and business associate of Boston's notorious "Winter Hill Gang," was convicted of multiple counts of money laundering related to the purchase of commercial real estate with money from the mob.[5] As the First Circuit court stated, the case suffered from a fatal weakness.[6] There was insufficient evidence that the funds used in the real estate transaction were actually derived from an SUA, as opposed to other criminally derived proceeds.[7] Furthermore, the government's witness did not indicate a time frame for the underlying offenses.[8] In order to establish a money laundering violation, the court emphasized, the funds used in the transactions must have been derived from criminal activity *before* the purchase of the property.[9]

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[5] 364 F.3d 339 (1st Cir. 2004).
[6] *Id.* at 345.
[7] *Id.*
[8] *Id.*
[9] *Id.* at 345–46.

III. Traditional merger: are there proceeds?

A. The same transaction cannot generate proceeds and launder proceeds

Where the money laundering statute has a proceeds requirement, the government must show that the defendant (1) acquired the proceeds of an SUA and then (2) engaged in a money laundering transaction with those proceeds. In other words, the money laundering offense must be separate and distinct from the underlying offense that generated the money to be laundered. Therefore, the laundering of funds cannot occur in the same transaction through which those funds become tainted by crime. In *United States v. Johnson,* the defendant fraudulently induced victims to wire funds to his bank account.[10] The government charged those transfers as money laundering violations.[11] On appeal, the Tenth Circuit reversed the convictions, holding that the funds transferred directly to the defendant were not "criminally derived" at the time the transfer took place.[12] The victim's money did not become proceeds of the wire fraud until the funds were credited to his account and the defendant had possession of the funds.[13]

Relying on the court's holding in *Johnson*, the defendant in *United States v. Huff*, claimed the government failed to prove he conducted a money laundering transaction after taking possession of proceeds.[14] As part of a mortgage fraud scheme, Huff received two checks from a title company which he subsequently deposited into his business' bank account.[15] Those deposits were the basis for his money laundering conviction.[16] On appeal, Huff argued depositing the checks could not be money laundering because the statute requires a person to "obtain" proceeds from the unlawful activity before laundering them.[17] In his view, the checks from the title company were not

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[10] 971 F.2d 562 (10th Cir. 1992).
[11] *Id.* at 564.
[12] *Id.* at 570.
[13] *Id.*
[14] 641 F.3d 1228 (10th Cir. 2011).
[15] *Id.* at 1229–30.
[16] *Id.* at 1230.
[17] *Id.*

proceeds of the wire fraud.[18] He didn't "obtain" proceeds, he contended, until the checks were deposited into his bank account.[19] The court rejected Huff's assertion, stating there is nothing in the statute that requires proceeds to be in the form of cash.[20] When a person receives illicit proceeds in the form of a check, he "obtains criminally" derived property.[21] Here, the court pointed out, the government alleged faxing the fraudulent mortgage application to the lender as the basis for the wire-fraud charge.[22] That offense, the court stated, was complete at the time the application was faxed.[23] When Huff subsequently deposited the check—criminally derived property—in a bank, he committed money laundering.[24] The court emphasized that the government in this case had alleged "subsequent and distinct transfers of funds" by the defendant involving the proceeds of the earlier mail fraud.[25] That, the Tenth Circuit declared, distinguished the case from *Johnson.*[26]

B. "Receipt and deposit" cases

Cases, such as *Huff*, in which the money laundering transaction consists of nothing more than depositing a check, representing proceeds of the SUA, into the defendant's account, are commonly referred to as "receipt-and-deposit" cases. Notwithstanding decisions

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[18] *Id.* at 1231.
[19] *Id.*
[20] *Id.* (citing United States v. Silvestri, 409 F.3d 1311, 1333 (11th Cir. 2005) ("Proceeds does not mean only cash or money . . . there is nothing in § 1957 that requires that the proceeds be in the form of cash or that the checks must be contained in a bank account before being considered 'proceeds.'")).
[21] *Id.* at 1231. Huff was convicted of "[e]ngaging in monetary transactions in property derived from specified unlawful activity," in violation of 18 U.S.C. § 1957 which prohibits knowingly (1) engaging or attempting to engage; (2) in a monetary transaction; (3) in criminally derived property; (4) of a value greater than $10,000 where; (5) the property is, in fact, derived from specified unlawful activity. 18 U.S.C. § 1957. Section 1957(f)(2) defines "criminally derived property" as "*any* property constituting, or derived from, proceeds *obtained* from a criminal offense . . . ." 18 U.S.C. § 1957(f)(2) (emphasis added).
[22] *Huff*, 641 F.3d at 1230.
[23] *Id.* at 1233.
[24] *Id.*
[25] *Id.*
[26] *Id.*

by several courts holding that depositing a check is a transaction involving proceeds, the Department has determined that these types of cases ordinarily should not be charged as money laundering absent extenuating circumstances. The Justice Manual states that:

> In any case when the conduct to be charged as money laundering under § 1956 or § 1957, or where the basis for a forfeiture action under § 981 consists of the deposit of proceeds of specified unlawful activity into a domestic financial institution account that is clearly identifiable as belonging to the person(s) who committed the specified unlawful activity, no indictment or complaint may be filed without prior consultation with the [Money Laundering and Asset Recovery Section.][27]

C. Proceeds can be generated before the crime is complete

Traditional merger issues generally arise in determining when the underlying criminal activity has become a "completed" offense and generated proceeds that can be laundered. Some criminal activities, however, can produce proceeds long before their completion. Courts, consequently, have recognized that proceeds can be generated by "completed phases" of an ongoing crime. The issue is not whether the underlying offense has run its course but whether the offense had already generated proceeds in transactions that were "discrete from" and occurred "prior to" the acts charged as money laundering.[28]

A fraud scheme, such as Medicaid fraud, is the prototype of an activity that can generate proceeds before the scheme is complete. Glenis Bolden owned and operated a nursing home facility.[29] Her

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[27] JUSTICE MANUAL § 9-105.330(5) (Prosecutions in Receipt and Deposit Cases).

[28] *See* United States v. Nunez, 419 F. Supp. 2d 1258, 1268–72 (S.D. Cal. 2005); *see also* United States v. Seward, 272 F.3d 831, 837 (7th Cir. 2001) (defendant laundered the proceeds of the earlier, already completed phases of a fraudulent scheme; there is no requirement that the entire fraudulent scheme be complete); United States v. Conley, 37 F. 3d 970, 980 (3d Cir. 1994) (funds are criminally derived if they are from an already completed offense or a completed phase of an ongoing offense).

[29] United States v. Bolden, 325 F.3d 471 (4th Cir. 2003).

husband, Clifford Bolden, owned a nursing supply company.[30] Using a sham business as an intermediary, they billed Medicaid at inflated prices for supplies ordered from the husband's company.[31] The money laundering counts of the indictment incorporated and re-alleged overt acts charged in the fraud conspiracy. The defendant complained that the fraud count clearly indicated the basis for the mail and wire fraud violation consisted only of the submission of the annual Medicaid Cost Reports (Cost Reports).[32] Therefore, according to the Boldens, it was not until those Cost Reports were submitted that their fraud scheme generated proceeds.[33] The money laundering transactions, as a result, could not have involved proceeds of the fraud.

Contrary to the defendant's assertion, the court responded, the money laundering statute does not require the underlying criminal activity be completed prior to the money laundering transactions.[34] The Boldens' scheme to defraud Medicare, the court stated, "cast a wide net, and it was not limited to the submission of the Cost Reports."[35] The Cost Reports, the court concluded, were simply used to justify payments the defendants had already received. "[T]he mail and wire submissions were merely the culminating acts in a scheme that had begun long before."[36] "[A]lthough their fraud scheme may not have been consummated until the submission of the Cost Reports, the Boldens had completed a substantial part of the scheme prior to" receiving and depositing the check from Medicare.[37] Accordingly, the court rejected the Boldens' contention that "the money laundering offenses were not conducted with the 'proceeds' of the fraud scheme . . . ."[38]

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[30] *Id.* at 478.
[31] *Id.* at 478–79.
[32] *Id.* at 487–88.
[33] *Id.*
[34] *Id.* (citing United States v. Butler, 211 F.3d 826, 829 (4th Cir. 2000)); *see also Butler*, 211 F.3d at 829–30 (money became proceeds of bankruptcy fraud when defendant gave it to third party to hold and did not inform bankruptcy trustee; subsequent purchase of cashier's checks involved funds "derived from an already completed offense, or a completed phase of an ongoing offense").
[35] *Bolden*, 325 F.3d at 488.
[36] *Id.*
[37] *Id.*
[38] *Id.*

In the money laundering context, therefore, the critical "merger" question is whether the money laundering crime is based upon the same or continuing conduct as the underlying predicate offense, or whether the crimes are based upon separate conduct. In other words, the underlying criminal offense must have generated proceeds in a completed transaction that is discrete from and prior to the money laundering transaction.

IV. *Santos* merger: one crime or two?

In *United States v. Santos,* the Supreme Court identified a second "merger" issue that can arise when payments that are a "normal part" of the underlying SUA are charged as a separate money laundering offense.[39] In other words, simply by committing the underlying criminal offense, the defendant necessarily commits a money laundering violation.

A. *United States v. Santos*: a fractured court

Efrain Santos operated an illegal lottery that allowed individuals to place bets at local bars and restaurants in Indiana.[40] He employed "runners" to collect bets from gamblers and to deliver the money to "collectors" who in turn delivered the money to Santos.[41] Santos was convicted of running an illegal lottery business in violation of 18 U.S.C. § 1955 and promotion money laundering under 18 U.S.C. § 1956(a)(1).[42] The money laundering counts were based on

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[39] 553 U.S. 507 (2008). For a critical view of the *Santos* decision, see Jimmy Gurulé, *Does "Proceeds" Really Mean "Net Profits"? The Supreme Court's Efforts to Diminish the Utility of the Federal Money Laundering Statute*, 7 AVE MARIA L. REV. 339 (2008).

[40] *Santos*, 553 U.S. at 509.

[41] *Id.*

[42] Section 1956(a)(1) reads:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—(A)(i) with the intent to promote the carrying on of specified unlawful activity . . . shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is

payments to runners, collectors, and winners—essentially, business expenses of conducting his illegal scheme.[43] His co-defendant, Benedicto Diaz, pleaded guilty to money laundering conspiracy for accepting paychecks from Santos for his role in the illegal gambling.[44]

The question before the Court was whether the payments to Santos' employees and winning bettors constituted "proceeds" under the money laundering statutes. Justice Scalia, writing for the plurality, pointed out that the meaning of proceeds was ambiguous.[45] Proceeds could mean either "receipts" or "profits."[46] Scalia was concerned that if "proceeds" meant "gross receipts," then every person who operated an illegal lottery would, by default, simultaneously commit money laundering because paying winning bettors and employees was a normal cost of doing business.[47] In such cases, according to the plurality, the money laundering charge may be said to "merge" with the crime generating the proceeds.[48] To prevent the "merger" of the two offenses, the Court invoked the rule of lenity and adopted the more defendant-friendly definition.[49] Justice Scalia felt Congress would not have "wanted a transaction that is a normal part of a crime it had duly considered and appropriately punished elsewhere in the Criminal Code to radically increase the sentence for that crime" by application of the money-laundering statutes.[50] Further, the plurality stated, the profits definition is not limited to illegal lotteries but would

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> greater, or imprisonment for not more than twenty years, or both.

