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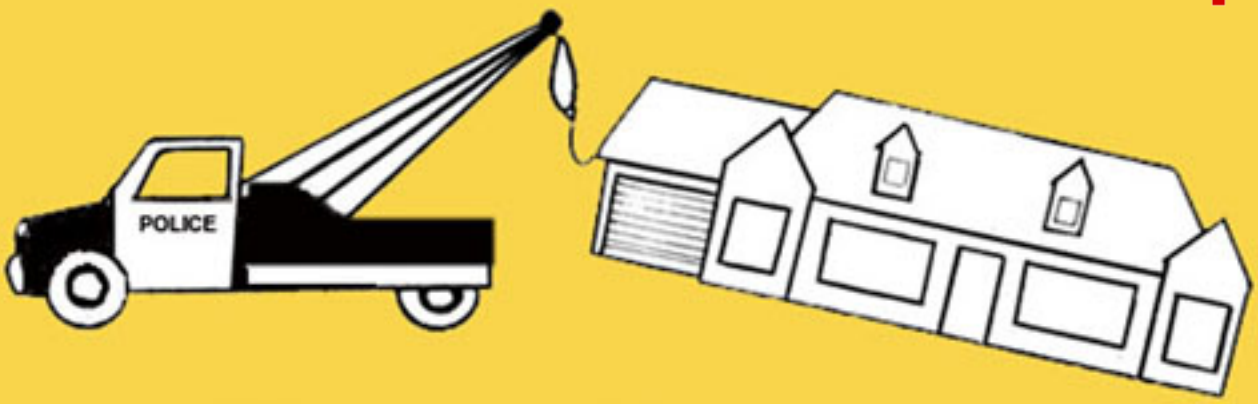

Your House is Under Arrest

by Brenda Grantland, Esq.

How the police can take your house,
car, business, and bank accounts
-- without a conviction --
and what you can do to protect yourself.

2nd Edition - 2016

Your House
Is Under Arrest

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By Brenda Grantland, Esq.

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Chapter 1: A brief history of asset forfeiture

Asset forfeiture is not a new concept. In fact, it dates back to Biblical times. Historians trace it to this Biblical passage: "If an ox gore a man or woman and they die, then the ox shall be stoned and his flesh not eaten; but the owner of the ox shall be quit."[1]

This principle continued in early English common law, with the theory of the "deodand," which required forfeiture of any instrument causing a person's death. One law review article describes the deodand concept as follows:

> The principle was based on the legal fiction that the instrument causing death was deemed "guilty property" capable of doing further harm. For example, if a domesticated animal killed a person, it would be forfeited, usually to the King, regardless of the guilt of its owner. The original purpose for creating this legal fiction was to satisfy the superstition that a dead person would not lie in tranquility unless the "evil property" was confiscated and viewed by the deceased's kin as the object of their retribution. Eventually, the King used forfeiture to enhance revenue, and this corrupt practice lead to the statutory abolishment of deodand in England in 1846.[2]

America inherits forfeiture from England

The American colonists were not fond of forfeiture. In fact, the British practice of confiscating boats for tax stamp violations was one of the reasons the colonies declared their independence from England. However, that fact was quickly forgotten as Customs duties, and forfeitures for Customs violations became the chief source of revenue for the new United States of America.

From the ancient concept of the "deodand" came the quaint theory (often called a "legal fiction") in civil forfeiture that it is not the property owner but the property itself that is on trial -- hence the bizarre case names such as *United States v. $8,850* or *State of California v. One 1992 Mercedes Benz.*

This legal fiction has caused a lot of damage to our constitutional rights. Because property does not have constitutional rights, the absurd reasoning goes, it is okay for forfeiture procedures to suspend the normal due process protections required in other civil and criminal cases.

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[1] Exodus 21:28. "the owner shall be quit" means the owner himself will not be punished.

[2] Note: "Criminal Forfeiture," 32 American U. L. Rev. 227, 232 (1982).

Unfortunately, when the United States adopted these concepts from the British, the courts gave this ridiculous legal fiction and its ancient underpinnings more weight than our own, hard-fought-for Bill of Rights. As forfeiture lawyer Terrance G. Reed pointed out in his report for the CATO Institute:[3]

> Property owners whose assets have been seized by government officials often try to press their claims for relief through traditional, well-respected, legal arguments, such as that they have not been accused of criminal conduct, that they are presumed by law to be innocent of wrongdoing, or that the government has taken their property without affording them any prior notice or hearing.
>
> Unfortunately, those facially formidable legal claims, claims that normally would find ample support in the Constitution, prove unavailing. Instead, an otherwise rational judge - one who has earned his status through the exercise of careful, logical, and sober judgment - informs the property owner that it is his property, not he, that is being prosecuted by the government; that, in the eyes of the government, his property is a criminal perpetrator and that it is his property's rights (or lack thereof), not those of its human owner, that determine the sufficiency of the procedures the government can use to confiscate it.
>
> More than one property owner has been baffled by this spectacle as he tries to invoke traditional legal arguments against such government action. Such an imaginative notion of transferred responsibility for misconduct seems more natural from a child with his hand in the cookie jar than from a learned judge....
>
> The power of these historical arguments is formidable, as the Supreme Court has acknowledged. They have been repeatedly used to cast aside fundamental notions of fairness that have otherwise guided the development of our system of justice. The notion, for example, that the innocence of a property owner is no defense to the forfeiture of his property to the government does violence to widely accepted common understandings of fair play and due process. As recently as 1974, however, the Supreme Court reaffirmed the triumph of forfeiture over protestations of owner innocence solely by reference to forfeiture's historical lineage."[4]

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[3] American Forfeiture Law: Property Owners Meet The Prosecutor, (CATO Institute, Sept. 29, 1992), p. 6.

[4] The case he is referring to is *Calero-Toledo v. Pearson Yacht Leasing Company*, 416 U.S. 663 (1974).

Forfeiture in the United States

The early years

Although the United States has had asset forfeiture laws ever since it was founded, until recently, they were primarily limited to violations of U.S. Customs laws.

Asset forfeiture played a hand in the American Revolution. The British seized John Hancock's schooner Liberty for failure to pay customs duties on its shipment of Madeira wine, sparking a riot. As you may recall, John Hancock joined the revolution and went down in history for having the largest signature on the Declaration of Independence.

When the American Revolution broke out, the colonists turned the evil weapon the U.S. had inherited from England on the British, and began seizing their ships too.

During the Civil War, forfeiture arose again in the form of "Confiscation Acts," authorizing the confiscation of the property of Confederate soldiers. An early U.S. Supreme Court case upheld the Confiscation Act, holding that confiscation of the property of the "enemy" was not punishment.[5]

The twentieth century

By and large, until 1970, forfeiture cases were limited to forfeitures under the Customs laws. If for example you travel abroad and bring back products that are illegal to bring into the United States - such as medicines that have not been approved by the Food and Drug Administration, quarantined plants or animal products, or counterfeit designer clothes - the Customs Service could confiscate the property.

Customs also confiscates otherwise legal goods which travelers fail to declare when crossing the border. Customs laws require travelers to report certain property they purchased abroad and are bringing into the country, and if you don't declare the property, it can be forfeited. They could also seize your boat, car, or plane used to smuggle the undeclared property. Or they can seize all your money if you don't write down the correct amount on your Cash and Monetary Instruments Report Form, Customs form 4790.[6]

Forfeiture was used during Prohibition to seize bootleg alcohol, illegal stills, and the vehicles used to transport the illegal contraband, using the same legal theories now used in drug cases.

