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ACQUISITIONS

Real Property Forfeitures Utilizing the Facilitation Theory Under Federal Law 21 U.S.C. §881(a)(7)



An Investigator's Guide for Law Enforcement

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I. INTRODUCTION

This guide is for police officers investigating properties with a history of narcotic-related activity who wish to utilize a legal remedy known as civil forfeiture. There are over 100 forfeiture statutes contained in the United States Code. This guide addresses only one aspect of federal forfeiture law, the facilitation theory as it relates to real property (Title 21 Section 881(a)(7)). It sets out techniques used in investigating real property that is in violation of this section. These methods are not the only way to investigate real property for forfeiture cases. However, investigators using the system outlined here have put together investigations which have been accepted by the DEA, FBI and subsequently filed in Federal Court by the United States Attorney.

Aside from the financial benefit that flows back to the investigating agency (equitable sharing), forfeiture has other advantages. It can result in a quick end to the activity if the property is seized. Upon seizure, the owner occupant can be required to execute an agreement which provides that the criminal activity immediately cease. It is also an appropriate remedy to deal with individuals who are benefiting from the illegal sale or use of drugs because it takes away the asset (property) that is being used to facilitate the illegal activity.

While the traditional remedy of forfeiture was based upon the premise that the property itself was at fault and was being punished for the illegal activity taking place on it, the United States Supreme Court has articulated other public policy considerations justifying forfeiture. In Calero-Toledo v. Pearson Yacht Leasing Co. (1974) 416 U.S. 663, the court listed five of these factors: (1) Punishing the wrongdoer (2) deterring crime (3) preventing the use of the property for illegal activity (4) compensating the government for law enforcement costs and (5) providing that subsequently imposed fines are paid. In a later case, Caplin & Drysdale v. United States (1989) 491 U.S. 617, the court included raising funds for restitution for victims of crime and stripping drug dealers of their economic base as appropriate considerations.

The federal forfeiture remedy has become one of the most effective and widely-utilized law enforcement tools of the decade. Incarceration of individuals combined with the use of forfeiture law is a powerful deterrent to narcotic-related crime.

II. APPLICABLE LAW

On October 12, 1984, the Comprehensive Crime Control Act of 1984, Pub.L. No. 98-473, added a new provision which allows the forfeiture of real property used or intended for use, in any manner or part, to commit, or to facilitate the commission of, any felony violation of the Controlled Substances Act. This provision is codified as 21 U.S.C. § 881 (a)(7) and states that the following is subject to forfeiture.

All real property, including any right, title, and 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 title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

A. Forfeiture Defined

Forfeiture, simply defined, is the taking, without compensation, of property used in a manner contrary to law.

B. Facilitation Defined

Courts have interpreted "facilitate" to mean "to free from difficulty or impediment." Pon Wing Quong v. United States (9th Cir. 1940) 111 F.2d 751, 756. In criminal law, it is the act of making it easier for another to commit a crime. In forfeiture proceedings involving real property, the property itself must have made it easier to violate a felony provision of the Controlled Substances Act. Such situations include real property where drugs are sold, stored, manufactured or grown, as well as locations where drug deals are made.

C. Relation-back Doctrine

Section 881(a)(7) does not require an element of contemporaneity of events establishing probable cause for seizure of property. Instead, 21 U.S.C § 881(h) provides that: "all right, title, and interest in property described in Subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture ..." Courts interpreting this section have held that property becomes forfeitable the instant it is used in violation of Section 881. Following the violation, it merely awaits the government's assertion of its right to immediate possession. However, it is advisable to act expeditiously in processing a forfeiture case.

D. Burden of Proof

Civil forfeiture proceedings are "in rem" proceedings, i.e., law suits which are brought against the property. The title of the case would read, for example, "U.S. v. A single family residence, located at 123 Anywhere Street." Anyone wishing to contest the forfeiture would have to file a claim for the property. The government has the initial burden of proof of showing probable cause for the forfeiture; in other words, establishing that the property in question was used in connection with illegal activity. Once the government has met its burden, the burden of proof shifts to the claimant (owner) to demonstrate by a preponderance of the evidence that the property is not subject to forfeiture or that the claimant is an innocent owner protected under Section 881 (a)(7). In order to show probable cause the government must establish that it is reasonable to believe that the property was used to facilitate the drug activity. The facts in the case must however, amount to more than a mere suspicion. This reasonable belief may be demonstrated by direct evidence, circumstantial evidence or by hearsay evidence. The claimant, on the other hand, must show by a preponderance of the evidence that he did not know of or consent to the illegal activity, or that the property was not used to facilitate the narcotics activity. In other words, the claimant must only present evidence considered weightier by the jury than the contrary evidence presented by the government. Thus, if the civil jury believes that the claimant's story offers a higher probability of being true than does the government's

contention, the claimant will prevail. In nonlegal terms, if evidence had to be weighed on a 100-point scale of probability, evidence with a 51 percent believability factor would prevail over contrary evidence with a 49 percent factor.

E. Innocent Owner Defense

21 U.S.C. § 881(a)(7) provides that a property may not be forfeited if an owner establishes that the act or omission which makes the property forfeitable was committed or omitted without his or her knowledge or consent. In cases where the owner is not actively participating in the narcotic activity or is failing to take steps to eliminate the illegal activity, the investigator should consult with the appropriate Assistant U.S. Attorney to ensure that the owner cannot successfully claim to be an innocent owner.

F. Application of the Eighth Amendment to civil forfeitures

The Eighth Amendment to the United States Constitution provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted."

