

No. 1200562

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In the  
SUPREME COURT of ALABAMA

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YAMIL ALEXSANDER HARE & JOSE SOSA,

Appellants,

v.

SHERIFF HOSS MACK, STACY MCELROY, &  
CITY OF GULF SHORES,

Appellees.

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On Appeal from the Circuit Court  
of Baldwin County, Alabama  
Case No: CV-2021-900130

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**BRIEF OF THE APPELLANT**

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## **STATEMENT REGARDING ORAL ARGUMENT**

Mr. Hare and Mr. Sosa do not request oral argument since “[t]he facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.” Ala. R. App. P. 34(A)(3).

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## **STATEMENT OF JURISDICTION**

The Baldwin County Circuit Court's judgment was entered on May 8, 2021. (C. 131). This appeal was filed on May 11, 2021. (C. 132). This Court's jurisdiction is invoked under Ala. R. App. P. 4(a) and Ala. Code §§ 12-2-27 & 12-2-7 for a claim exceeding \$50,000. (C. 100-01).

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## STATEMENT OF THE CASE

### A. The Complaint

On February 4, 2021, Mr. Hare and Mr. Sosa filed suit in Baldwin County Circuit Court against the Baldwin County Sheriff's Office (BCSO), Officer Stacy McElroy, and the City of Gulf Shores (City). (C. 5). The suit sought the return of approximate \$100,000 in U.S. currency and three cell phones seized by McElroy during a state traffic stop with no federal involvement. (*Id.*) The complaint was later amended, removing the sheriff's office and adding Sheriff Hoss Mack. (C. 56). Following the stop, Mr. Hare was arrested and charged with Possession of Marijuana Second, a misdemeanor. (C. 23).

### B. Motion for Default Judgment and Motion to Strike

On March 11, 2021, Plaintiffs prematurely filed a Motion for Default Judgment, (C. 9), and after a response from the BCSO, (C. 27), the court denied the motion, (C. 31). Mr. Hare and Mr. Sosa also filed a Motion to Strike Affidavit of BCSO Chief Deputy Lowery. (C. 40). The BCSO responded, (C. 95), and the court denied the motion, (C. 102).

### **C. Motion to Dismiss**

The BCSO filed a Motion to Dismiss, (C. 12), as did Officer McElroy and the City, (C. 33). Defendants claimed the state court lacked in rem jurisdiction because the property was seized by the state but adopted by federal agents on the same day, November 3, 2020. (C. 14).

Mr. Hare and Mr. Sosa opposed the motions, claiming federal jurisdiction had not attached because the Defendants presented no evidence of adoption. (C. 44; 60). The BCSO responded, (C. 79), and the court granted the Motions to Dismiss, (C. 100; 101).

### **D. Motion to Alter, Amend, or Vacate**

Mr. Hare and Mr. Sosa filed a Motion to Alter, Amend, or Vacate. (C. 103). The BCSO and Sheriff Hoss Mack responded, (C. 115), as did Officer McElroy and the City, (C. 122). Mr. Hare and Mr. Sosa filed rebuttals to the Defendants' responses. (C. 128). The court denied the motion to amend. (C. 131). Mr. Hare and Mr. Sosa filed this appeal. (C. 132).

## **STATEMENT OF THE ISSUE**

Federal and state courts cannot exercise concurrent in rem jurisdiction and the first court to acquire in rem jurisdiction excludes all others. Local law enforcement seized approximately \$100,000 from Mr. Hare during a traffic stop with no federal involvement, then gave the currency to a federal task force officer, seeking adoption. Since Defendants failed to establish federal adoption, did the trial court err in dismissing the state-court action for lack of jurisdiction?

## STATEMENT OF THE FACTS

### I. The Paper Tag

On November 3, 2020, Gulf Shores Police Officer Stacy McElroy was working traffic as a state officer, part of the Baldwin County Sheriff's Office Special Operations Unit. (C. 76). Parked in the median of Interstate 10 in Baldwin County, McElroy spotted Mr. Yamil Hare traveling eastbound in a black Ford F-150. *Id.* Mr. Hare's truck had a floppy paper tag, and McElroy pulled onto the interstate and followed Mr. Hare. *Id.* He continued to follow him for five, full miles. *Id.*

Officer McElroy's radar "did not pick up the vehicle," but he observed that his own speedometer registered *two miles per hour* over the speed limit. *Id.* McElroy stopped Mr. Hare because "the vehicle continued to create distance between us." *Id.* McElroy stopped Mr. Hare for two state violations: Improper Display of Registration (Ala. Code § 32-6-51) and Speeding (Ala. Code § 32-5A-171). *Id.*

### II. The Stop.

McElroy stated he detected the odor of marijuana when he approached Mr. Hare's truck. (C. 77). During questioning, Mr. Hare admitted he had one gram of marijuana in the truck, and McElroy

issued Mr. Hare a warning and searched his truck. *Id.* During the search, McElroy located the one gram of marijuana, three cell phones, and two bundles of U.S. currency in the console. *Id.* While searching the truck's speaker box, McElroy felt "illegal narcotics" and arrested Mr. Hare, telling him the arrest stemmed from "the bundles in his speaker box." *Id.* But when the box was opened, McElroy found no drugs; instead, McElroy seized ten bundles of U.S. currency and arrested Mr. Hare for misdemeanor possession of marijuana. (C. 75).

### **III. The Handoff.**

A few hours later, Officer McElroy bestowed the bundles of currency and cell phones on local DEA Task Force Officer Daniel Middleton, claiming the DEA "adopted" the case at that time. (C. 78, 127). Officer McElroy completed the state arrest report for possession of marijuana. (C. 78).

In his affidavit, local DEA Task Force Officer Andrew Harville recounted storing the property in the evidence vault on the day of the seizure, before taking the money two days later to deposit in a bank in Foley. (C. 120). The chain of custody form does not record the property's location following its placement in the evidence vault on the

day of the arrest. (C. 127). The custody form records Harville's signature, but fails to record the date of the property's removal or its new location. (*Id.*)

Fifteen days after Harville deposited the money in the Foley bank, Harville stated he mailed a cashier's check to the U.S. Marshals Service. (C. 120). The record contains no evidence of a federal agency's official adoption of the property or even a state request for a federal agency to do so.

## STANDARD OF REVIEW

The standard of review is de novo:

We construe a motion to dismiss on the ground of a lack of in rem jurisdiction similarly to a Rule 12(b)(1), Ala. R. Civ. P., motion to dismiss for lack of subject-matter jurisdiction and a Rule 12(b)(2), Ala. R. Civ. P., motion to dismiss for lack of personal jurisdiction. Our review of the trial court's ruling on the motion to dismiss is therefore de novo. *Nance v. Matthews*, 622 So. 2d 297, 299 (Ala. 1993) ("On appeal, a dismissal is not entitled to a presumption of correctness."); *see Mattel, Inc. v. Barbie-Club.com*, 310 F.3d 293, 298 (2d Cir. 2002) ("We review de novo a dismissal for lack of in rem jurisdiction.").

*Gray v. City of Opelika*, 216 So. 3d 431, 434 (Ala. Civ. App. 2015).

## SUMMARY OF THE ARGUMENT

Officer Stacey McElroy seized approximately \$100,000 from Mr. Hare during a traffic stop conducted under state law and without federal involvement. (C. 78). Later that day, McElroy gave the currency to another local officer, cross-designated as a federal task force officer, seeking federal adoption of the forfeiture. (*Id.*) Defendants claim the seizure, transfer of the property, federal adoption, and exclusive federal jurisdiction all occurred on the same day, thus prohibiting state court jurisdiction over the property. (C. 13-14, 20, 34-35, 38, 78, 80, 82-83). The trial court agreed with the Defendants and dismissed Mr. Hare and Mr. Sosa's claim for lack of jurisdiction. (C. 100; 101).

Mr. Hare and Mr. Sosa urge this Court to reverse the trial court's dismissal and assert the following arguments:

- **Federal Jurisdiction.** Federal courts hold their own jurisdiction attaches to an adoptive forfeiture when the adoption is approved by a federal agency. *United States v. \$6,676 in U.S. Currency*, 2014 U.S. Dist. LEXIS 188700 (M.D. Ala. 2014). Confusion abounds because state courts have alternatively found federal jurisdiction attaches the moment the property is controlled,



seized, taken, detained, or possessed by federal agents. *Infra* § I(A).

- **The Process.** The adoptive-forfeiture process is more than a transfer of property from one officer to another or even one agency to another. The U.S. Department of Justice devotes an entire chapter to the procedures required for adoption; it is almost impossible for these procedures to be completed in a day. U.S. Dep't of Just., Asset Forfeiture Pol'y Man., Ch. 3 (2021)<sup>1</sup>.
- **The Evidence.** Defendants offered evidence of the property's transfer and location but failed to present any evidence of official federal action or approval by a federal agency. (C. 20, 37, 120). The record is devoid of any evidence of when the adoptive process began, if at all.