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[5] *Miller v. United States*, 78 U.S. 268, 322 (1870).

[6] This form must be filled out whenever you cross a U.S. border with $10,000 or more in cash or monetary instruments, including checks and money orders.

Gambling forfeiture statutes, similarly authorizing forfeiture of buildings and cash, were lucrative sources of forfeiture revenue too.

RICO and The War on Drugs

In 1970, the forfeiture laws were expanded in the "RICO Act."[7] The Racketeer Influenced Corrupt Organizations Act was meant to target the assets of organized crime. Unfortunately, it has been used for virtually everything but organized crime.

RICO has been used to prosecute anti-abortion protestors for vandalism at abortion clinics. It has also been used to seize an entire retail video and bookstore business (three stores and their entire inventory) for selling 10 sexually explicit magazines and videotapes worth $105. The insider trading cases against Drexel Burnham Lambert, Inc. and Michael Milken were brought under RICO. More recently RICO was used against a street gang and a cybercrime gang that bought and sold counterfeit credit cards.

In addition to racketeering, the RICO Act included the first drug-related forfeiture statutes, including the original version of 21 U.S.C. Sec. 881, the civil forfeiture statute for proceeds of drug trafficking and property used to "facilitate" drug offenses. Because of the broad sweep of Section 881, and its procedural slant in favor of the government, it is by far the most frequently used forfeiture statute of the past decade.[8]

Although non-Customs forfeiture laws have been on the books since 1970, police and prosecutors rarely used them for the first ten years of their existence. Their nonuse prompted the U.S. General Accounting Office,[9] Congress's watchdog for waste, fraud and abuse in government agencies, to issue a report in 1981 entitled Asset Forfeiture - A Seldom Used Tool In Combatting Drug Trafficking. This report was instrumental in expanding the forfeiture laws and increasing confiscations.

Judging from subsequent General Accounting Office reports, it seemed for a while that the GAO would like to take back its 1981 recommendation, for virtually every GAO report on forfeiture from the 1980s through 2003 criticized the waste, fraud, and abuse in forfeiture programs. One GAO Report stated:

> The Comptroller General has designated the asset forfeiture programs as high-risk areas warranting special audit effort because of their vulnerability to fraud, waste, and mismanagement. Both programs deal with hundreds of millions of dollars of

< SNIP >

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[7] 18 U.S.C. Sec. 1962 & 1963.

[8] See Chapter 2.

[9] Now called the Government Accountability Office.

Chapter 2: Modern forfeitures come in every shape, size, and scent

Drug dog sniffs and highway forfeiture traps see a resurgence

Back in the 1990s, roadside forfeiture traps were often in the news. Now they have made a comeback.

Forfeiture traps are often located in sparsely populated rural counties that have an interstste highway running through them. A squad of officers is assigned to daily troll that" interstate highway and pull over cars with out of state tags, or fitting a "drug courier profile," and search them for drugs and money.

The police often use a traffic infraction as the ruse for the stop. That infraction could be objectively verifiable - a front license plate missing, a tail light out, speeding captured on radar - or driving infractions that can't be verified unless the cop car camera captures them - following too close, making an unsafe lane change, failing to use a signal, or driving in the passing lane in states where that is illegal. Once the car is pulled over the cop checks for ID and questions the driver and then frequently asks for permission to search the car. Often the police lack probable cause to search the car and are counting on getting the driver to consent to the search. A surprising number of educated people fall for that ruse and give permission, thinking they will not be targeted for forfeiture because they have not committed any crime.

What the travelers don't expect is that the police will take their money - with or without evidence of any crime. How do they justify the seizure? They will say the money is drug proceeds or intended for use to purchase drugs. Without finding any evidence of drug dealing other than the money, police have to rely on drug dog sniffs. If the trained drug dog sniffs the car or the money and "alerts," that is considered evidence that the money is proceeds of drug dealing.

Travelers from out of state are at a distinct disadvantage. The case will go to trial in the county courthouse for the county in which it was seized (if the police use state forfeiture law), or in the nearest federal courthouse in that district (if it is turned over to the feds under the Federal Adoption program). To defend the property the claimant will have to hire a lawyer located many miles away from home, and will have to travel back to that state multiple times while the case is pending. The sheer cost of litigating often overwhelms the property owner, forcing them to settle for a portion of their money back, even if the police have no evidence other than the dog sniff.

In October 2012, Adam and Jennifer Perry were stopped on Interstate 80 in Illinois, and police seized $107,520 in cash, their wedding rings, and their vehicle. The December 2015 article[10] about their case on the Opposing Views website says that they were still fighting to get back their assets.

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[10] Note, some of the details in that article are incorrect. The reactions to the 9/11 terrorist attack was not the origin of the forfeiture laws, and police have seized far more than $2.5 billion

In April 2013, two professional gamblers - William "Bart" Davis and John Newmerzhycky - were driving on Interstate 80 across Iowa when they were pulled over for not using a turn signal while passing. Claiming the pair fit a drug trafficking profile, police searched.the car and seized their $100,020 gambling bankroll. They eventually settled for return of $90,000, but had to pay their attorney one third of it, according to the Des Moine Register.

In April 2016, police in Muskogee County, Oklahoma pulled over Eh Wah - a Burmese refugee who had been an American citizen over 10 years - for having a broken tail light. They brought a drug sniffing dog, and found $53,000 in cash but no drugs or other indicia of drug usage or dealing. Eh Wah was managing a Burmese Christian music group called The Klo and Kweh Music Team, which was touring to raise money for a Christian school in Burma and an orphanage in Thailand. The money seized was generated from ticket sales and donations. Five weeks after the traffic stop, police charged Eh Wah with "acquiring proceeds from drug activity," a felony. Their only evidence was the money itself and the drug dog alert. After a non-profit public interest law firm took Eh Wah's case and it began getting publicity, authorities dropped the criminal charges and forfeiture case and gave back the money.

More reports of forfeiture traps gone awry

In 2014 an Oklahoma sheriff found $10,000 in cash during a search of a car stopped for a traffic violation. The sheriff called his captain for advice on what to do, and the captain came to the scene. When both passengers claimed ownership of the $10,000 the captain placed them under arrest for possession of drug proceeds. One suspect told him that he was on parole and asked if there was any way he could avoid being arrested. The captain allegedly told him that the only way he would go home was if he disclaimed ownership of the money. He disclaimed ownership. No charges were filed. The officers deposited the money in a special forfeiture account. In April, 2016, both officers were indicted for bribery and extortion. Hopefully the officers will be given the punishment they deserve, and this will be a lesson to other corrupt forfeiture squads.

Forfeiture squads spread out to airports, train stations, Fed Ex, UPS, and the Post Office

If you think you can avoid forfeiture traps by flying, taking the train or bus, or by sending your cash through the mail or Federal Express, you are wrong. Any place where people or packages may be carrying cash is a likely spot for a forfeiture trap. All they need is a drug dog alert to the passenger or package and the money instantly becomes drug money. Once that money is seized, the owner will have a hard time getting it back.

In some jurisdictions the mere presence of a "large sum of money" is inherently suspicious, giving rise to a presumption that it is drug proceeds.

- in fact the feds are raking in forfeiture profits of close to $5 billion per year now.