In Austin v. United States (1993) U.S. Lexis 4407, the United States Supreme Court ruled that a forfeiture did constitute punishment of the owner, even though the action was brought against the property itself. As such, it was subject to the excessive fines clause of the Eighth Amendment. The Supreme Court left it to the

lower court to decide whether the forfeiture of Austin's mobile home and autobody shop was an excessive fine in light of Austin's offense, which consisted of the sale of two grams of cocaine and the storing of small amounts of marijuana and cocaine.

Austin's impact on the evidence required for successful forfeitures is unclear at this time. Clearer rules will emerge as cases work their way through the courts. For now, law enforcement personnel should work closely with their Assistant United States attorneys in developing the required proof of the owner's culpability.

III. DEVELOPMENT OF A FORFEITURE CASE

Law enforcement agencies have the opportunity to identify forfeitable property during the course of their criminal narcotic investigations. Investigators should remain aware of this potential while investigating narcotic violations and develop both the criminal and forfeiture cases along parallel lines. Investigation of an asset forfeiture case should not await the conclusion of the criminal case, instead, criminal activities should be linked to specific real property as an integral part of the forfeiture investigation. All officers should be trained to be alert to the possibility of a real property forfeiture when a narcotic arrest is made on real property, so that a referral can be made to the appropriate investigating officers and/or agency.

A. Federal Policy

It is the policy of the DEA and FBI to proceed only against real property that has substantially been used to facilitate a Controlled Substance Act felony violation, as opposed to a remote or incidental use of such property. This policy is based upon federal cases which have held that Section 881 imposes such a requirement. It is also the policy of the Federal government to seize only those properties where there is an appreciable amount of equity. It is impractical for the government to expend resources to acquire a piece of property which will be difficult to manage and will yield a minimal amount of forfeiture proceeds. However, in some cases, where there are compelling law enforcement objectives at stake, the government may decide to initiate a forfeiture to serve those interests.

IV. TYPES OF EVIDENCE

Evidence which would ordinarily not be admissible in a criminal proceeding may be used to establish probable cause for a forfeiture. The various types of evidence which may be used for this purpose are as follows:

A. Direct Evidence

Direct evidence usually refers to the testimony of witnesses that ties the defendant directly to the commission of the crime, such as the testimony of an eyewitness who can positively state that the defendant committed the crime. It is, thus, based on the firsthand knowledge of the witness regarding the guilt of the defendant.

B. Real Evidence

Sometimes referred to as physical evidence, real evidence is that which is connected with the commission of the crime and can be produced in court. An example of real evidence would be narcotics, narcotics paraphernalia, weapons, etc.

C. Demonstrative Evidence

Photographs, motion pictures, maps, drawings, etc.

D. Hearsay Evidence

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Hearsay is derived from "heard say." Testimony in court which repeats what others were heard to say means testifying to a second version of what actually was said. The witness has no personal knowledge of the facts in question. Thus, the truth of the testimony depends on the truthfulness and the competence of the person from whom the information was heard rather than on the person testifying.

E. Circumstantial Evidence

Circumstantial evidence is evidence which proves a fact from which an inference of the existence of another fact may be drawn. Circumstantial evidence is frequently used to prove the state of mind of an individual, e.g., establishing that the owner had knowledge of the illicit activity by proving that he either resided at the location or was a frequent visitor.

F. Historical Evidence

Historical evidence is all evidence obtained prior to initiating a forfeiture investigation, i.e., narcotics arrest reports, police calls for service, search warrants served at the location, etc. Historical evidence also allows the investigator to form an opinion on the most effective ways to gain additional evidence. The

investigator should research historical evidence on both the defendant(s) and the real property involved.

G. Declarations

In the law of evidence, a declaration is an unsworn statement or narration of facts. It is more generally defined as written testimony. Under California law, declarations must be made under penalty of perjury and may include only those facts of which the declarant has personal knowledge. Declarations can be valuable in establishing probable cause for the seizure; however, live testimony is preferable for trial.

H. Correspondence

A letter properly addressed, stamped, mailed, and not returned is presumed to have been duly delivered to the addressee. The investigator might elect to send an off-site property owner a letter advising of the narcotic activity. This letter will assist the investigator in overcoming the "innocent owner" defense.

V. REAL PROPERTY OWNERSHIP

In order to develop an expertise in real property forfeiture, it is necessary to have knowledge about the manner in which title to real property can be held. The following section discusses, in general, some common methods of holding title and some forms of transferring ownership.

The most common methods of holding title are as follows:

A. Individual Owner

If the individual holding property is not married, this form of ownership will ordinarily present no problems. The investigator should be aware, however, that under California law, spouses are entitled to one-half of the other spouse's earnings as community property. If the individual owner is married, the investigator may need to determine whether the property was purchased with community property or separate property funds.

B. Joint Tenancy

This form of ownership is preferred by the majority of married people, because it has a "right of survivorship," which means that upon the death of one of the joint tenants, the property automatically goes to the surviving joint tenant.

C. Tenants in Common

Under this form of ownership, each owner holds a designated interest in the property, for example, 50%. Upon the death of one of the owners, that individual's share goes to his or her heirs, not to the co-owner.

D. Trusts

A trust is an arrangement by which property is transferred with the intention that it be administered by a trustee for another's benefit. The individual transferring the property is the trustor, the person managing the property is the trustee and the person for whose benefit the property is held is the beneficiary. A trust is a very flexible legal device and the only limitation placed on the trust is that the terms cannot violate the law or public policy. Real property may be held in trust and title will reflect this form of ownership, for example, "J. Smith and F. Smith as Trustees for the Mildred Smith Trust dated 1-2-89."

Trusts can be created while the trustor is alive or they can be created by will, in which case they come into effect when the trustor dies.