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<sup>1</sup> Chapter three of the manual and pertinent federal directives are included in the Appendix for ease of reference.

## ARGUMENT

“It makes sense to scrutinize governmental action more closely when the State stands to benefit.”<sup>2</sup> The government utilizes civil asset forfeiture to seize personal property connected to criminal activity, thereby reducing financial incentives for crime. Despite its admittedly noble purpose, the practice creates an incentivizing benefit for law enforcement—they typically get to keep most of what they seize. *See* 21 U.S.C. § 881; Ala. Code § 20-2-93.

Law enforcement’s powerful incentives to not only seize property but also circumvent state law by seeking federal forfeiture invite scrutiny.<sup>3</sup> Federal policies encourage law enforcement to seek state instead of federal forfeiture when criminal defendants are being prosecuted in state court. In fact, Section I of the U.S. Department of Justice’s Asset Forfeiture Policy Manual is titled “Forfeitures Follow

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<sup>2</sup> *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9, (1991) (Scalia, J.).

<sup>3</sup> The Alabama Legislature recently curbed this practice by amending Ala. Code § 20-2-93, prohibiting federal adoptive forfeitures unless the property exceeds \$10,000. S.B. 210, 2021 Reg. Sess. (Ala. 2021) (effective Jan. 1, 2022).

the Prosecution.” U.S. Dep’t of Just., Asset Forfeiture Pol’y Man., Ch. 3, § I (2021); *See also* U.S. Dep’t of Treas., Treas. Dir. 34, n.3 (2017).

But when forfeiture may not be possible under state law, officers may choose to pursue federal forfeiture through adoptive-forfeiture procedures.<sup>4</sup> The reasons for this choice are enlightening: “Generally, the state or local officials either make a determination that forfeiture *is not possible under state law* or conclude that it is *advantageous to them* to transfer the matter to federal authorities for a federal administrative forfeiture proceeding.” *Green v. City of Montgomery*, 55 So. 3d 256, 258 (Ala. Civ. App. 2009) (emphasis added); *See also Ex parte Bennett*, 164 So. 3d 1162, 1164 (Ala. 2014) (Moore, J., dissenting) (“Moreover, if state or local law-enforcement officials could not obtain a person's seized property under state law, would it not be unjust for the state or local government entity to transfer that property to the federal government for forfeiture and then be given 80 percent of the property back?”).

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<sup>4</sup> The preferred method of federal forfeiture is administrative forfeiture, often effected without a hearing or judicial oversight. U.S. Dep’t of Just., Asset Forfeiture Pol’y Man., Ch. 5, § (II)(A)(1) (2021) (“Despite the preference for administrative forfeiture, it may be appropriate to seek a judicial forfeiture.”)

To that end, Officer Stacey McElroy pursued federal adoptive forfeiture when he seized approximately \$100,000 from Mr. Hare during a traffic stop and later that same day, gave the currency to another local law enforcement officer on the DEA task force. (C. 78). McElroy claims he stopped Mr. Hare, seized the property, gave the property to a federal agent, and the federal government adopted it acquiring exclusive jurisdiction—all on the same day. (*Id.*)

Nothing in Alabama law prevented McElroy from seeking federal adoption of the currency to bring it under federal jurisdiction. *See, e.g., Green*, 55 So. 3d at 261. The policy is well established, but a bright-line rule for state courts determining state versus federal in rem jurisdiction is not. Mr. Hare and Mr. Sosa ask this Court to determine if the circuit court erred in dismissing the case for lack of jurisdiction because Defendants presented no evidence of actual federal adoption and jurisdiction.

**I. State jurisdiction over Mr. Hare’s in rem forfeiture claim was proper because the action was filed before federal jurisdiction attached.**

Federal adoptive-forfeiture procedures resulting in federal jurisdiction are straightforward but not automatic. Federal courts hold

federal jurisdiction attaches to an adoptive forfeiture when a federal agency actually accepts the state's request to adopt it. *\$6,676 in U.S. Currency*, 2014 U.S. Dist. LEXIS 188700), at\* 9; *See infra* § I(B). Absent exceptional circumstances, federal policies mandate that state requests for federal adoption must be approved prior to the transfer of the property to federal custody. U.S. Dep't of Just., Asset Forfeiture Pol'y Man., Ch. 3, § II(B.2). Thus, federal agencies do not assert jurisdiction until the adoption is approved; adoption is a regulated process, not a handoff from state to federal officer.

**A. Adoptive forfeiture is an official, regulated process.**

Defendants claim state seizure and federal adoption occurred on the same day. (C. 13-14, 20, 34-35, 38, 78, 80, 82-83, 88, 116-17). But adoption is a formal, multi-step process involving official requests, attorney review, the possibility of rejection, and a declaration-of-forfeiture certificate indicating official adoption. *See* U.S. Dep't of Just., Asset Forfeiture Pol'y Man., Ch. 3 (2021). Since the traffic stop took place about 2:23 p.m., it is highly unlikely the request for adoption, legal review, and acceptance all occurred by end of day. (C. 78).

The U.S. Department of Justice controls adoptive-forfeiture procedures for federal and state entities. Key steps in the process reveal why it is almost impossible for seizure and federal adoption to occur within the same day:

- States are required to officially request adoption. § IV(A).
- The request for adoption must be reviewed by legal counsel, especially those that are pursuant to an exception to the 4th Amendment's warrant requirement. § IV(B).
- Only an attorney outside the chain-of-command of operational officials may approve a request for adoption. *Id.*
- Absent exceptional circumstances, the request for adoption must be approved prior to the transfer of the property to federal custody. *Id.*

U.S. Dep't of Just., Asset Forfeiture Pol'y Man., Ch. 3 (2021); *See also* U.S. Dep't of Just., Pol'y Dir. 17-1 (2017); U.S. Dep't of Treas., Treas. Dir. 34 (2017).

Here, the record is devoid of evidence showing when the adoption process began, if at all. Defendants submitted no evidence of actual adoption in the form of the required adoption request form or federal approval of the adoption request. Defendants' multiple affidavits attest to the independent actions of state and task force officers, but fail to present evidence of actual adoption or official action by a federal agency. (C. 20, 37, 120).

Defendants’ basis for claiming federal jurisdiction attached—on the same day as the traffic stop and seizure—stems from the confusion surrounding in rem jurisdiction. This is understandable. State-court holdings on federal in rem jurisdiction remain imprecise at best.

**B. State cases present conflicting opinions on federal jurisdiction.**

Differing interpretations of *Green v. City of Montgomery*<sup>5</sup> continue to plague citizens seeking the return of property seized under state law. In *Green*, the Alabama Court of Civil Appeals considered competing state and federal in rem jurisdiction over an adoptive forfeiture. 55 So. 3d at 256. “[T]he court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other.” *Penn General Casualty Co. v. Pennsylvania*, 294 U.S. 189, 195 (1935).

*Green* included the following sentence, supported by a case from the Seventh Circuit Court of Appeals: “So long as the state court has not exercised in rem jurisdiction, federal jurisdiction begins the moment the res is *controlled by federal agents*.” 55 So. 3d 256 (Ala. Civ. App. 2009) (citing *United States v. \$506,231 in U.S. Currency*, 125, F.3d 442 (7th

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<sup>5</sup> Though *Green* is not controlling for this Court, it remains one of the leading authorities governing state in rem jurisdiction.

Cir. 1997) (emphasis added). *Green* also stated, “The federal government controls the *res* when it is ‘taken or detained’ during a time when no other court has jurisdiction over the *res*.” *Green*, 55 So. 3d at 264. Unlike federal cases that determine their own jurisdiction based on actual adoption of the property, state cases base federal jurisdiction on the meaning of “controlled” or several other words including seized, taken, detained, and possession.

**1. In *Green*, federal jurisdiction failed to attach because plaintiffs filed the state action prior to federal adoption.**

In *Green*, a city police officer seized drugs and currency from a vehicle without federal involvement. The city turned over the currency to federal DEA agents and completed the required adoption request form. *Green*, 55 So. 3d at 258. Claimants filed a state claim for the return of the property. *Id.* at 264. The court found state in rem jurisdiction attached when the state claim was filed. If not for the interceding state claim, federal in rem jurisdiction *would have* attached, either when the DEA approved the adoption or when U.S. Marshals took the currency from the DEA after adoption. *Id.*



An often-overlooked fact in *Green* begs emphasis—the property seized by the state was physically transferred to the DEA on the same day as the seizure and request for adoption. *See Green*, 55 So. 3d at 258; *Little v. Gaston*, 232 So. 3d 231, 235 (Ala. Civ. App. 2017) (referencing *Green*: “[O]n the same day as the seizure, the City of Montgomery . . . transferred the seized currency to the DEA and requested that the DEA ‘adopt’ the seizure.”) The *Green* court rejected physical transfer to a federal agency or possession by one as triggering federal jurisdiction.