Some jurisdictions consider drug dog alerts highly probative, but testing shows they are frequently unreliable. However, unless a claimant or defendant challenges the drug dog's accuracy, the court can rely on the positive alert as proof of a connection to drugs.

The U.S. Supreme Court held in *Florida v. Harris*, 133 S. Ct. 1050 (2013):

> if a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search.

From the beginning of the War on Drugs police drugs squads positioned themselves in airport terminals, bus stations, and train depots, observing passengers to see if they fit a drug courier profile. The agents on the squad get assistance from airline, bus and train station employees, asking them to pass on tips that fit the "drug courier profile," sometimes in exchange for rewards.

Factors that trigger the drug courier profile are: buying a one-way ticket, or purchasing a ticket with cash, traveling alone or with friends or children; wearing bulky clothing or disheveled clothing, or a business suit, traveling and returning home in 24-48 hours, being nervous, looking over your shoulder, making phone calls immediately upon arrival (yeah, nobody does that but drug couriers!), and traveling to or from a "major drug center" (which means any major city). Often racial profiling is involved, but when questioned on the stand, the officer will say race had nothing to do with it. If they admit racial profiling it would be unconstitutional and the illegally seized evidence would be thrown out.

Drug courier profiles were approved by the Supreme Court in *United States v. Sokolow*, 490 U.S. 1 (1989). Rewarding informants from the proceeds of forfeiture cases is authorized by statute. 18 U.S. Code Sec. 524(c)(1)(B).

Both the drug courier profile and the informant rewards were supposed to be used to ferret out drugs, not money. But nothing stops them from looking for money instead, and cops don't have any use for the drugs.

A January 2016 article on Inquisitr.com reported that the DOJ Office of the Inspector General condemned the DEA for hiring

> a Transportation Security Administration (TSA) security screener to purposefully search luggage for cash that the DEA could confiscate. Furthermore, the DEA had plans to pay the agent out of the cash that he or she helped the agency to seize, which the Office of Inspector General says "could have violated individuals' protection against unreasonable searches and seizures if it led to a subsequent DEA enforcement action."

The Inspector General determined that the agreement between the DEA and TSA "violated DEA policy on many levels."

> [A] 2015 OIG report found that just from 2009 to 2013, the DEA seized a staggering total of $163 million in 4,138 cash seizures -- and many of those were later contested and overturned.
>
> ... the OIG also called out the DEA for paying an Amtrak informant nearly $1 million over two decades to provide them with passenger information that was already available to the agency.

Id. It is great that the OIG said those things, but I doubt this report will have any effect. Informants are promised contingency fees all the time. They make money for the seizing agency so the cops are glad to pay them a commission for their information.

UPS and Fed Ex join forces and sometimes profit off forfeiture

"Presumed Guilty," the seminal forfeiture expose by Andrew Schneider and Mary Pat Flaherty published in August 1991 in the *Pittsburgh Press*, showed UPS was involved in setting up forfeiture seizures as early at 1990. Part IV of the series, "The Informants" Aug. 14, 1991, says:

> The absence of regulations spawns 'privateers and junior G-men,' says Steven Sherick, a defense attorney in Tucson, Ariz., who recently recovered $9,000 for John P. Gray of Rutland, Vt., after a UPS employee found it in a package and called police.
>
> Gray, says Sherick, is `an eccentric older guy who doesn't use anything but cash.' In March 1990, Gray mailed a friend hand-money for a piece of Arizona retirement property Gray had scouted during an earlier trip West, say court records. The court ordered the money returned because the state couldn't prove the cash was gained illegally.

It could be that UPS employees are collecting informant rewards from the government, as airline ticket counter employees have been promised in the past for reporting travellers who purchase tickets with cash. . Informant rewards are one of the things the statute allows the government to spend forfeiture revenue on.

While you're at it, expect not to have privacy in anything you send by UPS's competitors, either -- including the U.S. Postal Service.

Back in the 1990s I asked a Federal Express desk clerk what procedures they have to go through before opening a package they consider "suspicious." She said they would call in the DEA dogs, hide the package amid a lot of other packages, and let them sniff it out. If the dogs pick out the package, she said, then they would probably get a warrant to open it. She thought it was company policy to get a warrant before opening the package, but she wasn't certain.

Since the early years of the 21st century, forfeiture squads have escalated their package searching abilities by stationing drug sniffing dogs at regional hubs where packages are sorted and having them walk around and sniff the packages.

In 2006 I had a case in San Francisco where a package containing $50,000 in cash was seized at a Federal Express sorting hub. A DEA task force and its drug sniffing dog “Maximus” were working the Federal Express facility, examining packages for suspected drugs. When Maximus allegedly alerted to the package by barking and scratching, the agents obtained a state search warrant and opened the package. No drugs were found - just the cash. My client had no prior record. When police contacted my client explained why he sent the money. When the police contacted the person to whom the package was addressed, she denied knowing anything about it. As flimsy as it was, the judge forfeited the money based on the dog alert and the inconsistent stories.

Are drug dog sniffs reliable evidence of drug dealing?

Drug sniffing dogs are very valuable to forfeiture squads. Not only are they deployed in UPS, FedEx and USPS package sorting hubs to ferret out packages of money (profitable for law enforcement!) and drugs (not profitable for law enforcement), but they are also used by law enforcement teams stationed at airports, bus terminals, railway stations and other transportation hubs to sniff passengers targeted by police for fitting a "profile" of a drug courier.

And drug dogs are essential to the "forfeiture trap" task forces that stop motorists on highways for minor or even bogus traffic stops, then ask permission to search and take all of the cash carried by the motorists. These forfeiture trap cops usually patrol freeways, targeting minorities (using the "drug courier profile" excuse) driving rental cars or cars with out of state tags. The traffic infraction is often something impossible to disprove - making an unsafe lane change or weaving. Once stopped, without any probable cause to believe that a crime is afoot, they ask the driver for permission to search the car, and if they give permission the cops search for drugs and money. If they find money, the drug dog is called in - if the dog isn't already on its way.[11]

In the early 1990s, a study conducted by the DEA drug lab, determined that the U.S. currency supply was highly contaminated with cocaine residue. That same study tested the belts in the sorting machines used by the Federal Reserve banks and found they were contaminated with drug residue too. Because cash comes into contact with other cash as well as the belts in the sorting machines, the likelihood is that drug dogs will alert to a package containing money.

If there is cash in a package and they do the experiment the FedEx employee discussed, the dogs will probably alert, and the government will find and seize the cash. The unreliability of dog sniffs to support seizure has been harshly criticized in various courts in the past, based on scientific tests showing the contamination of the money supply.[12]

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[11] In Dennys Rodriguez v. United States, 575 U.S. ___ (2015), the Supreme Court held that it is a violation of the Fourth Amendment for the police to hold a motorist stopped for a traffic infraction longer than is necessary to write the traffic ticket in order to wait for a drug dog.

[12] *Jones v. U.S. Drug Enforcement Administration*, 819 F.Supp. 698, 719-21 (M.D. Tenn. 1993). This is the case of Willie Jones, the shrubberyman who was stopped in the Nashville

In a 1994 case, *United States v. $30,060.00,* the Ninth Circuit cited a defense expert's affidavit showing that more than 75%[13] of the currency supply in Los Angeles was contaminated with drug residue. The majority found that the drug dog's positive alert, coupled with suspicious packaging, and the claimant's false accounts of the money's source and sketchy employment record was insufficient evidence of *probable cause* to forfeit the money.[14] That was before CAFRA, when the government's burden of proof was still probable cause rather than a preponderance of the evidence.