The fact that real property is held in trust will not automatically stop a forfeiture, however, it will create the need for further investigation. Oftentimes, it is the beneficiary who is living on the property and engaging in illegal activity, while the trustees technically hold title to the real property. Whether the property is forfeitable may depend upon the terms of the trust. As stated earlier, there are no

real limitations on the terms of a trust. It is not uncommon for a trust to require that title to the property be vested in the beneficiary's name when he or she reaches a certain age or meets other requirements. To determine this information, the investigator should make every effort to obtain a copy of the trust governing the property. Trust documents can often be located during the execution of related search warrants at the subject property. It may also be advisable to notify the trustees of the illegal activity to eliminate the innocent owner defense. In all events, the investigator should obtain the advice of the involved Assistant United States attorney.

E. Corporations

A corporation is a separate legal entity in which title may be vested. The investigator should contact the appropriate agency to find out the names of the corporate officers. In California, this information may be obtained from the Secretary of State. This information is also available on databases such as Lexis. The corporate officers and the Board of Directors are responsible for managing the affairs of the corporation; however, the owners are the stockholders. In smaller corporations, it is quite common for the same person to hold the three positions of President, Secretary and Treasurer (officers). When investigating properties held by corporations, all correspondence should be directed to the president of the corporation.

F. Partnerships

Partnerships can be general or limited. It is quite common for investment property to be held by limited partnerships. A limited partnership is comprised usually of one or more general partners who control the partnership and are responsible for the day to day affairs and the debts of the partnership, and limited partners who contribute funds to the partnership, but have no voice in the management of the partnership and no liability for the debts incurred by the partnership. Partnership information in California can be obtained from the Secretary of State or through the Lexis database.

G. Methods of Transferring Ownership

Generally, title to real property must be conveyed by a written document. The document must be notarized in order to be recorded at the County Recorder's office.

1. Grant Deed: The most common means of transferring title is by grant deed. This is the method used when a purchase is made of real property. There are certain legal requirements that must be met in order for the deed to be valid. Basically, it must contain the names of the grantor and grantee, be in writing, signed, delivered and accepted.

2. Quitclaim Deed: This is a document that is used to relinquish all the interest that a person owns in real property. It is possible that the individual executing the quitclaim may not be on the title of the property, e.g., he or she may be a spouse who although not listed on the title, may own a community property interest in the property.

H. Death of the Owner: Upon the death of the owner of real property, the property will generally be transferred by one of the following methods:

1. Right of Survivorship. As stated earlier, when real property is held in joint tenancy, the decedent's interest will pass to the surviving joint tenant(s).
2. By Will. The property owner may have left a will, in which case the property will be transferred according to the terms of the will, providing the will does not conflict with the rights of other parties.
3. By Intestacy. If the property owner dies without a will, and no other provision has been made to dispose of the property, the property will go to the decedent's heirs as specified by state law.
4. By Trust. The property may be held in trust, and the trust will typically provide for the disposal of the property upon the property owner's death. Trusts may be created when the property owner is alive, or a trust may be created by will, in which case it becomes operative when the property owner passes away.

VI. OWNERSHIP INTERESTS THAT MUST BE ESTABLISHED
TO CONTEST FORFEITURE OF PROPERTY

A party seeking to recover seized property can do so by filing a petition for "remission" and/or by filing a "claim" to contest the forfeiture. Remission is similar to a pardon and can be filed with the Attorney General if the property is appraised at more than \$100,000. The grant or denial of remission is totally discretionary and cannot be challenged in court. Claimants on the other hand, must file a claim asserting an ownership or possessory interest in the property. This interest must be proved by a preponderance of evidence in federal court.

A. A Property Interest

An owner must prove he has a property interest in the asset as owner, mortgagee, lienor, secured party or otherwise. He must support his claim with bills of sales, contracts, deeds, mortgages, security agreements, or other documentary evidence.
28 § CFR 9,5; 19 § CFR 171.13.

B. Strawman (Strawowner)

A "strawman" is one who only appears to be the owner. His name is on the documentary evidence of ownership, but the property is not really his. The title of strawman is merely a fiction which the courts and executive officers will

ignore. A strawman will not be granted remission or standing to assert a claim.
28 CFR § 9.6(e).

If a person's name appears on ownership papers, but another had almost exclusive possession and control of the property, the nominal owner is probably a strawman. Unless the owner can satisfactorily explain why he allowed another person habitual use of the property, his petition will be denied. U.S. v. One 1942 Plymouth Sedan, 89 F.Supp.884 (ED TN 1950) and U.S. v. One 1981 Datsun 280ZX, 563 F.Supp. 470 (ED PA 1983).

C. Family Members

It is common knowledge that parents frequently keep vehicles in their names for insurance purposes, but in fact, they have made a gift of the property to a child who has paid nothing for the property and who has complete use and control of it. In these circumstances, the parent will be presumed to be a strawman. See U.S. v. One 1971 Porsche Coupe, 364 F.Supp. 745 (ED PA 1973); U.S. v. One 1956 Dodge Coronet 2-Door Sedan, 150 F.Supp. 503 (WD AR 1957).

D. Ignorance of Illegal Use

An owner must prove he had no knowledge or reason to believe his property would be used to violate the law. 19 U.S.C. § 1618; 18 U.S.C. § 3617(b); 28

CFR §§ 9.5(b), 9.5(c)(2); 19 CFR § 171.12(a).

U.S v. One 1941 Cadillac Sedan, 145 F.2d 296 (7th Cir. 1944).

One 1941 Ford 1/2-Ton Pickup Truck v. U.S., 140 F.2d 255 (6th Cir. 1944).

E. Ignorance of Record

An owner must also prove that he had no knowledge or reason to believe the person to whom he entrusted his property had any record for related crime. 19 U.S.C. § 1618; 18 U.S.C. § 3617(a)(9)(3); 28 CFR § 69.2(j).