[43] *Santos*, 553 U.S. at 509.
[44] *Id.*
[45] *Id.* at 515.
[46] *Id.*
[47] *Id.* at 515–16.
[48] *Id.*
[49] *Id.* at 514–15.
[50] *Id.* at 517. Santos was found guilty of one count of conspiracy to run an illegal gambling business (18 U.S.C. § 371); one count of running an illegal gambling business (18 U.S.C. § 1955); one count of conspiracy to launder money (18 U.S.C. §§ 1956(a)(1)(A)(i) and 1956(h)); and two counts of money laundering (18 U.S.C. § 1956(a)(1)(A)(i)). The court sentenced Santos to 60 months of imprisonment on the two gambling counts and to 210 months of imprisonment on the three money-laundering violations. Diaz pleaded guilty to conspiracy to launder money based on his receipt of payments as an employee of Santos and was sentenced to 108 months.

apply to a whole "host" of crimes.[51] Interpreting "proceeds" to mean "profits," Scalia stated, would ensure that defendants would not be convicted of money laundering merely for paying essential "crime-related expenses" of the predicate offense.[52]

Justice Stevens provided the crucial fifth vote to reverse Santos's money laundering convictions; however, he concurred in the judgment only.[53] Writing separately, he was similarly troubled by the merger problem and concluded that "[a]llowing the Government to treat the mere payment of the expense of operating an illegal gambling business as a separate offense is in practical effect tantamount to double jeopardy . . . ."[54] Justice Stevens concluded it would be

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[51] *Id*. at 516.

[52] *Id*. at 515–16.

[53] *Id.* at 524.

[54] *Id*. at 527. Although Justice Stevens viewed the merger issue as akin to double jeopardy, the Court did not analyze Santos's lottery payments in light of *Blockburger v. United States*, in which the Supreme Court held that, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. 299, 304 (1932). When applying this test in multiple punishment cases, a court's "exclusive focus" is "upon the elements of the statutory provisions in question," rather than on the particular facts of the underlying case. United States v. Allen, 13 F.3d 105, 109 n.4 (4th Cir. 1993). However, Justice Scalia, writing for the plurality in *Santos*, concluded that "any specified unlawful activity, an episode of which includes transactions which are not *elements* of the offense and in which a participant passes receipts on to someone else, would merge with money laundering." *Santos,* 553 U.S. at 516 (emphasis added). Justice Scalia further stated that a defendant should not be punished for "[t]ransactions that normally occur during the course of running a[n illegal scheme]." *Id*. at 517. As the Ninth Circuit concluded, in *United States v. Bush*, "*Santos* did not examine the money-laundering statute itself but, rather, inquired into the elements and purpose of the predicate offense from which the laundered funds were derived." 626 F.3d 527, 535 (9th Cir. 2010). A number of courts, however, appear to have relied on an elements-of-the-offense approach to resolve merger issues, without directly citing *Blockburger*. In *United States v. Giles*, for instance, the court addressed the petitioners *Santos* argument and held that his conviction for conspiracy to distribute marijuana did not merge with the money laundering conspiracy because an actual financial transaction is not an element of the drug offense. No. 3:14-cv-203-RJC, 2017 WL 3971282 (W.D.N.C. Sept. 8, 2017). Thus,

"particularly unfair" in this case because the penalties for money laundering are substantially more severe than those for operating a gambling business.[55] To treat the payment of an essential expense as a separate offense where it "radically" increased the sentence for that crime, he concluded, would lead to a "perverse result" that Congress could not have intended.[56] Stevens, however, did not endorse the plurality's view that "proceeds" means "profits" for all predicate offenses. Rather, the meaning of "proceeds," as he saw it, could vary depending on the underlying predicate offense and the court's interpretation should be determined on a case-by-case basis, guided by legislative intent.[57] Based on the legislative history of the money laundering statute, he concluded that Congress intended proceeds to include gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales, but was silent regarding gambling.[58] Justice Stevens concluded, therefore, that "proceeds" means "profits" when used to pay the essential expenses of operating a gambling operation.[59]

Justice Alito, writing for the dissent, rejected the plurality's definition of "proceeds." The dissent contended that "proceeds" always means the total amount brought in, that is, gross receipts.[60] Justice Alito disagreed with Justice Stevens that the meaning of the term "proceeds" could vary "depending on the nature of the illegal activity that produces the laundered funds."[61] Alito viewed the merger problem as fundamentally a sentencing problem to be resolved by the district court at sentencing or, if necessary, through amendments to

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"*Santos* did not apply at all." *Id*. at *12. The court's analysis in *Giles* did little to distinguish between double jeopardy and merger. Neither did the *Santos* decision itself. The Supreme Court, it appears, blurred the double jeopardy lines in seeking to achieve a "fair" result. In doing so, it may have created a Gordian knot.

[55] *Santos*, 553 U.S. at 527.

[56] *Id*. at 526–27. What Justice Stevens found to be the "perverse result" in this case was that the money laundering conviction increased the statutory maximum from 5 years to 20 years.

[57] *Id*. at 525–26.

[58] *Id*.

[59] *Id*. at 529.

[60] *Id*. at 546 (Alito, J., dissenting).

[61] *Id*. at 548 ("The meaning of the term 'proceeds' cannot vary from one money laundering case to the next . . . .") (Alito, J., dissenting).

the sentencing guidelines.[62] Further, concerns about sentencing disparity, Alito stated, were misplaced and provided no justification for the court's decision as the sentencing guidelines were no longer mandatory.[63]

B. Aftermath of *Santos*: "the blind leading the blind"

The *Santos* Court was divided not only over the meaning of "proceeds" but also over the holding of the case itself. The Justices disparaged each other's opinions and did nothing to clarify the merger issue outside the context of gambling. As the Fifth Circuit noted, "[t]he precedential value of *Santos* is unclear outside of the narrow factual setting of that case, and the decision raises as many issues as it resolves for the lower courts."[64] The Cambridge Dictionary defines "the blind leading the blind" as a situation in which "a person who knows nothing is getting advice and help from another person who knows almost nothing."[65] Unfortunately, that might very well describe the state of post-*Santos* law.

After *Santos*, federal courts were widely split regarding the scope of the holding and struggled to glean what, if any, new rule of law the divergent opinions of the *Santos* Court established.[66] The confusion

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[62] *Id*. at 547.

[63] *Id*. Justice Alito pointed out that when the respondents were convicted, their money laundering convictions resulted in higher sentences only because of the money laundering sentencing guideline, United States Sentencing Guidelines Manual (U.S.S.G.) § 2S1.1 (U.S. Sentencing Comm'n 1997) [U.S.S.G.], which, in the pre-*Booker* era, was mandatory. Now that the guidelines are no longer mandatory, Alito pointed out, a sentencing judge could impose the sentence called for by the guideline that applies to the gambling business provision, see U.S.S.G. § 2E3.1(a)(1), or an entirely different sentence. Justice Breyer, writing in a separate dissent also saw "merger" as a problem. If the merger problem is essentially a problem of fairness in sentencing, he stated, the Sentencing Commission has adequate authority to address this kind of disparity. *Santos,* 553 U.S. at 530 (Breyer, J., dissenting).

[64] United States v. Brown, 553 F.3d 768, 783 (5th Cir. 2008).

[65] *The Blind Leading the Blind*, CAMBRIDGE DICTIONARY.

[66] "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of 'the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15

has led to at least three different approaches to determining the stare decisis effect of the opinion: one narrow, one somewhat broader, and one viewing Justice Stevens's concurring opinion as controlling. Courts adopting a narrow reading of *Santos* limit the holding to its facts and have determined that the case constitutes binding precedent only in the context of an illegal gambling operation.[67] Another group of courts adhere to what might be characterized as the middle or moderate view and have concluded that a court does not need to pick a single definition of proceeds for every unlawful activity. These courts read *Santos* to hold that when a merger problem arises in the context

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(1976) (opinion of Stewart, Powell, and Stevens, JJ.)). This would mean that Justice Stevens's concurring opinion is the one that controls. There was, however, no agreement as to what was that precedential effect. The plurality, minus Justice Thomas, stated that the holding of *Santos* under the *Marks* rule was that proceeds means profits when there is no legislative history to the contrary. *Santos*, 553 U.S. at 523. Justice Stevens, however, disputed that interpretation his own opinion, which he characterized as the "purest of dicta." *Id.* His conclusion, he explained, was driven by the conviction that Congress could not have intended the "perverse result" that would result in this case by defining proceeds as all receipts where there was no legislative history to the contrary. *Id.* at 528. The Second Circuit in *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003), determined that the *Marks* rule does not apply when the "narrowest concurring opinion explicitly rejects the plurality's reasoning and does not represent a 'common denominator [of] the position approved by at least five justices.' In such a case, there is no 'law of the land' and the decision is limited to its facts." *See* Rachel Zimarowski, *Taking a Gamble: Money Laundering After United States v. Santos*, 112 W.V. L. REV. 1139, 1163 (2010). Furthermore, Justice Scalia specifically disagreed with Justice Stevens's case-by-case approach to defining proceeds and warned that only Justice Stevens seemed to think that the statute could be interpreted differently in different contexts. *Santos*, 553 U.S. at 524. Some courts and commentators, therefore, have suggested that the *Marks* rule does apply because the meaning of words in a statute cannot change with the statute's application. In other words, the term "proceeds" cannot have different meanings. *See* Clark v. Martinez, 543 U.S. 371 (2005). For an in-depth discussion of the *Marks* rule and *Clark v. Martinez*, see Zimarowski, *supra*.

[67] *See, e.g.*, United States v. Thornburgh, 645 F.3d 1197, 1209 (10th Cir. 2011) (proceeds means profits only where an illegal gambling operation is involved); United States v. Demarest, 570 F.3d 1232, 1242 (11th Cir. 2009) ("*Santos* has limited precedential value"; it applies only when the SUA is an unlicensed gambling operation).

of money laundering and illegal gambling, the *required* solution is to define the proceeds of the illegal gambling business as its net profits. But for other offenses, they address merger using a case-by-case approach.[68] Courts holding this view appear to be in the majority, particularly where the underlying offense is drug trafficking.[69] Finally, a few district courts have taken a broad approach and adopted the bright-line rule of the plurality, interpreting *Santos* as applying to all specified unlawful activities—not just gambling.[70] The S*antos* decision left courts baffled and confused and has led one court to comment that *Santos* may well be a case in which no common denominator exists beyond agreement on the result.

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[68] These courts have concluded that whenever a predicate offense presents a merger problem, the term "proceeds" should be defined as "net profits," and that when no merger problem exists, the term "proceeds" should be defined as "gross receipts." *See* United States v. Van Alstyne, 584 F.3d 803, 814 (9th Cir. 2009); United States v. Lee, 558 F.3d 638, 642–43 (7th Cir. 2009). The Sixth Circuit, for example, would fall within this group. In *United States v. Kratt*, 579 F.3d 558 (6th Cir. 2009), the court held that because Justice Stevens's opinion controls, proceeds means profits only when the predicate offense creates a merger problem that leads to a radical increase in the statutory maximum sentence and only when nothing in the legislative history suggests that Congress intended such an increase. *See also* Garland v. Roy, 615 F.3d 391, 401–02 (5th Cir. 2010) (holding that courts must look to both the merger problem and legislative history).

