

U.S. Department of Justice
Office of Justice Programs



Bureau of
Justice
Assistance

ASSET FORFEITURE

132834

View of Real Property:
view

The Bureau of Justice Assistance

The Bureau of Justice Assistance provides Federal assistance to state and local units of government for programs which improve the functioning of the criminal justice systems. The Bureau administers a major grant program and a number of direct assistance programs.

The Edward Byrne Memorial State and Local Law Enforcement Assistance Program for narcotics control provides grant assistance to enhance state and local drug control efforts. Programs eligible for funding include those which improve the apprehension, prosecution, adjudication, detention and rehabilitation of drug offenders. Eradication programs, treatment programs and programs which concentrate on major drug offenders are also eligible for funding. The states, District of Columbia and the territories receive a block grant award which is administered at the state level. The discretionary grant program administered by the Bureau is used to enhance, coordinate and fill gaps in state and local efforts through national and multi-state programs.

Direct Assistance Programs administered by the Bureau include Public Safety Officer's Benefits, Emergency Federal Law Enforcement Assistance, Regional Information Sharing Systems, Mariel-Cuban Reimbursement, Surplus Federal Property and the Prison Industry Certification Program.

The Bureau of Justice Assistance
633 Indiana Avenue, N.W.
Washington, D.C. 20531
(202) 514-6638

ASSET FORFEITURE

Forfeiture of Real Property: An Overview

George N. Aylesworth

132834

U.S. Department of Justice
National Institute of Justice

This document has been reproduced exactly as received from the person or organization originating it. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the National Institute of Justice.

Permission to reproduce this ~~copyrighted~~ material has been granted by

Public Domain/OJP/EJA

U.S. Department of Justice

to the National Criminal Justice Reference Service (NCJRS).

June 1991

Further reproduction outside of the NCJRS system requires permission of the ~~copyright~~ owner.

U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Assistance

U.S. Department of Justice
Dick Thornburgh
Attorney General

Office of Justice Programs
Jimmy Gurule
Assistant Attorney General

Bureau of Justice Assistance
Gerald "Jerry" P. Regier
Acting Director

James C. Swain
Director, Policy Development and Management Division

Curtis H. Straub II
Director, State and Local Assistance Division

Pamela Swain
Director, Discretionary Grant Programs Division

William F. Powers
Director, Special Programs Division

Cheryl Driscoll
Asset Forfeiture Program Manager

Prepared under cooperative agreement No. 87-DD-CX-K090(S-1) by the Police Executive Research Forum.

The Assistant Attorney General, Office of Justice Programs, coordinates the activities of the following programs offices and bureaus: the Bureau of Justice Statistics, National Institute of Justice, Bureau of Justice Assistance, Office of Juvenile Justice and Delinquency Prevention, and the Office for Victims of Crime. Points of view or opinions in this document are those of the authors and do not necessarily represent the official position or policies of this Agency.



U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Assistance

Office of the Director

Washington, D.C. 20531

Dear Colleague:

Illicit drug traffic continues to flourish in every part of the country. The cash received by the traffickers is often converted to assets that can be used by drug dealers in ways that suit their individual tastes. Since 1981, federal authorities have increased their attack on these assets through both criminal and civil forfeiture proceedings with remarkable success. The recent passage and use of state asset forfeiture laws offers an excellent means for state and local jurisdictions to emulate the federal success.

The Bureau of Justice Assistance (BJA), in the Office of Justice Programs, has funded a nationally focused technical assistance and training program to help state and local jurisdictions facilitate broader use of such laws. BJA selected the Police Executive Research Forum to develop and administer this program because of its history of involvement in practical, problem-oriented research to improve police operations and the Forum's central role in developing training materials for use by police agencies and chief executives.

As part of this project, the Forum has contracted with experts in the area of asset forfeiture and financial investigations to prepare a series of short manuals dealing with different concerns in the area of asset forfeiture. We hope these manuals help meet the rapidly unfolding needs of the law enforcement community as more and more agencies apply their own forfeiture laws and strive to learn from the successes and problems of their peers.

I welcome hearing your comments about this program. We have this project so that most requests for information or assistance can be handled through the Forum staff in Washington, D.C., by calling 202/466-7820.

Sincerely yours,

A handwritten signature in cursive script that reads "Jerry Regier".

Gerald (Jerry) P. Regier
Acting Director

Acknowledgments

The author would like to acknowledge the research and editorial assistance provided by the following individuals in preparing this publication: Thomas Guilfoyle, Robert Knabe, Arthur Nehrbass, and Richard Grande, Metro-Dade Police Department, Legal Bureau, Forfeiture Section.

PERF would like to thank Cary Copeland, Director, and Katherine Deoudes, Assistant Director of Operations, Executive Office for Asset Forfeiture, Office of the Deputy Attorney General, United States Department of Justice, for their review of an earlier draft of this guide. Other Department of Justice personnel who were kind enough to review the manuscript and offer suggestions for improvement are Dennis Hoffman, Chief Counsel, Drug Enforcement Administration, and Jim Brown, Asset Forfeiture Office, Criminal Division, Department of Justice. We are also grateful to Sandra Janzen, an Assistant Attorney General in the Special Investigations Division, Office of the Arizona Attorney General, for her review and helpful comments.

Police Executive Research Forum

Contents

Introduction 7

Forfeiture: general principles 7

Model forfeiture statutes 8

Constitutional issues 9

Strategy and Policy Considerations 10

Sharing in federal forfeitures 10

Model forfeiture policy 11

Strategy: target assets as well as defendants 11

Pre-Seizure Planning 12

Title to real estate 13

Environmental concerns 13

Seizure of businesses or residences 14

Management of Seized Property Pending Forfeiture 15

Liability 15

Occupancy by tenant or owner 15

Documents Involved in Seizing Real Property 16

Warrant of seizure 16

The affidavit 18

Procedures For Seizing Real Property 19

Executing the seizure warrant 20

Timing 21

Litigation 21

Civil action v. criminal prosecution 22

Settlement 23

Summary judgment 23

Trial and discovery 24

Disposal of the property 24

Conclusion 25

Endnotes 27

Appendix A: Stipulation for Occupancy and Indemnity 28

Appendix B: Seizure Warrant 33

Appendix C: Affidavit for Seizure Warrant 35

Appendix D: Petition for Rule to Show Cause 39

Appendix E: Notice of Lis Pendens 44.

Appendix F: Jury Instructions 46

Appendix G: U.S. Justice Department Policy on Seizure of Occupied Real Property (October 9, 1990) and Sample Occupancy Agreement (April 9, 1991) 54

Forfeiture of Real Property: An Overview

Introduction

Forfeiture: General Principles

Forfeiture is a legal mechanism whereby the government may take, without compensation, property that is used or acquired illegally.¹ There are two general types of forfeiture: criminal and civil.

Criminal forfeiture is "in personam," that is, against the *person*; it can be invoked only after the property owner has been convicted of certain types of crimes. Civil forfeiture is "in rem," that is, against the *thing*; it is directed at property that has been used illegally. Both types of forfeiture have existed since Biblical times. Both were part of English common law, and both have been allowed in the United States since the country's formation.

Civil forfeiture generally is based on the "guilt" of an item of property. It is independent of any criminal proceeding against the property owner. Therefore, the acquittal or conviction of the property owner is not a factor.² Civil forfeiture can be viewed as an adjunct to law enforcement, insofar as it removes the offending property from the hands of wrongdoers, prevents further illegal use of the property, may serve as a deterrent to criminal behavior, and compensates the government for the costs of enforcing the law.³

This guide focuses on civil forfeiture of *real property*, a relatively new procedure in some jurisdictions. Although many jurisdictions have for many years provided for forfeiture of personal property, many states only recently have adopted statutes that permit the taking of real property.⁴ (Federal law has permitted forfeiture of both types of property for many years.⁵) This guide is based on the real property forfeiture provisions of the Florida Contraband Forfeiture Act of 1989.

The rationale underlying civil forfeiture is that property itself can be "guilty" if it was used directly in a crime or in some way facilitated the commission of a crime. The property is sub-

ject to "arrest," or seizure, either pursuant to a warrant or by means of warrantless, physical detention. The exact type of use that subjects an item of property to forfeiture depends on the forfeiture statute involved. Most felonies and some misdemeanors (such as those involving gambling) can serve as a basis for forfeiture. In some jurisdictions, property purchased with proceeds derived from criminal activity is forfeitable.

The procedure for civil forfeiture actions is similar to that for most civil actions, with some notable exceptions. Under many forfeiture laws, seizure of an item of property requires only probable cause that the property was involved in illegal activity. Such a standard is actually easier to prove than the standard necessary to sustain most RICO actions against property, which demand a much higher standard of proof.

To begin a forfeiture action, the seizing law enforcement agency must demonstrate probable cause. The burden then shifts to the individual contesting the forfeiture, who must either rebut the probable cause or establish, by a preponderance of the evidence, that the statute was not violated or that an affirmative defense exists.⁶

Model forfeiture statutes

The Florida Contraband Forfeiture Act is an excellent example of a state forfeiture statute. The Florida provisions, as amended and refined, are very broad. They allow forfeiture of personal property, currency, real property, and items purchased with proceeds of criminal activity. The Act was selected by the International Association of Chiefs of Police (IACP) as a model statute for jurisdictions seeking to enact or modify forfeiture laws.⁷ Louisiana's recent Forfeiture Act, another fine example of a state forfeiture statute, is very similar to the Model Forfeiture Act proposed by the National Association of Commissioners on Uniform State Laws (NACUSL) and the National Association of Attorneys General (NAAG).⁸ It differs from the Florida Act in that it provides for both *in rem* and *in personam* forfeiture. Like the Federal law, the Louisiana law provides for passage of title at the time of the criminal act that gave rise to forfeiture. (This provision, known as the "relation-back doc-

trine," can be used to invalidate transfer of property that occurred after the criminal act but before the seizure.) The model act proposed by the American Bar Association's Criminal Justice Section, although based on the Louisiana Act, is significantly more restrictive, and favors the claimant.*

The Florida Act, together with the case law interpreting it, establishes various procedural and evidentiary guidelines. For example, it contains two affirmative defenses—an *innocent-owner* defense and an *innocent-lienholder* defense. A claimant who disputes a forfeiture must prove, by a preponderance of the evidence, one of these defenses in order to defeat the forfeiture. In Florida, title to property seized for forfeiture automatically vests in the seizing agency at the time of seizure. A jurisdiction seeking to enact or amend civil forfeiture laws would do well to emulate the Florida or Louisiana statute.

Constitutional issues

Because forfeiture actions are strictly construed by the courts, seizing agencies must adhere to constitutional and statutory guidelines.⁹ In addition, forfeiture actions, whether under Federal or state law, must conform to certain principles that may not be specified in the statutes. For example, whether the taking of the property is compensated or uncompensated, the property owner must be given due process.¹⁰ Such due process must include constitutionally adequate notice of the taking and a meaningful system for disputing the action. As a concession to the realities of criminal law enforcement, however, pre-seizure due process (i.e., notice and an opportunity to be heard) generally is not required for forfeitures based on criminal conduct.¹¹

Fourth Amendment restrictions on searches and seizures also apply to forfeiture cases. Consequently, evidence necessary to prove a forfeiture case can be suppressed if it was obtained in a constitutionally impermissible manner. The exclusionary rule doctrine used to redress government violations of Fourth Amendment rights in criminal proceedings is applicable

*The Department of Justice has drafted a model forfeiture statute that differs, in certain parts, from the ABA, NACUSL, and NAAG statutes.

in forfeiture cases, as forfeiture actions generally are viewed as "quasi-criminal" in nature.¹²

Strategy and Policy Considerations

Forfeitures of real property may pose greater legal and practical problems than forfeitures of personal property.¹³ For one thing, seized cash and other personal property can be moved into secure storage relatively easily. Once forfeiture is granted, cash can be used immediately, and most personal property can be sold readily and the proceeds made available quickly. In contrast, real property must be managed and maintained where it is situated, and requires a complicated sale and closing process. In addition, although the basic legal tools of forfeiture are the same, real property law complicates the process. Attorneys hired to handle real property forfeiture should have real property background or access to relevant information, as the smallest mistake can make the property unsalable and render months of work ineffective.

