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Why the Feds Cannot Forfeit Jeffrey Epstein's Mansion

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Following Jeffrey Epstein's death and the dismissal of the criminal charges pending against him, commentators have suggested that federal prosecutors in the Southern District of New York might file a civil forfeiture action against Epstein's \$77 million Manhattan townhouse to recover assets for eventual distribution to his alleged victims. Based on the publicly available evidence, however, a civil forfeiture action against the mansion would almost certainly be time-barred under the statute of limitations applicable in such cases, raising the prospect that the government has waited far too long to pursue such a remedy.

The Indictment and Criminal Forfeiture. The indictment, unsealed on July 8, 2019, charged Epstein with participating in a sex trafficking conspiracy, in violation of Title 18, U.S.C. §1591, "from at least in or about 2002, up to and including in or about 2005." The indictment alleges that Epstein abused numerous minor victims at his mansion located at 9 East 71st St. during that time period by causing them to be recruited to engage in paid sex acts with him.

While the typical statute of limitations in federal criminal cases requires that charges be filed within five years of the offense, in cases involving the sexual

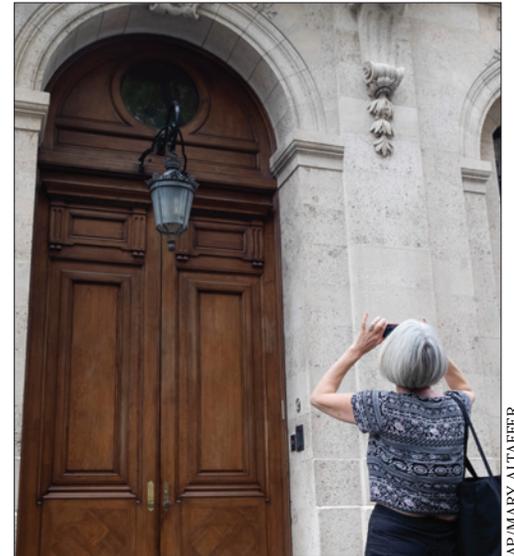
abuse of a child under the age of 18, criminal charges may be brought at any point during the life of the child or for ten years after the offense, whichever is longer.

Notably, the indictment also included a Forfeiture Allegation specifying that upon conviction, the government intended to seek criminal forfeiture of Epstein's mansion on the grounds that it had been used to facilitate the commission of the sex trafficking offenses.

On Aug. 28, 2019, at the request of prosecutors, Judge Richard Berman dismissed the indictment against Epstein pursuant to the rule of abatement which requires termination of criminal charges when the defendant dies before final judgment has been rendered.

With the dismissal of the indictment, criminal forfeiture of the mansion is no longer possible. Federal prosecutors could pursue a separate civil forfeiture complaint against the property, and the government normally has wide discretion to file such a civil case before, after, or even simultaneously with the filing of an indictment containing criminal forfeiture counts. Ordinarily, the government in that situation will ask the court to stay the parallel civil forfeiture action pending resolution of the criminal case. However, as discussed below, the government must still commence such an action in a timely manner.

Civil Forfeiture: Standards and Statute of Limitations. In an in rem civil forfeiture, the government has the burden



ENTRANCE TO EPSTEIN'S townhouse on the Upper East Side of Manhattan

AP/MARY ALTAFFER

to establish, by a preponderance of the evidence, that the property is subject to forfeiture, meaning in this context that the property was used to commit or facilitate the commission of the underlying offense conduct and that there was a substantial connection between the offense and the property itself. In a number of cases involving sexual abuse of minors and production of child pornography, courts previously have ordered the forfeiture of residential properties on the theory that they provided offenders with the privacy that allowed them to operate without fear of discovery.

Federal civil forfeiture actions are governed by the general customs law statute of limitations. Title 19, U.S.C. §1621 provides that a civil forfeiture action must be filed within five years

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of when the offense giving rise to forfeiture was discovered, or within two years of when the involvement of the property in that offense was discovered, whichever is later.