On that basis, the court in *Little v. Gaston* explained why its holding in that case was consistent with *Green*. 232 So. 3d at 236-37. Because the claimants in *Green* filed the state-court action at a time when the federal government was merely *considering* the City’s request to adopt the seizure, the state court had in rem jurisdiction. 232 So. 3d at 236. Further, the court reiterated the point that mere possession by federal agents does not amount to control for the purposes of establishing federal jurisdiction. *Id.* at 237.

**2. Subsequent cases interpreting *Green* find federal jurisdiction begins at the moment of possession.**

Recent cases illustrate the conflicting interpretations of *Green* and the legal confusion created by those interpretations. *Ex parte City of Montgomery* interpreted *Green*'s holding to mean that federal jurisdiction turned on the moment of *possession* and not adoption or actual control by federal authorities after adoption. 275 So. 3d 1154, 1157 (Ala. Civ. App. 2018). The court stated, "If the DEA or some other federal agency . . . took *possession* of the vehicle before [claimant] initiated her action . . . the relevant federal court has jurisdiction over the action . . . because federal jurisdiction attaches at the moment of *possession*." *Id.* (emphasis added).

Another case uses the same terminology in its interpretation of *Green*. In *Ruiz v. City of Montgomery*, the court stated, "In *Green*, we held that the federal government controls property when that property is in the 'actual possession' of agents of the United States." 200 So. 3d 26, 30 (Ala. Civ. App. 2015). But without further context, this statement is unclear because the actual adoption date is omitted in the *Ruiz* opinion.

In *Ruiz*, if federal possession by U.S. Marshals took place after formal adoption, *Ruiz* reaches a determination *Green* never reached—that federal jurisdiction begins, not with adoption, but when U.S. Marshals take possession of the property *after* adoption. If possession by the Marshals took place prior to adoption, *Ruiz* holds that possession is all that is required.

**C. Federal cases find federal jurisdiction begins with adoption.**

“[F]ederal agents do not consider themselves to be in control of the *res* before they agree to accept a state or local government's request for an adoptive seizure.” *Green*, 55 So. 3d at 263; *See also Little*, 232 So. 3d at 236. Adoption of the forfeiture by a federal agency triggers federal jurisdiction, as stated in the following federal cases:

- “Had the state court initiated a forfeiture in rem proceeding before the DEA adopted the cash seizures, the state court jurisdiction of the *res* would have been valid as prior in time.” *\$6,676 in U.S. Currency*, 2014 U.S. Dist. LEXIS 188700, at\*9.
- “After a federal agency adopts a state or local seizure, the property is deemed to have been seized by the federal government, and is thus subject to exclusive federal jurisdiction as of the date of seizure.” *United States v. \$19,855 in U.S. Currency*, 2012 U.S. Dist. LEXIS 164737, at \*10-11 (M.D. Ala. 2012).
- “After a federal agency adopts a state or local seizure, the property is deemed to have been seized by the federal government.” *United States v. \$6,207 in U.S. Currency*, 2009 U.S. Dist. LEXIS 61423, at \*18 (M.D. Ala. 2009).

- “Once a federal agency adopts the seizure, the property is not repleviable, subject only to orders from the court having jurisdiction over the forfeiture proceeding.” *United States v. \$894,800.00 in U.S. Currency*, 2011 U.S. Dist. LEXIS 168455, at \*7 (N.D. Ala. 2011).

The first court asserting jurisdiction does so to the exclusion of all others. *Penn General*, 294 U.S. at 195. Here, the federal government is not asserting jurisdiction; the state is hurling it at them. The trial court eschewed jurisdiction without evidence of official federal action or acceptance. The affidavits support mere transport and possession of the property, but not federal adoption. Adoption on the same day as the seizure is highly unlikely due to federal requirements and procedures. (*See supra* § I). Thus, the record lacks evidence of federal jurisdiction prior in time to the Plaintiffs’ state claim.

## **II. Without evidence of federal approval of the adoption, the court erred in dismissing the case for lack of jurisdiction.**

### **A. Defendants failed to establish a prima facie case in support of dismissal.**

Courts construe motions to dismiss for lack of in rem jurisdiction similarly to motions to dismiss for lack of subject-matter jurisdiction and personal jurisdiction. *Gray*, 216 So. 3d at 434. Parties moving to dismiss bear the burden of making a prima facie showing of the court’s

lack of in rem jurisdiction. *Id.* at 435. Here, a prima facie showing would present clear evidence of federal jurisdiction over Mr. Hare and Mr. Sosa’s property.

For comparison, the defendants in *Gray v. City of Opelika* made a prima facie showing of federal jurisdiction. The *Gray* defendants filed a motion to dismiss arguing that federal jurisdiction attached prior to the filing of the state claim. *Id.* at 433-34. The court failed to rule on the first motion to dismiss, and defendants renewed their motion, submitting new, pertinent evidence—a federal declaration-of-forfeiture certificate. *Id.* at 434. “The declaration-of-forfeiture certificate indicates that federal administrative forfeiture proceedings have been completed and that federal adoption of the seizure occurred on August 27, 2014. The evidence presented a prima facie showing of an adoptive seizure by federal officials and, thus, federal in rem jurisdiction over the currency.” *Id.* at 436.<sup>6</sup>

Here, Defendants did not submit a declaration-of-forfeiture certificate. Defendants instead submitted affidavits by the officers

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<sup>6</sup> Plaintiffs do not argue *Gray’s* holding requires a declaration-of-forfeiture certificate to prove jurisdiction; Plaintiffs assert only that Defendants’ affidavits detailing physical transfer of property fall far short of the proof accepted by the *Gray* court.

detailing the physical transfer of the property, (C. 20, 37), and called it “undisputed evidence” of federal jurisdiction, (C. 35, 93).

Defendants also submitted a chain of custody form for the seized property, but instead of proving adoption, the form fails to even support Defendants’ assertions of physical transfer. (C. 127). The first and last date on the form is the date of the original stop and seizure. (*Id.*) While the DEA task force officer’s name is on the form, no location or the date of the currency’s transfer is recorded after its initial placement in the evidence vault. (*Id.*)

Mr. Hare and Mr. Sosa highlighted *Gray*’s reasoning that federal jurisdiction attaches when the adoption is complete. (C. 49, 65). At any time, Defendants could have submitted a declaration-of-forfeiture certificate and settled the matter. They did not.

**B. Even if Defendants presented a prima facie case for federal jurisdiction, Plaintiffs presented evidence of a material, factual dispute.**

“You cannot prove a negative” is folk logic, the equivalent of proving nonexistence. A party making a negative claim cannot logically provide substantial evidence of nonexistence. Sometimes the absence of evidence is all that is available.

When a party makes a prima facie case that no material fact is at issue, the burden shifts and "the plaintiff is then required to substantiate the jurisdictional allegations in the complaint by affidavits or other competent proof." *Ex parte Covington Pike Dodge, Inc.*, 904 So. 2d 226, 230 (Ala. 2004). In the case of state versus federal in rem jurisdiction, presenting competent proof of state jurisdiction requires showing the *absence* of federal jurisdiction—proving a negative.

To prove federal jurisdiction failed to attach, Plaintiffs would have to prove that a declaration-of-forfeiture certificate was nonexistent. Providing the court that kind of evidence in the initial stages of a case is nearly impossible for any plaintiff.

Asked to prove that negative, Mr. Hare and Mr. Sosa argued the absence of evidence showing official federal adoption and the legally mandated procedures, including federal approval outside the chain of command, required for jurisdiction to attach. (C. 48, 64, 109). They also presented evidence of the adoption process, casting serious doubt that seizure and adoption occurred on the same day. (C. 103-04).

"[W]here the plaintiff's complaint and the defendant's affidavits conflict, the . . . court must construe all reasonable inferences in favor of

the plaintiff." *Ex parte Covington Pike Dodge*, 904 So. 2d at 230. Given the absence of official federal action and the likely impossible timeline, it was reasonable to infer that federal jurisdiction had failed to attach to this forfeiture. The trial court's dismissal of the complaint was in error, as federal jurisdiction was by no means certain.

### CONCLUSION

The matter before the Court may be summed up with a Latin phrase: *Factum negantis nulla probatio*, or "No proof is incumbent on a person who denies a fact." Black's Law Dictionary, (11th ed. 2019). Mr. Hare and Mr. Sosa deny that federal jurisdiction attached to the property taken from Mr. Hare. The record is devoid of evidence showing that the local law enforcement initiated adoption or that a federal agency approved it. In the absence of that evidence, Mr. Hare and Mr. Sosa ask this Court to reverse the trial court's dismissal.

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## **CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with the word limitation set forth in Ala. R. App. P. 28(j)(1). According to the word-count function of Microsoft Word, the brief contains 4,274 words from the Statement of the Case through the Conclusion. I further certify that this brief complies with the font requirements set forth in Ala. R. App. P. 32(a)(7). The brief is prepared in the Century Schoolbook font using 14-point type. See Ala. R. App. P. 32(d).