Sharing in Federal forfeitures

Because not all states have enacted their own forfeiture laws, a significant aspect of forfeitures (of both real and personal property) is the ability of local law enforcement agencies to share in the proceeds of Federal forfeitures.¹⁴ The basis of the sharing can be a cooperative effort in which a local agency contributed to a Federal investigation. Or a local seizure may be "adopted" by the Federal government, with the property being forfeited through the Federal system. All Federal real property forfeitures are processed judicially in accordance with Justice Department policy.

There are potential advantages to the Federal sharing process, especially when real estate is involved. First, there may be no local law providing for forfeiture, in which case Federal adoption of the case is necessary to secure forfeiture.* Second,

*It should be noted that Section 6077 of the Anti-Drug Abuse Act of 1988, which permitted federal adoptive forfeiture *only* if the state law in the affected jurisdiction did *not* prohibit the type of forfeiture involved or the distribution of the forfeited proceeds, was repealed in 1989.¹⁵ A similar restriction on adoptive forfeiture was proposed again and defeated in Congress in 1990.¹⁶

the local agency may not have the attorneys or resources necessary to prosecute the case to conclusion. Third, the local seizure may be of property that was involved in a complex, far-reaching Federal investigation. In such cases, the interests of all parties may best be served if the forfeiture is prosecuted within the Federal system.

Potential disadvantages of using the Federal system are lack of control by local agencies, the slow pace of the Federal process compared with the pace in some state systems, and the reduced percentage of assets remitted to the local agency. (In adoptive forfeitures, for example, pursuant to the U.S. Attorney General's guideline of July 31, 1990, 80 percent of the assets are shared if the judicial forfeiture is contested, and 85 percent are shared if not contested.)

Model forfeiture policy

As noted earlier, real property forfeitures are more complex than personal property forfeitures. Because of the immovable nature of real property and peculiarities regarding the acquisition and transfer of property titles, they require more than the general knowledge, procedures, and systems needed to prosecute personal property forfeitures. Enforcement programs that target real property should have an overall strategy for handling forfeitures, a system for pre-seizure planning and for managing assets after seizure, a procedure governing the seizure of property, and a policy for handling the litigation of major cases and for disposing of property after judgment.¹⁷ An example of forfeiture policy is contained in "Model Policy for Forfeiture of Assets by Law Enforcement Agencies," published collectively by several Florida law enforcement organizations.¹⁸ Florida law mandates that this policy be implemented by local agencies, thus ensuring uniformity in forfeiture prosecution among the agencies. Most aspects of the policy apply to all types of property and forfeiture.

Strategy: target assets as well as defendants

It is essential that an agency have a strategy and policy governing seizures and forfeitures in place before beginning such

an endeavor. This is especially critical in cases involving real property. The strategy and policy should cover all aspects of the forfeiture process, including the investigation, deciding whether to seize property and whether to proceed with forfeiture actions, handling and maintaining seized property, prosecuting forfeiture cases (including settlements), and disposing of forfeited assets. Assets and their movement should be targeted and investigated just as offenders are targeted. In so doing, the forfeiture remedy will be factored into all investigations (although some seizures will occur spontaneously, as products of buy-bust cases, or on short notice). Additionally, if pre-seizure planning and investigation are pursued systematically, the attorneys who will prosecute the cases can become involved at an early stage.

Forfeiture strategies should provide for coordination with other agencies, such as the Internal Revenue Service or state taxing authorities. Such cooperation may lead to discovery and seizure of other assets related to targeted property, and thus may prevent transfer of assets or use of illegally obtained assets to fund the defense of a forfeiture case. When possible, all agencies that have the authority to seize assets or to impose levies or taxes should do so at the same time. This immobilizes the asset and may also incapacitate the defendant and, hopefully, will have the same effect on the illegal operation.

Pre-Seizure Planning

Planning a property seizure is an extremely important stage of the overall forfeiture process. The quality of the plan may affect the outcome of a forfeiture action, or the ultimate benefit or detriment realized by the seizing agency.

The first step in planning is deciding whether to seize a particular item of property. The decision should be based on several factors. The most obvious is the ultimate value of the seized property. Other factors are the cost of pursuing the case and the cost of managing and disposing of the property. When placing a value on real property, the nature of the ownership

must be taken into account. The value to be considered most likely will be the value of the owner's equity in the property, as the interests of innocent mortgagees and lienholders will in most cases be protected.¹⁹ After all factors have been considered, it may be that a decision *not* to seize is the prudent course.

Title to real estate

The title to real property must be examined carefully to identify all recorded interests in the property, the extent and nature of those interests, and their values relative to the overall value of the property. The examination also may provide leads for further investigation of the various interests in the property. (Such further investigation may be recorded on a bank document typically referred to as an "O & E" (Ownership and Equity) Report.) The examination may reveal a loan in excess of the property's market value. A loan that required no application or credit check may be evidence that the lender has guilty knowledge.²⁰

The initial investigation should target the spouse or other co-titled owner, to preclude a later claim of "innocent" ownership. Likewise, a landlord-owner whose tenant is engaged in criminal activity may claim that he or she had no knowledge of the crime. Guilty knowledge may be established by investigative means, or by putting the landlord on notice by certified mail. If the landlord then does nothing to prevent the criminal behavior, the defense of innocent ownership may be precluded.²¹

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

Environmental concerns

Characteristics of an item of property that may create serious problems during the forfeiture process or may render the property a liability to the seizing agency must be taken into account

when deciding whether to attempt forfeiture. For personal property, the problem may be a need for expensive or complex storage arrangements, or a tendency for the property to deteriorate or depreciate rapidly. For real property, the expense of management and preservation are of great concern, as is any potential difficulty of selling the property.

Because title to the property may pass to the seizing agency upon seizure (or in some states at the time the crime was committed), the seizing agency may become, for liability purposes, the "owner" of the property at that time. This can have important implications. For example, should the property be contaminated with toxic waste, the current owner may be assessed the costs of cleanup and related decontamination activities, regardless of fault.²² Of particular concern should be such properties as service stations, dry cleaners, paint manufacturers, warehouses, and drug-manufacturing or drug-processing sites.

Seizure of businesses or residences

If a property being considered for seizure is the site of an operating business, other considerations become important. Is the business itself, which can constitute an item of "property" distinct from the realty, also subject to forfeiture? If only the realty is forfeitable, the seizure must be made with due regard for the rights of any tenant business; the government may be liable if the business is damaged somehow. If the business is also subject to seizure, additional care must be taken. Upon seizure, the law enforcement agency will become the "owner" of the business, with all the attendant problems, liabilities, and responsibilities. To benefit from the value of the business, the seizing agency may have to see that the business continues to operate, at least until it is sold. If forfeiture is not successful, the agency may be responsible for any deterioration of the business, of either its physical properties or inventories, or of its good name or "good will."²³

Another factor affecting a decision to seize property, particularly real property, is the effect the action might have on the agency's public image. Seizure of residential real property, or of a small, personally owned and operated business, can bring

negative publicity, even when the seizure is technically correct. Therefore, a seizure that likely will result in the eviction of a family from their home, or in the incidental destruction of a "mom and pop" business, must be considered carefully. Conversely, the seizure of a notorious property, such as a "crack house," can enhance the agency's image.

Management of Seized Property Pending Forfeiture

Once property is seized, the agency is responsible for managing and protecting it. Some items of personal property may pose special problems, but generally they can be moved to a location under the control of the seizing agency or a designee, and there be protected and maintained. In contrast, real property cannot be moved, but must be maintained and protected where located.

Liability

Agencies that seize a considerable amount of real estate may need to use the services of a property management company. The company also may be able to sell the property on behalf of the seizing agency. Otherwise, the agency must maintain the property and assume responsibility for a number of unwanted and time-consuming functions, including collecting rent, dealing with tenants, physically maintaining the property, protecting against vandalism and deterioration, maintaining insurance, and making tax and mortgage payments. Many of these details, including responsibility for injuries occurring on the property, can be avoided by hiring an insured property management firm. By specifying in the contract the duties of the management firm, the agency can insulate itself from claims for damages incurred by tenants or third parties.

Occupancy by tenant or owner

When possible, the seized property should be kept occupied by the tenants. Keeping it occupied can lessen deterioration,

deter vandalism, offset the costs of management, and provide continuation of mortgage payments. Particular consideration should be given to retaining the individuals who were occupying the property at the time of seizure. This eliminates the need to find new tenants, and also avoids the adverse publicity that may accompany an immediate eviction. Keeping the property occupied while protecting the interest of the seizing agency can be accomplished by means of an occupancy agreement, executed at or near the time of seizure (Appendix A). Such an agreement, much like a lease, can include terms regarding maintenance responsibilities, rent payment, entry by the seizing agency, eviction, and insurance coverage.

Clearly, the mortgage will have to be satisfied at the conclusion of the forfeiture action. Continued mortgage payments by the original occupants will increase the net award and may prevent foreclosure suits by mortgagees or other lienholders.²⁴ (If a foreclosure suit *is* brought, it should be consolidated with the pending forfeiture action.) Moreover, if an obviously innocent lienholder is involved, that individual's interest should be stipulated to at the initiation of a forfeiture action in order to avoid potential liability for costs.²⁵ Obviously, the law enforcement agency also must ensure that the property is not used in any further illegal behavior. At the very least, such activity would result in embarrassment to the agency.

Documents Involved in Seizing Real Property

The local office of the U.S. Marshals Service (USMS) should be able to give state and local authorities valuable advice on real property seizure matters. Such advice certainly should be sought if Federal adoption of the property forfeiture is anticipated. The U.S. Justice Department policy on the seizure of occupied real property is included as Appendix G, together with a sample occupancy agreement.

Warrant of seizure

Under most forfeiture statutes, a warrant authorizing seizure of property, including real property, is not required. It may be

desirable, however, even though the process of seeking a warrant may entail a great deal of effort and may not be successful. A warrant may be needed in some instances to seize certain personal property, and may be desirable in all instances to seize real property, because a warrant, issued upon a showing of probable cause, is required to enter private premises, particularly residential premises.²⁶ This requirement is based on the Fourth Amendment.

Although few jurisdictions (other than the Federal system) have statutes dealing directly with warrants for the seizure of property subject to forfeiture, all have some general provisions regarding search and seizure warrants directed at the fruits or instrumentalities of crimes, contraband, and evidence of the commission of a crime.²⁷ Property that is subject to forfeiture generally is forfeitable on grounds similar to those for search and seizure. Therefore, such property is generally a proper subject under most states' search warrant statutes, and a seizure warrant can be obtained in essentially the same manner an arrest or search warrant is obtained in criminal cases.²⁸

Although a seizure warrant in a forfeiture context should be similar to a search warrant, the application for the warrant, and the warrant itself, might contain additional provisions regarding the handling of the seized property pending forfeiture (Appendix B). These might be provisions for maintaining seized realty, or for evicting tenants in the event an occupancy agreement is not signed or is later breached. Such unusual provisions, as well as the relative newness of such activities in some jurisdictions, may make it advisable to have the forms and procedures for forfeiture seizure warrants reviewed and approved in advance, by both the chief judge of the local jurisdiction and the local prosecuting authority. That approval, plus some type of advance informational presentation to all judges who will be asked to consider such warrants, can make the process of obtaining them run smoothly when actual application is made.