Generally, the term "record" means arrests followed by convictions for crimes of the same general character as the offense resulting in forfeiture. Two or more such convictions is definitely a record, regardless of when the convictions occurred. 28 CFR § 8.2(j):

In certain instances, even a conviction may not be required. An arrest, or series of arrests, as to which charges were dismissed for reasons other than acquittal or lack of evidence, can be considered a record. 28 CFR § 9.2(j):

U.S. v One 1951 Chevrolet Delivery Sedan, 116 F.Supp. 830 (E.D.Mi. 1953).

F. Ignorance of Reputation

An owner must also prove he had no knowledge or reason to believe that the person to whom he entrusted his property had any reputation for related crime. 19 U.S.C. § 1618; 18 U.S.C. § 3617(a)(3); 28 CFR §§ 9.2(k), 9.5(c)(3); 19 CFR § 171.13(a).

Mere suspicion among officers that someone is violating the law does not amount to a reputation for breaking the law. There must be specific, articulable facts that officers can relate that are known to the agency or law enforcement community.

G. Lack of Negligence

Note that an owner must prove not only that he had no actual knowledge of illegal use, record, or reputation, but also that there were no facts or circumstances that would give him reason to believe the property would be illegally used, or the borrower had a record or reputation. In effect, he must prove a lack of negligence in lending his property:

Federal Credit Co. v. U.S., 109 F.2d 121 (5th Cir. 1940).

H. Family Members

A mere family relationship between an owner and the violator does not necessarily justify imputing knowledge to the owner. But, if the violator has a record or

reputation for drug-related crime, a member of his immediate family, or a close friend, is very likely to know of it. Knowledge will be imputed to such an owner, and a mere statement that he lacked knowledge will not qualify him for remission.

19 CFR § 171.13(a):

Jones v. U.S., 330 F.2d 908 (10th Cir. 1964).

Similarly, if drug-related activities occurred in the home of the violator, knowledge of those activities will be imputed to petitioners who share that home, such as close friends or family members. Again, a simple assertion that they lacked knowledge will not be sufficient to grant them remission. 19 CFR § 171.13a):

U.S. v. One 1960 Ford Convertible, 209 F.Supp. 247 (S.D. Ms. 1962).

VII. THE PRELIMINARY INVESTIGATION

Once information has been received concerning narcotics activity a, preliminary investigation is initiated. The preliminary investigation is designed to determine whether or not sufficient evidence exists to support the initiation of a civil forfeiture. The investigator should keep in mind that evidence gathered in the course of the preliminary investigation may eventually be used in court and should be properly documented.

It is during the preliminary investigation that the investigating officer will form an opinion, based upon his or her narcotics expertise, that the real property falls within the provisions of Section 881(a)(7).

A. History of the Location

The history of the real property is of primary importance to the preliminary investigation. Attention should be focused on quantifiable historic evidence of narcotics activity. Generally, a one to two year period is examined, although this may vary depending on the investigation. Quantifiable historic evidence can be obtained from several sources. These include narcotics arrests, police calls for service and citizen complaints.

B. Linking the Activity to the Location

The investigating officer should be aware that while many arrest reports may identify the targeted property as the location of arrests, the arrest report narratives often fail to tie the narcotics activity specifically to the property.

In addition, it is just as common to review reports where the information on the arrest facesheet concerning the location at which the crime was committed and/or the suspect arrested is indicated only as an intersection or 100 block designation.

Unfortunately, the specific location of the arrest or illegal activity has never been considered a critical element of the criminal charge. This failure to document the relationship between the illegal activity and the property is the single largest obstacle to compiling a civil forfeiture case. Linking illegal activity to the specific property under investigation is the key element in civil forfeiture investigations.

In all cases, the accompanying arrest report narrative must be examined to determine if it appropriately connects the crime to a specific location. The investigator should ensure that any subsequent arrests made during the course of the civil forfeiture investigation specifically document the connection of the criminal activity to the specific property. The investigator should also ensure that any officers who regularly conduct enforcement activities at this location receive appropriate training on this subject.

C. Using Automated Data Bases

Investigators should make use of any automated data base which will provide calls for service and arrest information. Generally, a one to two year criminal history is reviewed, to establish a pattern of criminal activity.

D. Interviews

In many cases, interviews are critical to the success of an investigation. Police officers, citizens, informants and suspects are potential sources of evidence. The investigating officer should use these interviews to link the narcotics activity to a specific property. Sidewalk sales do not constitute sufficient evidence for forfeiture action unless the investigator can tie this activity to the specific property. The information derived during these interviews will be used to determine, in part, the focus and direction of the investigation. This information should be documented in the form of signed declarations. It is not uncommon for the investigator to determine through interviewing other officers that the legal owner has been previously advised of the illicit narcotics activity by other investigators.

E. Evaluation

At the completion of a preliminary investigation, the investigator should evaluate the information gathered, as it relates to the following questions:

1. What type of historical evidence exists?
2. What is the relationship between the owner/defendant and the real property?
3. Is there sufficient historic evidence to warrant a federal seizure?
4. What federal felony narcotics laws have been or are currently being violated?
5. How is the real property facilitating the violation(s)?
6. Does the real property owner have knowledge of the illicit activity?
7. Are there other persons or entities who have an interest in the real property? (spouse, trust, lienholder, etc.,)
8. Does the investigator have sufficient personnel and/or equipment to gather additional evidence that may be required?
9. Is there sufficient equity in the property?
10. Are there severe management or maintenance problems which would adversely affect the feasibility of a forfeiture and or sale of the property?
11. Has the preliminary investigation been discussed with a federal filing agency (DEA/FBI) and prosecutor (U.S. Attorney's Office)?