/s/ Vallee V. Connor  
Vallee V. Connor(CON078)

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 30th June 2021, the foregoing was filed with the Alabama Supreme Court using the Court's electronic filing system, and has been served upon the following parties via electronic mail.

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## Chapter 3: Seizures by State and Local Law Enforcement

### I. Forfeitures Follow the Prosecution

As discussed in Chapter 5, Section [LB](#) in this *Manual*, when property is seized as part of an ongoing federal criminal investigation and the criminal defendants are being prosecuted in federal court, and unless federal forfeiture is not possible for one of the reasons outlined in Section [IV](#) in this chapter, the federal seizing agency should commence an administrative forfeiture proceeding or forfeiture should be pursued civilly or criminally in federal court, regardless of whether the property was seized by a federal, state, or local law enforcement agency.

Conversely, when a state or local agency has seized property as part of an ongoing state criminal investigation and the criminal defendants are being prosecuted in state court, any forfeiture action should generally be pursued in state court assuming that state law authorizes the forfeiture.

### II. General Adoption Policy

An “adopted” forfeiture—or “adoption” for short—occurs when a state or local law enforcement agency seizes property under state law, without federal oversight or involvement, and requests that a federal agency take the seized asset into its custody and proceed to forfeit the asset under federal law. Federal forfeiture law addresses the federal adoption of seizures by state and local agencies. *See* 18 U.S.C. § 981(b)(2)(C) (civil forfeiture statute includes an exemption to the warrant requirement if “the property was lawfully seized by a State or local law enforcement agency and transferred to a Federal agency”); 18 U.S.C. § 983(a)(1)(A)(iv) (extending the general requirement in 18 U.S.C. § 983(a)(1)(A)(i) that notice to “interested parties” be sent “in no case more than 60 days after the date of the seizure” to 90 days in the case of adoptions).

Under [Attorney General Order No. 39462017: Federal Forfeiture of Property Seized by State and Local Law Enforcement Agencies \(July 19, 2017\)](#), federal adoption of all types of assets seized lawfully by state or local law enforcement under their respective state laws is authorized whenever the conduct giving rise to the seizure violates federal law.<sup>1</sup> The net equity and value thresholds in [Chapter 1](#) in this *Manual* continue to apply.<sup>2</sup> Agencies and components should prioritize the adoption of assets that will advance the [Attorney General’s Crime Reduction Strategy](#).<sup>3</sup> Please consult the Department of the Treasury (Treasury) for procedures regarding adoptions by federal agencies participating in the Treasury Forfeiture Fund (TFF).

The Department of Justice (Department), through legal counsel for federal investigative agencies as well as through U.S. Attorney’s Offices (USAOs), will ensure that adoptions are conducted in

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<sup>1</sup> *See* [Attorney General Order No. 39462017: Federal Forfeiture of Property Seized by State and Local Law Enforcement Agencies \(July 19, 2017\)](#).

<sup>2</sup> Chap. 1, Sec. [I.D.1](#) in this *Manual* establishes minimum net equity thresholds of at least \$5,000 for vehicles, and a minimum amount of \$5,000 for cash seizures, or at least \$1,000 if the person from whom the cash was seized either was, or is, being criminally prosecuted by state or federal authorities for criminal activities related to the property. U.S. Attorney’s Offices (USAOs), in consultation with federal law enforcement agencies, may continue to establish higher thresholds for judicial forfeiture cases in order to best address the crime threat in individual judicial districts.

<sup>3</sup> *See* [Department Press Release 17-227 “Attorney General Announces Crime Reduction and Public Safety Task Force”](#) (February 17, 2017).

compliance with law and Department policies.<sup>4</sup> Specifically, the following safeguards, among others, shall be maintained and implemented to ensure that there is sufficient evidence of criminal activity and that the evidence is well documented:

- to ensure that adoptions involve lawfully seized property, legal counsel at the federal agency adopting the seized property must continue to review all seizures for compliance with law, especially seizures made pursuant to an exception to the Fourth Amendment's warrant requirement; and
- to assist federal legal counsel in this review process, the adoption form used by state and local agencies seeking federal adoption of seized assets requires that the state or local agency provide additional information about the probable cause determination justifying the seizure. The additional information in the adoption form better documents probable cause in the first instance and provides federal legal counsel with the relevant information relating to probable cause for review. In addition, state and local agencies are required to certify on the adoption form that they have obtained a turnover order, if necessary,<sup>5</sup> and that the adoption request complies with their state laws.

Adoptions of cash in amounts equal to or less than \$10,000 require additional safeguards. Those adoptions are permissible where the seizure was conducted:

- pursuant to a state warrant,
- incident to arrest for an offense relevant to the forfeiture,
- at the same time as a seizure of contraband relevant to the forfeiture, or
- where the owner or person from whom the property is seized makes admissions regarding the criminally derived nature of the property.

If a federal agency seeks to adopt cash equal to or less than \$10,000, and none of these safeguards are present, then the agency may proceed with the adoption only if the USAO first concurs.

### III. Custody

#### A. Concurrent jurisdiction

Federal prosecutors and agencies may not initiate a federal forfeiture proceeding in rem against property seized by state or local law enforcement while the property remains subject to the in rem or quasi-in-rem jurisdiction of a state court. The court first assuming in rem jurisdiction over the property retains jurisdiction to the exclusion of all others.<sup>6</sup> In addition, the *Rooker-Feldman* doctrine acts as a jurisdictional bar to a federal court reconsidering matters finally decided by a state court, and this doctrine may be applicable in certain circumstances.<sup>7</sup> Finally, considerations of comity may

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<sup>4</sup> Department policy does not affect the ability of state and local agencies to pursue the forfeiture of assets pursuant to their respective state laws. Moreover, when a state or local agency has seized property as part of an ongoing state criminal investigation and the criminal defendants are being prosecuted in state court, any forfeiture action should generally be pursued in state court assuming that state law authorizes the forfeiture. See Sec. I in this chapter.

<sup>5</sup> See Sec. IVB in this chapter.

<sup>6</sup> *United States v. Timley*, 443 F.3rd 615, 627–628 (8th Cir. 2006).

<sup>7</sup> *United States v. Timley*, 443 F.3rd 615, 628 (8th Cir. 2006) (*Rooker-Feldman* doctrine not applicable where the state court did not decide a turnover order proceeding on the merits).

counsel against a federal court asserting jurisdiction over an asset seized by the state even where there is no direct legal obstacle to federal in rem jurisdiction.

Depending on state and circuit law, a state court may be deemed to acquire jurisdiction over property seized by a state or local agency in various circumstances, such as:

- a state or local agency seizes the property pursuant to a state search warrant or seizure warrant,
- a state commences forfeiture proceedings against the seized property,
- the property is subject to a state turnover order requirement or another state-imposed limitation on turnover of seized property for federal forfeiture,
- a party files an action in state court seeking the return of the property, or
- even when a state or local law enforcement officer simply seizes the property in the absence of state process. If a state court has in rem jurisdiction over property, the state court must relinquish jurisdiction before any initiation of federal in rem forfeiture.<sup>8</sup>

Assets seized pursuant to the authority of a state search or seizure warrant may be deemed to be within the actual or constructive in rem jurisdiction of the state court, thereby impeding federal adoption of those assets even in the absence of a formal turnover statute.<sup>9</sup> Where federal adoption is sought for assets seized through state process, federal prosecutors and agencies should be aware of state law and state practice concerning such assets, and may want to consider requesting assistance from the appropriate state or local prosecutorial office in seeking an order from the state court either approving the turnover of the asset for adoption or formally releasing the asset from state jurisdiction.<sup>10</sup>

Several states have statutes that require formal state court approval for turnover of a state-seized asset for federal forfeiture. In these situations, the agency requesting to initiate federal forfeiture, with the assistance of the appropriate state or local prosecutorial office, may be required to obtain a state court turnover order relinquishing jurisdiction and authorizing the turnover of the property to a federal law enforcement agency for the purpose of federal forfeiture.<sup>11</sup>

The turnover order must be obtained from the state court with jurisdiction over the seized property (i.e. the state court that issued the warrant allowing the seizure or before which the state forfeiture proceedings have been or could be commenced). The USAO should not seek such orders in state court but may assist its state counterparts in doing so. Failure to obtain a turnover order may make it impossible for a federal court to take jurisdiction over the seized property in subsequent judicial forfeiture proceedings. In some cases, this may result in the United States dismissing or voiding a federal judicial forfeiture proceeding.

<sup>8</sup> Depending on state law, a turnover order may be required for the federal department to assert in rem jurisdiction over the asset.