The exclusionary rule is applicable to forfeiture cases. Therefore, it should be noted that even if a seizure warrant is found to be statutorily defective, the only evidence that could be excluded is that obtained as a result of illegal entry into the

premises.²⁹ Typically, a real property seizure is based on evidence already secured by other, independent methods. Therefore, it is not affected by the exclusion of evidence seized pursuant to the seizure warrant.

The seizure warrant and its affidavit should be prepared in cooperation with the attorney who will be prosecuting the forfeiture. The attorney and a command-level officer within the seizing agency should oversee all activities related to forfeiture seizure warrants. Such oversight will help ensure that the investigation is conducted properly, that the warrant is correct, and that no seizure is made prematurely or contrary to agency policy.

The affidavit

An affidavit for a seizure warrant should recite sufficient facts to support overwhelmingly the existence of probable cause (Appendix C). In many jurisdictions, case law has developed an inherent requirement that all forfeitures, because of the severity and the limited statutory nature of the remedy, be strictly construed. Thus, applications for seizure warrants may be closely scrutinized by the issuing judge. Moreover, real property seizures may be much more likely than personal property seizures to elicit media attention.

Probable cause must be recited for each holder of interest in an item of property, if that interest is to be forfeited. This includes the interest of a titled spouse or a suspected non-innocent lienholder. Particularized probable cause for each item of personal property that is to be seized along with the realty also must be included. If evidence for use in a criminal proceeding also is being sought, a separate search warrant should be obtained, even if that evidence is property named in a seizure warrant.

The most appropriate, and usually the most qualified, person to be the affiant on an affidavit for seizure is the lead investigator in the forfeiture investigation. This individual may also be the lead investigator in the criminal investigation. It may be wise to conduct separate but parallel investigations, however, as this may improve the focus of each. In larger

agencies, it is advisable to dedicate an investigator or a squad to forfeiture cases, particularly cases involving real estate. As always, a recitation in the affidavit of the investigator's training and experience may enhance the credibility of the investigator and his or her inferences about the significance of facts cited in the affidavit.

Once the affidavit has been presented to the judge and the seizure warrant has been signed, service of the warrant must be coordinated. The forfeiture investigators should consult with their attorney and the criminal case investigators.

Procedures for Seizing Real Property

The forfeiture case against an item of property is begun by filing a Complaint or a Petition, depending on the jurisdiction. As with the warrant, this initiating document should cite the facts supporting probable cause to forfeit (Appendix D). When real property has been seized pursuant to a warrant, a certified copy of the signed warrant and affidavit should be attached, as should other pertinent documents, such as an occupancy agreement (which should be filed with the court after it is signed). All titled owners and lienholders of record should be named in this initiating document, and their interests specified.

In many jurisdictions, when a real property forfeiture is begun a Notice of "Lis Pendens" must also be filed (Appendix E). When recorded in the county where the property is situated, the Lis Pendens puts all prospective purchasers on notice of the pending forfeiture action, and of the fact that title to the property has passed to the seizing agency. Any interest acquired after that date will thus be taken with knowledge of the forfeiture, and should be subordinate to any interest acquired by the seizing agency through the forfeiture. To be effective, the Lis Pendens should name all owners, interest holders, and lienholders of record at the time the Lis Pendens is filed, and copies should be sent by certified mail to all those individuals after it is filed. It should also give the street address, if available, and a complete legal description of the subject property.

The Lis Pendens should state the reason for the filing as well as the relief sought in the action.

Seizure of real property using a warrant is best accomplished if the necessary actions are undertaken in a certain order and with the proper timing. The warrant should be obtained at least the day before a planned seizure. This will allow for adequate planning and leave time to handle any contingencies that may arise. The forfeiture action should be commenced almost simultaneously with the service of the seizure warrant.

Experience has shown that the actual seizure should be accomplished at a time when the owners or tenants of the property are present or their whereabouts known, unless safety concerns or other exigencies make this undesirable. The presence of an owner or tenant will minimize entry problems and will facilitate quick execution of an occupancy agreement.

Immediately after the seizure is accomplished, the Petition or other initiating document should be filed by another member of the seizure team or by the attorney. A phone call or radio transmission is an appropriate method for notifying the legal staff that the seizure has been accomplished. Immediately after the Petition or Complaint is filed, the Lis Pendens should be filed in the appropriate recorder's office. These filings can be accomplished in quick succession while the seizure team is still on the seized premises. Immediate filing will reduce the opportunity for the owner to alienate the property or otherwise complicate or subvert the forfeiture process.

Executing the seizure warrant

Once entry has been accomplished and the premises made secure, the seizure team should conduct a walk-through inspection of the property, recording its condition with a still or video camera. Permanent fixtures on the property, as well as damage and defects, should be noted. The seizure team cannot, however, search for items or evidence not specifically named in the seizure warrant or another warrant.³⁰

After the walk-through inspection, a copy of the warrant should be given to the owner or tenant on the scene, and be posted conspicuously at the front of the premises. The original

warrant should then be endorsed by the person serving it. The date and time of seizure should be noted; in some jurisdictions such as Florida, this information establishes the passing of title to the seizing agency and may later be needed for obtaining title insurance. The warrant and affidavit should then, as required by law, be returned to the issuing court, along with a "Return and Inventory." Certified copies of these documents should be filed in the civil forfeiture action, which will already have been commenced.

It should be noted that an occupancy agreement should be titled a "Stipulation for Occupancy" and filed in the forfeiture action, thereby placing the action under the control of that court for its enforcement. Generally, to secure physical eviction upon a breach of the occupancy stipulation or upon failure to sign an occupancy stipulation, a traditional writ of possession should be obtained from the presiding judge pursuant to a properly drafted clause in the occupancy stipulation and seizure warrant.

Timing

When possible, the seizure warrant should be obtained after any collateral criminal investigation has been completed and all criminal search warrants have been served. This is because information obtained from the search may help support the forfeiture, and may prevent the confusion that accompanies execution of two separate warrants at the same time. A disadvantage is that a sophisticated targeted individual may alienate his or her interest to an attorney or bondsman. Then, to obtain forfeiture, the seizing agency would have to prove that the interest was transferred to a party who had knowledge of the underlying criminal activity.

Litigation

If any holders of interests in the property dispute the forfeiture, the forfeiture case against the property must be litigated. Such litigation follows the general course of all civil actions,

with some notable exceptions. The interactions between related criminal and civil actions, as well as means of actualizing the forfeiture and disposing of the property, are discussed in the following sections.

Civil action v. criminal prosecution

As noted earlier, civil forfeitures are independent actions, do not depend on the outcome of any criminal action, and may even exist when no criminal action has arisen out of the conduct leading to the seizure.³¹ Nonetheless, when there is a related criminal prosecution, the litigation of a civil forfeiture may be affected. A claimant in a forfeiture case who is also a criminal defendant may try to use the civil discovery mechanisms available in the forfeiture action to obtain information that would not normally be available to a criminal defendant. In that situation it may be advisable to seek a stay in the civil case, especially if a long-term criminal investigation or a major prosecution may be compromised by revelation of information being sought via the discovery process in the civil action.³² Plea bargaining in a criminal case may also affect the civil case, particularly if the prosecutor is not aware of the existence of the civil forfeiture.

Because the property subject to forfeiture is under the jurisdiction of the judge handling the forfeiture case, any agreements regarding disposition of the property can legitimately be made only by the appropriate parties in the forfeiture action. Moreover, a guilty plea in a criminal case can be used to establish facts in the civil action, or for impeachment.³³ A civil forfeiture action is not necessarily affected by a related criminal prosecution when evidence necessary to the forfeiture case is suppressed in criminal court. A ruling on a motion to suppress evidence in a criminal case is effective through the doctrine of *collateral estoppel* only when the parties in both actions are substantially the same.³⁴ Since a criminal case involves different parties, and the civil action is an *in rem* forfeiture, a ruling on a motion to suppress in the criminal case need not result in suppression in the civil action.³⁵ Finally, an acquittal or dis-

missal of criminal charges should have no effect on a related forfeiture action.³⁶

Settlement

Civil forfeiture cases can be concluded in several ways—by settlement, summary judgment, or trial. As civil actions, forfeiture cases are subject to settlement by the parties to the actions. Such settlements, once approved by the court, can avoid the expense, preparation time, and risk associated with going to trial. In addition, settlements generally are favored by judges in civil cases.

Settlements of real property cases may present more problems than settlements of other types of cases. For one thing, several parties, including owners, their lessees, and their mortgagees, may hold interest in the property. All of these parties will have to be dealt with. In addition, the settlement may be affected by local ordinances or rules describing those officials who have the authority to affect the outcome of cases. In any case, settlements should be carefully monitored, and should be governed by the policies of the seizing agency and its legal staff.

Summary judgment

Summary judgment may be appropriate when the facts are clearcut and well documented. A motion for summary judgment must be accompanied by affidavits showing that there are no material facts left to be found by a judge or jury and that, based on the facts stated in the motion, the law enforcement agency is entitled to a final judgment of forfeiture as a matter of law.³⁷ Summary judgment may be exceptionally well suited for a real property seizure, as the claimant must respond to the motion and thus may be forced to state the case to the court, or to claim the Fifth Amendment privilege.

In attempting to defeat a summary judgment motion, or to defeat the forfeiture itself, the defense may raise an Eighth Amendment argument based on proportionality, or the "excessive fines" clause. The argument is that the punishment is too

severe, that it does not fit the crime. Although the proportionality requirement of the Eighth Amendment has always been found inapplicable in an in rem forfeiture proceeding, an argument based on excessiveness has never been foreclosed.³⁸

Therefore, in real property seizures it is best to avoid such arguments by waiting until a strong case has been developed to decide whether to seize realty. Because of potential emotional or media reactions to the forfeiture of real estate, it is usually wise to make such a seizure only when the underlying facts will also lead to the arrest of the owner.

Trial and discovery

Forfeiture cases that are not disposed of by settlement or summary judgment will come to trial. Trials may be before a judge or a jury, as in most jurisdictions either party may request a jury trial.³⁹ Although jury trials generally are more difficult than trials before judges, many juries will not be sympathetic to individuals who cannot explain the source of their good fortune. In a civil action, the government can call the claimant as a witness, and can subject that individual to extensive discovery. Depositions, examination of the claimant's tax returns, and investigation for ownership of other property before the trial may uncover undiscovered assets or inculpatory behavior. When the claimant is called to testify, the information can impeach the claimant, or can show that the declared income was not sufficient to pay for the property in question.

One of the more difficult aspects of a jury trial in a forfeiture case is preparation of jury instructions. There are no standards for these instructions, yet they are critical, as forfeiture is not commonly understood and the burden of proof in forfeiture is radically different than in an ordinary civil case. Several sample proposed jury instructions are given in Appendix F.

Disposal of the property

Once an order of forfeiture is obtained, a final judgment ordering forfeiture should be submitted for judicial execution. It may be advisable to include in such judgments an order re-

quiring the local official in charge of recordation to accept, file, and record the final judgment, as employees in the records office may be unfamiliar with judgments of forfeiture affecting real property. Further, final judgments should be detailed as to perfection of title, disposal of property, execution of a sheriff's deed, and other particulars. Consultation with the title insurance company is a must when drafting a final judgment, as a final judgment is useless if title insurance cannot be obtained. Once forfeited, property is then subject to disposal.

