

**Unit Goal: Forfeiture of seized property**

**11.1. Identify the requirements established by the legislature in Chapter 1701 Occupations Code for peace officers to be trained on asset forfeiture.**

Occupations Code, Section 1701.253 (g)

- (g) As part of the minimum curriculum requirements, the commission shall establish a statewide comprehensive education and training program on asset forfeiture under Chapter 59, Code of Criminal Procedure, for officers licensed under this chapter.

Occupations Code, Section 1701.402 (d)

- (d) As a requirement for an intermediate proficiency certificate, an officer must complete an education and training program on asset forfeiture established by the commission under Section 1701.253(g).

**11.2. Identify the philosophy behind forfeiture and the extent to which it is appropriate.**

Philosophy of forfeiture

- Should forfeiture be a form of “extra punishment?”
  - Main goal is to deprive criminals of the profits and instrumentalities of crime in a manner that benefits law enforcement and the State.
  - Remedial, not punitive
    - 8<sup>th</sup> Amendment, Excessive Fines Clause applies
    - Amount seized must bear some relationship to the gravity of the underlying offense
  - Not intended to be a means of oppression
  - Must seek justice
- Proportionality of property to be forfeited to the seriousness of the offense
- Jeopardy issues

**11.3. Identify definitions of contraband and proceeds.**

Contraband as defined by CCP 59.01 means property of any nature, including real, personal, tangible, or intangible, that is used in the commission of:

- Any first or second-degree felony under Penal Code (PC)
- Any felony Section 15.031(b), 21.11, or 38.04 or Chapter 29, 30, 31, 32, 33, 33A, or 35, Penal Code
- Any felony under Chapter 43, Penal Code, except as provided by Paragraph (B)
- Any felony under The Securities Act (Article 581-1 et seq., Vernon's Texas Civil Statutes)
- Any offense under Chapter 49, Penal Code, that is punishable as a felony of the third degree or state jail felony, if the defendant has been previously convicted three times of an offense under that chapter

Used or intended to be used in the commission of:

- any felony under Chapter 481, Health and Safety Code (Texas Controlled Substances Act)
- any felony under Chapter 483, Health and Safety Code
- any felony under Chapter 20A or 34, Penal Code

- a Class A misdemeanor under Subchapter B, Chapter 365, Health and Safety Code, if the defendant has been previously convicted twice of an offense under that subchapter
- any felony under Chapter 32, Human Resources Code (Medical Assistance Program), or Chapter 31, 32, 35A, or 37, Penal Code, that involves a health care program, as defined by Section 35A.01, Penal Code
- a Class B misdemeanor under Chapter 522, Business & Commerce Code
- a Class A misdemeanor under Section 306.051, Business & Commerce Code
- any offense under Section 42.10, Penal Code
- any offense under Section 46.06(a)(1) or 46.14, Penal Code
- any offense under Chapter 71, Penal Code
- any offense under Section 20.05, 20.06, 20.07, 43.04, or 43.05, Penal Code
- an offense under Section 326.002, Business & Commerce Code

The proceeds gained from the commission of a felony listed in Paragraph (A) or (B) of this subdivision, a misdemeanor listed in Paragraph (B)(vii), (ix), (x), (xi), or (xii) of this subdivision, or a crime of violence.

Acquired with proceeds gained from the commission of a felony listed in Paragraph (A) or (B) of this subdivision, a misdemeanor listed in Paragraph (B)(vii), (ix), (x), (xi), or (xii) of this subdivision, or a crime of violence.

Used to facilitate or intended to be used to facilitate the commission of a felony under Section 15.031 or Chapter 43, Penal Code.

Used to facilitate or intended to be used to facilitate the commission of an offense under Section 20.05, 20.06, or 20.07 or Chapter 20A, Penal Code.

### **Proceeds Definitions – What are proceeds?**

CCP Article 59.01(7) "Proceeds" includes income a person accused or convicted of a crime or the person's representative or assignee receives from: (A) a movie, book, magazine article, tape recording, phonographic record, radio or television presentation, telephone service, electronic media format, including an Internet website, or live entertainment in which the crime was reenacted; or (B) the sale of tangible property the value of which is increased by the notoriety gained from the conviction of an offense by the person accused or convicted of the crime.