By the early 2000s, after CAFRA raised the government's burden of proof from probable cause to preponderance of the evidence, drug dog alerts had regained favor!

> [W]e find the dog sniff caselaw cited by Calhoun either distinguishable or simply unpersuasive with regard to whether dog alerts to currency are entitled to probative weight. The conclusions reached in these cases rest on uncritical adoption of the currency contamination theory. In at least some of these cases, even the government seemed to assume the truth of the currency contamination theory....
>
> More recently, however, courts have taken the approach suggested by Dr. Furton and Dr. Rose and moved away from unquestioning acceptance of the currency contamination theory....[15]

Observing that "the federal courts have become more open-minded toward dog alert evidence" the Seventh Circuit ruled that the positive dog alert in that case "should be entitled to probative weight."

So how did the courts become "more open-minded" to drug dog alerts?

Government drug dog experts began testifying that the new generation of drug dogs were so well trained that they could distinguish between currency that was recently contaminated versus the generally contaminated currency supply.

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airport, and his $9,600 seized, simply because he fit a drug-courier profile, and the dogs alerted to the cash. His story has been featured on CBS *60 Minutes*, and he testified at the first Government Operations Committee hearing before Congress on September 30, 1992.

[13] This case cited other cases saying 90% to 97% of currency taken from various cities throughout the U.S. was sufficiently contaminated to cause a drug dog alert. *United States v. $30,060.00,* 39 F.3d 1039, 1043 (9th Cir. 1994).

[14] *United States v. $30,060.00*, 39 F.3d 1039, 1045, (9th Cir. 1994).

[15] *United States v. $30,670,* 403 F.3d 448, 459-460 (7th Cir. 2005)

In *United States v. $ 22,474*,[16] the Ninth Circuit reversed course and said the drug dog alert was entitled to greater weight than it had under the earlier currency contamination theory previously followed by the Ninth Circuit.

> [T]he government presented evidence that the dog would not alert to cocaine residue found on currency in general circulation. Rather, the dog was trained to, and would only, alert to the odor of . . . methyl benzoate[, and] . . . unless the currency [the defendant] was carrying had recently been in the proximity of cocaine, the detection dog would not have alerted to it").[17]

This theory seems easy enough to debunk. It assumes that anyone traveling with a large sum of money has to be trafficking in cocaine, specifically, and that they are stupid enough to put their hands in the cocaine and then handle the money just before it is transported. What if they are instead trafficking in methamphetamines, prescription drugs like Oxycontin, steroids, pot, counterfeit designer sunglasses or athletic shoes, counterfeit software, untaxed cigarettes, or bootlegged DVDs? Do the police have to carry around a kennel full of specialized contraband sniffing dogs for each one of those offenses? Now that the Rodriguez decision stops police from holding motorists on the side of the road to call in a drug dog, they will have to carry that kennel of dogs around with them! Imagine the parade of dogs around a car on the side of the road!

Oh wait, they'll say that the dog was a super expert dog trained to alert to recent proximity of the money to any of the above types of contraband. If so, how do you cross-examine a dog to get them to say which one it was?

Even if the money was in fact owned by drug dealers, what is the likelihood that they will contaminate their own money by touching drugs and then touching their money without washing their hands?

Here is the next theory that defense counsel should raise. Animal behavior expert Dr. Lit published a report in Animal Cognition, summarized in an article published in the Economist, involving a study of "dog handlers and their mutts" in which 18 professional dog handlers were asked to conduct two sets of four brief searches. Of those 18 dogs, 13 were trained in drug detection, 3 in explosives and 2 in both. The test was held in a church, and the search areas did not contain any drugs or explosives. The handlers were told that some of the search areas might contain up to 3 target scents, and that in 2 cases they would be marked by pieces of red paper. The results: of the 144 searches only 21 came up clean (no dog alert). All of the others had one or more alerts. The total number of alerts was 225 -- *all false*!

Predictably, the experiment showed the red paper was likely to trigger an alert, since the handlers were led to believe there might be an association between the red paper and the presence of drugs. The test givers had also hidden sausages in some of the search areas. When the red paper and sausages were in the same room, false positives were highest. When red paper

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[16] 246 F.3d 1212, 1216 (9th Cir. 2001).

[17] *Id*.

and no sausages were in the room, the false positives were slightly fewer but not statistically significant. When only sausages were present the false positives occurred only about half the time. What this shows is that the dogs were taking subtle cues from their handlers, who are steering the dogs to alert to things the handlers consider likely to contain contraband.

This is not the end of the battle of experts over drug sniffing dogs.

Drug dogs are expedient ways to rake in money from highway forfeiture traps, which are very lucrative sources of revenue for law enforcement. The forfeiture squads can't do without them. So we can expect that, for every effort made to debunk the accuracy of drug dog alerts, government experts will soon rebunk them.

Some more exotic forfeiture cases

Drug profile highway traffic stops present the most common visual image the public sees when they think of asset forfeiture -- primarily because the footage is dramatic and visually interesting. Although they are probably the most frequent in occurrence, they generate only a small fraction of the forfeiture revenue, because the individual dollar amounts are relatively small.

There is a whole world of things that can be forfeited and unlimited scenarios in which forfeiture can be triggered.

Microfossils

In the late 1990s I received a call from a forfeiture claimant whose seized property was a collection of micro-fossils - fossils of tiny creatures so small they could only be seen with a microscope. He had taken some soil - allegedly from federal land - and meticulously searched through it with a microscope until he found them. It took an incredible amount of time and patience.

The value of that collection would be very hard to establish, so it would be difficult to determine at what point continuing to fight the case was no longer cost-effective.

To make matters more complicated, the micro-fossil collector didn't believe his activities were illegal under existing law, and perhaps he was right. In 2009 Congress passed the Paleontological Resources Preservation Act to provide criminal and civil penalties for collecting of fossils on federal land. According to an article in Albany Government Law Review,

> Before 2009, federal agencies relied on a hundred-year-old law [the Antiquities Act of 1906] for general authority to protect paleontological finds on federal land, and a few scattered statutes, for authority in particular situations.

Cronin, "A Bone To Pick: The Paleontological Resources Preservation Act and Its Effect on Commercial Paleontology," *Albany Government Law Review*, Vol. 7, No. 1, p. 273.[18]

Probably the most exotic asset ever forfeited was a Tyrannosaurus Rex skeleton named "Sue." Although the news reports today sometimes spin the Sue story as an ownership dispute, at the time Sue was seized, it had all of the earmarks of a forfeiture case, including an armed raid of the Black Hills Institute (which had paid for and excavated the T. Rex skeleton) by 35 armed agents of the FBI, police and National Guard.

It started out as an Antiquities Act forfeiture prosecution, but the government's theory morphed. Despite the fact that the Institute had paid money to the Native American whose land it was on, the federal government successfully claimed ownership because "Williams' private ranch was part of Indian Trust land." The District Court held that Sue's skeleton was "an interest in land" and could not be removed from the Indian Trust land without the consent of the Secretary of the Interior.[19]

Forfeiture for... *feathers*?

Among the more absurd things that have triggered asset forfeiture are collecting migratory bird feathers. Yes, some bird feathers are illegal to sell, even if the bird flies over and drops them in your back yard.