A common statutory scheme mandates that the property be sold by public auction, subsequent to some type of public notice. In such situations, time should be allowed to adequately advertise the property so as to attract qualified bidders. The Florida Forfeiture Act also allows for transfer of property to non-profit or charitable organizations. This might be appropriate for certain types of property, and could enhance the public image of a police agency and its forfeiture program.

Conclusion

Civil forfeiture of property used in criminal activity or purchased with proceeds of crime can be an important component of a comprehensive law enforcement strategy. Civil forfeiture of real property can deprive criminals of assets and a site for their activities, discourage similar activity, establish a positive public-relations image, and provide the seizing agency with a source of revenue. Although civil forfeiture is easier to prove than a RICO forfeiture, seizure of real property is much more difficult and complicated than seizure of personal property. All forfeiture programs should be based on a formal policy within the seizing agency. When the legal, practical, emotional, and public-relations issues have been resolved, forfeiture of real property can be an effective law enforcement tactic. Ideally, it will be combined with arrests, seizures of personal property, and imposition of I.R.S. assessments, drug taxes, and levies or fines. "[Y]ou can cut off the head of a drug trafficking operation by putting its leaders in jail, but if you do not get the fi-

nancial assets, a new head will grow as new leaders come up through the system to replace those in jail."40

It is hoped that this article will provide guidance to agencies that are contemplating seizure of real property. The documents in Appendices A-F were created by the Metro-Dade Police Department Legal Bureau. Other agencies are encouraged to use or modify them as needed.

Endnotes

1. Smith, *Prosecution and Defense of Forfeiture Cases*, Matthew Bender, New York 1986, p. 2-1.
2. *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 93 S.Ct. 489, 34 L.Ed.2d 438 (1971).
3. *United States v. One Tintoretto Painting*, 692 F.2d 603 (2d Cir. 1982); Smith, *supra*, p. 2-1.
4. 932.701-704, *Florida Statutes* (1989) (The Florida Contraband Forfeiture Act).
5. 21 U.S.C. 881(a)(1) through (a)(7).
6. *In re Forfeiture of Approximately \$48,900*, 432 So.2d 1381 (Fla. 4th DCA 1983).
7. "Asset Forfeiture: Taking the Profit Out of Drug Trafficking," *Police Chief*, Vol. LIV, #8, September 1987, p. 13.
8. "Seizure and Controlled Dangerous Substance Property Forfeiture Act of 1989," La.R.S. 40:2600-2600.21.
9. *U.S. v. Oregon*, 644 F.2d 500 (5th Cir. 1981).
10. *Lamar v. Universal Supply*, 479 So.2d 109 (Fla. 1985).
11. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S.Ct. 1080, 40 L.Ed.2d 45 (1974).
12. *United States v. Owen*, 858 F.2d 1514 (11th Cir. 1988); *Forfeiture of \$48,900*, *supra*.
13. Guilfoyle, T., "Amendment to Florida Contraband Forfeiture Act," *Florida Police Chief*, November 1989, p. 45.
14. 21 U.S.C. 881(e)(1); 19 U.S.C. 1661(a).
15. See History following 21 U.S.C.A. 881(e)(3) (1990 Supplement) regarding repeal of 6077 of the 1988 Anti-Drug bill.
16. 402 of Pending 1990 House Crime Bill (H.R. G269).
17. Aylesworth, G. N. and Taylor, F., "Contraband Forfeiture: Preserving the Effectiveness and Integrity of the Forfeiture Act," *Florida Police Chief*, February 1988, p. 42.
18. *Model Policy for Forfeiture of Assets by Law Enforcement Agencies*, published by the Florida Department of Law Enforcement, Florida Police Chiefs Association, Florida Sheriffs Association, and Florida Association of Police Attorneys; 1989 Laws of Florida, c. 89-148, 3.
19. 932.703(3), *Florida Statutes* (1989).
20. See *United States v. One Single Family Residence Located at 960 Miraflores Avenue*, . . . [The Republic National Bank Case], 732 F.Supp. 1563 (S.D. Florida 1990).
21. *United States v. Certain Real Property and Premises Known as 418 57th St., Brooklyn, N.Y.*, 737 F.Supp. 749 (E.D.N.Y. 1990).
22. C.E.R.C.L.A. (Comprehensive Environmental Response Compensation and Liability Act) 42 U.S.C. 9601, et seq. The Executive Office of Asset Forfeiture, Department of Justice, issued a policy statement on June 29, 1990, concerning the seizure of contaminated property. Copies can be obtained from the Department of Justice.
23. See *United States v. Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988).
24. See *U.S. v. Real Property Titled in the Name of Shaskin*, 680 F.Supp. 332 (D. Hawaii 1987); but compare *U.S. v. Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988).
25. See *City of Orlando v. Sun Bank*, 428 So.2d 769 (Fla. 5th DCA 1983).
26. *U.S. v. Ladson*, 774 F.2d 436 (11th Cir. 1985).
27. *Warden, Maryland Penitentiary v. Hayden*, 307 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967).
28. 933.02(4)(a), *Florida Statutes* (1989) [allowing for a search warrant to be issued when any property is held or possessed in violation of the laws relating to food and drug]; *U.S. v. Certain Real Estate Property Located at 4880*

S.E. Dixie Highway, 612 F.Supp. 1492 (S.D. Florida 1985).

29. *U.S. v. Premises and Real Property at 4492 South Livonia Rd.*, 889 F.2d 1258 (2nd Cir. 1989).

30. *Ladson*, *supra*.

31. *Lobo v. Metro-Dade Police Department*, 505 So.2d 621 (Fla. 3d DCA 1987).

32. See *Klein v. the Royale Group*, 524 So.2d 1061 (Fla. 3d DCA 1988); *Campbell v. Eartland*, 307 F.2d 478 (5th Cir. 1962).

33. See *Gray v. C.I.R.*, 708 F.2d 243 (6th Cir. 1983); *U.S. v. One 1973 Dodge Van*, 416 F.Supp 43 (E.D. Mich. 1976).

34. *State v. McCord*, 402 So.2d 1147 (Fla. 1981); *In re Forfeiture of 1982 Ford*, 432 So.2d 732 (Fla. 4th DCA 1983).

35. See *In re Forfeiture of 1981 Ford*, 432 So.2d 732 (Fla. 4th DCA 1983); and *Neil v. International Union of Operating Engineers*, 427 So.2d 798 (Fla. 4th DCA 1983).

36. *U.S. v. One Assortment of 89 Firearms*, 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984).

37. See *U.S. v. One 1984 Cadillac*, 888 F.2d 1133 (6th Cir. 1989).

38. See *U.S. v. Premises Known as 3639 - 2nd Street*, 869 F.2d 1093 (8th Cir. 1989); and *U.S. v. Tax Lot 1500*, 861 F.2d 232 (9th Cir. 1988).

39. See *U.S. v. One 1976 Mercedes Benz*, 618 F.2d 453 (7th Cir. 1980); and *In re Forfeiture of 1978 Chevrolet Van*, 493 So.2d 433 (Fla. 1986).

40. See footnote 7, *supra*

Appendix A: Stipulation for Occupancy and Indemnity

This Stipulation for Occupancy and Indemnity, hereafter the Agreement, is made this _____ of January, 1990, by and between _____, "Occupant(s)," and the Metro-Dade Police Department, "The Department," a department of Metropolitan Dade County, Florida, a political subdivision of the State of Florida.

WHEREAS: The Metro-Dade Police Department has seized for forfeiture that certain parcel of real property located at _____, Miami, Florida _____, and more formally known as:

hereinafter "the property," together with all appurtenances thereon and improvements thereto.

WHEREAS: Occupant(s) currently occupy(ies) the said premises pursuant to that certain Warranty Deed dated April 15, 1981, and that certain Mortgage and Promissory Note dated April 15, 1981.

WHEREAS: Occupant(s) wish(es) to continue to occupy the said premises pending the conclusion of forfeiture proceedings against the property in the Circuit Court of the Eleventh Judicial Circuit of Florida.

WHEREAS: The Department is willing to permit Occupant(s) to remain in possession of the property during said pendency on the following terms and conditions and only on these terms and conditions.

NOW THEREFORE, it is hereby warranted, covenanted and agreed by and between the parties hereto for and in consideration of the right to remain on the premises pending resolution of the said forfeiture proceedings:

That upon execution of this Agreement and so long as Occupant(s) remain(s) in strict compliance herewith, Occupant(s) may continue in possession of the property until such time as the Court disposes of same in accordance with law.

That Occupant(s) unconditionally agree(s) to release, save, hold harmless and indemnify the Department and Metropolitan Dade County, Florida, their officers, servants, employees, agents, heirs, successors and assigns from any and all claims demands, damages, causes of action, suits or actions, of whatever kind, type or description and wheresoever situated, by or on behalf of others, that may now exist or hereafter arise by reason of, affecting or concerned with, directly or indirectly, the seizure, maintenance, disposal, return or occupancy of the property, including any act or omission which occurs on the property, any accident, mishap or injury which takes place on or about the property, whether intentional or accidental, or the presence of an attractive nuisance thereon, including

costs, expenses and reasonable fees for the services of attorneys to defend any such action, whether said attorneys are employees or independent contractors.

That Occupant(s) shall, upon any breach of this Agreement, forthwith quit and remove himself (themselves) and his (their) personal property from the property, upon notice of the breach being provided by personal service, posting same on the property or by first-class mail sent to the address of the property. That Occupant(s) shall not oppose, object to or impede the issuance of any writ or order including, but not limited to, a Writ of Possession seeking to have him/them evicted from the property and shall be responsible for all costs of obtaining same, including reasonable attorneys' fees whether the attorneys are employees or independent contractors.

That Occupant(s) agree(s) to comply fully with all the terms and conditions of the aforementioned Deed, Note and Mortgage, and any breach of same shall be deemed a breach of this Agreement and shall be a default hereunder whether or not such breach is an event of default under the aforementioned and whether or not a default in the aforementioned is declared by the other party(ies) thereto.

That a declaration or determination of default or acceleration by the other party(ies) to aforementioned Deed, Note and Mortgage shall be a default hereunder regardless of the outcome of any action predicated on those documents.

That Occupant(s) shall maintain the property and such maintenance shall include, but not be limited to:

- a. Keeping the property free of hazards and nuisances, attractive or otherwise;
- b. Removing any hazards or nuisances, attractive or otherwise, which may exist on the property on the date hereof;
- c. Keeping the property clean, in good order and repair and in conformity with all applicable codes, ordinances and regulations;
- d. Give prompt and proper care, maintenance and repair to all heating, air conditioning, plumbing, electrical, gas, oil or other power facilities, appliances or systems in place upon the property and replace any such facility, appliance or system or any part thereof which cannot be repaired or which it is impracticable to repair and to advise the Department or its designated agent of the failure or malfunction of any such facility, appliance or system forthwith on discovery of same.
- e. Occupant(s) shall have routine maintenance not covered by that agreement or to be performed by the prior owner or his agent, such as lawn maintenance, etc., performed in a timely and competent manner and Occupant(s) shall be responsible for same.

That Occupant(s) shall maintain all policies of insurance currently in effect or required by the aforementioned Deed, Note and Mortgage, if any, in full force and effect with respect to the property including, but not

limited to, policies covering potential liability to persons injured on said property.

That Occupant(s) shall effect and maintain the following insurance whether or not such other policy is currently valid regardless of whether or not the aforesaid Deed, Note and Mortgage requires same: A policy or policies providing proper, adequate and sufficient coverage to compensate the Department named therein for loss to or of the property in an amount at least equal to the appraised value of said property which shall be established by an appraisal done by the Department or its designated agent. Liability coverage shall be in an amount deemed appropriate by a qualified insurance analyst, taking into account the circumstances of the occupancy (i.e., number of residents on the property, volume of vehicular and pedestrian traffic in and around the property, etc.).