VIII. METHODS OF OBTAINING AND DOCUMENTING EVIDENCE

A. Surveillance

In order for the investigating officer to fully understand how the real property is facilitating violations of federal narcotic laws, the investigating officer may elect to observe first hand, the criminal activity. There are numerous federal narcotic laws under Title 21, that if violated will allow the seizure of real property. The investigating officer must be familiar with these statutes in order to observe a violation, and, relate it to the property. Surveillance for many investigating officers is the tool used to gather needed information and evidence. Nothing is more compelling than a video or group of still photos of illicit activity. The investigating officer may also decide to utilize this information for follow-up search warrants.

1. Video and Still Photos

In order for the investigating officer to take full advantage of video and photo surveillance, the investigating officer should have a working knowledge of the equipment and equipment needed for a particular operation. For example, a 400mm lens may be in order for taking photos of illicit activity from a distance, but what happens if the suspects move

closer to the investigating officer's observation point? A zoom or wide angle lens may be more beneficial. The investigating officer may elect to choose lenses that are compatible with both still and video equipment. The operation may include several video tapes; are 8mm videos more desirable due to their compact size? These and other questions can best be answered by the investigating officer who has a clear understanding of the equipment and the type of information or evidence needed in the forfeiture case.

THE INVESTIGATING OFFICER CONDUCTING SURVEILLANCE
SHOULD CONSIDER THE FOLLOWING:

1. Distance to target
2. Lighting conditions
3. Type of film 100, 400, 1600, 3200 etc.
4. Type of lenses - wide angle, 400mm, 800 mm
5. Tripods
6. Low light equipment
7. Type of video equipment - 8mm or STD VHS
8. Power supply - electrical outlet, battery pack, etc.
9. Estimated length of surveillance
10. Food, water, restroom facilities
11. Weather conditions

12. Investigating officer's personal gear
13. Communication - police radio, cellular phone, pager, etc.
14. Documentation - note pad, laptop computer, tape recorder
15. The overall objective of the surveillance.

2. Electronic Surveillance: Any electronic surveillance, whether by still photos or videotape, is valuable evidence. The investigator must document the officer's name who obtained the photos as well as the date and time of the surveillance.

NOTE: Since an examination of surveillance photographs and videotapes often reveals the location from which they were taken, the investigator should be cautious when electing to use private property as an observation post. As a result of the discovery process, the identity of citizens who have cooperated with law enforcement in allowing surveillance to be conducted from their property may have to be disclosed.

B. Undercover Officers

When the investigator elects to utilize an undercover officer, he/she should provide the undercover officer with as much information as possible. This information should include a description or photograph of the person from whom the officer is to attempt to purchase the narcotics. The officer should also be shown a

photograph of the property owner so that if he is present, that information can be documented. This information can be used later to disprove the innocent owner defense. The investigator should also discuss with the undercover officer exactly what type of evidence is needed in the forfeiture investigation.

C. Recording Devices

The use of units worn on undercover officers to monitor conversations, which are subsequently transmitted to officers located nearby who record the conversations, has been approved by the courts. In U.S. v White (1971) 401 U.S. 745, the United States Supreme Court held that the Fourth Amendment was not violated when a police agent, unbeknownst to the defendant, carried electronic equipment to record the defendant's words. Other similar California cases include People v Murphy (1972) 8 Cal.3d 349.

D. Search Warrants

The probable cause required for a search warrant is also probable cause for the forfeiture case and should be articulated in the investigating officer summary. Other than narcotics, narcotics paraphernalia, ledgers, etc., the investigator should attempt to obtain the following:

1. All documentation regarding legal ownership of the property i.e., trust, wills and grant deeds.

2. Photos of the exterior and interior.
3. Photos of all narcotics and narcotics paraphernalia seized.
4. Photos of all persons present at the location.
5. Interviews with all persons present who can and will articulate their knowledge of the criminal activity in declarations.
6. Interviews with citizens who live in the area (if applicable during the search warrant).

The investigating officer should assign responsibilities to other team members in the recovery of the above evidence. Team members must be fully advised of the exact type of evidence they should try to obtain in the search.

Following the service of the search warrant, diagrams and/or sketches depicting exact locations of individuals and/or narcotics recovered should be made for the forfeiture file.

E. Piggy-Back Search Warrants

After a search warrant has been served, officers often recover evidence and develop information on additional narcotics locations which warrant additional searches. To save time in the preparation of additional search warrants, consideration should be given to the "piggy-back" search warrant procedure. This consists of using the affidavit from the first search warrant as a substantial portion of the affidavit in a subsequent related search warrant.

F. Rollback Search Warrants

A rollback search warrant is defined as a search warrant that is written as a result of the evidence recovered from a previous search warrant.

Most officers regard the service of a search warrant as the conclusion of their investigation. But a rollback search warrant is based on the concept that the service of the first search warrant is the beginning, rather than the end, of the investigation.

G. Intercepting Telephone Calls

Officers present in a house during a lawful search can answer incoming telephone calls when they have been informed that the house serves as a headquarters for illicit narcotics trade, and can conceal their identities in order to learn of possible unlawful activities. People v. Sandoval (1966) 65 Cal.2d 303. However, it should be noted that People v. Harwood (1977) 74 Cal.App.3d 460, held that a general consent to search a particular premises did not include the right to intercept telephone calls to the premises involved. Therefore, if the officer believes that the location is being used to take telephone orders for drugs, permission to answer the telephone should be requested in the search warrant.

H. Informants

When interviewing informants, all information relayed to the investigator is "hearsay" and should be corroborated by the investigator. If the investigator uses the informant to purchase a quantity of narcotics from the location, the informant should be given specific direction concerning both the type of the evidence sought and the individual(s) from whom it should be purchased.