<sup>9</sup> In *Little v. Gaston*, 232 So.3rd 231 (Ala. Civ. App. 2017), the state appellate court held that assets seized pursuant to the authority of a state search warrant remained within the actual or constructive in rem jurisdiction of the court that had issued the search warrant, such that their provision for federal adoption was improper.

<sup>10</sup> Federal agents and federal taskforce officers (TFOs) will often participate in the execution of a state search or seizure warrant. Assets seized by agents and TFOs pursuant to the authority of state process should normally be returned to the state court rather than taken in directly for federal forfeiture.

<sup>11</sup> State and local agencies are required to certify that they have obtained a turnover order where necessary. See Secs. [II](#) and [IVB](#) in this chapter.

Some states have passed laws prohibiting the turnover of assets for federal forfeiture unless the asset exceeds a specific value, or unless other conditions are met, which may prevent or limit federal adoption of state-seized assets. These state laws may or may not provide exceptions for seizures by task force officers (TFOs) acting in their federal role or in connection with joint investigations. It is imperative that federal prosecutors work in conjunction with state prosecutors and state agencies to understand the impact state law may have on the federal forfeiture process, as a failure to do so may result in a court-ordered return of seized assets, state court lawsuits against the seizing state agency or officers, and state officers not acting in compliance with state law.

### **B. Use of anticipatory seizure warrants to obtain federal in rem jurisdiction**

If a state or local law enforcement agency commences a forfeiture action under state law, no federal forfeiture action may be commenced as long as the state court has in rem or quasi-in-rem jurisdiction over the subject property. If, however, the state or local authorities determine, for whatever reason, that the state action will be terminated before it is completed, and that the property will accordingly be released, or a federal seizing agency otherwise learns that the state court is about to order the release of property that is federally forfeitable, the property may be federally seized by obtaining an anticipatory seizure warrant from a federal judge or magistrate. The anticipatory seizure warrant must provide that it will be executed only after the state court has relinquished control over the property. For purposes of the notice requirements in 18 U.S.C. § 983(a)(1), property seized pursuant to an anticipatory seizure warrant in these circumstances is considered the subject of a federal seizure such that the period for sending notice of the forfeiture action is 60 days, commencing on the date when the anticipatory seizure warrant is executed.

Given the rapidly changing landscape of state forfeiture laws described above, federal prosecutors should consider whether an anticipatory federal seizure warrant will create obligations that are directly inconsistent with state law.

### **C. Retention of custody by state or local agency during federal forfeiture proceedings**

Where authorized by the U.S. Marshals Service (USMS) or Treasury, federal, state, or local agencies may maintain custody of designated assets pending forfeiture under a written substitute custodial agreement. Such agreements are contractual in nature and do not require district court approval. Substitute custodial agreements shall detail requirements for proper storage and maintenance of specified assets under the care of the custodial agency. In all such cases, security of the assets and the preservation of their condition and value pending forfeiture is of primary concern. Substitute custodial agencies must provide USMS-approved secure storage for the specified assets and provide the USMS full access to the assets for inspection purposes on request. The USMS may terminate substitute custodial agreements at any time at its sole discretion if the USMS determines that a substitute custodian has failed to comply with any of the terms of the agreement.<sup>12</sup>

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<sup>12</sup> See also Chap. 10, Sec. [II.B](#) in this *Manual*.

## IV. Federal Adoption Procedure

### A. Federal adoption request

State and local agencies are required to complete the [Request for Adoption of State or Local Seizure Form \(July 2017\)](#) (adoption form) when seeking federal adoptions. Seizures made as part of joint federal-state investigations or pursuant to federal seizure warrants are not considered adoptions. Agency participants must review the circumstances of a seizure by state and local law enforcement to determine whether it is a federal adoption.

All state and local seizures that qualify for adoption under [Attorney General Order No. 39462017: Federal Forfeiture of Property Seized by State and Local Law Enforcement Agencies \(July 19, 2017\)](#) and are presented for adoption to either a Department or Treasury federal agency must be reported on the adoption form. The adoption form should be completed by the requesting state or local agency in the adoption form. A federal agency should not adopt a seizure while the property remains subject to the jurisdiction of a state court.<sup>13</sup> The state or local agency also may be required to complete the federal agency's standard seizure form as part of the adoption request. All information provided must be complete and accurate. Copies of any investigative reports and of any affidavits in support of warrants pertinent to the seizure must be attached for review.<sup>14</sup> When requesting adoption, state and local agencies must certify that the request complies with state law, as some states prohibit the referral of certain categories of seizures for federal forfeiture.

A federal forfeiture proceeding may appropriately arise in the following circumstances and is not considered an adoption:

- seizures by state or local authorities who are federally deputized TFOs working with federal authorities on a joint task force (*see* Section [IV.A.1](#) in this chapter);<sup>15</sup> or
- seizures by state or local authorities that are the result of a joint federal-state investigation or were coordinated with federal authorities as part of an ongoing federal investigation (*see* Section [IV.A.2](#) in this chapter).

#### A.1 Seizure by a federal task force officer (TFO)

This category of seizure generally occurs when an asset is seized by a sworn law enforcement officer employed by a state or local law enforcement agency but assigned either part-time or full-time to a federal law enforcement agency as a TFO. To qualify as a TFO seizure, the following criteria must be met:

- the TFO must have been a credentialed, deputized federal law enforcement officer at the time of the seizure;
- the TFO must have been assigned to a task force operated by a federal law enforcement agency at the time of seizure; and

<sup>13</sup> *See* Sec. [III](#) this chapter.

<sup>14</sup> State or local agencies may redact from investigative reports information which may disclose the identity of a confidential informant. However, disclosures ultimately may be required if information provided by the informant is needed to establish the forfeitability of the property in a subsequent judicial forfeiture proceeding.

<sup>15</sup> In some states, state law may forbid or regulate the provision of state-seized assets for forfeiture. In Missouri, for example, all seizures by TFOs are deemed Missouri state seizures if the TFO is a Missouri state or local officer.

- the TFO’s actions and authorizations for those actions at the time of seizure were related to task force duties and were not conducted solely pursuant to duties and authorizations as a state or local law enforcement agent.

If the above criteria are not met, the forfeiture of an asset seized by a TFO may nonetheless meet the criteria for a joint investigation seizure (*see* Section [IV.A.2](#) in this chapter). There is no circumstance that would warrant a blanket “federalization” of every seizure made by a state or local law enforcement agency simply because the state or local agency has an officer assigned to a federal task force or initiative like the High Intensity Drug Trafficking Area (HIDTA) or Organized Crime Drug Enforcement Task Force (OCDETF).

However, as discussed in Section [III.B](#) in this chapter, federal forfeiture of assets seized by state or local law enforcement officers, including TFOs acting in a federal role, may be foreclosed or delayed where the state has preexisting in rem jurisdiction, or if state law forbids or regulates the provision of state-seized assets for federal forfeiture.

### **A.2 Seizure by a state or local law enforcement officer as part of a joint investigation**

This category of seizure occurs when an asset is seized under the following circumstances:

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

It can be appropriate to use state or local law enforcement officers to conduct seizures based on probable cause obtained during a federal investigation.

The following criteria generally must be met for a seizure to qualify as a joint-investigation seizure:

- the federal law enforcement agency had advance notice that the seizure would be made;
- the federal law enforcement agency concurred with the seizing state or local law enforcement agency that the seizure was appropriate and in furtherance of the goals of the relevant federal criminal investigation;<sup>16</sup> and
- there was an open federal criminal investigation in which federal agencies were participating in at the time of seizure.

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<sup>16</sup> In some states, state laws may nullify this exception.

## B. Federal law enforcement agency review

The adopting federal agency must consider adoption requests promptly.<sup>17</sup> Absent exceptional circumstances, the adopting federal agency must approve the request prior to the turnover of the property to federal custody.

Only an attorney (e.g. the agency's office of chief counsel or other legal unit) outside the chain-of-command of operational officials may approve a request for adoption.

The attorney review shall verify that:

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

Federal law enforcement agencies will normally secure attorney review through their own offices of chief counsel or other legal unit but—at their discretion—may request that a federal prosecutor conduct this review. Any further review processes established in the future for federal seizures will also apply to adoptive seizures.

## C. Timing

Federal law requires agencies to commence administrative forfeiture proceedings by sending written notice to interested parties “not more than 90 days after the date of seizure by the state or local law enforcement agency.”<sup>18</sup> In order to give individual property owners an opportunity to challenge the seizure as soon as practicable, the Department will expedite federal agencies' decisions regarding adoptions and their provision of notice to interested parties. State and local law enforcement agencies must request federal adoption within 15 calendar days following the date of seizure. The adopting federal agency must send notice to interested parties within 45 days of the date of seizure.<sup>19</sup> The supervisory forfeiture counsel (or higher-level official) of the adopting agency may extend these time limitations for good cause by, provided that such extensions are documented in writing and include a description of the circumstances justifying the extension. Any such extensions remain subject to statutory time limits pursuant to 18 U.S.C. § 983(a)(1)(A)(iv).