[69] *See, e.g.*, United States v. Richardson, 658 F.3d 333, 340 (3d Cir. 2011) (Santos does not apply in drug cases); United States v. Quinones, 635 F.3d 590, 600 (2d Cir. 2011) (Justice Stevens's concurrence makes clear that the profits test does not apply in drug cases).

[70] The district court in *United States v. Hedlund* rejected the government's argument that *Santos* did not apply in drug cases because that was the view of five of the justices. No. CR-06-346-DLJ, 2008 WL 4183958 (N.D. Cal. Sept. 9, 2008). The court responded that "the bottom line is that five Justices said that, but they did not vote that." *Id.* at *6. To the contrary, the court emphasized, Justice Scalia made it very clear that the decision was not to be read as permitting the word "proceeds" to be given different meanings for different applications of the statute. *Id.*

V. A judicial quagmire: what are "normal" or "essential" expenses of the underlying crime?

Perhaps the single most perplexing issue facing prosecutors who are trying to determine whether charging money laundering would create a merger issue is: exactly what costs or expenses can implicate the merger issue? Justice Scalia referred to transactions that are the normal expenses of a crime.[71] Justice Stevens referred to transactions that are "essential expenses" of operating a business.[72] Subsequently, courts have been all over the map when determining whether a payment created a merger issue.[73] Much of the confusion surrounding the merger issue might have been avoided, perhaps, had the Supreme Court viewed the merger problem as arising where the money laundering transaction is "intrinsic" to the crime. In other words, committing the predicate offense necessarily depends on the payment. Paying a winning bettor is intrinsic to violations of the gambling statute. *Santos's* lottery operation would not have existed without these payments. By making those payments, he *necessarily* violated the money laundering statute without any additional conduct.

Not unsurprisingly, the lack of guidance has resulted in conflicting decisions by the courts. In *United States v. Coles,* the Third Circuit rejected the defendant's contention that paying rent for an apartment that was used to divide and package cocaine presented a merger problem as identified in *United States v. Santos.*[74] "He is incorrect.

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[71] *See Santos*, 533 U.S. at 517.

[72] *Id.* at 528.

[73] *See* United States v. Cloud, 680 F.3d 396, 404–08 (4th Cir. 2012) (payment of an "essential expense" of the SUA merges with the SUA); United States v. Van Alstyne, 584 F.3d 803, 815–16 (9th Cir. 2009) (lulling payments in the furtherance of a Ponzi scheme was "a central component of the 'scheme to defraud'"); *Hedlund*, 2008 WL 4183958, at *5 (paying mortgage on building where marijuana was grown was a "business expense"); United States v. Ali, 620 F.3d 1062, 1072–73 (9th Cir. 2010) (conviction based on payments "necessary to the function of" a fraud scheme must be vacated); *Richardson*, 658 F.3d at 340 (purchase of real property was not "integral" to the crime of drug trafficking).

[74] United States v. Coles, 558 F. App'x 173, 180 (3d Cir. 2014) (not precedential).

Unlike the lottery payments in *Santos*, where the winning bettor's payment involved the receipts of the illegal lottery, paying rent for the apartment is not integral to drug trafficking."[75] On the other hand, the district court in *United States v. Hedlund* reached a different conclusion and held that using marijuana proceeds to pay the mortgage on a warehouse where marijuana was grown was a "business expense" that implicated *Santos*.[76] In neither case was the payment intrinsic to a violation of 21 U.S.C. § 841. Buying more drugs, for example, would be an intrinsic expense in a drug trafficking conspiracy.

A. "Essential" to a violation of the statute? Or "essential expense" of the defendant's scheme?

The merger issue is further complicated by conflicting decisions regarding whether the money laundering transaction must be a normal or essential expense of *violating the statute,* or a normal expense of *how defendants conduct their own particular criminal activity*. Some courts have focused on the statute itself. For instance, in *United States v. Webster*, the Ninth Circuit held that the petitioner's conviction for conspiracy to distribute marijuana did not merge with the money laundering conspiracy because drug crimes need not involve the exchange of money.[77] These courts, nevertheless, have sometimes reached conflicting opinions regarding how to interpret the statutory requirements of the same predicate offense. Perhaps the divergence in holdings has been no more dramatic than where the defendant is charged under the wire fraud or mail fraud statutes.

In *Rashid v. Warden Philadelphia FDC,* the issue before the court was whether "proceeds" means "'profits from the *artifice or scheme to*

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[75] *Id.* at 180 n.6 (internal citations omitted).
[76] 2008 WL 4183958, at *5.
[77] 623 F.3d 901 (9th Cir. 2010); *see also* Wooten v. Cauley, 677 F.3d 303, 311 (6th Cir. 2012) (notwithstanding United States v. Kratt, 579 F.3d 558 (6th Cir. 2009), there is no merger problem if the SUA and money laundering have different elements); United States v Payton, 437 F. App'x 241 (4th Cir. 2011) (not precedential) (conviction for possession with intent to distribute cocaine base does not present a merger problem with his money laundering conviction because an actual financial transaction is not an element of Payton's drug conviction).

defraud,' or instead means 'profits from *use of the mail or an interstate wire communication*.'"[78] The court explained:

> In this case, the "unlawful activity" that generated the laundered "proceeds" was mail and wire fraud. Mail and wire fraud are completed crimes when the mail or wire communication is sent. Thus, the "essential expenses" of mail and wire fraud are costs incurred in sending mail or interstate wire communications, not, as defendant argues, the expense of maintaining the scheme or artifice to defraud. By paying the expenses of his artifice or scheme to defraud, through payment of salaries and rent, [Rashid] laundered profits from completed mail and wire fraud to facilitate future crimes.[79]

The Ninth Circuit, on the other hand, has taken a completely different approach regarding merger and fraud. In *United States v. Van Alstyne*, the court was confronted with the issue of whether payments associated with a Ponzi scheme created a merger problem.[80] Mail fraud, the court began, "has two elements: '(1) having devised or intending to devise a scheme to defraud (or to perform specified fraudulent acts), and (2) use of the mail for the purpose of executing, or attempting to execute, the scheme (or specified fraudulent acts).'"[81] The court concluded:

> The Supreme Court has emphasized that 18 U.S.C. § 1341 prohibits "the 'scheme to defraud' rather than the completed fraud . . .," and that a mailing need only be "incident to an essential part of the scheme" to satisfy the second element.
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> . . .
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> This language indicates that our analysis of the "merger" problem in the mail fraud context must focus on the concrete details of the particular "scheme to

[78] 617 F. App'x 221, 224 (3d Cir. 2015) (not precedential) (emphasis added) (quoting United States v. Rashid, 39 F. Supp. 3d 649, 653 (E.D. Pa. 2014)).
[79] *Id.* at 224 (internal citations and footnote omitted).
[80] 584 F.3d 803, 815–16 (9th Cir. 2009).
[81] *Id.* at 815.

> defraud," rather than on whether mail fraud generally requires payments of the kind implicated in S*antos*.[82]

Most courts have followed the approach of the Ninth Circuit and focused on the defendant's *particular* scheme or criminal activity. If the payments or transactions are a normal part of the cost of doing business, or in other words part of the "core scheme" or a "central component" of the underlying criminal activity, charging those transactions as a separate money laundering offense creates a merger problem.[83]

B. Not everything that promotes the predicate offense is a merger problem

Despite the confusion, conflicting decisions, and uncertainty surrounding the merger issue, it is important to understand that not all payments that promote a criminal offense create a merger problem. The Ninth Circuit's opinion in *United States v. Van Alstyne*, provides a good example.[84] Van Alstyne operated what is commonly known as a Ponzi scheme, selling interests in oil and gas properties he

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[82] *Id.* (internal citation omitted). This issue divided the panel in United States v. Simmons, 737 F.3d 319 (4th Cir. 2013). The majority, following *Van Alstyne*, concluded dividend payments to investors in a Ponzi scheme are essential expenses. The court "decline[d] the Government's invitation to divide Simmons's Ponzi scheme into a successive series of past, present, and future frauds." *Id.* at 327. Rather, they concluded, a Ponzi scheme, like the lottery scheme in *Santos*, represented a single, ongoing enterprise. *Id.* at 327. Judge Niemeyer disagreed. *Id.* at 329–30. In his view, once the fraudulent statements were made to customers and they sent money to Simmons based on those statements, the fraud was complete. *Id.* "Simmons would then be punishable for violating the wire fraud statute, 18 U.S.C. § 1343." *Id.* "The subsequent payments back to the investors, who had earlier been defrauded, were not expenses of the fraudulent act—they were not necessary as a matter of fact or law." *Id.* at 329 (Niemeyer, J., dissenting). Rather, they were acts of money-laundering that had the effect of covering up the fraud and promoting future frauds. *Id.*

[83] *See, e.g.*, United States v. Ali, 620 F.3d 1062, 1072–73 (9th Cir. 2010) (applying *Van Alstyne*; money laundering convictions involving payments necessary to continue a fraud scheme must be vacated, but those involving non-essential payments affirmed); United States v. Grasso, 724 F.3d 1077, 1095 (9th Cir. 2013) (kickbacks received by defendant were not central component of underlying scheme to defraud banks).

[84] 584 F.3d at 803.

controlled to elderly and retired investors.[85] Funds from new investors were used to pay purported returns to the earlier backers.[86] The distributions were intended to convince investors that they had invested wisely and to encourage them to invest additional funds.[87] When the scheme began to collapse, Van Alstyne returned some or all of the initial investments to complaining victims. The defendant was convicted of mail fraud and money-laundering.[88] The money laundering convictions were based on mailing "distribution checks" periodically to individual investors and a transaction in which he refunded the full amount to a couple in response to their complaints after the scheme began to unravel.