Courts have held that with regard to an alleged offense involving a continuing course of conduct (such as a sex trafficking conspiracy), the limitations period starts afresh with the commission of each separate offense. Courts have also determined that the limitations period runs from the date on which federal law enforcement agents became aware of the offense or the connection between the offense and the property in question. See, e.g., *United States v. 6 Fox Street*, 480 F.3d 38 (1st Cir. 2007).

What Did the Feds Know and When Did They Know It? So the crucial question arises: when did federal law enforcement first become aware of the alleged sex trafficking activity and/or the fact that such activity was allegedly taking place at the Manhattan mansion? Normally we might not have access to such information, but the Epstein investigation has a long history that sheds light on this issue.

On Sept. 24, 2007, after reportedly conducting a year-long investigation, the U.S. Attorney for the Southern District of Florida entered into a formal non-prosecution agreement with Epstein whereby he received immunity from prosecution for federal sex trafficking offenses committed in that District from in or around 2001 through in or around September 2007. In lieu of federal charges, Epstein agreed to plead guilty to two state law prostitution charges and served 13 months in a county jail.

Subsequently, victims brought an action (*Jane Doe #1 and Jane Doe #2 v. United States*, S.D. Fla. Dkt. No. 08 Civ. 80736) seeking to set aside the Epstein non-prosecution agreement on the grounds they had not been consulted on the terms of the proposed deal. Defending the Government's conduct,

in a motion to dismiss the victims' claim filed in July 2013, federal prosecutors in Miami stated that "a number of districts outside the Southern District of Florida (e.g., the Southern District of New York and the District of New Jersey) share jurisdiction and venue with the Southern District of Florida over potential federal criminal charges based on the alleged sexual acts committed by Epstein against the Petitioners." The Miami federal prosecutors then explicitly invited victims aggrieved by the non-prosecution to contact those other Offices to pursue Epstein-related claims.

Thus, regardless of whether federal prosecutors in Manhattan knew of Epstein's alleged sex trafficking back then, it is indisputable that as of September 2007, federal law enforcement authorities in Florida were aware of the offense conduct, having immunized Epstein for such actions. It is also clear, at least as of July 2013 (if not earlier), that those same federal law enforcement authorities were aware that the conduct in question also occurred, in part, in the Southern District of New York where Epstein was known to reside and where the subject property is located.

Attributing that knowledge to the federal government as a whole, and construing all inferences in the prosecutor's favor, the statute of limitations for commencing a civil forfeiture action against the Manhattan mansion either would have lapsed in September 2012 (five years after the date of the non-prosecution agreement describing the alleged federal sex trafficking offenses) or July 2015 (two years after prosecutors in Florida confirmed in writing that the conduct at issue had also occurred in the Southern District of New York).

Can Prosecutors Salvage a Civil Case? The government might try to avoid dismissal by making three arguments, none of which is likely to succeed given the passage of time and tactical

decisions made over the years in this long-running investigation.

First, the government could argue that while its representatives were aware of possible sex trafficking conduct in the Southern District of New York by 2013 (if not earlier), they had not yet developed evidence linking such activity to the mansion. Given the explicit details of sexual acts allegedly taking place in the mansion that have been revealed in various civil litigations filed by a number of victims over the years since the NPA, however, it is difficult to believe that agents and prosecutors had not already heard similar claims by witnesses who were interviewed in the course of the original federal investigation.

Second, the government could try to "restart the clock" by alleging that additional acts in furtherance of the sex trafficking conspiracy at issue took place in the Manhattan mansion at some point within the past five years (*i.e.*, after September 2014). But that would be surprising at this point given that the conspiracy alleged in the indictment ends in 2005, and prosecutors in Florida and New York have presumably had years to pore over the evidence in this high-profile matter. Furthermore, prosecutors argued tenaciously against granting Epstein bail following his arrest yet produced no evidence to the court of more recent sex trafficking activity after the period at issue in the indictment (although they did claim that lewd photographs of indeterminate vintage had been found in a search of the mansion).

Third, the government could argue that the statute of limitations should be tolled (*i.e.*, suspended). §1621 provides for tolling during the time of "the absence from the United States of the person subject to the penalty or forfeiture, or of any concealment or absence of the property" to be forfeited. The case law makes clear that with respect to *in rem* actions, it is the *property's* absence or concealment that tolls the statute.