In 1993, Michigan artist Judy Enright was holding an exhibit of her paintings when the place was raided by armed agents of the U.S. Fish and Wildlife Service, who seized one of her mixed-media paintings. Her crime? She had decorated it with bird feathers she picked up in her back yard. Unbeknownst to most people, the sale of any object which contains migratory bird feathers violates the 1918 Migratory Bird Treaty Act. "A Fowl Law: Feathers Fly Over Artist's Work," August 5, 1993, the *Ann Arbor News*, Ann Arbor Michigan.

The biggest dollar value feather forfeiture case I've seen involved forfeiture of the historic headdress worn by Apache leader Geronimo to the Last Pow-Wow. It was forfeited to the federal government in 2000 and its owner, Georgia lawyer Leighton Deming, pled guilty to a misdemeanor under the U.S. Migratory Bird Protection Act, which prohibits trafficking in golden eagle feathers. The headdress had been in Deming's family for generations. It was given to Deming's grandfather by Geronimo, who was a friend. Deming wanted to sell it, and engaged an art broker, Thomas Marciano, to market the sale privately. Marciano posted a message on an internet chat room offering to sell the headdress for $1 million, only to "serious international buyers." His chat message included a warning that it was illegal to sell eagle feathers in the US. An undercover FBI agent learned of the offer and set up a sting, posing as a potential buyer.

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[18] See http://www.albanygovernmentlawreview.org/Articles/Vol07_1/7.1.268-Cronin.pdf.

[19] *Black Hills Inst. of Geological Res. v. U.S. Dep't of Justice*, 812 F.Supp. 1015, 1020 (D.S.C. 1993).

Deming was sentenced to six months' probation and a $15,000 fine, and the headdress was forfeited. The judge allowed Deming to choose the museum that the headdress would be donated to, and he chose the Fort Sill Mueum in Oklahoma, Geronimo's final resting place. Deming had tried unsuccessfully to donate the headdress to that museum before offering to sell it, but that museum - and all the other museums he approached - turned him down because of federal regulation over feathers and Native American artifacts. Apparently having the government forfeit the headdress first immunized it from being forfeitable and the museum could own it without fear.

Forfeiture of your car - for playing your stereo too loud?

Even playing a car stereo too loud is not too trivial an offense to trigger forfeiture. In 1993, I reported in the first edition of *Your House Is Under Arrest*, that New York police had begun confiscating cars for playing the radio too loud. "The Boom Box Cops: They Want New Yorkers To Get Some Rest At Night," by Peter Marks, New York Times, July 1993.

The ordinance was probably aimed mostly at teenagers playing rap music too loud. One would think that forfeitures for loud music were rare, but when I googled it, the loud music forfeiture ordinances seem to be popping up everywhere.

Anchorage Alaska has a municipal ordinance that makes it illegal, punishable by fines, to play music from a vehicle that is clearly audible 25 feet from the vehicle. A third offense within one year of the first violation is punishable by forfeiture of the sound system.

Albuquerque, New Mexico has a similar ordinance outlawing the playing of music in any vehicle that is plainly audible from 25 feet. The second offense requires temporary seizure of the vehicle and the application of a Denver Boot to the vehicle for 30 days. While it is booted it may be stored at a legal location selected by the owner, but if it is stored at the police impound lot, the owner must pay storage fees and must agree to hold the City harmless for any damage to the vehicle while stored.

Peoria, Illinois has a similar ordinance. It only authorizes a temporary impoundment of the car, but somehow they made it highly profitable for the police department. As Officer Donna Nicholson, Asset Forfeiture Investigator, explains in her description of the Peoria Police Department Vehicle Impoundment Program:

> The drug impoundment program ran so smoothly that more and more (and more and more and more) ordinances were added [Including Prostitution and Weapons in '04; Suspended/Revoked Driver's License and DUI in Oct. '05; a $25 Administrative Fee (for all tows) in Nov. '05; Fleeing/Eluding and Hit & Run in May '06; and finally Noise (loud music) on June 1, 2006]. Over time, our city has made some needed changes to the ordinances and procedures. As you can see from the charted income in this packet, (2004 impound revenue was $66,000 which increased in 2005 to $310,250 and this year is on track for $863,675), the program is not slowing down. ...

In 27 months the department raked in over a million dollars in revenue from the Peoria forfeiture ordinances.

The officer who wrote that article appeared amused by the amount of harm this ordinance caused ordinary citizens, including innocent lienholders. "We even have some lien holders come from all over the country to pay the fees and get the vehicles back to either protect their interest from the asset forfeiture laws of Illinois or because they were trying to repossess the vehicle anyway."

Here is the officer's justification for this ordinance, under the subheading "Revenue vs. Respect"

> Try and picture yourself in your car at a stop light. Now think of an extremely loud bass thumping and rumbling music blaring out of the car that just pulled up next to you as you are, inevitably, stuck at the longest red light in the city (no right turn). Now put the most offensive cuss words in with the thumping bass. Now think of the same scenario with your small children in your car. Now put small children in "that" car. A person's right to listen to music as loud as they want, certainly does not outweigh another person's right to peace and quiet. We certainly should be protected from the subjection of disgusting language. Some people have just lost their manners and sometimes I wonder if some people were ever even taught manners. This "It's all about me" attitude is like a plague and it is just plain rude. Our city has been suffering for years from loud music, blaring out of vehicles. This is a huge quality of life issue. Loud music is: 1. a form of pollution; 2. permanently damaging to hearing; 3. disrespectful; 4. distracting; 5. sometimes offensive; 6. dangerous when emergency vehicles are running code; and 7. most of all, IT IS ILLEGAL! (And, yes, it is still ILLEGAL even if you turn it down after you see Mr. Nice Policeman - another one of my favorites.) It is not that our city has sat back and let it happen. We, the police, have tried to battle the problem the best that we could with what we had. We had repetitive offenders taking advantage of an already broke judicial system with little, if any, consequence. Unfortunately, this just wasn't good enough and it just wasn't working.
>
> From 2004 to 2006, our police officers wrote 1411 loud music tickets. The fine was a stiff $225 - hoping to deter future offenses. Let's pretend it is a perfect world and 1411 X $225 = $317,475 ... so, the city makes big revenue off of the violators. Now back to reality, not only were the tickets being dropped and continued, but, judges were ruling inconsistently or not at all. People were given little or no penalty....
>
> The police department and the legal department requested that our city council make an impoundment ordinance for vehicles with loud music.... The ordinance for noise was passed on June 1, 2006. Our intentions were not to create more revenue, for the city, with this ordinance, but to try and stop the loud music. This ordinance wasn't going after a "criminal element" like the other ordinances. The new ordinance was passed

with this language: 1st offense - $25 plus tow/storage; 2nd offense - $275 plus tow/storage; and 3rd and subsequent offenses $525 plus tow/storage.

The Peoria ordinance is just an impoundment ordinance and not a forfeiture ordinance *per se*, but they function the same way. They impound the vehicle and when it is necessary to get to work most people will pay a ransom to get it back.

This article also shows the inflammatory propaganda used on communities to get them to pass such ordinances. These trivial offenses get pumped up out of proportion and routinely cause constitutionally disproportionate forfeitures - but no one can afford to fight it on constitutional grounds because the cost of litigation exceeds the ransom the government demands to get the property released.