The Ninth Circuit reversed the convictions that were based on "lulling" payments concluding those convictions suffered from a merger problem. The very nature of a Ponzi scheme, the court remarked, requires some payments to investors for it to be at all successful. Those distributions are necessary to inspire investor confidence in the Ponzi scheme and to attract additional investment. Without the lulling payouts there would have been no Ponzi scheme. Those distributions, the court held, were "a central component" of the scheme to defraud and ran squarely into the merger problem that troubled the Court in *Santos*.[89] On the other hand, the court held that returning the full investment to a victim after the scheme began to unravel did not create a merger problem because it was not part of the "core scheme."[90] Rather than being an expense of running the day-to-day operation of the Ponzi scheme, that payment "undermined rather than advanced" the scheme, as it left the defendant with fewer funds "to lull other investors . . . ."[91] Nevertheless, the transaction did serve to "promote the carrying on" of the scheme by preventing detection of the fraud.[92] Therefore, the Court affirmed that conviction.[93]

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[85] *Id.* at 807–08.
[86] *Id.*
[87] *Id.*
[88] *Id.* at 809–10.
[89] *Id.* at 815.
[90] *Id.* at 815–16.
[91] *Id.*
[92] *Id.* at 816.
[93] *Id.*

It is unclear where a court will draw the line regarding what is an essential expense. In fact, the courts themselves have had difficulty trying to apply *Santos*. After *Van Alstyne*, the Ninth Circuit was again called on to address a merger issue in the context of a Ponzi scheme.[94] This time, however, the court struggled to determine exactly which payments were inherent to the scheme. The defendant was convicted of travel fraud and money laundering related to an extravagant Ponzi scheme he masterminded.[95] The scheme was based on appearing rich and successful to gain investors' trust.[96] He offered luxury travel, including all-expense-paid trips to Hawaii, and made other extravagant expenditures that were designed to create an aura of legitimacy and lull victims into investing in his Ponzi scheme.[97]

On appeal, Ferguson challenged the district court's determination that those expenditures were not inherent to his illegal scheme.[98] The Ninth Circuit noted that its earlier decision in *Van Alstyne* made clear that payments to investors were inherent to the Ponzi scheme because they lulled investors into believing that the investment scheme was genuine.[99]

In this case, however, none of the money laundering counts involved payouts to earlier investors. Nevertheless, the expenditures were intended to gain the confidence and trust of the investors so they would invest in his Ponzi scheme. Unlike the payments in *Van Alstyne*, the court stated, it was not "plain" whether these expenditures were inherent to the scheme.[100] The extravagances could have been part of a front inherent to the defendant's scheme, the court mused,[101] or, part of a front but not inherent to the scheme.[102] Or the expenditures, such as luxury trips to Hawaii with investors, might have been mere self-indulgences with the victims' money and, therefore, not inherent to the Ponzi scheme.[103] The court never

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[94] United States v. Ferguson, 412 F. App'x 974 (9th Cir. 2011) (not precedential).
[95] *Id.* at 975.
[96] *Id.*
[97] *Id.*
[98] *Id.* at 976.
[99] *Id.*
[100] *Id.* at 976–77.
[101] *Id.*
[102] *Id.*
[103] *Id.*

determined which of these possible motives for the expenditures was most likely and, therefore, sidestepped the difficulties associated with applying *Santos*. "*Santos* is, as we said in *Van Alstyne*, a decision 'with less than clear results.' The distinguishable facts and plurality decision make *Santos* by itself difficult to apply . . . ."[104] In this case, the court stated, "the law was unclear at trial and is still unclear on appeal."[105] Therefore, the Ninth Circuit simply held that any error by the district court was not plain.[106]

C. Merger and conspiracies

The merger issue is even more unsettled where the government charges a money laundering conspiracy.[107] Section 1956(h) creates a separate criminal offense for conspiring to violate one of the money laundering statutes.[108] The essence of a conspiracy is the agreement. Section 1956(h) does not require an overt act.[109] It does not require proof of an actual financial or monetary transaction. Nor does it require proof that the property involved in the transaction was SUA

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[104] *Id*. at 976–77; *see also* United States v. Cloud, 680 F.3d 396, 408 (4th Cir. 2012) ("In rejecting the government's arguments, we recognize the difficult line-drawing problems cases like this one present.").
[105] *Ferguson,* 412 F. App'x at 976.
[106] *Id*. at 976–77.
[107] The *Santos* Court affirmed the Seventh Circuit's decision to vacate all money laundering convictions, including the defendant's section 1956(h) conviction for conspiracy to violate 18 U.S.C. § 1956(a)(1)(A)(i). *See* Santos v. United States, 461 F.3d 886 (7th Cir. 2006). The Supreme Court, however, did not address the conspiracy issue. Simply noting that "[r]espondents were also convicted of conspiring to launder money under § 1956(h). Because the Government has not argued that respondents' conspiracy convictions could stand if 'proceeds' meant 'profits,' we do not address that possibility." *Id*. at 511 n.1 (citation omitted).
[108] Conspiracies to violate sections 1956 and 1957 may be charged as violations of section 1956(h) or as objects of a section 371 conspiracy. If only money laundering is charged, section 1956(h) is the preferred statute because of the higher penalty and availability of criminal forfeiture. If the conspiracy has multiple objects, of which money laundering is just one, the prosecutor may charge two conspiracies; or for simplicity, one section 371 conspiracy with money laundering as one object.
[109] *See* Whitfield v. United States, 543 U.S. 209, 211 (2005) (section 1956(h) does not require proof of an overt act).

proceeds.[110] The crime is complete once the conspirators have a meeting of the minds. Some courts, therefore, have concluded that because conspiracy is an inchoate crime, it does not implicate the merger issue that troubled the court in *Santos*. For instance, in *United States v. Gibson*, the Fifth Circuit held that the defendant's convictions for conspiracy to commit Medicare fraud and conspiracy to launder money did not merge because conspiracy does not require an overt act.[111] The court stated that "the government bore no burden to identify *any* financial transaction, let alone distinguish between legitimate and unlawful ones."[112]

On the other hand, in *United States v. Smith,* the court rejected the government's argument that even if the money was not proceeds under *Santos*, the defendant could still be convicted of conspiring to launder proceeds.[113] The case arose out of the government's investigation into an illegal moonshine operation.[114] In addition to convictions directly related to the production of illegal liquor, Margaret Smith was also convicted of promotional money laundering.[115] Smith's primary involvement with the moonshine conspiracy was purchasing the land in her name and then making the mortgage payments on the property where the still was built.[116] After the jury returned a guilty verdict, she filed a motion for judgment of acquittal contending that the money laundering violations were based on payments for the moonshine operation's essential expenses.[117] Therefore, as a matter of law, they could not constitute "proceeds" after the Supreme Court's decision in *Santos*. The court agreed and dismissed the individual section 1956(a)(1) promotion counts.[118] The

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[110] *See* United States v. Farrell, No. CRIM.A.03-311-1(RWR), 2005 WL 1606916, at *8 (D.D.C. 2005) (conspiracy does not require proof of a completed money laundering offense, therefore, it is not necessary to prove that the financial transaction involved SUA proceeds, but only that defendant agreed to conduct a transaction involving such proceeds).

[111] 875 F.3d 179 (5th Cir. 2017).

[112] *Id.* at 191 (citing *Whitfield*, 543 U.S. at 219).

[113] 623 F. Supp. 2d 693 (W.D. Va. 2009).

[114] *Id.* at 696.

[115] *Id.* at 696–97.

[116] *Id.* at 699.

[117] *Id.*

[118] *Id.* at 712. The court further stated that "[a]lternatively, and irrespective of *Santos*," the money laundering convictions for payments towards the

government nevertheless argued that *Santos* should not apply to her convictions for conspiring to violate the statute.[119] The court disagreed[120] and stated that:

> Finally, the government argues that *Santos* should not apply to the conspiracy to launder money conviction . . . The court finds that if the [money laundering] transactions that form the basis for Margaret Smith's conspiracy conviction are no longer valid after *Santos,* then so too must her conspiracy conviction be vacated.[121]

As noted, section 1956(h) makes it a crime to agree to engage in conduct that would violate one of the money laundering statutes.[122] A conspiracy to violate section 1956(a)(1)(A)(i), for instance, is an agreement to conduct financial transactions that would promote an SUA. Prosecutions, however, are factually bound. To determine whether the "agreement" creates a merger problem, the critical question is—what financial transactions did the defendants agree to conduct? In *Giles v. United States*, for instance, the financial transactions were large cash deposits by marijuana distributors into the supplier's bank account in order to purchase more drugs for future sales.[123] As such, those transactions do not merge with the underlying offense—conspiracy to distribute marijuana. On the other hand, an agreement to use proceeds from a Ponzi scheme to make regular payouts as purported returns in investments to lull victims into investing more funds into the scheme would, in fact, create a merger

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property's mortgage must be overturned because there was insufficient evidence that the funds used for those payments represented proceeds from specified unlawful activity. *Id.* at 704.

[119] *Id.*

[120] *Id.*

[121] *Id*. (citing United States v. Santos, 553 U.S. 507, 509–10 (2008)).

[122] *See* United States v. Henry, 325 F.3d 93, 103 (2d Cir. 2003) (government must prove agreement to commit all substantive elements of a money laundering offense).

[123] No. 3:14-cv-652-RJC, 2017 WL 3971282, at *12 (W.D.N.C. Sept. 8, 2017) (The court determined Giles's conviction for conspiracy to distribute marijuana did not merge with the money laundering conspiracy because an actual financial transaction is not an element of the drug offense, and thus, *Santos* did not apply at all.).

problem with the underlying fraud—the Ponzi scheme.[124] Where the evidence establishes that the factual basis for the money laundering conspiracy is the payment of essential expenses of committing the underlying criminal offense, there is no reason to conclude prosecutors can sidestep a merger problem simply by charging conspiracy.[125]

VI. The Fraud Enforcement and Recovery Act (FERA): Congress defines proceeds

Congress responded quickly to the confusion and uncertainty among the lower courts attempting to discern the meaning and scope of the *Santos* decision. The following year it enacted the FERA, which amended the money laundering statutes and explicitly defined "proceeds" in section 1956(c)(9) as "any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity."[126] Congress thereby overruled the *Santos* decision. It, however, did little to clarify the merger issue itself. When enacting FERA, Congress

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[124] United States v. Simmons, 737 F.3d 319, 328–29 (4th Cir. 2013) (following *Van Alstyne*; dividend payments to investors in Ponzi scheme are essential expenses).

[125] *See* United States v. Moreland, 622 F.3d 1147, 1166 (9th Cir. 2010) (reversing section 1956(a)(1)(A)(i) convictions; jury instruction for conspiracy to commit money laundering, which stated that the jury could find defendant guilty if there was an agreement between two or more persons to commit money laundering, was erroneous because it permitted the jury to convict defendant of conspiracy to launder money even if he agreed only to transfer gross receipts); *cf.* United States v. Cloud, 680 F.3d 396, 405–08 (4th Cir. 2012) (affirming conviction for section 1956(h) conspiracy where the conspiracy charge was not tied to any specific payment to a recruiter, buyer, or coconspirator" and there was evidence that the defendant used the profits from his previous illegal deals to finance additional purchases); Hagen v. United States, No. 3:13-cv-394-WEB, 2014 WL 3895062, at *8 (W.D.N.C. Aug. 8, 2014) (evidence, at best, showed conspirators used some of the proceeds to pay expenses of the scheme; however, evidence also showed they agreed to conceal profits from the scheme by transfers through various foreign banks and those transactions do not create a *Santos* merger problem).

[126] Fraud Enforcement and Regulatory Act of 2009 (FERA), Pub. L. No. 111–21, § 2(f)(1), 123 Stat. 1617, 1618 (2009) (codified at 18 U.S.C. § 1956(c)(9)). The 2009 amendments are not retroactive. *See* FERA, at § 4(f) (making *Santos* inapplicable to post-2009 conduct).

specifically included a sense of Congress provision that reflected obvious Congressional concern with charging a money laundering offense based on a transaction in which the criminal proceeds are used to pay essential expenses of the SUA that generated the proceeds. The provision states,

> It is the sense of the Congress that no prosecution of an offense under section 1956 or 1957 of title 18, United States Code, should be undertaken in combination with the prosecution of any other offense, without prior approval of the Attorney General, the Deputy Attorney General, the Assistant Attorney General in charge of the Criminal Division, a Deputy Assistant Attorney General in the Criminal Division, or the relevant United States Attorney, if the conduct to be charged as "specified unlawful activity" in connection with the offense under section 1956 or 1957 is so closely connected with the conduct to be charged as the other offense that there is no clear delineation between the two offenses.[127]

Although Congress legislatively overruled the Supreme Court's definition of "proceeds," it is important to understand it did not eliminate the merger issue identified by the Court in *Santos*. Any suggestion that there is no longer a merger problem after FERA finds little support in courts or Congress. FERA should be seen as an attempt to correct the *Santos* remedy for merger—not an invitation for prosecutors to charge money laundering counts that "merge."