I. Surveys

Surveying is a close examination of the real property. For example, during the service of a search warrant, the investigating officer should examine and photograph the interior and exterior of the property looking for violations of federal narcotic laws that could not be observed during a surveillance, e.g., rooms that are used to ingest controlled substances, stash locations, escape routes, illegal room additions, etc.

THE INVESTIGATOR SHOULD:

1. Examine the property using a systematic approach
2. Photograph all evidence consistent with illicit activity (fortification, stash locations) etc.
3. Draw, photograph or videotape the complete interior/exterior
4. Note any hazardous conditions (gas leaks, faulty electrical wiring or structural failure)

5. Note any structural conditions (water damage) etc.
6. Note any health violations (trash, vermin) etc.
7. Note any evidence of child or elderly neglect/endangerment
8. Note any special conditions that may be of concern for the U.S. Marshal's service (barred security doors/windows, dogs, etc.)

Real property can not be seized/forfeited due to trash, vermin or structural deficiencies. However, presenting this type of evidence in a forfeiture case shows the U.S. government the condition of the property and the adverse effect many of these properties have on the community. It also reflects unfavorably on the real property owner who may claim that he/she is an "innocent and responsible owner."

J. Conclusion

Surveillance, surveying and photography are techniques that require systems, methods and tools. The investigating officer should continue to educate him/herself in these areas.

Not all of the answers to the needs of law enforcement can be found solely within the ranks of the police. Special police teams routinely use information that has been provided by people who have never carried a badge. Building Inspectors, Engineers, Systems Specialists and others have assisted many investigating officers in finding better and easier ways of doing the job.

IX. PREPARATION OF THE INVESTIGATIVE FILE

An investigative file should be initiated when the investigating officer has begun documenting the narcotics activity and collecting evidence. The documentation associated with a forfeiture investigation can be maintained in a three-ring notebook and divided into the following sections:

- Investigating Officer's Summary
- Property Owner Information
- Property Information
- Property Owner Meeting (when applicable)
- Photos
- Search Warrants
- Narcotics Arrests
- Officer Declarations
- Citizen Declarations
- Miscellaneous

A. Investigating Officer's Summary Section

The Investigating Officer's (I/O) Summary articulates all pertinent information relating to the investigation. It provides a general synopsis of events relating to the subject location. The remaining sections in the investigative file will corroborate this summary. This section should contain notes made by the investigator documenting the progress of the case. It should also include the names of all investigating officers, a brief overview of the location (owner information, legal description, arrest history and periodic progress reports). Any references to arrests at the location should include associated booking and/or case identification numbers. In addition, the relationship of the arrestee to the property (i.e., tenant, owner, etc.) should be noted. (See attached sample summary).

B. Property Owner Information Section

This section contains all owner information associated with the location under investigation. First, the investigator should identify the parties who have legal ownership of the property. These may be an individual, a group of individuals, a partnership or a corporation. Initially, this information can be obtained from a variety of sources. Commercial automated data bases such as DAMAR and DATAQUICK can provide this information for a fee. Another commercial data base, LEXIS, provides information concerning corporate officers. In the case of a deceased owner, a certified copy of the death certificate may be obtained from

the appropriate county agency.

Additional sources of ownership information include:

- County Assessor's Office (tax information)
- County Recorder's Office (trust deed information)
- Municipal Engineering Bureaus/Departments (title reports)
- City Clerk's Office (tax and business permits)
- Probate Court (when listed owner is deceased)
- Title Company

The investigator should obtain certified copies of any and all deeds which provide current title information on a targeted location.

In addition, the investigator should identify any agents of the owner. Owners' agents include managers, management companies, maintenance workers and other contractors. Once the owner and his/her agents have been identified, the investigator should obtain the addresses, telephone numbers, driver's license photographs and criminal histories of all involved parties.

C. Property Information Section

Property information is obtained from the same sources as owner information. This section should include a legal description of the targeted property, tract and parcel numbers, assessed value, date of assessment, zoning information and an

approximate appraisal.

NOTE: Commercial data bases such as DATA QUICK can provide the investigator an approximate appraisal of the property. However, to file the case with a federal agency (DEA/FBI) an official preliminary title report must be obtained.

D. Photo Section

Videotapes and photographs are an excellent source of documentation. Subjects may include, (but are not limited to) the exterior and interior of the property, suspects and seized narcotics.

E. Narcotics Arrest Report and Search Warrant Section

Legible copies of all arrest reports for narcotics violations specific to the targeted property and search warrants should be maintained in this section. If the owner is not principally involved in the activity, the investigator may elect to show a pattern of on-going activity. Copies of reports for all narcotics arrests made during the course of the investigation should also be included.

It is critical that reports taken after the filing of the case also be included. These subsequent reports substantiate that the problem persists. All of these reports are crucial in that they document the illegal activity occurring at the location and the

law enforcement measures that have been taken in response to the activity.

G. If Charges Were Filed

Each arrest report, if the related charge was filed as a criminal case, should have a corresponding court docket attached which contains case disposition information. Title 21 does not require a criminal filing or conviction to pursue forfeiture; however, the inclusion of case disposition makes a more thorough case and is often times requested by the U. S. Attorney's Office.

NOTE: Narcotics analysis reports should be attached to those arrests reports which contain a record of narcotics seizures.

H. Officer Declaration Section

Declarations should be obtained from officers who currently or have previously worked, in the area where the targeted property is located. These declarations should articulate all observations of narcotics activity, the officer's involvement with the location, its reputation, and the sources of information upon which his or her opinion is based. It is not uncommon for officers to verbally notify the owner of the narcotics activity and advise him to take steps to eliminate it. Such

conversations should be included in the declarations.

