

SEIZE ‘EM AND WEEP: THE REACH OF ALABAMA’S  
GAMBLING FORFEITURE STATUTE TO INTERMINGLED  
CURRENCY

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You've got to know when to hold 'em  
Know when to fold 'em  
Know when to walk away  
And know when to run  
You never count your money  
When you're sittin' at the table  
There'll be time enough for countin'  
When the dealin's done  
Every gambler knows  
That the secret to survivin'  
Is knowin' what to throw away  
And knowin' what to keep  
'Cause every hand's a winner  
And every hand's a loser  
And the best that you can hope for  
Is to die in your sleep<sup>1</sup>

## I. INTRODUCTION

Consider the following: A pawn shop owner ran an illegal bookmaking and gambling operation out of his store.<sup>2</sup> Law enforcement, after conducting surveillance, executed a search warrant and seized, among other things, approximately \$4,800 in cash and coins and \$6,000 in other cash found in a safe.<sup>3</sup> While the store owner was found guilty of illegal gambling and admits that the \$4,800 was gambling related, he argued that the money from the safe, which was fifteen to twenty steps away from the gambling operation, was money that was a loan from his mother used exclusively for the operation of his pawn business.<sup>4</sup> Since that money was not used in any form of gambling, should it be forfeitable?

Alternatively, consider the situation of a defendant who was arrested for paying out a bet to an undercover officer that had been placed with a known professional gambler.<sup>5</sup> When she was arrested, police found three large unmarked bundles of cash, two containing \$5,000 and one containing \$4,300, in a bag inside her purse.<sup>6</sup> Additionally, several envelopes were found in her purse containing a total of \$73, with some having the names of

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1. KENNY ROGERS, *The Gambler*, on THE GAMBLER (United Artists Grp. 1978).

2. *See* State v. Fisher, No. 01-C-01-9205-CC-00158, 1993 WL 75341, at \*1 (Tenn. Crim. App. Mar. 18, 1993).

3. *See id.*

4. *See id.* at \*2.

5. *See* Ward v. State, 592 So. 2d 581, 582 (Ala. 1992).

6. *See id.*

various sports games written on them.<sup>7</sup> All of this money was seized by authorities. Defendant claims that she had taken the money in the bundles out of her safe deposit box to buy furniture and appliances and that it was wholly unrelated to the gambling money.<sup>8</sup> Security footage at the bank indeed shows her entering and exiting the safe deposit area the morning before she was arrested. Is this seizure legal?

Finally, consider the case of a bar owner who decided to install illegal coin-operated casino machines in his establishment to increase his revenue.<sup>9</sup> The machines were a hit, attracting a great many new patrons who often requested change in quarters from bartenders to play slots. Those who were successful often used their winnings to buy drinks at the bar. While the scheme was initially successful, it soon attracted the attention of law enforcement, who executed a search warrant and seized the machines, all quarters in the machines, and all remaining currency in the establishment, including all money in registers behind the bar and thousands of dollars in cash in a back-office safe. The bar owner comes to you for help, arguing that most of the money the police seized either came purely from purchases of alcohol without winnings or are winnings that became unidentifiable as gambling proceeds once they were used at the bar.<sup>10</sup> Can the police really take every cent of his hard-earned cash?

Scenarios like these pose an interesting dilemma. Money tends to be fluid and difficult to trace reliably. While some gambling forfeitures may only result in the seizure of funds that are fairly clearly associated with criminal activity, such as the coins in an illegal slot machine, comprehensive seizures such as the ones listed above may cast a net so wide that arguably innocent funds may easily be seized, even with little to no evidence of a connection to anything illegal. These seizures may include proximate funds, those within the same area of the illegal activity or contraband, and intermingled funds where innocent money has been mixed with “tainted” funds to such an extent that it becomes difficult, if not impossible, to divide them up. This article will specifically seek to determine what limits exist, if any, on the seizure of these proximate and intermingled funds under Alabama’s gambling-forfeiture statute. Part II will outline the history and composition of various forms of gambling forfeiture. Part III will take an in-depth look at the gambling-forfeiture laws of Alabama and compare its text and practices to those of other states. Part IV will compare Alabama’s gambling-forfeiture statute with the application

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7. *See id.*

8. *See id.* at 583.