VII. Where are we now? The post-FERA merger landscape

Although *Santos* caused considerable confusion and disagreement among the courts, the inconvenient truth is that prosecutors had more guidance on merger issues before the enactment of FERA. They could rely on decisions in their own circuits or districts to predict how the courts would address the merger issue. That is no longer true.

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[127] *Id.*

A. Courts continue to be split

Since FERA was enacted, there have been very few reported decisions dealing with the issue that troubled the Supreme Court in *Santos*. Not surprisingly, courts have taken conflicting positions on the effect of the legislation. Several courts have expressed the view that after FERA, merger generally should not be a problem in future cases.[128] For instance, in *United States v. Millender*, the defendant was convicted of orchestrating a fraudulent scheme using a company he established allegedly to help the poor in developing countries by providing short-term "micro-loans."[129] The money was instead used to make risky investments on the foreign-exchange currency market and for personal expenses.[130] Millender solicited funds by offering high rates of return on investments that were "guaranteed" because they were secured by "reserves."[131] He was also convicted of promotional money laundering for using funds from lenders to pay promotors in the scheme.[132] In denying Millender's motion for judgement of acquittal, the court recognized that Congress had "amended" the definition of proceeds and that new definition—"gross proceeds"—applied to the transactions in this case, which occurred from 2011–2015. The court stated, however, that *before* the amendment, the defendant's transactions would *not* have constituted money laundering under *Santos* because they were "the essential expenses of the underlying fraud . . . ."[133]

Other courts, however, continue to recognize merger as an issue that must be addressed when raised before the court. For example, in

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[128] *See, e.g.,* United States v. Cloud, 680 F.3d 396 n.6 (4th Cir. 2012) (in holding defendant's substantive money laundering convictions presented a merger problem requiring reversal, the court noted that Congress had amended the money laundering statute to define proceeds and concluded "the issue we address today is not likely to arise in many more cases").

[129] No. 1:16-cr-239-1 (AJT), 2018 WL 4568602, at *3 (E.D. Va. Sept. 24, 2018).

[130] *Id.* at *4.

[131] *Id.*

[132] *Id.*

[133] *Id.* at *12 n.25; *see also* United States v. Grasso, 724 F.3d 1077, 1091 (9th Cir. 2013) (holding that the defendant's money laundering offense merged into the underlying loan fraud and bank fraud offenses and could not be separately punished, but stating that after the 2009 amendments there could be "no debate" that Grasso's "referral fees" would be separately punishable as money laundering).

United States v. Capacho, the defendant was indicted for his role in a corporate kickback scheme.[134] As an initial matter, the court pointed out that the defendant was charged under section 1956(a)(1)(B) of the money laundering statute.[135] The *Santos* merger issue, the court stated, does not apply to concealment money laundering—only to the promotional money laundering provision.[136] Moreover, the court continued, the charges alleged in the indictment did not implicate a merger problem.[137]

> There is no merger problem because Capacho is not charged in the money laundering counts with paying individuals involved in the underlying wire fraud for services they provided that were necessary to the operation of the wire fraud, or otherwise engaging in the same transactions that form the basis for the wire fraud charges.[138]

There are two significant points worth noting in the court's opinion in light of FERA. First, because the conduct charged in the indictment occurred after FERA was enacted, the Supreme Court's holding in *Santos* was inapplicable. Nevertheless, the court analyzed the allegations in light of *Santos* and concluded that there was no merger problem because "the money laundering counts are not premised on the same transactions as any of the wire fraud counts."[139] Clearly the *Capacho* court recognized that merger is not a dead issue. Second, the district circuit cited to pre-FERA decisions when addressing the defendant's merger argument.[140] It is still too early to determine

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[134] No. H-17-019, 2018 WL 1334812, at *2 (S.D. Tex. Mar. 15, 2018).
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.* at *3.
[139] *Id.* at *2.
[140] *Id.* at *2–*3 (citing *Stewart v. Keffer*, 514 F. App'x 504, 508 (5th Cir. 2013) (not precedential) (there was no merger issue, and thus no *Santos* problem, where the money laundering transactions involved only the transfer of funds from one bank account to another in order for defendant to access those funds) and United States v. Barton, 526 F. App'x 360, 364 (5th Cir. 2013) (not precedential) (defendant's money laundering convictions arising from his operation of Ponzi-like scheme did not merge with his wire fraud convictions, where wire fraud counts addressed specific transactions whereby defendant

whether courts will adopt the reasoning and conclusions of their pre-FERA decisions when dealing with merger issues in future cases. *Capacho,* however, suggests this may be a possibility.

B. Is the merger issue "dead"?

It is unclear to what extent FERA will change how courts resolve merger issues in future cases. The Ninth Circuit provided some valuable insight for courts as they consider the merger issue in future cases. In *United States v. Williams*, the court attempted to determine the binding effect of a recent Supreme Court decision in light of the splintered opinions of the Justices.[141] The court applied the principles of *Marks*, concluding that, "[w]e need not find a legal opinion which a majority joined, but merely 'a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree.'"[142] In *Santos*, the *result* the Court sought was to avoid the unfairness of convicting and sentencing the defendants twice for what essentially was one crime. This issue drove the

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fraudulently obtained funds from investors in scheme, and money laundering charges focused on specific distinct transactions further transferring those unlawfully-obtained funds onward to various third-party entities));
United States v. Valdez, 726 F.3d 684, 691 (5th Cir. 2013) (paying employees who submitted the false billings in a healthcare fraud scheme above normal salary supported jury's conclusion that the payments were made to secure loyalty or cooperation in the scheme, and were not normal business expenses).

[141] 435 F.3d 1148, 1157–61 (9th Cir. 2006).

[142] *Id*. (quoting Planned Parenthood v. Casey, 947 F.2d 682, 693 (3d Cir. 1991), *aff'd in part and rev'd in part on other grounds*, 505 U.S. 833 (1992)); *see also* Zimarowski, *supra* note 66.

Supreme Court's decision.[143] Therefore, it is hard to argue persuasively that after FERA, the merger issue is "dead."[144]

VIII. Merger approval and reporting requirements: Criminal Resource Manual § 2187

In response to FERA, the Department implemented *New Approval and Reporting Requirements for Certain Money Laundering Prosecutions*, which can be found in Criminal Resource Manual § 2187.[145] The following categories of cases are subject to the sense of Congress approval requirement: (1) cases that fall within the existing consultation requirement of Justice Manual § 9-105.330; and (2) any money laundering offense charged under a promotion theory under section 1956(a)(I)(A)(i) where the financial transaction is alleged to promote the specific SUA offense that generated the proceeds, and where both money laundering and the SUA offense are being charged.[146] It is important to understand that the Department's approval requirements only apply to a *very limited* group of money laundering cases. All others do not require approval.

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[143] Courts have generally viewed the issue in *Santos* not as one of statutory construction, but one of fairness. *See, e.g.*, United States v. Simmons, 737 F.3d 319, 324 (4th Cir. 2013) (because the merger problem provided the "driving force" behind both the plurality's and Justice Stevens's opinions, we recognized that *Santos* compelled us to construe the money-laundering statute so as to avoid punishing a defendant twice for the same offense (citing United States v. Halstead, 634 F.3d 270, 276–77 (4th Cir. 2011))); Crowe v. Keffer, No. 4:11CV89-S, 2014 WL 4211192 (W.D. Ky. Aug. 25, 2014) (explaining the holding in *Santos* was designed to avoid the possibility that the same conduct will simultaneously violate two statutes).

[144] *See* Leslie A. Dickinson, *Revisiting the "Merger Problem" in Money Laundering Post-Santos and the Fraud Enforcement and Recovery Act of 2009*, 28 NOTRE DAME J. L. ETHICS & PUB. POLICY 579, 599 (2014) (suggesting that Scalia's analysis and concerns are "overstated," but concluding that the merger problem still exists under the promotional theory of section 1956).

[145] CRIMINAL RES. MANUAL § 2187.

[146] *Id.*

A. Cases that implicate the merger issue

For example, the following transactions *require* approval before they can be used as the basis for a money laundering charge:

- A drug retailer has a supply of drugs "fronted" to him, sells the drugs, and then pays his supplier for the "fronted" drugs.
- The operator of an illegal lottery uses sales proceeds to pay winners.
- A sex trafficker uses the money earned by prostitutes in his massage parlors to pay current expenses such as rent, utilities, phone bills, and advertising costs for the massage parlors.
- In a health care fraud prosecution, a dentist uses proceeds of the fraud to pay current expenses of his practice, such as building rent, equipment rent, and dental supplies.
- A telemarketer uses proceeds of his fraud scheme to pay the current monthly phone bill of his boiler room operation.
- A Ponzi scheme operator diverts victim investment proceeds to pay his office rent.

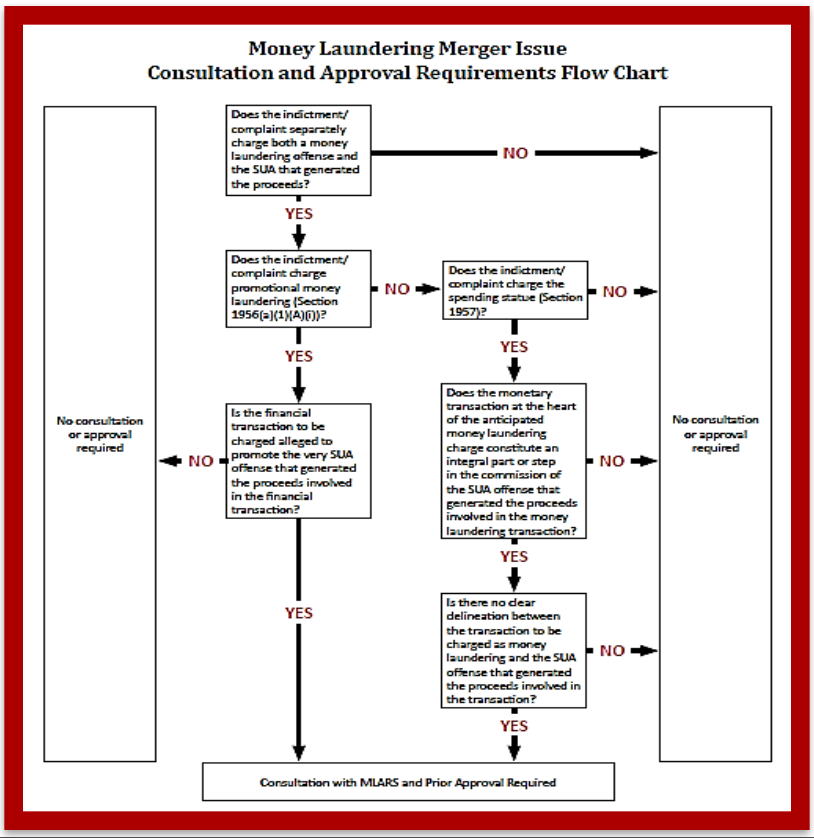
B. Cases that do not implicate the merger issue

The merger approval requirements do *not* apply to:

- Cases in which money laundering is charged but the underlying SUA is not.
- Charges under 18 U.S.C. § 1956(a)(1)(A)(i) in which the SUA being promoted is different from the SUA that generated the proceeds.
- Charges under 18 U.S.C. § 1956(a)(1)(A)(i) in which the transaction promotes a future crime or new phase of the SUA activity or scheme.
- Intent to promote tax fraud/tax evasion charges under 18 U.S.C. § 1956(a)(1)(A)(ii).
- Conceal and disguise money laundering charged under sections 1956(a)(1)(B)(i) or 1956(a)(2)(B)(i).
- International money laundering charges under section 1956(a)(2)(A) which has no proceeds requirement.