I. Citizen Declaration Section

Citizens living in the area of the targeted property can provide compelling evidence in a forfeiture investigation. Written statements which articulate the illegal activity associated with the property should be obtained in the form of signed declarations.

J. Property Owner Meeting (if applicable)

All documentation associated with informal property owner meetings should be included in this section. Any and all registered or certified mail receipts must also be provided to prove that all correspondence was received by relevant parties. Any paperwork regarding the hearing itself as well as any follow-up correspondence should be retained in this section.

X. OFF-SITE OWNERS

The investigating officer may be presented with a case which involves an off-site owner who may claim no knowledge of the narcotic activity. In order for the investigating officer to overcome this defense, a property owner meeting should be scheduled as soon as there is sufficient evidence. The scheduling of this meeting can be accomplished telephonically or by sending a letter to the owner. The purpose of this meeting is to attempt to assist the owner in eliminating the criminal activity on the property. It will also demonstrate to the court, the willingness of local law enforcement to work with property owners in abating the problem prior to filing the forfeiture case.

A. Property Owner Meeting

At the property owner meeting, law enforcement personnel should advise the owner of the narcotics activity and violations associated with his or her property and attempt to obtain voluntary compliance in correcting these problems. This is achieved by providing the owner with evidence uncovered during the investigation. Later, the owner will be unable to establish status as an innocent owner by asserting that his or her inaction was due to a lack of awareness of the problem. This meeting also provides an opportunity to discuss the extent of the narcotics

activity, its effect on the immediate neighborhood and what assistance governmental agencies can provide to the owner.

B. Hearing Procedures

The meeting is conducted by law enforcement personnel who introduces all investigative participants to the owner and advises him or her of the purpose of the investigation, i.e., eliminating the problems associated with the targeted property. As the meeting has a goal of obtaining the owner's voluntary participation in solving these problems, an effort should be made to establish a cooperative relationship.

Law enforcement personnel will review the evidence which demonstrates the existence of narcotic activity at the location. The evidence may take the form of documentation consisting of arrest reports, search warrants, community complaints and calls for service. Visual aids, such as videotapes and photographs of criminal activity, usually provide the most compelling evidence. If there are building and safety violations, Orders to Comply should be given to the owner as well.

After all evidence has been presented, a list of suggested improvements should then be given to the owner. The suggested improvements should address the major areas of concern and include crime deterrent measures which are applicable to this specific property.

Improvements commonly suggested include the type and placement of enhanced lighting, fencing and other security measures, as well as graffiti removal, eviction of problem tenants and the use of proper rental/lease agreements. Eviction assistance information, model rental agreements and other applicable materials may be provided to the owner.

In addition, the owner may be asked to provide the investigating officer with a variety of information that will assist law enforcement in eliminating criminal activity. This may include a copy of all current rental agreements, a list of tenants, the name, address and telephone number of the owner's management company and a diagram of the physical layout of the building.

The owner should be given a specific non-negotiable time period during which the list of suggested improvements must be completed and the property brought into compliance. In most cases, a period of 30 days is specified; however, the circumstances of the investigation and/or the condition of the property may dictate a longer time period. The owner may be required to present a written plan of scheduled improvements and/or submit weekly progress reports. The owner should also be advised that during this time period the location will be monitored by personnel from the participating entities.

The investigating officer should advise the owner of the possible repercussions of noncompliance. These potential repercussions may include the following:

1. Seizure and forfeiture of the real property by the U. S. Attorney's Office based on a "facilitation" theory.
2. Lis pendens (notice of pending litigation) filed against the title of the property.
3. Narcotics abatement civil law suits by the county district attorney or city attorney.

C. Follow-ups and Monitoring

Following the informal hearing, the property should be monitored on a regular basis to ensure that the owner is in compliance with the provisions outlined in the hearing. The investigating officer should conduct periodic site visits, usually on a weekly or biweekly basis to document the progress (or lack thereof) on the suggested improvements. This information should be documented in the case summary.

Narcotics enforcement operations should continue during this period. Any arrests made during this time period may be used in future court proceedings as evidence that narcotics activity still exists at the location.

If the property owner attempts to sell his property to avoid meeting the requirements imposed during the informal hearing, he is required by law to disclose to any prospective buyers any facts materially affecting the value or the desirability of the property. Any real estate agent who has independent knowledge or who is notified by an owner that a property for sale is the subject of a forfeiture investigation has a clear duty to disclose such information to all prospective buyers.

NOTE: Property owner hearings are not required if the owner has knowledge or is involved in the narcotics activity. The investigating officer should consult with the U. S. Attorney's Office regarding off-site owners and the "innocent owner" defense.

XI. FILING THE CASE WITH A FEDERAL FILING AGENCY

As noted earlier, only a federal agency (DEA/FBI) can file a forfeiture case with the U.S. Attorney. Liaison should be established early in the investigation with the DEA's or FBI's Asset Forfeiture Unit as well as the Asset Forfeiture Section in the U.S. Attorney's Office. The filing agency (DEA/FBI) will review the case and ensure that the case contains sufficient evidence to meet the government's burden of proof. A federal agent will draft a declaration for forfeiture. This declaration is submitted to the U.S. Attorney's Office who in turn files a complaint for forfeiture with the U.S. District Court Clerk (Civil Section). The U.S. Attorney then records a Lis Pendens with the appropriate County Recorder's Office. It is customary now, with residential property to not "seize" the property till the forfeiture is complete. However, if the activity continues after the filing of the forfeiture action, the U.S. Attorney should be contacted to determine if a seizure is desirable at that point. If the property is ultimately forfeited, the U.S. Marshall's Service is also responsible for coordinating the sale of the property.