That Occupant(s) agree(s) not to sub-lease, rent or otherwise suffer or permit any other person(s) to occupy said property other than temporary guests (i.e., family and friends visiting on a temporary basis only) and no person shall pay any fee, rent or remuneration of any kind for lodgings on the property.

That Occupant(s) agree(s) not to utilize the property for any purposes not included in the zoning classification of the property or for which there is no valid permit or authorization and not to use the property for any business or commercial enterprise without the express written consent of the Department.

That Occupant(s) shall not destroy, injure, alter, remove, encumber or alien the property in any way or do or permit to be done any act thereon which shall or may detract from the value of the property, except for ordinary wear and tear and improvements thereto for which a building permit has actually been issued, or, if no such permit is required, work has actually commenced, may be completed in accordance with the permit or plans therefor.

That Occupant(s) agree(s) to provide the Department with thirty (30) days written notice prior to vacating the property.

That Occupant(s) shall not violate or suffer or permit the violation of any applicable law, ordinance or regulation on the property or in proximity thereto.

That Occupant(s) agree(s) to protect, shelter, feed and provide all necessary and reasonable veterinary care for all domestic animals allowed to remain on the property.

That Occupant(s) agree(s) to make timely payment for rent, mortgage and any and all other payments required of Occupant(s) under the terms of the aforementioned Deed, Note and Mortgage and shall provide evidence of said payment, satisfactory to the Department, to a person designated by the Department.

That Occupant(s) agree(s) to permit Metro-Dade Police Department personnel or their designees, upon reasonable advance notice, to enter

and inspect the property and all appurtenances thereon or improvements thereto at any time and, on an emergency basis, to do so without notice.

That Occupant(s) grant(s) permission to the Department and its designees to obtain information regarding Occupant(s)' payment history under the aforesaid Deed, Note and Mortgage, any policies of insurance covering the property or any other payment made for or on behalf of the property.

That this Agreement shall remain in full force and effect until the forfeiture proceedings are resolved by Order of the court of competent jurisdiction. Failure of Occupant(s) to comply with all terms and conditions hereof, or evidence presented to the Department of any violation(s) of law occurring on the premises or any violation of law committed by Occupant(s) elsewhere will result in the immediate filing of a petition for Writ of Possession to the court of competent jurisdiction.

Occupant(s) has (have) read this Agreement and understand(s) its contents and affix(es) his (their) hand(s) hereto with the intention of being bound hereby.

OCCUPANT(S): _____

METRO-DADE POLICE DEPARTMENT OR AGENT:

BY: _____

DATE: _____, 19____.

Appendix B: Seizure Warrant

IN THE CIRCUIT COURT OF
THE ELEVENTH JUDICIAL
CIRCUIT OF FLORIDA, IN
AND FOR DADE COUNTY

State of Florida)
)
County of Dade)

SEIZURE WARRANT FOR REAL PROPERTY
IN THE NAME OF THE STATE OF FLORIDA, TO ALL AND
SINGULAR:

The Director of the Metro-Dade Police Department, Dade County, Florida, who is also known as the Sheriff of Metropolitan Dade County, Florida, or his Deputies.

Affidavit having been made before me by _____, said affidavit being incorporated herein as if repeated herein in full, demonstrating that he has probable cause to believe and does believe that the whole of the premises described below, including the curtilage and any appurtenances thereon or improvements thereto, hereinafter referred to as "The Premises," and described as: LOT ____, BLOCK ____, OF ____, ACCORDING TO THE PLAT THEREOF, AS RECORDED IN PLAT BOOK ____, AT PAGE ____ OF THE PUBLIC RECORDS OF DADE COUNTY, FLORIDA, which has the address of _____, MIAMI, FLORIDA, and being in Dade County, Florida, has become and is contraband subject to forfeiture pursuant to Sections 932.701-704 and 893.12, Florida Statutes, in that "The Premises" has been used, or intended to be used, in any manner or part, to commit or to facilitate the commission of a violation of any provision of Chapter 893 and Chapter 896, Florida Statutes, related to a controlled substance described in Section 893.03(1) or (2), to wit:

That "The Premises" were used to conceal 5.9 million dollars in contraband currency which was used or intended to be used in violation of the narcotics laws of the State of Florida and to conceal currency used in violation of 896.101(2), Florida Statutes.

And as I am satisfied that there is probable cause to believe that "The Premises" has been used as aforesaid and has therefore become and is contraband subject to forfeiture, I expressly find probable cause for the issuance of this Warrant and the seizure of "The Premises" as contraband.

YOU ARE, THEREFORE, HEREBY ORDERED to seize "The Premises" above-described, and to serve this warrant pursuant to Chapter 933, Flor-

ida Statutes, making the seizure in the Daytime or the Nighttime, as the exigencies may demand or require, or on Sunday, with the proper and necessary assistance, and to enter any and all structures on "The Premises" for the purposes of an inspection for physical damage and an inventory of fixtures, including the videotaping or photographing of the exterior and interior of "The Premises" and any and all structures thereon, and to leave a copy of this warrant on "The Premises" along with a written Inventory as described above, including a statement specifying the individuals upon whom this Warrant was served and a statement as to the satisfaction of the orders herein issued, and to return it and this Warrant within 10 days of issuance as required by law.

YOU ARE FURTHER ORDERED to use necessary means to secure "The Premises," including the use of occupancy agreements and management agents as appropriate, and the Court shall issue any order necessary to effectuate and prevent the frustration of the execution of this warrant.

IT IS FURTHER ORDERED that the legal occupants of "The Premises," if there be any, shall quit the premises no later than seven days from the execution of this warrant, unless the attached Stipulation for Occupancy and Indemnity is executed by the legal occupants and the Metro-Dade Police Department. If the aforesaid Stipulation is not executed, is declared invalid, or "The Premises" have not been vacated within the time described above, THE METRO-DADE POLICE DEPARTMENT IS ORDERED to cause the occupants to be evicted from the premises upon application and issuance of a Writ of Possession.

IT IS FURTHER ORDERED that the owners and occupants of "The Premises" not make any changes or improvements whatsoever to "The Premises" without the written approval of the Metro-Dade Police Department, nor damage "The Premises" in any way.

If "The Premises" is vacant, or becomes vacant, THE METRO-DADE POLICE DEPARTMENT IS ORDERED to take exclusive custody of "The Premises," and to secure and maintain "The Premises" using whatever means necessary, including the use of occupancy agreements and management agents as appropriate, and to take reasonable action to protect any personal property of the owner or former tenants remaining on "The Premises," but such property shall be considered abandoned if not claimed within the statutory period as provided by law.

IT IS FURTHER ORDERED that the Metro-Dade Police Department shall bring "The Premises" before a court of competent jurisdiction by filing a Petition for Rule to Show Cause in accordance with the Florida Contraband Forfeiture Act as soon as practicable after the execution of this warrant.

WITNESS MY HAND AND SEAL this _____ day of _____, 19_____.

CIRCUIT COURT JUDGE

Appendix C: Affidavit for Seizure Warrant

IN THE CIRCUIT COURT OF
THE ELEVENTH CIRCUIT
OF FLORIDA, IN AND FOR
DADE COUNTY

State of Florida)
 :
County of Dade)

AFFIDAVIT FOR SEIZURE WARRANT FOR REAL PROPERTY

Before me, a Judge of the Circuit Court of the Eleventh Judicial Circuit of Florida, having jurisdiction pursuant to Section 932.704(1), 933.02(2)(a) or 933.02(4)(c), Fla. Stat. (1989), and Art. V, Section 5(b) and 20(b)(3), Fla. Const., personally appeared _____, being by me first duly sworn, depose and say that he has probable cause to believe and does believe that the whole of the premises described below, including the curtilage and any appurtenances thereon or improvements thereto, hereinafter referred to as "The Premises," and described as:

A residence located at _____, Miami, Fl., a single family residence, one story concrete block construction, which is pink in color with white trim and a white front door, and gray shingled roof. The premises is located on the SW corner of the intersection of _____ and _____ St., on the west side of _____. The front door is recessed and faces east. The numerals are black in color and are on the left side of the door. The attached garage is to the right of the front door; and being in Dade County, Florida, has become and is contraband subject to forfeiture pursuant to Section 932.701-704 and 893.12, Florida Statutes, in that "The Premises" have been used, or intended to be used, in any manner or part, to commit or to facilitate the commission of a violation of any provision of Chapters 893 and 896, Florida Statutes, related to a controlled substance described in Section 893.03(01) or (2), and 896 to wit:

That "The Premises" were used to facilitate the laundering of the proceeds of narcotics transactions and to conceal contraband currency used or intended to be used in violation of the narcotics laws of the State of Florida.

Affiant's factual basis for the belief that "The Premises" are contraband subject to forfeiture as stated above, are as follows:

1. I am a police officer employed by the Metro-Dade Police Department.
2. On and before April 18, 1990, I was assigned to investigate violations of the narcotics laws of the State of Florida.

3. I have been a police officer for eight years and have attended DEA drug investigation school, FDLE RICO investigation school. I have an Associate Degree in Criminology.

4. I have been assigned narcotics investigations for 2½ years and have worked undercover buying and selling drugs. For the past six months I have specialized in the investigation of narcotics money laundering and movement.

5. I have, in obtaining 40 or 50 search warrants, been accepted as an expert in narcotics transactions.

6. On April 18, 1990, I was engaged with other law enforcement personnel in the surveillance of a 1990 Honda Accord, 4 door, Burgundy color, Florida Tag _____.

7. I observed this car enter the garage at _____, Dade County, at 3:15 p.m., on April 18, 1990. The garage door opened as the car approached and closed after the car entered.

8. I observed the garage door of _____ Court open at 3:25 p.m., April 18, 1990, and a person later identified as _____ locked the house door inside the garage opening into the house proper. The above car exited the garage with _____ driving and _____ as passenger. I observed in the garage a number of cardboard boxes with the name "U Haul" printed thereon.

9. Other law enforcement personnel followed the 1990 Honda described above to _____ Avenue and _____ Drive. At this point I am informed the driver and passenger exited the car delivering the car to a person later identified as _____ who drove it away.

10. I am informed by the officers surveilling the 1990 Honda that they followed it to _____ St. and _____ Avenue; observing erratic driving, apparently to detect surveillance, the car was stopped. Mr. _____ stated the car was not his but he had been driving it all day and that he had not met with anyone. He consented to a search of the car.

11. In the trunk of the 1990 Honda, I am advised by the surveilling officers, was found a cardboard box marked "U Haul" which contained a large quantity of U.S. Currency (later determined to be \$403,854) rubber banded in a manner favored by narcotics traffickers. Upon being questioned about the money Mr. _____ stated he did not know it was there and had never seen it before.

12. Mr. _____ was contacted at _____ N. W. _____ th Court, Dade County, and denied driving the 1990 Honda into or out of the garage or being at _____ N. W. _____ th Court on April 18, 1990. He advised that this is his daughter's house. He refused consent to search the house stating there is nothing in there and that he did not have a key.

13. Ms. _____ was located at _____ N. W. _____ th Court

and advised she is the owner of the house at _____ N. W. _____ th Court. She stated her husband is out of town and she has not been staying at the house but was in the house earlier that day. She refused consent to search the house stating there was nothing in there.

14. A search warrant was obtained from U.S. Magistrate S.D. Fla. on April 19, 1990, to search the house at _____ N. W. _____ th Court.