- Money laundering charges under 18 U.S.C. § 1957 except for those involving transactions to pay the ordinary expenses of the criminal operation that generated the SUA proceeds.[147]
- Civil forfeiture actions under 18 U.S.C § 981(a)(1)(A) that are premised on violations of either 18 U.S.C. §§ 1956 or 1957 regardless of whether such civil action related to a criminal investigation, indictment or complaint that would otherwise require prior approval.

The following flow chart provides an easy to understand presentation of the consultation and approval requirements for money laundering prosecutions.



Money Laundering Merger Issue Consultation and Approval Requirements Flow Chart

[147] *See* United States v Kratt, 579 F.3d 558, 562–63 (6th Cir. 2009) (rejecting government's argument that *Santos* does not apply to section 1957; proceeds means the same thing in both statutes).

Most money laundering charges do not require prior approval pursuant to Criminal Resource Manual § 2187. Two categories of cases, in particular, however, bear emphasizing.

1. International money laundering: no proceeds requirement—no merger issue

The international promotion money laundering provision, 18 U.S.C. § 1956(a)(2)(A), has no proceeds requirement where the funds are used to promote specified unlawful activity. Merger, therefore, is not implicated in charging these offenses.[148] This distinction can be extremely useful in prosecuting international cases such as violations of the Foreign Corrupt Practices Act (FCPA).[149] More importantly, section 1956(a)(2)(A) reaches conduct in which the defendant cannot be charged with the underlying criminal activity. In a recent case example, defendant Hoskins, a nonresident foreign national, was indicted for his role in bribing Indonesian officials in an effort to win a contract to build power stations for Indonesia's state electricity company.[150] The indictment charged him with conspiring to violate the FCPA, substantive violations of the FCPA, and international promotion money laundering in violation of section 1956(a)(2)(A).[151] On appeal, the Second Circuit held that to the extent

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[148] *See, e.g.,* United States v. Moreland, 622 F.3d 1147, 1166–67 (9th Cir. 2010) (because the international promotion money laundering statute, section 1956(a)(2)(A), contains no proceeds element, *Santos* is irrelevant); United States v. Krasinski, 545 F.3d 546, 551 (7th Cir. 2008) (section 1956(a)(2)(A) contains no proceeds element, therefore the Supreme Court's decision in *Santos* defining proceeds has no application in section 1956(a)(2)(A) case).

[149] In *United States v. Harder*, the defendant was charged with violating the FCPA, the Travel Act, and money laundering offenses based on allegations that he paid a foreign official, through a third party, to act unlawfully. 168 F. Supp. 3d 732, 736 (E.D. Pa. 2016). The defendant, relying on *Santos*, complained that by charging the corrupt payment as proceeds under the money laundering statute, the government effectively guaranteed that every violation of the FCPA involving payments made by a defendant would also violate the money laundering statute. *Id.* at 745–46. The court stated the defendant's argument was legally incorrect. *Id.* at 746. Section 1956(a)(2)(A) contains no proceeds requirement, therefore, *Santos* is inapplicable to international promotional money laundering charges. *Id.*

[150] United States v. Hoskins, 902 F.3d 69, 72 (2d Cir. 2018).

[151] *Id.* at 72–73.

the defendant was not within the categories of persons directly covered by the FCPA, he could not be liable for aiding and abetting a violation of, or conspiracy to violate, the statute.[152] In other words, a person may not be guilty as an accomplice or coconspirator for an FCPA crime that he or she is incapable of committing as a principal.

The money laundering counts against Hoskins, however, were not affected by the court's rulings. To be convicted of money laundering under section 1956(a)(2)(A), the statute simply requires that the defendant conduct a financial transaction intending to promote specified unlawful activity. The defendant does not have to be the one who would commit the offense that is being promoted.[153] Therefore, a non-resident foreign national who could not, by the terms of the statute, commit a violation of the FCPA, nevertheless could be convicted of laundering money with the intent to promote the FCPA violation.[154]

2. Using proceeds to promote a new crime: that is not merger

Merger issues arise only when the transaction defrays an expense of acquiring the SUA proceeds, not when it is an expense of promoting a new crime.[155] Criminal Resource Manual § 2187 provides several examples: a drug dealer sells a kilogram of heroin and uses the proceeds to buy additional heroin for future sales; a sex trafficker uses

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[152] *Id.* at 97–98.

[153] *See, e.g.*, United States v. Cherry, 330 F.3d 658, 667 (4th Cir. 2003) (it is clear that a defendant may be convicted of money laundering even if she is not a party to, much less convicted of, the specified unlawful activity); United States v. Davis, 205 F.3d 1335 (4th Cir. 2000) (defendant must know property is proceeds of a felony, but "nothing in the text of section 1956 suggests that *the defendant* must have committed that felony himself").

[154] *See* United States v. Bodmer, 342 F. Supp. 2d 176, 191 (S.D.N.Y. 2004) (defendant need not be the one who would commit the offense being promoted; defendant, a non-resident foreign national who could not, by the terms of the statute, commit a violation of the FCPA, therefore, could be convicted of laundering money with the intent to promote the violation).

[155] *See, e.g.*, Santana v. United States, Nos. C08-1493-JLR, CR06-220-JLR, 2009 WL 1228556, at *4 (W.D. Wash. May 4, 2009) (using methamphetamine proceeds to start marijuana business is the promotion of a new crime, not the payment of an essential expense of the crime that generated the proceeds; there is no merger problem).

money earned by prostitutes in a massage parlor to open a massage parlor in another city; or the operator of a Ponzi scheme uses fraud proceeds to purchase a mailing list of new potential victims.

In *United States v. Fata* the defendant was charged with promotional money laundering based on using proceeds from his health care fraud to fund a facility which would be used to facilitate further fraudulent billing.[156] The district court critically described Fata's misconduct:

> The defendant, Farid Fata, was a physician who intentionally misdiagnosed no fewer than 553 of his patients with cancer and other maladies they did not have, then administered debilitating treatments, noxious chemicals, and invasive tests—including chemotherapy, intravenous iron, and PET scans—they did not need. For this reprehensible conduct, Fata received no less than $17 million in ill-gotten payments from Medicare and other insurers. The district court accurately described Fata's conduct as "a huge, horrific, series of criminal acts."[157]

Fata submitted false claims to insurance companies and Medicare through his company, Michigan Hematology Oncology.[158] Using funds he received from filing the false claims, he incorporated a new company, United Diagnostics to perform PET scans.[159] The money laundering convictions were predicated on the deposit of two $100,000 checks from Michigan Hematology into the United Diagnostics account which was then used to fund the new PET facility.[160] Once United Diagnostics opened, Fata immediately began using it to conduct and bill for unnecessary tests.[161] Although Fata pleaded guilty to health-care fraud, conspiracy to pay and receive kickbacks, and promotional money laundering, he subsequently appealed his convictions arguing that his plea colloquy failed to provide a factual basis that he engaged in the financial transactions with the specific intent to promote the submission of false medical

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[156] 650 F. App'x 260 (6th Cir. 2016) (not precedential).
[157] *Id.* at 261–62.
[158] *Id.*
[159] *Id.* at 266–67.
[160] *Id.* at 267.
[161] *Id.*

claims.[162] The Sixth Circuit, reviewing the record, had no difficulty concluding that there was no merit to Fata's arguments.[163] Depositing checks drawn on an account which contained proceeds from his fraudulent medical insurance and Medicare claims, in order to fund the PET scan facility, which would be used to facilitate further fraudulent billing, the court determined, was sufficient to establish he used proceeds of a crime to commit a new crime.[164]

Any ongoing criminal activity, if not disrupted, will grow and expand at some point—adding new employees, new equipment, new facilities, or expanding into new geographical areas. Prosecutors can frequently identify instances in which the defendants, like Fata, expanded the nature of their original scheme. Merger is not an issue where proceeds are used to commit a new offense—even if it is part of the same scheme.[165]

IX. Is the merger issue "dead"? Not for prosecutors

Regardless of the uncertainty still surrounding the merger issue, "[w]hat does remain clear from *Santos* is that when a merger problem arises, a judicial solution must be found to eliminate its unfairness."[166] Therefore, until the Supreme Court clarifies its position on merger, prosecutors should be not only be familiar with the position taken by their circuit or district interpreting and applying *Santos*, but also have a solid understanding of the merger issue itself that troubled the Court. Where there is no post-FERA guidance within a circuit, prosecutors should look to the rationale adopted by other circuits to cite as persuasive authority. Regardless of the holding of any

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[162] *Id.* at 266–67.
[163] *Id.* at 267.
[164] *Id.*
[165] *See, e.g.*, United States v. Abdulwahab, 715 F.3d 521, 531 (4th Cir. 2013) (essential expenses of the underlying SUA merged, but expenses that continued the scheme in the future did not); United States v. Catapano, No. CR-05-229 (SJ), 2008 WL 4107177, at *4 (E.D.N.Y. Aug. 12, 2008) (*Santos* applies to cases where the transaction relates back to the offense that generated the proceeds, not to cases where defendant was using the proceeds of a completed crime to commit a new one, even if it is part of the same scheme).
[166] United States v. Halstead, 634 F.3d 270, 279 (4th Cir. 2011).

particular court, prosecutors must, nevertheless, comply with Department policy when making money laundering charging decisions. Prosecutors, therefore, should view the post-FERA merger rule broadly as stating an individual should not be convicted of money laundering for paying the essential costs of the illegal activity.

X. Practical considerations in merger cases

A. Look for charging alternatives

After acquiring criminal proceeds, defendants will generally conduct transactions to (1) promote further criminal activity; (2) conceal the illegal proceeds; or (3) spend the money. When making charging decisions, if the use of the funds would create a potential merger problem, prosecutors should consider other charging alternatives that might be available.

B. Charge "downstream"

In a 2002 episode of HBO's crime drama, *The Wire*, Detective Lester Freamon explains "[y]ou follow drugs, you get drug addicts and drug dealers. But you start to follow the money, and you don't know where the [f***] it's gonna take you."[167] That's valuable advice for prosecutors when making charging decisions. By following the money and tracing "downstream transactions," prosecutors can avoid most merger problems—particularly "traditional merger" issues. Where there is no clear delineation between the criminal activity that generated the proceeds and the money laundering transaction, the important question to ask is, "what did the defendant do next?" What subsequent transactions were conducted with the funds?