<sup>17</sup> See also Sec. [IV.C](#) in this chapter.

<sup>18</sup> See 18 U.S.C. § 983(a)(1)(A)(iv); see also Chap. 5, Sec. [II.B.1](#) in this *Manual*.

<sup>19</sup> Although federal law gives agencies up to 90 days to send notice to interested parties in the case of adoptive forfeitures, [Attorney General Order No. 39462017: Federal Forfeiture of Property Seized by State and Local Law Enforcement Agencies \(July 19, 2017\)](#), requires them to send notice not later than 45 days after seizure, unless a senior official at the federal agency approves such an extension. See also Chap. 5, Sec. [LB](#) of this *Manual*.



## V. Cases Initiated by a U.S. Attorney Directly with State and Local Law Enforcement without Federal Agency Involvement

As a general rule, a lead federal seizing agency is required to be involved in a federal forfeiture case. However, there are occasions when a federal agency declines involvement or federal prosecutors partner with state and local law enforcement directly and no federal seizing law enforcement agencies are involved.<sup>20</sup>

### A. Direct adoption by the U.S. Attorney

If a federal agency will not adopt property seized by a state or local law enforcement agency, and the USAO wants to include the property in a judicial forfeiture, the U.S. Attorney must request that the Money Laundering and Asset Recovery Section (MLARS) authorize direct adoption of the seizure for the following assets: firearms, ammunition, explosives and any asset that does not meet the minimum net equity and value thresholds in Chapter 1, Section [I.D.1](#) in this *Manual*.<sup>21</sup> The U.S. Attorney may approve direct adoption of assets that meet the applicable minimum net equity and value thresholds and property associated with child pornography.

For the U.S. Attorney or MLARS to approve a proposed direct adoption:

- a federal seizing agency must decline adoption of the seizure;
- the state or local law enforcement agency that seized the property must complete the adoption form and certify that the proposed direct adoption complies with state and local law, including any turnover statutes;
- the USAO must independently verify that the proposed transfer complies with state and local law and all turnover orders, if required, are obtained before recommending approval of the direct adoption;<sup>22</sup>
- the USAO must coordinate with its district USMS Asset Forfeiture Coordinator to ensure that the USMS can obtain custody of the asset and the agency with custody of the property will continue to retain custody in accordance with Section [III.C](#) in this chapter.

For direct adoptions requiring MLARS approval, the USAO must send a request to MLARS to initiate the direct adoption of an asset named in a federal indictment or civil forfeiture complaint. During the approval process, MLARS may obtain input from the headquarters office of the seizing agency that declined to adopt the seizure. MLARS shall notify the USAO and the USMS in that district when direct adoption is authorized. Where the property being adopted for federal forfeiture is a seized firearm, the state or local law enforcement agency that seized or is holding the firearm pending federal forfeiture is required to submit a tracing request to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) National Tracing Center (NTC) via eTrace, in accordance with the January 16, 2013, Presidential Memorandum “[Tracing of Firearms in Connection with Criminal Investigations](#).” Written acknowledgement from the state or local agency indicating that this action was completed is required before the USMS will accept custody.

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<sup>20</sup> On such occasions, the USMS is the custodial agency.

<sup>21</sup> For direct referral of assets that do not qualify for adoption, *see* Sec. [V.B](#) in this chapter.

<sup>22</sup> *See* Sec. [III.A](#) in this chapter.

## B. Direct referral by the U.S. Attorney

In some instances, the USAO will partner directly with a state or local law enforcement agency regarding an asset that cannot be adopted because no seizure has occurred (i.e. money judgment, collection on a money judgment, real property).<sup>23</sup> If the USAO wants to include the property in a judicial forfeiture, the USAO must not accept a direct referral from a state or local agency until a federal agency declines to process the asset for federal forfeiture. Once that occurs, the USAO may authorize direct referral of any asset other than real property. For real property, the USAO must request that MLARS authorize the direct referral. Prior MLARS approval is required for real property to ensure proper communication and coordination between the USAO, state or local agency, and USMS to process the asset and manage its liquidation and deposit into the Assets Forfeiture Fund (AFF). The USAO must initiate the request to MLARS in the same manner as a direct adoption (*see* Section [V.A](#) in this chapter). MLARS shall notify the USAO and USMS in that district when direct referral is authorized.

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<sup>23</sup> Regarding real property, Department officials should adhere to the Department's applicable net equity thresholds (*see* Chap. 4, Sec. [1.B.2](#) in this *Manual*) and policy concerning the forfeiture of personal residences where title or ownership lies with persons not implicated in illegal conduct. *See* Chap. 5, Sec. [III.D.1.c.](#) in this *Manual*.



**DEPARTMENT OF THE TREASURY**  
UNDER SECRETARY FOR TERRORISM AND FINANCIAL INTELLIGENCE

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JUL 26 2017

MEMORANDUM FOR: TERRI ALEXANDER  
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ENFORCEMENT

FROM: JOHN FARLEY  
DIRECTOR  
TREASURY EXECUTIVE OFFICE FOR ASSET FORFEITURE

SUBJECT: TEOAF Directive No. 34 – Policy Regarding the Federal Adoption  
of Seizures by State and Local Law Enforcement Agencies

Attached to this memorandum is the updated Treasury Executive Office for Asset Forfeiture (TEOAF) Directive No. 34, "Policy Regarding the Federal Adoption of Seizures by State and Local Law Enforcement Agencies." The prior version of this Directive was issued on January 16, 2015. Please distribute this to your forfeiture personnel and counsel.

We appreciate your attention to these and future changes to our policies, and as always we stand ready to assist with any related requests for guidance or clarification. Should you have any questions, please feel free to contact TEOAF at (202) 622-9600.

Attachment

**DEPARTMENT OF THE TREASURY  
EXECUTIVE OFFICE FOR ASSET FORFEITURE**

**DIRECTIVE NO. 34**

**DATE:** July 26, 2017

**SUBJECT: Policy Regarding the Federal Adoption of Seizures by State and Local Law Enforcement Agencies**

1. **PURPOSE.** This Department of the Treasury Executive Office for Asset Forfeiture (TEOAF) Directive No. 34 contains policies and procedures pertaining to the federal adoption of seizures made by State and Local law enforcement agencies. The purpose of this Directive is to provide the circumstances under which adoptions may be accepted and the procedures to be followed when an adoptive seizure is contemplated by a Treasury Forfeiture Fund (TFF) participating agency.
2. **SCOPE.** This Directive applies to all TFF participating agencies.
3. **BACKGROUND.** As a result of an Order issued on July 19, 2017 by the Attorney General, and after review of the adoptions policy within both the Department of the Treasury and the Department of Justice (DOJ) forfeiture programs, it has been determined that modification of the adoption policy was appropriate. Under the July 19, 2017 Order, federal adoption of assets seized lawfully by state or local law enforcement under their respective state laws is authorized whenever the conduct giving rise to the seizure violates federal law. Certain enhanced legal review and expedited time requirements apply. The policy contained in this Directive is intended to be consistent with the new DOJ policy and AG Order.
4. **POLICY.** TFF participating agencies may adopt assets lawfully seized by state and local law enforcement agencies under their respective state laws whenever the conduct giving rise to the seizure violates federal law. The net equity and value thresholds found in TEOAF Directive Number 20 will continue to apply.<sup>1</sup> As part of the federal law enforcement community, agencies and components should prioritize the adoption of assets that will advance the missions of the Department of the Treasury and the Department of Homeland Security. TFF participating agency legal counsel review is required for all adoptive seizures, as is compliance with the time frames and procedures set forth herein.
5. **SEIZING AGENCY RESPONSIBILITIES.** All TFF participating agencies shall ensure that adoptive seizures are accepted only in the circumstances set forth in this Directive. TFF participating agencies shall ensure agency counsel review of any prospective adoption.
6. **GUIDANCE AND PROCEDURES.**
  - A. **Time Limits:** In order to give individual property owners an opportunity to challenge the seizure as soon as practicable, TFF participating agencies will expedite their decisions regarding adoptions and their provision of notice to interested parties.

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<sup>1</sup> See TEOAF Directive 20 for current net equity requirements. U.S. Attorneys' Offices, in consultation with local federal law enforcement agencies, may continue to establish higher thresholds for judicial forfeiture cases in order to best address the crime threat in individual judicial districts.

- i. State and local law enforcement agencies must request federal adoption within 15 calendar days following the date of seizure.
- ii. The adopting federal agency must send notice to interested parties within 45 days of the date of seizure.

These time limitations may be extended for good cause by agency counsel or other designated official of the adopting federal TFF participating agency, provided that such extensions are documented in writing and include a description of the circumstances justifying the extension. Any such extensions remain subject to statutory time limits pursuant to 18 U.S.C. § 983(a)(1)(A)(iv).