15. A search of the house at _____ N. W. _____ th Court revealed 5.9 million dollars (\$5,900,000) in cardboard boxes, duffel bags and one package in the master bedroom. The tops of some of the boxes and duffel bags were open and the currency visible. The boxes bore notations as to amounts and amounts in batches of currency. The currency was rubber banded in a manner favored by narcotics traffickers. Also located in the master bedroom were narcotics ledgers recording the sale of kilograms of cocaine and receipt of money as well as a money counting machine and two pistols

16. A trained narcotics detection dog alerted to each box or container that had currency in it.

17. Ms. _____, when questioned concerning this currency, refused to answer or provide any information.

18. The master bedroom, which contained the currency also had soiled male and female clothes and had framed photographs of Ms. _____ and a person identified as her husband.

19. Based upon my training and experience in narcotics matters the following totality of circumstances provide me with probable cause to believe the currency seized from the 1990 Honda is contraband; the 1990 Honda transporting the currency is contraband and the house at _____ N.W. _____ th Court concealing the 5.9 million dollars is contraband and the 5.9 million dollars is contraband.

1. The large amount of currency (5.9 million and \$403,854).
2. The manner of packaging: cardboard boxes, 2 duffel bags and one [package].
3. The currency rubber banded for quick counting as favored by drug traffickers.
4. Ledgers reflecting narcotics transactions; that is, the sale of kilograms quantities of cocaine with street price and total.
5. Alert by a trained narcotics detection dog on each package of currency.
6. Ms. _____ refused to answer questions concerning the currency found in her house.
7. Two pistols in the master bedroom.
8. Currency not concealed but open to plain view (boxes, duffel bag open).
9. Boxes labeled with amounts of currency in each, broken down into batches as is characteristic of narcotics traffickers.
10. Money counting machine.

11. Mr. _____, who entered the house, lied concerning his ever being in the house that day.

12. The activity concerning the \$403,854 and the 1990 Honda involved a car switch usual in narcotics activities.

WHEREFORE, Affiant prays that a Seizure Warrant for Real Property be issued ordering the Director of the Metro-Dade Police Department, Dade County, Florida, who is also known as the Sheriff of Metropolitan Dade County, Florida, or his Deputies, to seize "The Premises" above-described, making the seizure in the Daytime or the Nighttime, as the exigencies may demand or require, or on Sunday, with the proper and necessary assistance, and to obey any other directives mandated in said warrant.

_____ Affiant

SWORN TO AND SUBSCRIBED before me this _____ day of _____, 1990.

JUDGE OF THE CIRCUIT COURT

Appendix D: Petition for Rule to Show Cause

IN THE CIRCUIT COURT OF
THE ELEVENTH JUDICIAL
CIRCUIT OF FLORIDA, IN
AND FOR DADE COUNTY

GENERAL JURISDICTION
DIVISION

CASE NO.

IN RE: FORFEITURE OF)	
)	
FIVE MILLION, NINE HUNDRED)	
THOUSAND DOLLARS (\$5,900,000))	PETITION FOR RULE
<u>IN U.S. CURRENCY</u>)	TO SHOW CAUSE _____
)	
FOUR HUNDRED THREE THOU-)	
SAND, EIGHT HUNDRED FIFTY-)	
FOUR DOLLARS (\$403,854) IN U.S.)	
<u>CURRENCY</u>)	
)	
THAT CERTAIN PARCEL OF REAL)	
ESTATE KNOWN AS _____ N. W.)	
____TH COURT, DADE COUNTY,)	
<u>MIAMI, FLORIDA</u>)	
)	
ONE (1) 1990 HONDA, FLORIDA)	
<u>REGISTRATION</u>)	

The Metro-Dade Police Department, by and through the undersigned counsel, in a civil cause of forfeiture alleges upon information and belief that:

1. This Court has jurisdiction pursuant to Section 932.701-932.704, Florida Statutes (1987), the "Florida Contraband Forfeiture Act," and Section 893.12, Florida Statutes (1989).

2. On or about April 25, 1990, officers of the Metro-Dade Police Department seized the above-described parcel of real estate, hereinafter referred to as the property, including all appurtenances thereto and all improve-

ments thereon, in Dade County, Florida, under Metro-Dade Police Case Number _____ pursuant to a Seizure Warrant for Real Property issued by Judge _____ on April 25, 1990, a copy of which is herein incorporated by reference. The legal description of the property is: LOT _____ BLOCK _____ OF _____ ACCORDING TO THE PLAT THEREOF AS RECORDED IN PLAT BOOK AT PAGE _____ OF THE PUBLIC RECORDS OF DADE COUNTY, FLORIDA.

3. On or about April 18 and 19, 1990, officers of the Metro-Dade Police Department seized the above-described 1990 HONDA vehicle at _____ Street and _____th Avenue, in Dade County Florida, hereinafter called the vehicle, and seized the above \$403,854 in U.S. Currency from the vehicle; and also seized \$5,900,000 in U.S. Currency from inside the residence at the above-described real estate (hereinafter both sums of currency shall collectively be referred to as the currency).

4. On or about April 19, 1990, the property and the vehicle were used to facilitate the transportation, concealment, purchase, sale, exchange, giving away, or possession of a contraband article in violation of Section 932.702(3); and/or a contraband article was concealed or possessed in or upon the property and the vehicle in violation of Section 932.702(2), Florida Statutes (1989); and/or the property and vehicle were used in violation of Section 932.702 as an instrumentality in the commission of the crime of money laundering, a violation of Section 896.101, Florida Statutes. Any motor vehicle or real property which has been or was intended to be used in violation of any provision of Section 932.702 is subject to forfeiture. Section 932.703(1), Florida Statutes (1989).

5. On or about April 19, 1990, the currency was possessed, concealed, or conveyed as a contraband article in violation of Section 932.702, Florida Statutes, the totality of the circumstances being such as to indicate a nexus between the currency and a Chapter 893 narcotics violation, in that the currency had been, was being or was intended to be used in violation of Chapter 893, Florida Statutes, either as proceeds from the sale of a controlled substance or as funds to be used in the purchase or trafficking of same. Currency which has been, is being, or is intended to be used in violation of any provision of Chapter 893, Florida Statutes, becomes a contraband article. Section 932.701(2)(a), Florida Statutes (1989). Currency possessed, concealed, or conveyed as a contraband article in violation of Section 932.702 is subject to forfeiture. Section 932.703(1), Florida Statutes (1989).

6. The property, the vehicle, and the currency have become and are contraband subject to forfeiture, to wit: On April 18, 1990, through April 19, 1990 (as set forth in detail in the attached affidavit of Detective _____, of April 25, 1990, for seizure of the real property in this action and incorporated herein by reference as if recited herein in full), \$403,854 in cash, rubber banded in a manner favored by narcotics

traffickers, was located in the 1990 Honda in this action. Furthermore, narcotics detection dogs alerted to the odor of narcotics on the currency. _____, the driver of the Honda, advised he was not the owner of the car and did not know the currency was in the car. A federal search warrant executed on the real property, _____ N. W. _____ th Court, located \$5,900,000 in the master bedroom of the house, rubber banded and packaged in cardboard boxes, in duffel bags and in paper, in a manner favored by narcotics traffickers; a drug detection dog alerted to the odor of narcotics on the currency. Narcotics transaction records were also in the master bedroom.

7. Information in the possession of the Metro-Dade Police Department indicates that _____ and AN UNKNOWN PERSON may have an interest in the real property; that _____ may have an interest in the seized vehicle; that _____ AND _____, _____ and AN UNKNOWN PERSON may have an interest in the seized \$403,854 in U.S. Currency; and that _____, and AN UNKNOWN PERSON may have an interest in the \$5,900,000 in U.S. Currency.

WHEREFORE, Petitioner prays that a Rule to Show Cause be issued to the above persons or entities ordering them to appear and to demonstrate an interest in the property and to show cause why the forfeiture of the property should not be decreed. It is requested that the above-listed persons or entities be required to serve a copy of any pleadings filed in this action on Petitioner's undersigned counsel.

Dated at Miami, Dade County, Florida, this _____ day of _____, 1990.

Respectfully Submitted,

_____, Esquire
Attorney for Petitioner
Metro-Dade Police
Department
73 W. Flagler Street, Rm. 1601
Miami, Florida 33130

IN THE CIRCUIT COURT OF
THE ELEVENTH JUDICIAL
CIRCUIT OF FLORIDA, IN
AND FOR DADE COUNTY

GENERAL JURISDICTION
DIVISION
CASE NO.

IN RE: FORFEITURE OF)
)
) VERIFICATION OF
) PETITION FOR RULE
) TO SHOW CAUSE _____
THAT CERTAIN PARCEL OF REAL)
ESTATE KNOWN AS _____)
N.W. _____TH COURT, DADE)
COUNTY, FLORIDA)
_____)
FOUR HUNDRED THREE THOU-)
SAND, EIGHT HUNDRED FIFTY-)
FOUR DOLLARS (\$403,854) IN)
U.S. CURRENCY)
_____)
FIVE MILLION, NINE HUNDRED)
THOUSAND DOLLARS)
(\$5,900,000) IN U.S. CURRENCY)
_____)
ONE (1) 1990 HONDA, FLORIDA)
REGISTRATION)
_____)

AFFIDAVIT

There appeared before me, an officer duly authorized to administer oaths in the State of Florida, JOHNNY PHILLIPS, who being duly sworn, deposes and says:

1. I am a sworn law enforcement officer employed by the Metro-Dade Police Department.
2. I took part in the investigation and seizure of the above-described property.
3. I have reviewed the Petition for Rule to Show Cause in this case and the facts alleged therein are true and correct and based on personal knowledge.

JOHNNY PHILLIPS, Detective
Metro-Dade Police Department

Sworn to and Subscribed before me this
_____ day of _____, 1990

NOTARY PUBLIC at Large
State of Florida

My Commission Expires:

Appendix E: Notice of Lis Pendens

IN THE CIRCUIT COURT OF
THE ELEVENTH JUDICIAL
CIRCUIT OF FLORIDA, IN
AND FOR DADE COUNTY

GENERAL JURISDICTION
DIVISION

CASE NO.

FLORIDA BAR NO.

IN RE: FORFEITURE OF)	
)	
THAT CERTAIN PARCEL OF)	NOTICE OF LIS PENDENS
REAL ESTATE KNOWN AS)	
_____)	

To:

Notice is given that on the _____ day of _____, 1990, in the above-listed Eleventh Judicial Circuit Court, in and for Dade County, Florida, that there was instituted a forfeiture action by the Metro-Dade Police Department under the above case number and style. The property involved in that suit is as described above, situated in Dade County, Florida, the legal description being:

LOT _____ BLOCK _____, OF _____, ACCORDING TO THE PLAT THEREOF, AS RECORDED IN PLAT BOOK _____, AT PAGE _____ OF THE PUBLIC RECORDS OF DADE COUNTY, FLORIDA

The relief sought is the forfeiture of said property to the Metro-Dade Police Department pursuant to Sections 932.701-704, Florida Statutes (1987), and Section 893.12, Florida Statutes (1989) and Sections 896.101 and 896.102, Florida Statutes (1989).

Said property was seized by the Metro-Dade Police Department on _____, 1990. It is anticipated that a Rule to Show Cause will be issued in the Circuit Court of the Eleventh Judicial Circuit on or about _____.

DATED on _____, 1990.