In *United States v. Kennedy,* the defendants were convicted of wire fraud and money laundering relating to an elaborate scheme to fraudulently obtain mortgage loans.[168] Kennedy operated a loan closing business.[169] After fraudulent loans were approved, the lenders wired the money to his company.[170] In turn, Kennedy funneled the funds from the finance company to shell corporations controlled by a coconspirator.[171] Those "downstream transactions" were charged as

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[167] *The Wire: "Game Day"* (HBO television broadcast 2002).
[168] 707 F.3d 558 (5th Cir. 2013).
[169] *Id.* at 560.
[170] *Id.* at 561.
[171] *Id.* at 562.

money laundering. The defendants characterized the transfer of the funds as simply part of the overall mortgage fraud scheme and alleged that charging both offenses created a merger problem.[172] On appeal, the Fifth Circuit emphasized that "the very nature of the promotional money laundering statute suggests there will always be [an] overarching scheme . . . ."[173] The question is whether within the "single scheme" there is more than one fully completed crime.[174] Wire fraud, the court stated, is a completed crime when the illicitly obtained funds are transmitted—in this case, when the lenders wired the mortgage loan funds to the defendants.[175] "If the entire scheme had come to a halt upon the Kennedys' receipt of the funds, the defendants would still have been guilty of the crime of wire fraud . . ."[176] The subsequent transfer of the funds to the shell corporations, the court stated, had no bearing on the completion of the wirefraud.[177] Therefore, the money laundering conviction did not merge with the underlying crime of wire fraud.[178]

C. Concealment money laundering: no merger issue

Section 1956(a) has four alternative "prongs:" (1) promote; (2) evade taxes; (3) conceal; and (4) avoid a reporting requirement. Merger issues arise only when charging transactions pursuant to section 1956(a)(1)(A)(I)—the promotion prong. Merger, for example, is not a problem where the purpose of the transaction is to conceal the criminal proceeds. The defendant in *United States v. Wilkes*, was charged with honest services fraud, bribery, and money laundering in connection with a scheme to bribe a member of Congress in exchange for lucrative government contracts.[179] In an effort to disguise the

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[172] *Id.* at 563.
[173] *Id.* at 565–66.
[174] *Id.*
[175] *Id.* at 566.
[176] *Id.*
[177] *Id.*
[178] In *Kennedy*, the government actually continued to follow the money and the prosecutor was able to demonstrate during trial that disbursements made to the shell companies were subsequently used to make down payments on newly acquired mortgages. Downstream transactions will frequently lead to violations of the money laundering statutes and provide prosecutors with charging alternatives that do not create merger issues.
[179] 662 F.3d 524 (9th Cir. 2011).

source of the money, the defendant funneled the funds through a complicated series of financial transactions before paying off the Congressman.[180] Wilkes argued that the transfer of funds, which was charged as a money laundering offense, was merely an expense associated with the bribery.[181] The Ninth Circuit rejected the merger argument.[182] Rather than paying the Congressman directly, the court stated, defendant used multiple transactions to move the funds, "including transferring the money to three different accounts within the course of a single week . . . ."[183] Those transfers were an attempt to conceal both the source and future ownership of the money. That effort to disguise the source of the money was an additional act that was separately punishable under section 1956(a)(1)(B)(i), notwithstanding the simultaneity of the two crimes.[184]

In *Wilkes*, the exact same transactions that promoted the predicate offense could also be charged as concealment money laundering. Charging intent to promote pursuant to section 1956(a)(1)(A)(i), however, would create a potential merger issue and require Department approval. Charging the bribe payments to the Congressman as concealment money laundering under section 1956(a)(1)(B)(i) instead implicates neither. Regardless of whether the defendant has an intent to promote his criminal activities, if the transaction is also conducted for one of the other purposes specified in section 1956(a)(1), merger is not a problem.[185]

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[180] *Id.* at 530.

[181] *Id.* at 544–45.

[182] *Id.* at 549.

[183] *Id.* at 547.

[184] *Id* at 547; *see also* United States v. Coles, 558 F. App'x 173, 180 (3d Cir. 2014) (not precedential) (paying rent on apartment where cocaine was packaged and distributed both *promoted* drug trafficking and *concealed* drug proceeds; apartment was leased in the name of defendant's minor son and defendant paid the rent and utilities with checks drawn on an account in the son's name).

[185] *See* United States v. Richardson, 658 F.3d 333, 341 (3d Cir. 2011) (listing ways in which concealment may be shown, including making structured cash deposits before using funds to conduct a transaction, and funneling money through a legitimate business).

D. 18 U.S.C. § 1957: the "spending statute"

Any transaction that is not an essential expense of the criminal activity, but instead is a discretionary expenditure, does not implicate the merger issue. Unlike section 1956, 18 U.S.C. § 1957 lacks a specific intent element. The government is not required to prove any mens rea beyond knowledge that the property involved in the transaction was criminally derived. Consequently, section 1957 can prohibit a broader scope of criminal activity than section 1956 and generally is easier to prove. Charles Nolan Bush operated several "high-yield" investment programs that ultimately amounted to nothing more than a four-year, $36 million dollar Ponzi scheme.[186] After authorities began investigating his business associates, Bush directed investors to send funds to an offshore account he controlled, rather than risk having the money sent directly to him.[187] The funds were then forwarded to Bush's accounts in the United States.[188] The government charged those transfers as a violation of section 1957.[189]

On appeal, Bush argued that the investor's funds ultimately were used, in part, to pay employees and other expenses that promoted the Ponzi scheme.[190] Those expenditures, he contended, were critical components of the scheme.[191] Convicting him of both of the Ponzi scheme and the monetary transactions, therefore, essentially resulted in two convictions for the same offense.[192] The court was unpersuaded.[193] Taking additional steps to hide his criminal activity by transferring funds between bank accounts, the court determined, was not central to defendant's Ponzi scheme.[194] Rather, those transactions served to conceal the source of the defendant's income from public authorities.[195] As such, those transactions did not merge with the fraud convictions.[196]

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[186] United States v. Bush, 626 F.3d 527 (9th Cir. 2010).
[187] *Id.* at 530–31.
[188] *Id.* at 531.
[189] *Id.* at 529.
[190] *Id.* at 533–34.
[191] *Id.* at 535.
[192] *Id.* at 538.
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] *Id.*

It should also be noted that by charging the transactions as violations of section 1957 instead of concealment money laundering under section 1956(a)(1)(B)(i), the prosecutor avoided any potential argument the defendant might have raised in light of *Cuellar v. United States*, in which the Supreme Court held the government must prove the defendant knew the purpose—not merely the effect—of the transaction was to conceal or disguise the nature, location, source, ownership, or control of the proceeds.[197]

Section 1957 is frequently referred to as the "spending statute" because its purpose is to make the criminal's money worthless by making it a felony just to spend it. Transactions that are for personal benefit do not create a merger problem. Therefore, section 1957 prosecutions are often tied to purchases such as luxury vehicles, houses, and expensive jewelry.[198] Where a transaction involves more than $10,000 in proceeds, therefore, section 1957 may provide prosecutors with a viable charging alternative.[199]

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[197] 553 U.S. 550 (2008) (it is not enough for the government to prove that a transaction, or the transportation of proceeds, had the effect of concealing proceeds; concealment must be the animating purpose of the transaction); *see also* United States v. Valdez, 726 F.3d 684, 690 (5th Cir. 2013) (under *Cuellar*, it is not enough to show that defendant's commingling fraud proceeds with other funds and moving them to other bank accounts or converting them to other forms made detection less likely; government must show defendant's purpose was to do so).

[198] In *Bush,* for instance, the defendant purchased a 20-acre estate, a condominium which he gave as a gift to his wife and daughter, artwork, a Harley Davidson motorcycle, and he made a $250,000 personal investment in Tully's Coffee stock. If acquiring those assets involved monetary transactions in criminally derived property of a value greater than $10,000 derived from his Ponzi scheme, those transactions could have been charged as section 1957 violations. *See also* Soreide v. Zickefoose, No. 10-24-52, 2010 WL 4878744, at *13 (D.N.J. Nov. 23, 2010) (purchase of a luxury residence and investments in a hotel and other real estate were not essential expenses underlying the fraud), *aff'd* 418 F. App'x 59 (3d Cir. 2011) (not precedential).

[199] The courts are divided over what rule to use to determine if funds drawn on a commingled account include at least $10,000 in criminal proceeds. Prosecutors, therefore, need to be familiar with decisions in their circuit or district regarding the use of commingled funds in 1957 offenses. *Compare* United States v. Rutgard, 116 F.3d 1270 (9th Cir. 1997) (withdrawal of commingled money does not meet $10,000 threshold if the remaining balance

E. Criminal Resource Manual § 2187: a "guidebook" to charging alternatives

As previously discussed, Criminal Resource Manual § 2187 identifies money laundering charging decisions that do not implicate the merger issue. The approval and consultation requirements thereby provide prosecutors with an excellent guide to charging alternatives. Nevertheless, where a proposed money laundering charge does fall within the Department's consultation and approval requirements, the Money Laundering and Asset Recovery Section (MLARS) is available to explore the case with the prosecutor and/or agent to identify possible money laundering charges that do not implicate the merger issue.

1. How you draft the indictment could affect the merger outcome

Courts have frequently looked at how the indictment was drafted when determining whether there is a merger problem. In *United States v. Olive,* the defendant was convicted of mail fraud, wire fraud, and money laundering for selling fraudulent investment contracts.[200] Olive operated his scheme through an alleged charitable corporation, the National Foundation of America (NFOA).[201] Victims were fraudulently convinced to exchange their annuities for the defendant's "charitable gift annuities" that guaranteed fixed income with no risk and would allow donors to take charitable deductions.[202] NFOA induced financial advisors to sell its products by offering them commissions that were far above industry averages.[203] The government charged those commission payments as money laundering.[204] On appeal, the defendant contended that the payments

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exceeds the amount of the tainted funds; section 1956 case law holding that the transaction need only involve criminal proceeds is not applicable to section 1957), *with* United States v. Sokolow, 91 F.3d 396, 409 (3d Cir. 1996) (where $20,000 in dirty money was commingled, government was not required to trace in order to prove that all money involved in the transaction was dirty; following *Johnson*).

[200] 804 F.3d 747 (6th Cir. 2015).

[201] *Id.* at 751.

[202] *Id.*

[203] *Id.* at 750.

[204] *Id.*

were a necessary part of carrying out the scheme and those convictions were barred by *Santos*.[205]

The court examined how the fraud was characterized in the indictment. The mail fraud counts charged that the defendant "through highly compensated insurance agents across the country, offered and sold investment contracts labeled as NFOA's 'Installment Plan Agreement.'"[206] As such, the court concluded, the commission payments were "essential expenses" of the scheme and reversed the conviction, because an individual cannot be convicted of money laundering for paying the essential expenses of operating the underlying crime.[207] This, the court stated, was a "classic example" of the merger problem.[208]

How you draft the indictment is important. If you can articulate why charging a transaction that is closely connected to the predicate offense as a separate money laundering violation does not create a merger problem, your theory should be reflected in the language of the indictment.

2. Pretrial challenges based on merger are premature

In *United States v. Askarkhodjaev*, the district court granted the defendant's motion to dismiss a promotion money laundering count for failure to state an offense.[209] The financial transaction alleged in the indictment—payment of the defendant's salary with fraud

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[205] *Id.* at 756.

[206] *Id.* at 757.