The investigating officer should be prepared to answer the following questions commonly asked by the U. S. Attorney's Office:

1. How did the property facilitate violations of federal narcotics statutes?
2. How current is the case evidence?

3. How much equity is in the property?
4. What is the approximate market value?
5. Who are the owners and lien holders?
6. What evidence exists that will overcome the "innocent owner" defense?

If the property owner is an off-site owner:

7. How did the investigating officer advise the owner of the criminal activity?
8. What evidence was presented to the owner? (Photos, videos, arrest reports, etc.)
9. What improvements to the property did the investigating officer suggest?
10. How much time was given to the owner to self-abate the activity? (30-45 days)
11. Were any reasonable measures attempted by the owner?
12. Is the activity still occurring?

NOTE: Questions 7 - 12 are asked when an off-site property owner is not directly involved in the narcotics activity.

XII. PRE-FORFEITURE PLANNING

Maintaining a close working relationship with a federal filing agency (DEA/FBI) and the U.S. Marshal's Service is critical. During the investigation, the federal investigator should be made aware of any special conditions that may affect the management of the real property following seizure.

Whether or not a property will be seized (physically taken over) by the Marshall's Service prior to the forfeiture filing depends upon the type of property. In United States v. Good (93 D.A.R. 15706) the United States Supreme Court held that absent exigent circumstances, the government may not seize a person's home without notice and a hearing. As a result of the Good decision, the government does not usually "seize" a residential property; however, the property is posted after the filing with a copy of the lawsuit.

In any event, the investigating officer should anticipate and avoid management problems which may occur for the U.S. Marshal's Service. The narcotics investigator will need to advise the Marshal's Service of any special conditions prior to seizing and/or posting the real property. These conditions may include the following:

- ◆ Suspects
- ◆ Conveyances
- ◆ Weapons

- ◆ Art
- ◆ Food or other perishables
- ◆ Lab Equipment and/or chemicals
- ◆ Farm equipment
- ◆ Lab Equipment/Chemicals
- ◆ Farm Equipment
- ◆ Jewelry
- ◆ Antiques

After posting, the property owner and/or tenant may be asked to sign an occupancy and indemnity agreement with the government. Violations of the agreement can result in eviction of the tenant or removal of the property owner from the premises. If the narcotics activity persists upon the seized/posted property, contact the U. S. Marshal's Office so steps can be taken to evict the tenant/owner.

XIII. SETTLEMENT AND INVESTIGATIVE COSTS

Occasionally the U.S. attorney will determine that the particular facts of the case warrant that the case be settled out of court. A settlement is an agreement between the government and the claimant of the property. The terms of the settlement are negotiable between the parties. The prosecutor may suggest that the case be settled for the costs of investigation if some weaknesses are revealed in the case. If all parties agree, the case is then dismissed and the property is returned to the claimant. The investigator may be asked to provide an itemized list of the costs associated with the investigation. Settlement terms may also include a requirement that the property owner sell the property and give a portion of the proceeds to the government. The claimant can also sign a stipulation of forfeiture, where he or she agrees that the property may be forfeited to the government. As stated earlier, the terms of the settlement will depend upon the strength of the government's case, which is sometimes affected by material facts disclosed after the case has been filed, i.e., the existence of a will or trust affecting title to the property.

XIV. EQUITABLE SHARING

A. Direct Participation

There are two ways that state and local law enforcement agencies can qualify for federal sharing of forfeited property. First, the agencies can work with federal agencies in a joint investigation. If the investigation leads to the seizure and forfeiture of property, then the participating agency is entitled to an "equitable share" of the asset. Determination of an equitable share is usually accomplished by evaluating the extent to which each participating agency was involved in the case. For example, if a local police department works with the DEA on a case and both the police department and DEA contribute an equal amount of time and effort to the investigation, then the net proceeds of the forfeiture would be divided equally with one-half going to the police department and one-half to the federal government. Federal guidelines provide however, that there must be a minimum ten percent allocation to the Federal government, even if the Federal agency did not undertake any investigation. In short, the sharing program requires direct participation by the state or local agency in the investigation resulting in the forfeiture.

If the above conditions are present, a federal, state or local agency may receive a share of assets forfeited under 21 U.S.C. §881 by filing a Form DAG-71 with the involved federal agency.

B. Adoptive Seizures

The second way in which a state or local agency can receive an equitable share of forfeited property is by requesting the DEA/FBI to "adopt" a seizure that has already been made by the agency. This type of situation may arise when the requesting agency makes a seizure under state law and subsequently determines that a state forfeiture is not feasible. Obviously, these situations will not arise in a jurisdiction where the agency does not seize the real property until the forfeiture case has been adjudicated.

XV. CONCLUSION

Forfeiture is a powerful remedy. It can provide a quick and effective solution to narcotics-related activity occurring on real property. However, investigators should use this tool selectively. Forfeiture is, of course, appropriate when the property is owned by a narcotics dealer and is being used to facilitate his illegal business. However, it may not always be the answer in every narcotics-related investigation. For example, it would be inappropriate in a situation where a sympathetic elderly owner has lost control of his or her property because he or she is unable to control a drug-dealing child, or in a situation where a property owner, in spite of reasonable efforts, cannot put an end to the criminal activity on his or her property. Full consideration should be given to the impact of the forfeiture on the affected homeowner, the community and in some cases, the media. It should also be noted that, the courts have not required property owners to risk their lives to rid their property of the criminal element. These factors should be kept in mind when the decision is made to forfeit a real property. The benefits to law enforcement from real property forfeiture can be enormous; however, law enforcement personnel should keep in mind, the fact that abuse of the process can result in limitations being placed upon the use of these statutes.