That provision might apply to, for example, a secret offshore bank account, but it clearly has no bearing on one of the largest private homes in New York City.

The government nevertheless could assert that the statute of limitations should be equitably tolled. Equitable tolling is reserved for extraordinary or exceptional circumstances. In civil forfeiture actions, it may be permitted, for example, where a claimant has actively pursued his judicial remedies but filed a defective pleading during the statutory period, or where the government was induced or tricked by an adversary's conduct into allowing a filing deadline to pass. The party seeking the benefit of the doctrine bears the burden of proving that tolling is appropriate. Generally, courts are less forgiving about defaults when the defaulting party (in this case the government) failed to exercise due diligence in preserving its legal rights.

Here, the government might well claim it properly included the mansion in the forfeiture allegation in a timely-filed indictment and could not have foreseen that Epstein's unexpected death would deprive them of a forum in which to secure criminal forfeiture of the building. While those facts may sound compelling and even unique at first, at least two federal district courts have expressly rejected equitable tolling under comparable circumstances.

In *United States v. Ninety-Six Thousand One Hundred Dollars in United States Currency*, 2007 U.S. Dist. LEXIS 15111 (W.D. Tenn.), defendant Young was indicted on currency reporting violations that occurred from September 1999 through October 2000. Young was convicted at trial and the court entered a preliminary order of forfeiture against \$96,100 in tainted funds associated with the offense.

Subsequently, in April 2006, Young died unexpectedly while an appeal of his conviction was pending. The Court of Appeals promptly dismissed

the indictment (under the abatement rule) and ordered the government to return the money. Two months later, in June 2006, the government filed a civil forfeiture against the same funds. Young's estate moved to dismiss, arguing the action was time-barred. The government conceded it had not filed within the five-year period but sought equitable tolling for the time when Young's criminal case was pending, asserting that it had diligently pursued forfeiture in the criminal case and was prevented from a successful forfeiture only by Young's death.

The district court refused to equitably toll. It held that although "the government clearly could have filed a contemporaneous civil proceeding and sought a stay, it elected not to do so, choosing instead to stand by and do nothing while the statutory period expired." The district court noted that while the government complained that it could not have foreseen Young's untimely death, it "is presumed to have been aware of case law vacating criminal judgments in the event a defendant dies prior to the finality of a direct appeal. The government simply gambled on Young's longevity and good health, and lost."

Similarly, in *United States v. Any & All Funds on Deposit in Account No. 12671905*, 2010 U.S. Dist. LEXIS 81151 (S.D.N.Y.), defendant Victor Kozeny was indicted in May 2005 in connection with Foreign Corrupt Practices Act and money laundering violations dating back to the late 1990s. He successfully resisted extradition to the United States from the Bahamas. In the interim, in April 2009, the government filed an action seeking to civilly forfeit funds arising from the sale of Peak House, a multimillion dollar home that Kozeny had allegedly purchased using proceeds from the criminal activity (and which was designated for criminal forfeiture in the indictment).

Claimants to the funds moved to dismiss the civil action on statute of

limitations grounds. The government did not dispute the timing, but argued that the applicable limitations period should be equitably tolled in light of the complicated earlier proceedings. Declining to invoke the doctrine, the court (citing *Ninety-Six Thousand One Hundred Dollars in United States Currency*) found that once the criminal proceedings had begun, there was no reason why the government could not also have brought a contemporaneous civil forfeiture claim which, once filed, also could have been stayed. The court concluded, "[i]t is unfortunate that this action, which appears to have some merit and involves a substantial amount of funds, must be dismissed on procedural grounds but there is no question that the Government learned of the Peak House funds at the very latest by 2005 and sat on its hands until 2009. As such, equitable tolling is unavailable to the Government and the action is time-barred."

Conclusion

Prosecutors faced little time pressure in bringing the recent indictment against Epstein. Had he been convicted, his mansion most likely would have been subject to criminal forfeiture. But the government must be vigilant in preserving the potential for a parallel civil forfeiture. Ironically, as compared to criminal forfeiture, the procedural standards governing timeliness of a civil forfeiture action are far more stringent and far less forgiving to the federal authorities.