[207] *Id.*

[208] *Id.*; *see also* United States v. Cosgrove, 637 F.3d 646, 646 (6th Cir. 2011). The court noted that payments the defendant received for his services as an attorney and claims adjuster, which the government stated were the only basis for upholding his conviction for conspiracy to commit money laundering, were listed in the indictment as overt acts in furtherance of the mail/wire fraud conspiracy. The indictment itself, the court stated, revealed the government's position—that the conspiracy to commit mail/wire fraud would, without any additional action by Cosgrove, also constituted a money laundering conspiracy. Therefore, the court held, Crosgrove's charges of conspiracy to commit mail/wire fraud and conspiracy to commit money laundering merged.

[209] Nos. 09-00143-01, 04-CR-W-ODS, 2010 WL 3940957, at *1 (W.D. Mo. Oct. 4, 2010).

proceeds—was an operating expense of the scheme, the court stated, and thus could not have involved net profits.[210] On the other hand, in *United States v. Finch*, the court denied the defendant's pretrial motion to dismiss the money laundering count based on the defendant's assertion that acts alleged in the money laundering count of the indictment and acts alleged in the bribery count (the money laundering SUA) created a merger problem.[211] The *Finch* court agreed with the defendant that the language of the indictment arguably presented a merger problem.[212] Nevertheless, the court stated, even if there is a merger problem it does not necessarily follow that pretrial dismissal is the remedy.[213] A challenge based on merger "is precisely the type of fact-based inquiry that cannot be resolved by a motion to dismiss."[214]

It would help clarify some of the confusion surrounding merger by making a distinction between "merger issues" (potential merger problems) and "merger problems." A merger "issue" arises where the government charges a transaction that is an integral expense of the underlying criminal activity as separate money laundering violation—for example, charging lulling payments in a Ponzi scheme,

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[210] *Id.*

[211] No. 10-00333 SOM-KSC, 2010 WL 3938176 (D. Haw. Sept. 30, 2010).

[212] *Id.* at *7. The merger problem has sometimes been analyzed by courts in terms of multiplicity. Defendants, therefore, may file a pretrial motion to dismiss the indictment in order to preserve the merger issue. *See, e.g.,* United States v. Gibson, 875 F.3d 179, n.8 (5th Cir. 2017) ("'We do not address whether the Gibsons forfeited their merger argument by failing to raise it pretrial'" (citing United States v. Njoku, 737 F.3d 55, 67 (5th Cir. 2013) (holding that failure to raise a multiplicity objection pretrial forfeits that argument on appeal) and United States v. Dixon, 273 F.3d 636, 642 (5th Cir. 2001) (same))). While acknowledging that a prosecutor has the discretion to prosecute a person simultaneously for both offenses, even though they are based on the same conduct, the *Finch* court noted that the defendant could not be convicted and punished for both offenses. *Finch*, 2010 WL 3938176, at *7 (citing Ball v. United States, 470 U.S. 856, 859–61 (1985) (in which the Supreme Court found that the cure for the multiplicity problem was for the district court "to exercise its discretion to vacate one of the underlying convictions" and to sentence the defendant on only one of the counts.)).

[213] *Finch*, 2010 WL 3938176, at *7

[214] United States v. LaCost, No. 10-CR-20001, 2010 WL 3522334, at *2 (C.D. Ill. Sept. 2, 2010).

paying for phones in a telemarketing scheme, or as in *Askarkhodjaev* paying the defendant's salary. A merger "issue" does not, however, become a merger "problem" unless the defendant is convicted of *both* offenses.[215] In other words, if the jury determines that the defendant committed the underlying predicate offense, but was not involved in the transaction charged as money laundering, there is no merger problem. Similarly, if the jury finds the defendant not guilty of committing the underlying SUA that generated the proceeds, but concludes that he engaged in a money laundering transaction with the proceeds, again, there is no merger problem. Simply put, unless there are two convictions, there is nothing to "merge."[216]

3. Resolving the merger problem after trial

In *United States v. Castronuovo*, doctors employed at a "pill mill" were indicted for their role in operating a pain clinic that provided tens of thousands of unlawful prescriptions for millions of doses of opioids and other controlled substances.[217] The defendants agreed to be paid for the use of their DEA licenses to distribute narcotics and were paid for each patient to whom they distributed drugs.[218] The doctors received a portion of their salary by check and the rest by cash.[219] The indictment alleged, among other things, conspiracy to traffic in oxycodone and oxycodone distribution resulting in deaths.[220] The doctors were also charged with conspiracy to engage in unlawful

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[215] *See e.g.,* United States v. Lineberry, 702 F.3d 210, 218 (5th Cir. 2012) (*Santos* does not apply if defendant is not charged with the SUA because there can be no merger); United States v. Atiyensalem, 367 F. App'x 845, 846 (9th Cir. 2010) (not precedential) (where defendant is convicted only of money laundering and not of the underlying crime, there is no danger of merger, so *Santos* does not apply); Rippetoe v. Roy, No. 5:08-CV-210, 2011 WL 2652131, at *6 (E.D. Tex. June 9, 2011) (there was no potential for a merger problem where defendant pled guilty to money laundering charges but not to the underlying SUA).

[216] A motion to dismiss money laundering counts pursuant to Federal Rule of Criminal Procedure 29 similarly would not be appropriate.

[217] 649 F. App'x 904 (11th Cir. 2016) (not precedential).

[218] *Id.* at 908.

[219] *Id.*

[220] *Id.*

monetary transactions for accepting and negotiating their paychecks, knowing that the money was criminally derived.[221]

Determining whether a physician has violated the statute is never simple, and these cases often result in a "battle of the experts." After a 31-day trial the jury ultimately returned a guilty verdict against the defendants on the money laundering conspiracy count.[222] The doctors, however, were acquitted on all the other charges.[223] Although the jury did not find that the defendants themselves unlawfully distributed narcotics, there was sufficient evidence they were aware that other doctors were illegally dispensing oxycodone, and that the paychecks they received for working at the clinics were proceeds from the pill mill's unlawful activity.[224] In fact, one defendant admitted he continued working at the clinic despite being aware that its operations were illegal, because he needed the money.[225]

Because the jury did not find the defendants guilty of the predicate offense, there was no merger problem in *Castronuovo*. If the government had charged only the drug offenses, because of potential merger issues relating to accepting and negotiating their paychecks, the doctors could have completely avoided responsibility for their criminal conduct. On the other hand, convictions for both offenses may have created a merger problem. There is no "bright line" rule in these cases, and merger issues are not always obvious. The U.S. Attorney or Deputy Assistant Attorney General for the Criminal Division, in appropriate cases, therefore, might elect to authorize the money laundering prosecution despite a potential merger issue—with the caveat that should the jury return convictions for both the money laundering offense and the predicate offense, thereby creating a merger problem, the government would seek to resolve the issue.

Congress clearly expressed concerns about charging cases that raise "merger" issues, and it was the sense of Congress that "no prosecution" should be undertaken without approval from the appropriate official in the Department before filing an indictment or complaint.[226] MLARS does not recommend charging cases that may

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[221] *Id.*
[222] *Id.* at 909.
[223] *Id.*
[224] *Id.* at 914.
[225] *Id.* at 916.
[226] Fraud Enforcement and Regulatory Act of 2009, Pub. L. No. 111–21, § 2(f)(1), 123 Stat. 1617 (2009).

create merger issues.[227] While there could be circumstances that would justify prosecuting cases in which there is no clear delineation between the conduct to be charged as an SUA and the money laundering offense, clearly these cases should be the exception. Prosecutors must be aware of the merger issue and, when a problem arises, seek to appropriately resolve the issue in a manner that addresses the concerns raised by the Supreme Court and Congress and complies with Department policy.

XI. Conclusion

When addressing merger issues, prosecutors should think of money laundering essentially as a two-step process. First, the SUA must have generated proceeds. Then, the defendant must conduct a transaction with the proceeds that is separate and distinct from the underlying SUA that generated the proceeds.

Courts have provided very little guidance on post-FERA merger issues. It is still too early, therefore, to tell what effect FERA will have on future decisions. The Department's approval requirements for money laundering cases, however, provide sound guidance for recognizing potential merger issues in money laundering cases.[228] Merger, therefore, should rarely be a problem for prosecutors. The problem will arise if prosecutors fail to recognize potential merger issues or do not address them appropriately when making charging decisions. When in doubt, prosecutors are urged to consult with MLARS.

About the Author

Stephen M. May has been with the Department's Criminal Division since 1991. After graduating law school, he served as an Assistant State's Attorney with the State's Attorney's Office for Baltimore City from 1982–1991. After joining the Department of Justice, he worked in the Narcotics and Dangerous Drug Section (NDDS) and Money Laundering Section (which subsequently became part of the Asset Forfeiture and Money Laundering Section (AFMLS), now known as

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[227] In the event that MLARS does not concur with pursuing the proposed money laundering charges, the prosecutor may still proceed with the money laundering prosecution as long as he or she obtains prior approval from the Department. *See* CRIMINAL RES. MANUAL § 2187.

[228] *See id.*

the MLARS. He returned to AFMLS in 2013, after serving as Senior Litigation Counsel and Deputy Chief for Litigation with NDDS. He received the OCDETF Asset Forfeiture Award at the National Leadership Conference in 2004, the Assistant Attorney General's Award for Transnational Criminal Enforcement in 2007, and Assistant Attorney General's Award for Distinguished Service in 2016. He lectures regularly at the National Advocacy Center, the DEA Academy, financial investigations seminars conducted by the Department, and has taught at the International Law Enforcement Academy (ILEA) in Budapest, Hungary for the Office of Professional Development and Training as well as the United Nations Office on Drugs and Crime (UNODC) Anti-Money Laundering Project in the Philippines. He has also taught law school classes as an adjunct professor of law.

Editor's Note: In September 2018, the Deputy Attorney General's Office released a complete revision of the United States Attorneys' Manual and renamed it the Justice Manual. As part of this revision process, all Resource Manuals associated with the Justice Manual, including the Criminal Resource Manual cited herein, were not revised. They will eventually be archived for historical purposes only. Any cross-reference to the Criminal Resource Manual in the Justice Manual will eventually be removed, and the material will be incorporated into the Justice Manual itself.

Note from the Editor-in-Chief

After the thousands of hours of work are done, the Editor-in-Chief has the pleasant task of thanking those who worked so hard to complete the issue. Asset forfeiture and money laundering are complex topics, but the authors, all subject matter experts, brought things down to earth for us mere mortals. We are indebted for their efforts.

Special thanks go out to Assistant United States Attorney Jim Alexander from the District of Minnesota who acted as the point of contact, that is, the individual who recruits the authors and divvies up the topics. Alice Dery, Chief of the Program and Training Unit of the Money Laundering and Asset Recovery Section, also helped shape the content of this issue. Sarah Dorsey and former Department of Justice employee Beth Zelman did the policy review.

Finally, there would be no DOJ Journal without the stellar work of Managing Editor Sarah B. Nielsen and Associate Editor Gurbani Saini, my University of South Carolina colleagues in the OLE Publications Unit, and our law clerks, Joshua Garlick, Emily Lary, Mary Harriet Moore, and Niki Patel. The team is always up to the challenge of producing a high quality product. Thank you all.

Chris Fisanick

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