Respectfully Submitted,

_____, Esquire

Attorney for Petitioner
Metro-Dade Police Dept.
73 W. Flagler St., Rm.1601
Miami, Fla. 33130

Appendix F: Jury Instructions

IN RE: FORFEITURE OF) CASE NO.
)
)
 TWENTY-SEVEN THOUSAND,)
 EIGHT HUNDRED SEVENTY)
 DOLLARS (\$27,870) IN U.S.)
 CURRENCY)
)
 BROWNING 380 PISTOL,)
 SERIAL T277975)
)
 BROWNING 380 PISTOL,)
 SERIAL 425PT06041)
)
 RUGER RIFLE, MINI 14,)
 SERIAL 18443659)
)
 RUGER RIFLE, 22 CALIBER, SERIAL)
 12746783)
)
 RUGER REVOLVER (GP 100))
 SERIAL 17065091)
)
)
 COLT RIFLE AR15, SERIAL)
 127534)
)
)
 SHOTGUN H&K, SERIAL)
 MO41210)

Petitioner's Proposed Jury Instructions

Petitioner, Metro-Dade Police Department, submits its Proposed Jury Instructions [see below].

Respectfully submitted,

_____, Esquire
Attorney for Petitioner
Metro-Dade Police
Department
Dade County Courthouse
73 W. Flagler Street, Rm.1601
Miami, Florida 33130

List of Instructions

1. Introductory Instruction
2. Believability of Witnesses
3. Probable Cause
4. Privilege Against Self Incrimination
5. Probable Cause Legal Issue
6. Greater Weight of the Evidence and Burden of Proof
7. Greater Weight (Preponderance) of Evidence Defined
8. Prejudice and Sympathy
9. Election of Foreman; Verdict Forms
10. Verdict Form
11. Verdict Form
12. Verdict Form
13. Verdict Form

Petitioner's Requested Jury Instruction No. 1: Introductory Instruction

Members of the jury, I shall now instruct you on the law that you must follow in reaching your verdict. It is your duty as jurors to decide the issues, and only those issues, that I submit for determination by your verdict. In reaching your verdict, you should consider and weigh the evidence, decide the disputed issues of fact, and apply the law, on which I shall instruct you, to the facts as you find them from the evidence.

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits received in evidence, [and] all facts that may be admitted or agreed to by the parties, [and any fact of which the Court has taken judicial notice].

In determining the facts, you may draw reasonable inferences from the evidence. You may make deductions and reach conclusions that reason and common sense lead you to draw from the facts shown by the evidence in this case. But you should not speculate on any matters outside the evidence.

Granted _____

Modified _____

Denied _____

Withdrawn _____

Modeled on Standard Jury Instruction 2.1

Petitioner's Requested Jury Instruction No. 2: Believability of Witnesses

In determining the believability of any witness and the weight to be given the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.

You have heard opinion testimony concerning the source of the money and the intended use of the money.

You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinion expressed, and all the other evidence in the case.

Granted _____

Modified _____

Denied _____

Withdrawn _____

Standard Jury Instruction 2.2

Petitioner's Requested Jury Instruction No. 3: Probable Cause

In a forfeiture case, the Petitioner has the initial burden of proving that there is probable cause to believe that there was a connection between the currency seized and illegal lottery activity, that is, that the currency was used or intended to be used in that illegal lottery.

Probable cause is defined as a reasonable ground for belief of guilt supported by less than prima facie proof but more than mere suspicion.

Granted _____

Modified _____

Denied _____

Withdrawn _____

Petitioner's Requested Jury Instruction No. 4: Privilege Against Self Incrimination

Petitioner relies on claimant's assertion of the privilege against self incrimination as circumstantial evidence in support of its position that the currency and guns were used or intended to be used in a narcotics violation. A claimant has a constitutional right to decline to answer a question on the ground that it may tend to incriminate him. However, you may, but need not, infer by such refusal that the answers would have been adverse to the claimant's interest.

Granted _____

Modified _____

Denied _____

Withdrawn _____

Brinks v. City of New York, 717 F.2d 700, 707 (2d Cir. 1983),
Cerro Gordo v. Fireman's Fund, 819 F.2d 1471 (8th Cir. 1987).

Petitioner's Requested Jury Instruction No. 5: Probable Cause Legal Issue

The Court has determined and now instructs you, as a matter of law, that based on the totality of the facts and circumstances surrounding the seizure of the currency, the Petitioner, Metro-Dade Police Department, has established probable cause to believe that the currency was used or intended to be used in violation of the narcotic laws of the State of Florida.

Granted _____

Modified _____

Denied _____

Withdrawn _____

In Re: Forfeiture of \$48,900, supra.
Gillum v. 1978 Kenworth, 543 So.2d 462 (Fla. 2d DCA 1989).
U.S. v. \$4,255,000, 762 F.2d 895, 903 n. 17 (11 Cir. 1985).
In Re: Forfeiture of One 1982 Oldsmobile, 527 So.2d 838 (Fla. 5th DCA 1988).

Adapted from Standard Jury Instruction 3.1

Petitioner's Requested Jury Instruction No. 6: Greater Weight of Evidence and Burden of Proof

If the greater weight of the evidence supports Petitioner's position that the money and/or guns were connected to an illegal narcotics transaction, your verdict should be for the Petitioner, Metro-Dade Police Department. If the greater weight of the evidence supports Claimants' position that the money and/or guns were not used or intended to be used in narcotics transactions, your verdict should be for the Claimants.

Granted _____

Modified _____

Denied _____

Withdrawn _____

In Re: Forfeiture of \$48,900, supra.
Gillum, supra.
In Re: Forfeiture of One 1982 Oldsmobile, supra.
Adapted from Standard Jury Instruction 3.7

Petitioner's Requested Jury Instruction No. 7: Greater Weight (PREPONDERANCE) of Evidence Defined

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

Granted _____

Modified _____

Denied _____

Withdrawn _____

Standard Jury Instruction 3.9

Petitioner's Requested Jury Instruction No. 8: Prejudice and Sympathy

Your verdict must be based on the evidence that has been received and the law on which I have instructed you. In reaching your verdict, you are not to be swayed from the performance of your duty by prejudice, sympathy or any other sentiment for or against any party.

Granted _____

Modified _____

Denied _____

Withdrawn _____

Standard Jury Instruction 7.1

Petitioner's Requested Jury Instruction No. 9: Election of Foreman; Verdict Forms

When you retire to the jury room, you should select one of your number to act as foreman [or forewoman] to preside over your deliberations and sign your verdict. Your verdict must be unanimous, that is, your verdict must be agreed to by each of you.

You will be given two forms of verdict. The questions presented to you are:

If you find the Claimant, _____, failed to establish by the greater weight of the evidence that the firearms did not have a connection to narcotics activity, you will find for the Petitioner, Metro-Dade Police Department.

If you find the Claimant _____ failed to establish by the greater weight of the evidence that the currency did not have a connection to narcotics activity, you will find for the Petitioner, Metro-Dade Police Department.

If you find that the Claimant _____ did establish this, then you find for the Claimant, _____.

If you find that the Claimant _____ did establish this, then you find for the Claimant, _____.

If you find for the Petitioner, your verdict will be in the following form: We the Jury, as to the firearms, find for the Petitioner, the Metro-Dade Police Department, and We the Jury, as to the currency, find for the Petitioner, the Metro-Dade Police Department.

If you find for the Claimant, your verdict will be in the following form:

We the Jury, find for the Claimant, _____, or We the Jury,
find for the Claimant, _____.

When you have agreed on your verdict, the foreman [or forewoman],
acting for the jury, should date and sign the appropriate form of verdict.
You may now retire to consider your verdict.

Granted _____

Modified _____

Denied _____

Withdrawn _____

Petitioner's Requested Jury Instruction No. 10: Verdict Form

We the Jury, as to the currency, find for:

The Petitioner, the Metro-Dade Police Department.

FOREPERSON

DATE

Petitioner's Requested Jury Instruction No. 11: Verdict Form

We the Jury, as to the firearms, find for:

The Petitioner, the Metro-Dade Police Department.

FOREPERSON

DATE

Petitioner's Requested Jury Instruction No. 12: Verdict Form

We the Jury, as to the currency, find for:

The Claimant, _____

FOREPERSON

DATE

Petitioner's Requested Jury Instruction No. 13: Verdict Form
We the Jury, as to the firearms, find for:

The Claimant, _____

FOREPERSON

DATE

Appendix G: "U.S. Attorney General's Guideline on Seizure of Occupied Real Property (October 9, 1990)"

"I. General Policy

As previously stated in this Office's memorandum styled "Seizure of Forfeitable Property", January 11, 1990, it is the Department's policy that ex parte judicial approval is required prior to the seizure of all real property.

However, it is not required that the U.S. Marshal actually seize property and take dominion and control of it in order to establish the Court's jurisdiction over the res. An alternative method of initiating the forfeiture of property is to "arrest" the property under the Admiralty Rules.

In certain circumstances it may be advisable to use this less intrusive means of bringing the property into the jurisdiction of the Court for purposes of commencing a civil in rem forfeiture action. Moreover, as "arresting" property through the service of process does not interfere significantly with an owner's possessory interests, advance ex parte judicial review is not required as a matter of law or policy.

The determination of whether to initiate real property forfeitures through a "seizure" or "arrest" of the property requires an exercise of discretion by the Attorney for the Government taking into account the circumstances of the case at hand.

A. Arresting Real Property without Taking Actual Possession

The Clerk of Court may issue a Warrant of Arrest pursuant to Rule C(3) of the Supplemental Rules for Admiralty and Maritime Claims which is then posted upon the real property by the U.S. Marshal. This process establishes the jurisdiction of the Court. The simultaneous filing of a complaint and a lis pendens should also occur to prevent the transfer or encumbrance of the real property subject to forfeiture.

B. Effecting the Seizure Where the U.S. Marshal Takes Dominion and Control

1. Permitting Continued Occupancy

As a general rule, occupants of real property seized for forfeiture should be permitted to remain in the

property pursuant to an occupancy agreement pending forfeiture provided that:

- a. The occupants agree to maintain the property, which shall include but is not limited to keeping the premises in a state of good repair or in the same condition as existed at the time of seizure, and continuing to make any monthly payments due to lienholders or to make timely rent payments to the U.S. Marshal or his designee if the occupants are tenants;
- b. The occupants agree not to engage in continued illegal activity;
- c. The continued occupancy does not pose a danger to the health or safety of the public or a danger to law enforcement;
- d. The continued occupancy does not adversely affect the ability of the U.S. Marshal or his designee to manage the property; and,
- e. The occupants agree to allow the U.S. Marshal or his designee to make reasonable periodic inspections of the property with adequate and reasonable notice to the occupants.

2. Removal of Occupants Upon Seizure

Immediate removal of all occupants at the time of seizure should be sought if there is reason to believe that failure to remove the occupants will result in one or more of the following:

- a. Danger to law enforcement officials or the public health and safety;
- b. The continuation of illegal activity on the premises; or
- c. Interference with the Government's ability to manage and conserve the property.

If appropriate under 19 U.S.C. 1612(a), consideration should be given to effecting an interlocutory sale of the defendant property if it is in the best interest of the United States. See A Guide to Sales of Property Prior to Forfeiture: The Stipulated and Interlocutory Sale, Criminal Division, 1990.

II. Notice and Opportunity for Hearing Prior to Seizure

It is the Department's position that no advance notice or opportunity for an adversary hearing is statutorily or constitutionally required prior to the seizure of property, including real property.

This is the Department's national policy and practice, with the exception of districts within the Second Circuit that are currently subject to United States v. The Premises and Real Property at 4492 South Livonia Road, 889 F.2d 1258 (2nd Cir. 1989), reh'g denied, 897 F.2d 659 (1990). The Court in Livonia Road did note that under exigent circumstances there is no need for a pre-seizure hearing (supra at 1265). The Second Circuit recently stated in United States v. 141st Street Corporation, 911 F.2d 870 (2nd Cir. 1990) that an exigent or extraordinary circumstance exists if: "1) seizure was necessary to secure an important governmental or public interest, 2) very prompt action was necessary, and 3) a governmental official initiated the seizure by applying the standards of a narrowly drawn statute."