The possiblity of generating forfeiture revenue for local police and the ease of getting local ordinances passed on nuisance issues (anything more serious would be the responsibility of the state legislature) makes loud music a very attractive forfeiture-triggering offense for cops. It also presents an easy cover for racial profiling, and creates walking probable cause to pull over cars. Instead of the old standbys for pretext traffic stops - you were 'weaving across the line' or 'made an unsafe lane change' (which could be disproved by dashboard cameras) they had the officer's subjective judgment that they were playing the radio too loud. The officer's judgment on this issue is hard to quantify. Does the dashboard camera record decibels?

The officer's description of the justification for the ordinance drips with racial prejudice: "offensive cuss words" and "thumping bass" (in other words, rap music), and the stereotypical slur "sometimes I wonder if some people were ever even taught manners."

Officer Nicholson's article sounds like it could be the sales pitch the cops made to the community and the city council to get that ordinance passed. For prejudiced white affluent folks who are afraid of black teenagers driving into their communities blaring their car stereos (and committing who knows what other crimes), this probably seemed like the perfect way to single them out for a police stop. And if the person whose car is impounded later protested that their music wasn't that loud, the Peoria police have a canned response ready - they turned it down when they saw "Mr. Nice Policeman."

Local forfeiture ordinances are breeding grounds for corruption and abuse

Forfeiture ordinances are local statutes passed by cities or counties, and only apply within their territorial limits. They are easy to pass. The local police agencies stir up public sentiment about drugs or prostitution (or loud stereos) and propose a forfeiture ordinance as the easy solution. The police agency would get to keep the proceeds, so the Chapter 4: Will They Kill You For Your Land?

Trail's End: The Donald Scott case

Consider what happened to reclusive California millionaire Donald Scott. Scott owned the Trail's End Ranch, a spectacular 200 acre property in Malibu, California. Among the

attractions on the property are a waterfall and ancient Chumash Indian relics. The ranch was surrounded by National Parkland. Several times over the years, Scott had been approached by Park Service personnel interested in buying the land to add to the surrounding park. Scott loved his land. He told them it was not for sale.

Early in the morning of October 2, 1992, a task force made up of state and federal agents[20] raided Trails End. Scott and his wife, Frances Plante, were in bed asleep. When police broke down the door, Frances ran downstairs and saw her house full of men with drawn guns. She yelled "don't shoot me. Don't kill me." Don Scott came to the top of the stairs with his gun held above his head. Three times the officers told him to lower the gun, and as he did, they shot him to death.

The task force's warrant was for evidence of marijuana cultivation on the property. But there was no marijuana found on the property and no evidence that it had ever been there.

A subsequent investigation by Ventura County's[21] District Attorney, Michael Bradbury, concluded that the raid was illegal, and that it was motivated by forfeiture.[22] The officers made false statements in the affidavit used to obtain the warrant, he concluded, and they had intentionally omitted material facts which would have shown the judge that they didn't have probable cause. Without probable cause, Bradbury concluded, the officers had no legal right to be on the property. "This search warrant became Donald Scott's death warrant."[23]

The DEA agent lied about seeing marijuana from the air

Bradbury's report uncovered unbelievably outrageous police misconduct - of just about every type imaginable:

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[20] The task force was made up of 13 Los Angeles Sheriff's deputies (including deputies from the Sheriff's forfeiture unit), 2 federal Drug Enforcement Administration agents, 2 state narcotics officers, 2 agents of the U.S. Forest Service, 4 officers from the L.A. Police Department canine unit, three National Park Service agents, 3 members of the National Guard, and 2 employees of the Jet Propulsion lab. The rocket scientists were there to conduct an experiment. If any marijuana was found growing on the property, they would take air samples around it.

[21] Trail's End ranch was located in Ventura County. The Los Angeles Sheriff's deputies who led the raid crossed their territorial boundaries to raid Donald Scott's property. No Ventura County agents were on the task force that conducted the raid. In fact, the task force hadn't even notified the Ventura County authorities to tell them they were coming.

[22] "Report on the Death of Donald Scott," by Michael D. Bradbury, District Attorney, Ventura County, California (March 30, 1993).

[23] *Id*. p. 62.

The affidavit which was used to obtain the search warrant relied on three things: (1) DEA Agent Charles Stowell's statement that he had flown over the property and spotted 50 marijuana plants growing there; (2) Information from a so-called anonymous informant that, a year earlier Frances Plante had been seen flashing a large bundle of cash and paying for things with $100 bills; and (3) A statement that Frances Plante's car was registered to Donald Scott, Trail's End Ranch. The affidavit was sworn to by L.A. Sheriff's Deputy Gary Spencer, the officer who later fired the shots that killed Scott.

Upon further investigation, each of those three allegations was as least partially false. The information about Frances Plante spending $100 bills was not from an "anonymous" informant. The car was actually registered to a Nevada corporation with a Malibu post office box address. And there had never been any marijuana growing on the Trail's End Ranch, the D.A.'s report concluded.

The Ventura D.A. concluded that Stowell had lied about seeing the marijuana. The initial information about the alleged marijuana cultivation came from an informant who had said there were 3,000 to 4,000 marijuana plants growing on the property. Stowell had flown over the property and claimed to have seen 50 plants, but told Spencer not to quote him in the affidavit unless it was separately corroborated.

In order to corroborate the information, the task force had the U.S. Border Patrol's "C-RAT"[24] team - "outfitted with climbing gear, cameras, weapons, and other equipment" - trespass on the Scott estate, without a warrant. They swooped down on the Scott estate in the middle of the night. They pushed through the heavy underbrush, looking for the marijuana patch which was not there. They came back later that night and tried again. This time they got close enough to the house to see the chimney. The Scotts' four Rottweilers were barking and charging.[25] Both times they found nothing to corroborate Stowell's tip.

Gary Spencer - the task force leader who fired the shot that killed Scott - finally got the original informant to say that there were about 40 pounds of marijuana growing on the property. Stowell agreed that was enough corroboration, and allowed Spencer to use his name as the source of the information that there was marijuana growing on the property.

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[24] I was told by a military veteran that "C-RAT" is a military term for soldiers' crawling on their bellies on the ground to avoid detection. It is used in wars to invade behind enemy lines. The fact that the Border Patrol had a team named for this type of invasion is a sure sign that they have done this before - probably many times. In fact, the matter-of-fact way in which even the Ventura County D.A. dealt with the warrantless invasion of Donald Scott's land, by paramilitary troops, is the scariest part of the whole report.

[25] Frances Plante later reported that, during the few weeks before the raid, there were several nights when their dogs barked all night long, and that one of the dogs had his head split open during that period of time.

In putting together the affidavit needed to obtain the warrant, they omitted any mention of the inconsistent informant tip. They also failed to mention the two illegal Border Patrol incursions onto the property that had found no marijuana growing there.

During the investigation after Scott's death, Stowell told the Ventura D.A. that he had been flying at an altitude of 1000 feet, and had not been using binoculars when he spotted the plants. He said he could tell they were marijuana because of their distinctive color. But when the Ventura D.A. showed Stowell an aerial photograph of the Scott estate, taken four days before Stowell's flight, Stowell could not identify any marijuana.

The Ventura County D.A. concluded Stowell had lied about seeing marijuana in the fly-over. He also concluded that there never had been marijuana growing on the Trail's End Ranch.