B. Legal Review Required By Agency Counsel: To ensure that adoptions are conducted in compliance with federal and state law, and Treasury and Homeland Security policies, at a minimum, the following safeguards, among others, shall be maintained and implemented to ensure that there is sufficient evidence of criminal activity and that the evidence is well documented:

- i. To ensure that adoptions involve property lawfully seized, legal counsel at the federal TFF participating agency adopting the seized property must review all adoption requests for compliance with law, especially seizures made pursuant to an exception to the Fourth Amendment's warrant requirement.
- ii. To assist federal legal counsel in this review process, the form used by state and local agencies seeking federal adoption of seized assets, *Request for Adoption of State and Local Seizure* ("Adoption Form"), will require that the state or local agency provide additional information about the probable cause determination justifying the seizure. This additional information in the Adoption Form will better document probable cause in the first instance, and provide federal legal counsel with the relevant information relating to probable cause for review. Additionally, state and local agencies must certify that the seizure and requested federal adoption comply with applicable state laws (including obtaining a turnover order if necessary).
  - a. Until the final joint DOJ-Treasury Adoption Form is available, which should be finalized shortly after issuance of this directive, the TFF participating agencies should contact their headquarters and TEOAF to discuss interim processes if they receive an adoption request.
- iii. Adoptions of cash<sup>2</sup> in amounts equal to or less than \$10,000 involve additional safeguards. Those adoptions will be permissible where the seizure was conducted: (1) pursuant to a state warrant, (2) incident to an arrest for an offense relevant to the forfeiture, (3) at the same time as a seizure of contraband relevant to the forfeiture, or (4) where the owner or person from whom the property is seized makes admissions regarding the criminally derived nature of the property. If a TFF participating federal agency seeks to adopt cash equal to or less than \$10,000 and none of these safeguards is present, then the agency may proceed with the adoption only if the U.S. Attorney's Office first concurs.

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<sup>2</sup> For purposes of this Directive, the term "cash" included currency and currency equivalents, such as postal money orders, personal and cashier's checks, stored value cards, certificates of deposit, traveler's check, and U.S. Savings Bonds.

- C. **Additional Training:** To facilitate implementation of these safeguards and help ensure that federal adoptions advance federal law enforcement objectives,<sup>3</sup> DOJ agencies are being required to provide annual training on state and federal laws related to asset forfeiture to its law enforcement officers. State and local agencies will also be required to take annual training on asset forfeiture. TEOAF will work with DOJ to coordinate such training with the TFF participating agencies and develop a similar training program.
- D. **Definition of Adoption:** Consistent with current policy, state and local agencies are required to complete the adoption form only when seeking federal adoptions. An adoption occurs when a state or local law enforcement agency seizes an asset, pursuant to their own authorities and without federal involvement (for example, without federal intelligence sharing, federal coordination, or federal oversight), and requests that a federal agency "adopt" the asset and forfeit it under federal law. This definition supersedes all prior definitions of adoption. Seizures made as part of joint federal-state investigations or pursuant to federal seizure warrants are not considered adoptions. TFF participating agencies must review the circumstances of a seizure by state and local law enforcement to determine whether it is a federal adoption.
- E. The TFF participating agencies shall track adoption requests and acceptances to ensure compliance with this policy. This shall include tracking of all requests for extensions of time limitations in 6.A above and whether the request was approved or denied.

**7. AUTHORITY.** 31 U.S.C. § 9705; Treasury Directive 27-03, "Organizations and Function of the Office of the Assistant Secretary (Enforcement)"; Delegation Memorandum dated May 19, 1995, "Technical Correction to EOAF Delegation of Authority"; and Treasury Order 102-14, March 24, 2007, "Delegation of Authority with Respect to the Department of the Treasury Forfeiture Fund" (or successor documents).

**8. CANCELLATION.** TEOAF Directive No. 34, "Policy Limiting the Federal Adoption of Seizures by State and Local Law Enforcement Agencies," January 16, 2015, is hereby cancelled and replaced with this Directive. Any other documents that reference adoptions (i.e., prior Treasury publications or policy documents) are hereby superseded to the extent they conflict with this Directive.

**9. INFORMATION CONTACT.** Any inquiries pertaining to this Directive should be directed to the TEOAF Equitable Sharing Team or to TEOAF Legal Counsel at (202) 622-9600.

**10. EFFECTIVE DATE.** This policy is effective immediately and applies to seizures made by state or local law enforcement agencies on or after July 26, 2017.

  
John M. Harley  
Director  
TEOAF

<sup>3</sup> This change in policy does not affect the ability of state and local agencies to pursue the forfeiture of assets pursuant to their respective state laws. Moreover, when a state or local agency has seized property as part of an ongoing state criminal investigation and the criminal defendants are being prosecuted in state court, any forfeiture action should generally be pursued in state court assuming that state law authorizes the forfeiture. See, e.g., DOJ Asset Forfeiture Policy Manual (2016), Chap. 14, Sec. 1.



**U.S. Department of Justice**

Criminal Division

Money Laundering and Asset Recovery Section

Washington, D.C. 20530

**POLICY DIRECTIVE 17-1**

**TO:** Heads of Department of Justice Components  
United States Attorneys  
Participants in the Department of Justice Asset Forfeiture Program

**FROM:** Deborah Connor, Acting Chief *Deborah Connor by NKD*  
Money Laundering and Asset Recovery Section  
Criminal Division

**SUBJECT:** Policy Guidance on the Attorney General's Order on Federal Adoption and Forfeiture of Property Seized by State and Local Law Enforcement Agencies

On July 19, 2017, the Attorney General issued an Order allowing Department of Justice components and agencies to forfeit assets seized by state or local law enforcement (referred to in the order as "federal adoptions"). Under the Attorney General's Order, federal adoption of all types of assets seized lawfully by state or local law enforcement under their respective state laws is authorized whenever the conduct giving rise to the seizure violates federal law. The net equity and value thresholds found in the Department of Justice *Asset Forfeiture Policy Manual* will continue to apply.<sup>1</sup> Agencies and components should prioritize the adoption of assets that will advance the Attorney General's Violent Crime Reduction Strategy.

The Department, through legal counsel for federal investigative agencies as well as through the U.S. Attorneys' Offices, will continue to ensure that adoptions are conducted in compliance with law and Department policies. Specifically, the following safeguards, among others, shall be maintained and implemented to ensure that there is sufficient evidence of criminal activity and that the evidence is well documented:

- To ensure that adoptions involve property lawfully seized, legal counsel at the federal agency adopting the seized property must continue to review all seizures

<sup>1</sup> See *Asset Forfeiture Policy Manual* (2016), Chap. 1, Sec. I.D.1, establishing minimum net equity thresholds of at least \$5,000 for vehicles, and a minimum amount of \$5,000 for cash seizures, or at least \$1,000 if the person from whom the cash was seized either was, or is, being criminally prosecuted by state or federal authorities for criminal activities related to the property. U.S. Attorneys' Offices, in consultation with local federal law enforcement agencies, may continue to establish higher thresholds for judicial forfeiture cases in order to best address the crime threat in individual judicial districts.



for compliance with law, especially seizures made pursuant to an exception to the Fourth Amendment's warrant requirement.

- To assist federal legal counsel in this review process, the form used by state and local agencies seeking federal adoption of seized assets, *Request for Adoption of State and Local Seizure* ("adoption form"), will require that the state or local agency provide additional information about the probable cause determination justifying the seizure. This additional information in the adoption form will better document probable cause in the first instance, and provide federal legal counsel with the relevant information relating to probable cause for review. State and local agencies will also be required to certify on the form that they have obtained a turnover order, if necessary.
- Adoptions of cash in amounts equal to or less than \$10,000 may require additional safeguards. Those adoptions will be permissible where the seizure was conducted: (1) pursuant to a state warrant, (2) incident to arrest for an offense relevant to the forfeiture, (3) at the same time as a seizure of contraband relevant to the forfeiture, or (4) where the owner or person from whom the property is seized makes admissions regarding the criminally derived nature of the property. If a federal agency seeks to adopt cash equal to or less than \$10,000 and none of these safeguards is present, then the agency may proceed with the adoption only if the U.S. Attorney's Office first concurs.
- Department officials should proceed with particular caution when deciding whether to waive the Department's net equity thresholds for real property, *see Policy Manual: Asset Forfeiture Policy* (2016), Chap. 13, Sec. I.B, and in considering the forfeiture of personal residences where title or ownership lies with persons not implicated in illegal conduct. *See id.* at Chap. 2, Sec. VIII.C.

In order to give individual property owners an opportunity to challenge the seizure as soon as practicable, the Department will expedite federal agencies' decisions regarding adoptions and their provision of notice to interested parties. State and local law enforcement agencies must request federal adoption within 15 calendar days following the date of seizure. The adopting federal agency must send notice to interested parties within 45 days of the date of seizure. These time limitations may be extended for good cause by the supervisory forfeiture counsel (or higher-level official) of the adopting agency, provided that such extensions are documented in writing and include a description of the circumstances justifying the extension. Any such extensions remain subject to statutory time limits pursuant to 18 U.S.C. § 983(a)(1)(A)(iv).