- Commonly understood meaning prevails
- Property derived from an event or transaction
- Conviction of criminal offense not necessary

**Instructor Note:** Use the following scenario to:

- Identify what, if any, criminal offense Mr. and Mrs. Benavides have committed.
- Based on the information, what, if any, of the money received in this action could be considered an illegal proceed.

- Based on the information what, if anything, could be subject to seizure as part of the on-going actions of Cinco.

It is Monday morning at the Smiling Face grocery store, a “mom and pop” operation run by Mr. and Mrs. Benavidez. Every Monday for the last year, a man they know only as Cinco comes to the store. He has asked them to accept checks for payment of merchandise, but to tell the person writing the check to leave the “Pay To” portion blank and they will use the store stamp later when they deposit it. However, they do not have a store stamp. Cinco pays them 20% more than the total of the value of all the checks added up. While they think it is suspicious, the Benavidezes see the extra money as bonus for their years of hard work and since they are paid in cash, they see no harm and no record of the action. In fact, the extra money, averaging about \$500.00 a week, allowed them to buy their new SUV. When Cinco is arrested and charged with Money Laundering, the investigation leads to Mr. and Mrs. Benavidez.

#### **11.4. Identify defenses to forfeiture.**

##### Defenses to Forfeiture

- Statutory Defenses, Article 59.02 Code of Criminal Procedure
  - Innocent Owner Defense (Non-Consensual)
    - Acquired interest before forfeiture
    - Did not know or should not reasonably have known of the act or omission giving rise to the forfeiture or that it was likely to occur at or before the time of acquiring the interest
  - Use or intended to be used without the effective consent of the owner
  - Stolen property
  - No spousal defense (except in cases when because of family violence the spouse was unable to prevent the criminal act)
  - Dismissal of acquittal of related charges
  - Raises presumption property should not be forfeited
  - Community Property
- Non-Statutory Defenses
  - Controlled Substances Analogue
    - Denial that a substance is an analogue of a controlled substance, however
    - State need only show the substance is an analogue by structure or effect (not both)
  - Homestead
    - Homestead protection not resolved in Texas
  - Community property
    - Not a defense
  - Legitimate source of income
    - Discovery before trial essential to establish supporting evidence
    - When, where, how check negotiated
    - Whether deposited and where and history before and since
    - When converted to cash

- Other issues
  - Suppression of evidence in criminal case
    - Different rules apply
    - Should have no effect on civil case
  - Dismissal or Acquittal in Related Criminal Case
    - Raises presumption that property should not be forfeited
  - Fifth Amendment
    - Can be used against defendant in civil case
    - Invocation of right can be used as a comment on any inference it may support

**Instructor Note:** Use the following scenario to:

- Identify what offense Jenkins could be charged with based on the given information.
- Identify whether his wife could be charged and if so to what extent.
- Explain what, if any, action could be taken on the property Jenkins and his wife have accumulated.

Angela is a dancer at a local club. One of her regular customers, Martin Jenkins, routinely spends \$2,000.00 a week on private dances from her. He's been doing this for more than a year, but this week he cut her off, so she phoned his supervisor to report him. It turns out that Jenkins works for the state as a commercial vehicle inspector at an international port of entry. The investigation finds he lives in a \$400,000.00 home, has a set of matching Land Rovers for him and his wife, matching motorcycles for him and his wife, lavish furnishings, a gun collection with more than 100 weapons and has paid cash for everything. His annual salary is \$51,000.00 and his wife, who works as a part-time crossing guard for the school district, makes about \$8,000.00. The investigation determines he is linked to a sophisticated narcotic smuggling operation and his part is to distract inspectors while the drugs are moved through the port.