The raid was motivated by forfeiture

District Attorney Bradbury's report also concluded that the raid was motivated by forfeiture. Attached to the Bradbury report is a separate memorandum from Deputy District Attorney Kevin G. De Noce, entitled "Motive Involved In The Trail's End Ranch Search Warrant." It states:

> Prior to the execution of the search warrant, law enforcement officers involved in the search warrant discussed the possibility of seizing and forfeiting the Trail's End Ranch. National Park Service Ranger Tim Simonds states that, prior to serving the search warrant, a Los Angeles County deputy sheriff stated that the ranch would be seized if they found 14 or more plants growing on the grounds....
>
> On September 22, 1992, at a briefing conducted by the Los Angeles County Sheriff's Department regarding the investigation of the Trail's End Ranch, officers present received documents which included a property appraisal statement of the Trail's End Ranch and a parcel map of the area.... DEA Special Agent Charles A. Stowell, who made the aerial flyover, made a notation on the parcel map indicating that the property encompassed 200 acres and that 80 acres 'in the area' had recently sold for $800,000....
>
> We can find no reason why law enforcement officers who were investigating suspected narcotics violations would have any interest in the value of the Trail's End Ranch or the value of the property sold in the same area other than if they had a motive to forfeit that property.[26]

After killing Donald Scott, the government did not seize the Trail's End Ranch. But then they did not find any evidence - not even enough to corroborate the tips they had used to get the warrant.

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[26] Attachment to Bradbury report.

Despite the publicity and the public outrage, none of the cops were prosecuted - not even the cops who killed Donald Scott! L.A. Deputy Sheriff Gary Spencer - who headed the investigation, swore to the falsehoods in the affidavit, and fired the shots that killed Don Scott - got off scott-free as did DEA agent Charles Stowell, who lied about seeing marijuana in the flyover of the Trails End Ranch.

After the Ventura D.A. issued his report, L.A. County Sheriff Sherman Block conducted his own investigation and wrote a 1,000 page report in which he concluded that his sheriffs' actions were all done in the line of duty. He was furious at the Ventura D.A. for criticizing his department. Sheriff Block even went so far as to call for an investigation of Bradbury, and "sanctions" against the Ventura D.A. for wrongfully criticizing his department.

A 24-page synopsis of Sheriff Block's 1,000 page whitewash report states that "Deputy Gary Spencer, and law enforcement in general, has been unfairly maligned."[27] It also complains that: "rarely does a police shooting, which has been ruled justifiable under the law, receive the tremendous amount of media attention that this case has received."[28]

The problem with that statement is that the shooting has never been "ruled justifiable under the law." The case against the police for framing Trails End and killing Donald Scott did not even go to a grand jury, and no judge has ever ruled on the propriety of the sheriff's deputies' conduct.

In the midst of the heated debate over police responsibility for their wrongdoing, the Scott estate burned to the ground in the Ventura county wildfires of the last days of October, 1993, less than a month after the one-year anniversary of Scott's murder.

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[27] L.A. Sheriff's Synopsis of the Internal Affairs Investigation Concerning the Death of Donald Scott, issued 9/10/93, p. 1

[28] *Id*.

Chapter 5: Homeowners: Yes, You Are Your Brother's, Spouse's, Children's and Guests' Keeper

Real estate can be seized for facilitating crime

In 1984 Congress enacted the Comprehensive Crime Control Act, adding real estate to the list of property which could be forfeited if it was "used or intended for use to facilitate" the commission of a felony drug offense.[29] Before the 1984 amendments, real estate could only be forfeited if it was purchased with proceeds of drug trafficking.

Immediately Sec. 881(a)(7) became the most popular federal statute for confiscating real property. This statute's popularity is easy to understand. Congress stacked the deck in favor of the government - and made it harder for the property owner to win. Additionally, initially the government could seize the real estate and board it up the day the complaint was filed, kicking the occupants out in the cold until the final verdict unless the property owner negotiated an "occupancy agreement" which sometimes required the property owner to pay rent to the government pending trial. This often forced property owners to their knees and forced them to agree to early settlements, no matter how unfavorable. The Supreme Court ended this practice in the 1993 case *U.S. v. James Daniel Good Real Property*, 510 U.S. 43 (1993), which stopped police from ousting property owners from their possession of the property until after the government obtained a forfeiture judgment.

Because 21 U.S.C. Sec. 881 is a civil forfeiture statute, it is not necessary for you to be convicted of a crime for your real estate to be forfeited. In fact, it is not even necessary that anyone be arrested. It also does not matter that the person who allegedly committed a crime with your property didn't own it. Because civil forfeiture is an *in rem* action, you are not the one on trial - the lawsuit is against your property itself.

Under Sec. 881, forfeiture of real estate can be triggered by any violation of federal drug laws punishable by more than a year's imprisonment.[30] That rules out simple possession of small

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[29] 21 U.S.C. Sec. 881(a)(7) makes the following forfeitable:

> All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment.

[30] Offenses which trigger forfeiture under Sec. 881(a)(7) include: cultivation (this includes growing one marijuana plant), distribution, and possession with intent to distribute. Intent to distribute may be proven by circumstantial evidence such as the packaging, paraphernalia associated with sales, such as scales, or statements or documents indicating an intent to distribute.

quantities of drugs for personal use as grounds for forfeiting real estate, but there are ways the police can get around that. Possession for personal use does not stop the police from seizing property. The property owner must prove possession was for personal use and not for sale or distribution.

Say, for example, you go out of town for the weekend and your teenage son has a party at your house. Totally without your knowledge, he has a marijuana dealer come over and sell him some marijuana. When his friends arrive, your son smokes the marijuana with his friends. The music gets too loud and the neighbors call the police.

When the police arrive, your son answers the door. The police smell the marijuana smoke as they talk to your son. By now one of the party guests overhears the conversation at the door and alerts the other guests that the cops are at the door.

One of your son's friends sees the marijuana on the coffee table and hides it in the first place he can think of - the top drawer of your desk. Coincidentally you also store in your desk several thousand dollars in cash you made at a yard sale last weekend and a ledger book where you kept track of money you lent your son that summer, in your own handwriting.

After questioning your son, the police leave and the party resumes. The police go to the nearest federal magistrate and get a warrant, then come back and search your house.

Can they forfeit your house for this?

They can try!

Because of the presence of several thousand dollars in cash in another drawer of the desk where the pot was found, the police will use that as circumstantial evidence that you were selling marijuana. The presence of cash in proximity to drugs, and ledgers itemizing cash transactions are circumstantial evidence that prosecutors routinely use at trial to show someone was dealing drugs.

Technically speaking they could forfeit your house because it was used to facilitate a sale of marijuana when the dealer brought the marijuana over and sold it to your son. The dealer who sold your son the marijuana could be an informant working for the police, who arranged for the sale to occur on your property to set it up for forfeiture.[31] You could still raise the innocent owner defense, and probably would be able to prove your innocence. You would also have a disproportionality defense if the only evidence they have is one sale on your property, but if they convince the judge that the ledger represents drug sales, they can use that to rebut the proportionality defense.

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[31] A criminal defendant who decides to cooperate as an informant in exchange for leniency in his own case gets sentence reductions based on the number of criminal convictions and the dollar amount of forfeitures his cooperation produces.

If your son has no prior record, he would probably get "diversion" or "pretrial intervention," which means he would report to a probation officer for a while and do some volunteer work and they would drop the charges. At worst, he would get probation for a first offense.