9. *See People v. Whitmore*, 608 N.E.2d 1304, 1307 (Ill. App. Ct. 1993).

10. *See id.* at 1312.

of its similar drug-forfeiture statute. Finally, Part V will attempt to apply Alabama's gambling-forfeiture law to the scenarios mentioned above.

## II. FORFEITURE GENERALLY

### A. History and Definitions

The idea of forfeiture is an ancient one, having roots in Biblical times as a form of "religious atonement" for an object causing a death.<sup>11</sup> This eventually evolved in English common law from religious restitution to a secular vehicle to fill the Crown's coffers while punishing those that were careless or "offen[ded] . . . the King's peace."<sup>12</sup> Forfeiture would spread to the Thirteen Colonies and later the independent United States, as statutes on both the federal and state level developed to "reach virtually any type of property that might be used in the conduct of a criminal enterprise."<sup>13</sup>

Three categories of forfeiture evolved in American jurisprudence from this ancient practice: criminal, administrative, civil.<sup>14</sup> Criminal forfeiture involves the seizure of property based upon a criminal conviction through an *in personam* action against a defendant, and is "typically imposed upon a person as part of his sentence in a criminal case."<sup>15</sup> Administrative asset forfeiture deals with *in rem* seizure of property through administrative action "without prosecutorial or judicial involvement" when no owner is willing to claim the property or contest the forfeiture.<sup>16</sup> Finally, civil forfeiture is an *in rem* action requiring a formal judicial proceeding against property alleged to be "either . . . derived from or . . . used to commit a crime."<sup>17</sup> In this proceeding, a property owner can "defend his property in a court of law" in an effort to recover it.<sup>18</sup> Civil forfeiture is the most consistently used method in the context of gambling-forfeiture statutes<sup>19</sup> and thus is the main focus of discussion here.

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11. Michele M. Jochner, *The Supreme Court Turns Back the Clock on Civil Forfeiture in Bennis*, 85 ILL. B.J. 314, 315 (1997).

12. *Id.*; see also *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681–82 (1974).

13. See *Calero-Toledo*, 416 U.S. at 683.

14. See Rachel L. Stuteville, Comment, *Reverse Robin Hood: The Tale of How Texas Law Enforcement Has Used Civil Asset Forfeiture to Take from Property Owners and Pad the Pockets of Local Government—the Righteous Hunt for Reform Is on*, 46 TEX. TECH L. REV. 1169, 1175 (2014).

15. *Id.* at 1175–76.

16. *Id.* at 1176–77.

17. *Id.* at 1177–78.

18. *Id.*

19. E.g., Stefan D. Cassella, *Forfeiture Reform: A View from the Justice Department*, 21 J. LEGIS. 211, 213 (1995); T. Michelle Ator, Note, *Constitutional Law—21 U.S.C. § 881 and the Eighth Amendment: Application of the Proportionality Requirement to Civil Forfeitures: Austin v. United States*, 113 S. Ct. 2801 (1993), 17 U. ARK. LITTLE ROCK L.J. 95, 103–104 (1994); John R. Russell,

The distinction between a criminal forfeiture, an *in personam* proceeding, and civil forfeiture, an *in rem* proceeding, is an important one. Criminal forfeiture, being an action against a person, requires a criminal conviction against the owner to be effective.<sup>20</sup> On the other hand, civil forfeiture, an action brought against the property itself, may be valid regardless of whether there is a conviction or even a prosecution.<sup>21</sup> In the same vein, the burden of proof in civil forfeiture cases—preponderance of the evidence—is far easier for the Government to reach than the “beyond a reasonable doubt” standard required in criminal forfeiture.<sup>22</sup> Thus, a civil forfeiture action may be successful if the Government can prove that it is more likely than not that the property was either used to commit a crime or derived from a crime.<sup>23</sup>