III. Circumstances Supportive of Immediate Removal of Occupants

- A. Reason to believe that leaving occupants in possession will result in danger to the health and safety of the public or to law enforcement may be based upon the following:
1. The nature of the illegal activity;
 2. Presence of weapons, "booby traps," or barriers on the property;
 3. Information that occupants will intimidate or retaliate against cooperating individuals, neighbors, or law enforcement personnel;
 4. Presence of serious safety code violations; or
 5. Contamination by or presence of dangerous chemicals.
- B. Reason to believe that leaving occupants in possession will result in continued use of the property for illegal activities may be based upon:
1. The nature of the illegal activity (e.g., repetitive drug sales);
 2. The history of the property's and/or occupant's involvement in illegal activities;
 3. Evidence that all occupants have been involved in the illegal activity;

-
-
4. The inability of non-participating occupants to prevent continued illegal activity; or
 5. The failure of other sanctions to stop illegal activity.
- C. Reason to believe that leaving occupants in possession might undermine the U.S. Marshal's or his designee's ability to manage the property may be based upon all the factors set out above or information that the occupants intend to waste or destroy the property.
- D. The above list of circumstances is not intended to be exclusive. Attorneys for the Government may find other circumstances justifying immediate removal of the occupants based upon demonstrable and articulable information provided by credible sources.

IV. Nature of Adversary Pre-Seizure Hearing

Notwithstanding our legal position regarding pre-seizure adversary hearings, some courts have required such hearings prior to the seizure of occupied real property. It is the Department's position that any such adversary hearing should be carefully restricted.

In terms of its scope, such a hearing should be limited to a proffer by the Government of evidence supporting probable cause. Such evidence may be circumstantial or hearsay. Claimants may then be heard, and upon the Court's satisfaction that probable cause exists and that there is no mistake in the identification of the property to be seized, the warrants for arrest should issue.

In terms of timing, given the limited nature of such a hearing it may be scheduled within 24 hours of notice of intent to seize. The Supreme Court has repeatedly indicated that the simple opportunity for an individual to speak and be heard in court has inherent value for purposes of due process. (See e.g., Marshall v. Jericho, 446 U.S. 238, 242 (1980)). Following initiation of the forfeiture action, a full trial on the merits will follow, prior to a judgment of forfeiture.

This policy does not create or confer any rights, privileges or benefits on prospective or actual claimants, defendants or petitioners. Likewise, this policy is not intended to have the force of law. See, United States v. Caceres, 440 U.S. 471 (1979)."

AUTHORITY: Memorandum dated October 9, 1990, from Cary H. Copeland, Director, Executive Office for Asset Forfeiture, to all United States Attorneys, et al., captioned "Departmental Policy Regarding Seizure of Occupied Real Property."

U.S. Department of Justice
Use of Seized Real Property by Occupants

The Department's policy states that as a general rule, occupants of real property seized for forfeiture should be permitted to remain in the property pursuant to an occupancy agreement pending the forfeiture. (See memorandum styled "Departmental Policy Regarding Seizure of Occupied Real Property," October 9, 1990.)

Attached is a form occupancy agreement developed by the Department which includes various restrictions (e.g. maintenance and access to the property, potential for continued illegal activity, threat to health and safety, etc.) that address Departmental concerns. Other specific restrictions that protect the best interests of the government in a particular case should be included as appropriate.

OCCUPANCY AGREEMENT

(Caption of the case.)

ORDER AND OCCUPANCY AGREEMENT

This Occupancy Agreement ("Agreement") is made between _____ and the United States Marshals Service (USMS) for the District of _____.

On _____ (date), _____, the United States of America, by and through the USMS, seized under authority of a warrant *in rem* bearing civil number _____, under the provisions of and authority of _____ U.S.C. § _____, a parcel of real property ("property") located at _____, which includes all fixtures and appurtenances thereto, and which is described as follows:

(address/description)

[The United States, by and through the USMS, also seized the following personal property which may, at the option of the USMS, remain on the property for the duration of this Agreement:

(description/attached list)]

The undersigned ("Occupant"), _____, resided on the property when it was seized by the USMS, and desires to continue to reside there pending the disposition of the forfeiture proceeding with respect to the property.

Therefore, it is hereby agreed, upon execution of the Agreement, and in compliance with all the terms and conditions stated herein, that the Occupant may continued to occupy the property until such time as an order for interlocutory sale or a final disposition order is entered by the Court.

TERMS AND CONDITIONS

1. Occupant shall be permitted to occupy the residence located on the property subject to the terms and conditions of this Agreement as long as the Court permits. It is understood by the Occupant that this Agreement does not create any interest in the land or a tenancy of any kind, but rather this Agreement is a license by USMS of this property under custody of the Court subject to revocation by the Court at the discretion of the Court or for violations of the terms and conditions of this Agreement.
2. The USMS shall have the right to re-enter the property, with or without the consent of Occupant, at reasonable times to inspect and/or appraise the property, or for any other purpose consistent with this Agreement.
3. Occupant shall maintain the property at Occupant's expense in the same, or better, condition and repair as when seized. The term "maintain" shall include, but not be limited to keeping the property free of hazards and/or structural defects; keeping all heating, air conditioning, plumbing, electrical, gas, oil, or other power facilities in good working condition and repair; keeping the property clean and performing such necessary sanitation and waste removal; maintaining the property and grounds in good condition by providing snow removal, lawn mowing and all other ordinary and necessary routine maintenance.
4. Occupant shall maintain casualty and fire insurance equal to the full replacement cost of the property and all improvements thereon, and shall maintain liability insurance for injuries occurring on or resulting from use of the property, or activities or conditions thereon, in the minimum amount of (appraised value). Additionally, Occupant shall arrange for a rider to all above-mentioned policies naming the United States as a loss payee and additional insured for the life of the Agreement. Occupant shall deliver proof of such insurance to the USMS *no later than the seventh calendar day* following the execution of this Agreement.
5. Occupant shall timely pay any and all mortgage, home equity loan, rent, utilities, sewer, trash, maintenance, cable television, tax and/or other obligations, otherwise necessary and due on the property, for the life of this Agreement. Moreover, Occupant shall abide by all laws, codes, regulations, ordinances, covenants, rules, bylaws, binding agreements and/or stipulations or conditions pertaining to the care, maintenance, control and use of the property.
6. Occupant shall not convey, transfer, sell, lease, or encumber in any way, title to the property. Nor shall he/she permit any other person,

other than his/her immediate family, and temporary house guests, to occupy the property.

7. Occupant shall not remove, destroy, alienate, transfer, detract from, remodel or alter in any way, the property or any fixture, which is part of the property, ordinary wear excepted, without express written consent of the USMS.

8. Occupant shall not use the property for any illegal purposes or permit the use of the property for such purposes; use the property so that it poses a danger to the health or safety of the public or a danger to law enforcement; or use the property so that it adversely affects the ability of the U.S. Marshal or his designee to manage the property.

9. Occupant agrees to provide the USMS with third (30) days' advance notice, in writing, in the event he/she chooses to vacate the property.

10. The USMS may require Occupant to vacate the property when the interests of the United States so requires. Except for the circumstances described in paragraph 11, or in exigent circumstances, the USMS agrees to provide Occupant with thirty (30) days' advance notice to vacate the property. However, at the discretion of the Court or if Occupant fails to vacate the property within that period, the USMS, upon notice to Occupant and all parties to the forfeiture action, may immediately petition the Court for directions to remove Occupant, and all other persons occupying the property, pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims, Rule E(4)(d).

11. If Occupant violates any term or condition of this Agreement, except Paragraph 10, the USMS shall notify Occupant that he/she has ten (10) days to correct the violation(s). If Occupant fails to correct the violation(s) cited by the USMS within that period, the USMS, upon notice to Occupant and all parties to the forfeiture action, may immediately petition the Court for directions to remove Occupant, and all other persons occupying the property, pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims, Rule E(4)(d).

12. Occupant, on behalf of himself/herself, his/her heirs, statutory survivors, executors, administrators, representatives, successors and assignees ["potential claimants"], agrees that he/she does hereby release the United States, its agencies, agents, assigns and employees ["potential federal defendants"] in their official and individual capacities, from any and all pending or future injuries, claims, demands, damages, suits and causes of actions arising from Occupant's possession, maintenance, occupancy and/or use of the property.

13. Occupant, on behalf of himself/herself and other potential claimants, further agrees to indemnify the United States, and other potential federal defendants, as to any and all pending or future claims, demands, damages, suits and causes of actions regarding any damage or personal injuries incurred on, or as a result of, the property while Occupant resides there.

14. Occupant acknowledges that violation of the contents of this Agreement as it pertains to the removal or destruction of property under the care, custody, or control of the USMS constitutes a violation of federal criminal law, specifically, 18 U.S.C. §2233 entitled "Rescue of Seized Property". That section provides for a fine not exceeding \$2,000, or imprisonment not exceeding two (2) years, or both.

15. This Agreement shall be construed in accordance with federal law, and any conflict over the terms and conditions of this Agreement must be decided by the Court as part of the forfeiture action.

[If applicable add:

_____, Occupant agrees to protect, feed and provide all reasonable and necessary veterinary care for any domestic animals permitted by the USMS to remain upon the seized property.]

_____	_____
Date	Occupant
_____	_____
Date	U.S. Marshal for the District of _____

[If applicable:

Entered as an Order of this Court, dated this _____ day of _____, 199 ____ .

UNITED STATES DISTRICT JUDGE]





About the Author

George N. Aylesworth is the Commander of the Police Legal Bureau of the Metro-Dade Police Department, in Miami, Florida. He was assigned to the Uniform Bureau of the Metro-Dade Police Department for three years prior to his promotion to Police Sergeant in 1979. Mr. Aylesworth was originally appointed to the Police Legal Bureau as a Legal Advisor in 1978. He is a member of the Florida Police Chiefs Association, the Florida Bar, the Dade County Association of Chiefs of Police, the International Association of Chiefs of Police and is a member and currently president of the Florida Association of Police Attorneys. Mr. Aylesworth is a graduate of the Southern Police Institute Administrative Officer's Course. He received a J.D. from the University of Miami School of Law in 1975, and a M.S. in Management from St. Thomas University in 1987.

Police Executive Research Forum

The Police Executive Research Forum is the national professional association of chief executives of large city, county, and state police departments. The Forum's purpose is to improve the delivery of police services and the effectiveness of crime control through several means:

- the exercise of strong national leadership;
- public debate of police and criminal justice issues;
- research and policy development; and
- the provision of vital management and leadership services to police agencies.

Forum members are selected on the basis of their commitment to the Forum's purpose and principles. The principles which guide the Police Executive Research Forum are that:

- Research, experimentation, and exchange of ideas through public discussion and debate are paths for development of a professional body of knowledge about policing;
- Substantial and purposeful academic study is a prerequisite for acquiring, understanding, and adding to the body of knowledge of professional police management;
- Maintenance of the highest standards of ethics and integrity is imperative in the improvement of policing;
- The police must, within the limits of the law, be responsible and accountable to citizens as the ultimate source of police authority; and
- The principles embodied in the Constitution are the foundation of policing.

Police Executive Research Forum

Darrel W. Stephens, *Executive Director*

Clifford L. Karchmer, *Project Manager*

John Stedman, *Project Director*

William Lenck, *Legal Consultant*

BJA Asset Forfeiture Project

Police Executive Research Forum

2300 M Street, N.W., Suite 910

Washington, D.C. 20037