Dropping the charges against your son would not prevent the police from filing a forfeiture case against your house, even if your son goes to trial and gets acquitted,[32] or they never even charge him at all.

A raid will trigger an investigation of you and your finances

Continuing with our hypothetical example, when the police arrive with the search warrant, they will turn your house upside down. The aftermath of a police search looks like an intentional ransacking by vandals. The contents of every drawer and cabinet will be dumped out and thoroughly examined. The cops also seize anything that interests them that might be related to the crime they are accusing you of.

Certainly the cops will find the marijuana your son's friend put in your desk drawer. That will cause them to search the desk thoroughly. They will take any documents showing whose desk it is (i.e., yours instead of your son's), and any document with arithmetic on it (those will be labelled as suspected drug ledgers or "pay/owe sheets").

In searches of residences, police usually seize every piece of paper that tells anything about the finances of the property owner - bank account records, canceled checks, phone and utility bills, tax returns, charge card bills, deeds, records of investments, documents identifying a safety deposit box and the keys, titles to cars, boats, etc., and any other record you have of your net worth and debts. If you have a computer, they will probably seize the computer, and will have its contents searched to find any other information that might turn up.

That's only the beginning. If the police find a safety deposit box key and identifying information, they will go into it to see what's in it. If something about you sparks their interest, the police may subpoena your bank records and your long distance phone records. The bank and phone company usually won't even tell you before they turn your records over.

The police may also obtain a "mail cover" instructing the post office to monitor your mail and write down the return addresses on the envelopes. Police can get a mail cover just by filling out a post office form - they don't need a court order or warrant.[33]

Police also check databases containing information about people and property from public documents. This includes a frightening array of sources: recorder of deeds and liens

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[32] *United States v. Kim*, 870 F.2d 81 (2nd Cir. 1989).

[33] See "Informants and Undercover Investigations," by Sandra Janzen, volume 13 of the Asset Forfeiture series, published by Bureau of Justice Assistance, U.S. Department of Justice (November 1990, reprinted January 1992).

offices records, tax records, corporation records, DMV records of drivers' licenses and auto registrations, professional licenses, police and fire records; birth, death and marriage certificates, court documents, credit reports, and just about any other form you have ever filled out for any government agency. The police also check out the target's relatives and business associates, previous tenants and employees, and even his accountant - for whatever they can turn up![34]

All the documents the cops seize, and all the information on your computer, will be gone over with a fine tooth comb to see if you are laundering money. Laundering money is not limited to hiding drug profits any more - it now includes a transactions with proceeds of a laundry list of of offenses known as "specified unlawful activity."

It is illegal to make cash transactions over $10,000 without filing Cash Transaction Reports, and if you cross the U.S. border carrying over $10,000 in cash, you have to fill out a Cash and Monetary Instrument Report ("CMIR") form declaring how much cash you are carrying. Information from these forms go into a national database called FinCEN (for Financial Crimes Enforcement Network). Those are just two of the types of financial records that go into FinCEN - there are many, many more. Any police officer - local, state, or federal - can access the financial information in FinCEN, without a warrant.

The police will also look for evidence of any criminal offense, including evidence of valuable assets that seem beyond your financial means - which they will suspect results from under-reporting income on your taxes.

Often your books and papers are turned over to a police accountant for a "net worth analysis." A net worth analysis report compares your reported earnings each year with what it appears you have spent or purchased, to see if you had unreported income. Often they will inflate the value of assets you bought. They never take into account unusual sources of income, such as insurance claims, lawsuit settlements, inheritances, gifts, gambling winnings and other one-time income sources that don't generate paper trails - so their suppositions may we way off.

The documents they seize will also be examined to see who you associate with. Your long distance phone bills will be examined to see who and where you call. Any papers showing investment partners or other business associates may cause your partners and associates to be scrutinized.

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[34] "Public Record and Other Information on Hidden Assets," by Frank R. Booth, Volume 2 in the Asset Forfeiture series, published by Bureau of Justice Assistance, U.S. Department of Justice (November 1988, reprinted January 1992.)

Chapter 15: Landlords, Make Sure Your Lease Is Effective

As you have probably gathered, there is nothing you can do to completely immunize your property from forfeiture. But you can cut down the risks, and speed eviction of risky tenants with an effective lease.

It would be great if you could include a clause that would let you evict the tenant as soon as you discover they are doing something that might cause your property to be targeted. But there is no such thing as a "quickie eviction." The landlord-tenant laws of virtually every jurisdiction create so many layers of due process - even for commercial tenants - that it's never quick. But, without some escape valve in the lease agreement that lets you evict the tenant, before the end of the lease, for behavior likely to trigger forfeiture - you might be caught with no way to get rid of a tenant before your property is confiscated.

Because landlord-tenant laws vary so much from state to state - and sometimes from county to county - I can only make general suggestions.

In designing an "eviction for cause" clause, don't create an impossible burden for yourself. If you only make criminal behavior grounds for eviction, then you will have to prove the criminal behavior in order to evict the tenant. You may not be able to do that quickly enough to satisfy the police that you are diligent. In addition, state in your lease that excessive noise or too many visitors coming and going from an apartment are grounds for eviction.

For property in low income areas, or any property that might attract drug dealing around the premises, put an anti-loitering clause in the lease. Make it a breach of the lease for your tenant to allow loitering on the premises after a warning from you. A simple photograph of people loitering around the premises after a warning may be enough to prove a violation of this clause.

For commercial real estate, tailor the clause to the type of business tenant, and the type of activities they might conduct that could trigger forfeiture.

If your business tenant is a retailer or wholesaler, check the products they sell. Shops that sell drug paraphernalia - or anything that could reasonably be considered drug paraphernalia - are risky in some communities. A whole chain of record stores was seized in Michigan because they sold rolling papers and pipes.

Design your lease with your business tenant with recent crime enforcement trends in mind. If the local prosecutor is cracking down on drug paraphernalia, you might include a clause in the lease which says selling "drug paraphernalia" is grounds for eviction. If you do this be sure to quote language from the state statute defining drug paraphernalia to make sure all of those grounds are covered.

Put a clause in your lease that requires the business tenant to notify you if they get a warning from police, and to promptly respond to any request by authorities that they cease selling a particular product or engaging in particular activity.

Although it might be unenforceable under some state landlord-tenant laws, you might also try including a clause that permits eviction if the tenant or one of the officers of the tenant's business is arrested for a crime that allegedly occurred on the premises. Check with state and local landlord-tenant law first.

If the clause turns out to be unenforceable, at least there's no harm in trying. On the other hand, it might be illegal in some states to even try to evict a tenant just because they were arrested. If you accuse them of drug dealing without evidence, the tenant may sue your for defamation, but the fact that an arrest or search occurred is an object fact which can be easily proven. If landlord-tenant law does not forbid such a clause, it would be good to have in order to speed up the eviction process.

Instead of entering long term leases, make your leases one-year leases with options to renew. This way, you have an annual right to terminate - without cause - a tenant who is engaging in risky behavior that you did not anticipate at the time you entered the lease.

Indemnity clauses

You can include an indemnity clause in your lease stating the tenant must indemnify you for any losses you incur if the property is seized for forfeiture because of activities by the tenant, including reimbursement for the attorneys' fees and all expenses you incur defending your lien in the forfeiture case.

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