**11.5. Identify issues regarding pre-seizure planning.**

- Must know the property owner
  - Community vs. Separate Property
  - Leased vs. owned
  - Liens and mortgages (is it worth it?)
- Businesses
  - Leases of real property
  - Liens against inventory
- Equity over mortgage
- Risks/Liabilities
- Costs
- Rented and owner's consent to criminal activity
- Bank Accounts
  - Identify account numbers and signatories
  - Monitor the account to determine best time to seize
  - Know whether it is collateral for a loan

**Instructor Note:** Use the following scenario to:

- Identify what, if any criminal offense Mr. Del Fescue may be involved in.
- Identify, based on the information, what action could be taken against:
  - Ramon Del Fescue
  - Tiny Tub Motors
  - Del Fescue's bank account
  - Ofelia Del Fescue

Tiny Tub Motors has been in the business of selling used cars for ten years. The business is on a leased property located in a rundown part of town in a building that used to be a gas station. The lot has a display of twelve cars. Surveillance of the lot shows twice a week the cars in inventory are moved around and new sales prices splashed on the windshields. The same cars have been on the lot for months. Sales records from the County Tax Assessor Collector's Office and Registration Office indicate Tiny Tub has sold only four cars in the last twelve months. Yet information shows the manager, Ramon Del Fescues, deposits \$25,000.00 per week into a commercial account of the same name. Mr. Del Fescues has a prior arrest and conviction for narcotics trafficking where he used his trucking business to move narcotics throughout the state. He did time in prison. The business is owned by Del Fescues' mother, Ofelia, who is 92 years old and lives in a nursing home. She has never set foot on the property.

**11.6. Identify methods of search and seizure.**

- Without Warrant
  - Owner, operator, or agent knowingly consents
  - Incident to search consented to
  - Property subject to prior judgment of forfeiture
  - Incident to lawful arrest, search, or lawful search incident to arrest
- Probable Cause for Seizure
  - Reasonable belief that a substantial connection exists between the property to be forfeited and the criminal activity defined by statute
- Exceptions to Warrant Requirement
  - Plain view
  - Emergency searches (exigencies)
  - Area within immediate control at time of arrest
  - Safety sweep
- With Warrant
  - Rules apply from Chapter 18 Code of Criminal Procedure
  - Contraband warrant must also show in affidavit the specific felony offense committed and the described property complies with the definition of contraband from CCP 59.01
- You cannot commit any act which could be construed as inducing a person to waive their rights to their seized property (Official Oppression)

**11.7. Identify post seizure procedures.**

- Peace Officer who seizes has custody

- Must provide attorney representing state a sworn statement containing:
  - Schedule of property seized
  - Acknowledgment that officer seized property
  - And list of reasons supporting seizure
- No later than 72 hours after seizure must:
  - Place property under seal
  - Remove property to a place ordered by court; or
  - Require law enforcement agency to take custody of the property and move it to a proper location.
- Currency
  - Deposit in interest bearing account in jurisdiction of prosecuting attorney
- Petition requirements
  - Include all property seized
  - All owners or interest holders must be included
    - Lien holders
    - Person who had custody of property when seized
    - Does not necessarily include spouses
  - Affidavit supporting forfeiture
- Affidavit requirements
  - Probable cause
    - A reasonable belief that a substantial connection exists between the property to be forfeited and the criminal activity (CCP 59.023)
  - Location of seizure
  - Date of seizure
  - Identify the owner of the property
  - Identity who was in possession of the property
  - Identify all essential parties
  - Set yourself up as an expert
- Probable cause
  - Justify the seizure based on the facts
  - Circumstantial evidence is okay
  - Identify key factors connecting the drugs to the property
    - Proximity to drugs
    - Canine alert
    - Suspicious activity consistent with drug sales
    - Amount of money
    - Alternative sources for the money or property
    - Storage location of the property
  - Antrim v State, 868 S.W.2d 809 (Tex.App. – Austin 1993, no writ)
- Affidavit preferences
  - Should be written by the seizing officer
  - First person, based on direct knowledge
    - I, not Officer X