To facilitate implementation of these safeguards and help ensure that federal adoptions advance federal law enforcement objectives,<sup>2</sup> the Department is enhancing its asset forfeiture

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<sup>2</sup> This change in Department policy does not affect the ability of state and local agencies to pursue the forfeiture of assets pursuant to their respective state laws. Moreover, when a state or local agency has seized property as part of an ongoing state criminal investigation and the criminal defendants are being prosecuted in state court, any forfeiture action should generally be pursued in state court assuming that state law authorizes the forfeiture. *See Asset Forfeiture Policy Manual* (2016), Chap. 14, Sec. I.

training. Beginning in 2018, law enforcement agencies participating in the Department of Justice Asset Forfeiture Program must provide annual training on state and federal laws related to asset forfeiture to their law enforcement officers. Specialized course material for state and local law enforcement will be available later this year.

This policy is effective immediately and applies prospectively to all new requests for adoption by state and local law enforcement. The Order and this policy guidance supersede all inconsistent adoption policy and procedures in any Department of Justice publication, including the U.S. Attorney's Manual § 9-116.000 *et seq.*; the *Attorney General's Guidelines to Seized and Forfeited Property* (2005); the *Asset Forfeiture Policy Manual* (2016), Chapter 14; and the *Guide to Equitable Sharing for State and Local Law Enforcement Agencies* (2009), Sections III.B and III.B.2. In particular, the Order supersedes Attorney General Order Nos. 3485-2015 and 3488-2015, "Prohibition on Certain Federal Adoptions of Seizures by State and Local Law Enforcement Agencies" (Jan. 12 and 16, 2015). This policy directive supersedes Policy Directive 15-1, "Policy Limiting the Federal Adoptions of Seizures by State and Local Law Enforcement Agencies" (Jan. 16, 2015); and Policy Directive 15-2, "Additional Guidance on the Policy Limiting the Federal Adoption of Seizures by State and Local Law Enforcement Agencies" (Feb. 10, 2015). Accordingly, the *Determination of Sufficient Federal Involvement for an Asset Seized by State or Local Law Enforcement* form is no longer required.

The adoption form will be updated to reflect these policy changes. The Department also will make conforming updates to the Consolidated Asset Tracking System (CATS). Until the CATS update is complete, agencies must manually track this information so that it is available for subsequent submission and review.

Consistent with current policy, state and local agencies are required to complete the adoption form only when seeking federal adoptions. Seizures made as part of joint federal-state investigations or pursuant to federal seizure warrants are not considered adoptions. Agency participants must review the circumstances of a seizure by state and local law enforcement to determine whether it is a federal adoption.

If you have questions regarding this policy directive or the application of the Attorney General's Order, please contact the Money Laundering and Asset Recovery Section at (202) 514-1263.

# Request for Adoption of State or Local Seizure

## U.S. Department of the Treasury



### Instructions

- **Part I** must be completed by the state or local law enforcement officer responsible for the seizure. The officer must include the name and title of the agency head or designated agency official who approved the request for adoption. Requests for federal adoption of state or local seizures must be accompanied by both a detailed written description of the facts and circumstances establishing probable cause to seize the asset(s) and all pertinent documents and reports. Requests must be submitted to the federal investigative agency **within 15 calendar days** of the state or local seizure date unless circumstances merit a waiver.
- **Part II** should be completed and signed by the federal investigative agency counsel **within 10 calendar days** of receiving this adoption request.
- **Part III** should be completed when the request includes seized cash equal to or less than \$10,000.00 which does not meet certain conditions and, therefore, requires additional review and approval by the U.S. Attorney's Office. Part III should be completed and signed by an Assistant U.S. Attorney (AUSA) **within 5 calendar days** of receiving this adoption request from the federal investigative agency.
- Absent exceptional circumstances, the request for adoption must be approved prior to the transfer of the property to federal custody.

### Part I - To Be Completed by State or Local Officer Conducting the Seizure

Name of Requesting Agency: \_\_\_\_\_

NCIC/ORI Code of Requesting Agency: \_\_\_\_\_ Requesting Agency Case #: \_\_\_\_\_

Full Name: Last, First \_\_\_\_\_

Telephone #: \_\_\_\_\_ Ext.: \_\_\_\_\_ Email: \_\_\_\_\_

Date of Seizure: \_\_\_\_\_ Date of Request: \_\_\_\_\_

**Location of Seizure** Address: \_\_\_\_\_

City: \_\_\_\_\_ State:  Zip Code: \_\_\_\_\_

### Seized Property Description(s) *(If more than 3, please attach additional sheet)*

1.	
2.	
3.	

### Seized From Parties *(If more than 2, please attach additional sheet)*

**1.** Full Name: Last, First \_\_\_\_\_ Telephone #: \_\_\_\_\_ Ext.: \_\_\_\_\_

Incarcerated?: Yes  No  Date of Release (If Known): \_\_\_\_\_

Institution: \_\_\_\_\_

Home Address: Street, City, State & Zip Code \_\_\_\_\_

**2.** Full Name: Last, First \_\_\_\_\_ Telephone #: \_\_\_\_\_ Ext.: \_\_\_\_\_

Incarcerated?: Yes  No  Date of Release (If Known): \_\_\_\_\_

Institution: \_\_\_\_\_

Home Address: Street, City, State & Zip Code \_\_\_\_\_

### Circumstances of the Property Seizure

**ATTACH ALL** pertinent investigative & arrest reports, & copies of any affidavits filed in support of a search or arrest warrant.

1. Property seized in conjunction with an arrest? Yes  No
2. Was property seized pursuant to a state or local warrant? Yes  No
3. Was an illegal controlled substance seized? Yes  No
4. Was other contraband besides controlled substances seized? Yes  No
5. Was there an admission of criminal activity associated with the seized property? Yes  No
6. Did the possessor deny ownership of the seized property? Yes  No
7. Was a firearm seized for forfeiture or retained as evidence of criminal activity? Yes  No
8. Please identify whether there is audio or video recording of the seizure or the facts establishing probable cause in support of that seizure: \_\_\_\_\_ *(e.g. "dashboard camera footage should be available")*

## Part I Continued - To Be Completed by State or Local Officer Conducting the Seizure

### State Prosecution and/or Turnover Information

As a general rule, if a state or local agency has seized property as part of an ongoing state criminal investigation, and if the criminal defendants are being **prosecuted in state court**, **the forfeiture action should also be pursued in state court.**

1. Has a related state or local criminal case been initiated? Yes  No   
(a) State or Local Case Number: \_\_\_\_\_  
(b) State or Local Prosecutor: \_\_\_\_\_  
(c) Telephone #: \_\_\_\_\_
2. Has a state forfeiture action been initiated for **this** property seized in the case? Yes  No   
(a) State or Local Case Number: \_\_\_\_\_  
(b) State or Local Prosecutor: \_\_\_\_\_  
(c) Telephone #: \_\_\_\_\_
3. Has a state forfeiture action been initiated for **other** property seized in the case? N/A  Yes  No   
(a) State or Local Case Number: \_\_\_\_\_  
(b) State or Local Prosecutor: \_\_\_\_\_  
(c) Telephone #: \_\_\_\_\_
4. Is this property subject to forfeiture under state law? Yes  No
5. Is a state turnover order or equivalent document required under state law? (*Attach a copy when obtained*) Yes  No
6. Does transfer of this property to the federal government comply with all state laws? Yes  No

#### Agency Head or Designated Agency Official Who Approved This Request

Full Name: Last, First \_\_\_\_\_

Title: \_\_\_\_\_

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### Part II - To Be Completed by the Federal Investigating Agency (10 Calendar Days)

1. Date Request Received: \_\_\_\_\_
2. Are all pertinent investigative/arrest reports and affidavits included? Yes  No
3. Does any of the property require USAO concurrence? Yes  No
4. Investigating agency approval to adopt? Yes  No

Reviewing Agency Counsel: Last, First \_\_\_\_\_

Telephone #: \_\_\_\_\_

Ext.: \_\_\_\_\_

Email: \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

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### Part III - USAO Concurrence (5 Calendar days)

USAO concurrence required **only for cash/currency seizures equal to or under \$10,000** and in addition, USAO concurrence only needed if questions 1 - 5 are all marked **no** in Part 1 - Circumstances of the Property Seizure.

1. Date Request Received: \_\_\_\_\_
2. Do you concur with the federal adoption of this property? Yes  No

AUSA Name: Last, First \_\_\_\_\_

Telephone #: \_\_\_\_\_

Ext.: \_\_\_\_\_

Email: \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

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#### Federal Use Only

Asset ID: \_\_\_\_\_

Case #: \_\_\_\_\_

Seizure #: \_\_\_\_\_