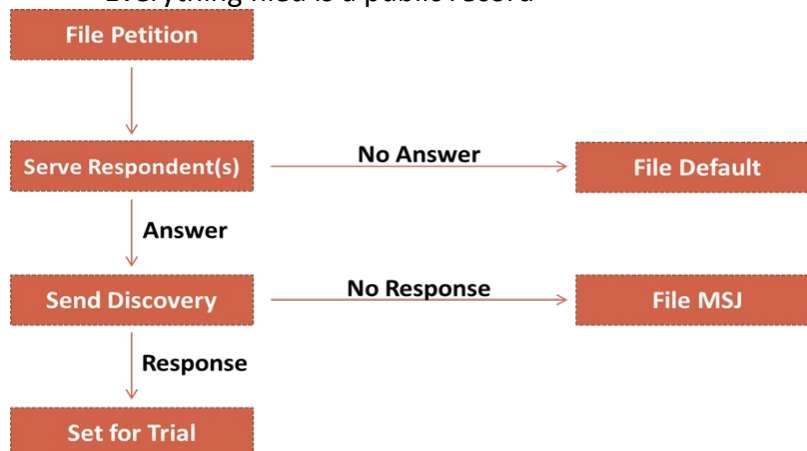
- Avoid hearsay unless subject to exception or no other option
  - Hearsay exceptions: Statement Against Interest, Excited Utterance, etc.
- Keep it simple as possible
  - Avoid acronyms and abbreviations that are not commonly known
- Defendant's explanation of where the property came from is not necessary
  - Unless: Its completely implausible and disproven
  - Still need your complete report with the explanation

**Instructor Note:** It is all public record. Do not add extraneous information. Be sensitive about names and witnesses. Stick with facts and reasonable conclusions. No speculation or rumors. Check grammar, punctuation, etc. Send in the affidavit for approval before signing if possible.

- Waivers
  - Interest
    - Article 59.04 Code of Criminal Procedure (possession)
  - Service of Process
    - Rule 119, Rules of Civil Procedure
    - Evidence of Lawsuit
    - Standing
    - Official Oppression Penal Code 39.03

#### 11.8. Identify forfeiture proceedings under 59.04.

- Article 59.04 Code of Criminal Procedure: Forfeiture Proceeding
  - Civil Proceeding
    - Civil rules apply
    - Preponderance of evidence (for now)
    - Respondent not entitled to appointed counsel
    - Same rule of evidence as criminal trials
      - Hearsay rules still apply
    - Everything filed is a public record



- Only a felony prosecutor can file
- In general, can only file in the County where the property is seized
- District Attorney must begin proceedings within 30 days of your date of seizure

- If seized by federal agents and then given to a local agency, 30-day timeframe begins to run when the local agency gets the property

**Instructor Note:** Check with your local prosecutors for any specific office policies that may vary from jurisdiction to jurisdiction. An example of some office policies may include only if property value > \$500, Call for approval first, must have a felony offense (absent special circumstances), Generally not filed for misdemeanors, we don't seize real property, we don't seize cars with large liens, Paperwork should be turned in within 15 days of the seizure, Guns are evidence and should be destroyed not "seized."

- Service of civil citation upon parties

**11.9. Identify other considerations in forfeiture cases.**

- Things to consider in forfeiture cases
  - Civil Discovery
- Interrogatories
- Depositions
- Settlement offers negotiations
- Trial
- Local agreement
- Federal adoption
- Drug trafficking
  - Drug profits moving through the U.S. financial system were estimated to be as high as \$100 billion a year in 2005 based on a report from the Institute for Policy Studies.
  - The trade in illicit drugs was estimated to be worth \$400 billion a year, or 8% of all international trade in 2005 based on a report from the Institute for Policy Studies.

**11.10. Explain where the proceeds from seizures go and what the proceeds cannot be used for.**

- Governed by State Law and Inter-local Agreements
- Must be spent on a "law enforcement purpose"
  - Example: made for an activity of a law enforcement agency that relates to the criminal and civil enforcement of the laws of the state (CCP 59.06 (d-2) and (d-3))
- "Official purpose of an attorney's office"
  - Example: Relates to the preservation, enforcement, or administration of the laws of the state
- Includes:
  - Equipment
  - Supplies
  - Investigative and training-related travel expenses
  - Crime prevention and treatment programs
  - Facility costs



- Witness-related costs
- Audit costs (related to forfeitures)
- Legal fees
- State Bar and legal association dues
- Forfeiture money cannot be used for: (CCP 59.06 (d-1))
  - Political campaign donations
  - Donate to any entity, except as provided by subsection (d-2)
  - Training for any member of the judiciary
  - Travel expenses for training that would violate generally applicable restrictions established by the governing body.
  - To purchase alcoholic beverages
  - Make any expenditure not approved by the commissioners' court or governing body of the municipality, as applicable, if the head of a LE agency or attorney representing the state holds an elective office and: (Instructor – see details of CCP 59.06 (d-1) (6)(A) and (B)).
  - Increasing salaries, unless approved by the governing body.