### *B. Scope and Limits of Civil Forfeiture Generally*

At first glance, it appears as though the Government may pursue civil forfeiture actions against virtually anything that may have been used in the commission of a crime, from a plane used in the transport of marijuana<sup>24</sup> to guns seized from an accused illegal seller<sup>25</sup> to the home of an alleged drug dealer.<sup>26</sup> However, it is important to note that the scope of what items may be seized under a civil-forfeiture statute naturally depends on the enacting text.<sup>27</sup> The type of crime mentioned in enacting legislation may also serve to limit the scope of a provision. Although numerous federal and state forfeiture statutes have been enacted throughout the United States, a great many are limited in scope to takings related to particularly serious areas of crime, such as drugs or gambling.

In addition to limitations in textual scope, forfeiture statutes are subject to inherent constitutional protections that may limit the amount or type of property that may be seized. A forfeiture may be considered excessive in violation of the Eighth Amendment’s protection against excessive fines due to its inherent punitive and monetary nature, even if it is technically a

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Comment, *The Constitutionality of Attorney Fee Forfeiture Under RICO and CCE*, 22 J. MARSHALL L. REV. 155, 155 n.5 (1988).

20. Stuteville, *supra* note 14, at 1181–82.

21. *Id.*

22. *Id.*

23. *Id.* at 1178, 1181–82.

24. *United States v. One 1965 Cessna 320C Twin Engine Airplane*, Serial # 1813841-1, License No. N3062T, 715 F. Supp. 808, 809 (E.D. Ky. 1989).

25. *United States v. Fifty-Two Firearms*, 362 F. Supp. 2d 1308, 1310 (M.D. Fla. 2005).

26. *Money v. State*, 717 So. 2d 38, 42 (Ala. Crim. App. 1997).

27. See generally Annotation, *Forfeiture of Money Used in Connection with Gambling or Lottery, or Seized by Officers in Connection with an Arrest or Search on Premises where Such Activities Took Place*, 19 A.L.R.2d 1228, § 2 (1951).

separate action from criminal proceedings.<sup>28</sup> Determinations on the excessiveness of forfeiture turn on the principle of proportionality, as “[t]he amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.”<sup>29</sup> Punitive forfeitures “grossly disproportional to the gravity of a defendant’s offense” are invalid.<sup>30</sup>

However, while considered a punitive measure subject to Eighth Amendment protections against excessive fines,<sup>31</sup> a civil forfeiture may be valid even against innocent owners without violations of the Fifth or Fourteenth Amendments due to its role as a deterrent to future crimes.<sup>32</sup> This deterrent purpose serves to make “illegal behavior unprofitable” rather than simply punish the owner.<sup>33</sup> Thus, the punishment–deterrence dichotomy leads to a system in which the seizure of a convicted drug dealer’s body shop and mobile home where he sold and stored narcotics might be considered excessive and invalid,<sup>34</sup> while the innocent wife of a man who solicits a prostitute is unable to recover the family car that he used in his offense.<sup>35</sup> These competing interests complicate any analysis on the overall reach of any forfeiture statute.

### *C. Forfeiture in Alabama*

The Alabama Criminal Code contains five forfeiture statutes covering several areas of the law. First, Alabama’s drug forfeiture statute allows for the seizure of, among other things, controlled substances, raw materials used to create controlled substances, things of value exchanged for controlled substances, real property used to violate drug laws, and conveyances used to transport controlled substances.<sup>36</sup> Second, the violation of certain firearm offenses may also lead to the seizure of a person’s pistols.<sup>37</sup> Third, equipment, vehicles, and other things used in the production, transportation, dissemination, display, or storage of child pornography are subject to seizure.<sup>38</sup> Fourth, gambling devices, gambling records, vehicles, or money used to violate state gambling laws can be seized.<sup>39</sup> Finally, a catch-all provision allows for property, proceeds, or

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28. *See Austin v. United States*, 509 U.S. 602, 621–22 (1993).

29. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

30. *Id.*

31. *See Austin*, 509 U.S. at 621–22.

32. *Bennis v. Michigan*, 516 U.S. 442, 450–52 (1996).

33. *Id.* at 452 (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687 (1974)).

34. *See Austin*, 509 U.S. at 604–06.

35. *See Bennis*, 516 U.S. at 443.

36. ALA. CODE § 20-2-93(a)(1)–(9) (2015).

37. ALA. CODE § 13A-11-84(b) (2015).

38. ALA. CODE § 13A-12-198 (2015).

39. ALA. CODE § 13A-12-30 (2015).

instrumentalities used or derived from a felony or prostitution offenses to be forfeited.<sup>40</sup>

### III. GAMBLING FORFEITURE

#### A. Prohibition of Gambling in Alabama

Gambling is generally prohibited in Alabama, both as a player<sup>41</sup> and as a proprietor.<sup>42</sup> “[G]ambling” involves a person who “stakes or risks something of value upon the outcome of a contest of chance . . . upon an agreement or understanding that he or someone else will receive something of value in the event of a certain outcome.”<sup>43</sup> “[A]dvanc[ing] gambling activity “ involves a person “engag[ing] in conduct that materially aids any form of gambling activity.”<sup>44</sup> Additionally, it is illegal to possess either a gambling device<sup>45</sup> or gambling records<sup>46</sup>

Any form gambling in the state of Alabama is per se unlawful unless it is “specifically authorized by law.”<sup>47</sup> While the Alabama Legislature may not constitutionally create any form of lottery,<sup>48</sup> the authorization of certain forms of nonlottery gambling is within its authority.<sup>49</sup> Several such statutory authorizations by the legislature have carved out areas of legality for certain types of gambling. For example, pari-mutuel betting<sup>50</sup> at race meetings is legal, so long as it is authorized by other state or local laws, so that gambling on greyhound races would not result in a criminal

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40. ALA. CODE § 15-5-61 (Supp. 2017).

41. ALA. CODE § 13A-12-21 (2015) (prohibiting “simple gambling,” when a person “knowingly advances or profits from unlawful gambling activity as a player”).

42. ALA. CODE § 13A-12-22 (2015) (prohibiting “promoting gambling,” when a person “knowingly advances or profits from unlawful gambling activity otherwise than as a player”).

43. ALA. CODE § 13A-12-20(4) (2015) (defining “gambling”).

44. ALA. CODE § 13A-12-20(1) (2015) (defining “advanc[ing] gambling activity”).

45. ALA. CODE § 13A-12-27 (2015).

46. ALA. CODE §§ 13A-12-24 to -25 (2015).

47. See ALA. CODE § 13A-12-20(12) (2015) (defining *unlawful* in the context of the criminal chapter on gambling).

48. ALA. CONST. art. IV, § 65; see also Opinion of the Justices No. 373, 795 So. 2d 630, 638 (Ala. 2001).

49. Op. of the Justices No. 205, 251 So. 2d 751, 754 (Ala. 1971) (advising that a bill legalizing pari-mutuel betting on horse or dog races did not contravene constitutional prohibitions against a lottery). *But see Ex parte Ted’s Game Enters.*, 893 So. 2d 376, 381 (Ala. 2004) (holding that the Chuck E. Cheese Law may not constitutionally be construed to allow for the legalization of activities “in which skill does not predominate over chance”); Op. of the Justices No. 373, 795 So. 2d 630, 643–44 (Ala. 2001) (advising that a bill legalizing video-gambling machines would be in violation of the antilottery provision of the state constitution).

50. ALA. CODE § 13A-12-20(7) (2015) (defining *pari-mutuel* as “[a] form of lottery in which the winning chances . . . are not determined upon the basis of . . . [an] act on the part of persons conducting or connected with the scheme, but upon the basis of the outcome of a future contingent event . . . otherwise unrelated to the particular scheme”).

prosecution.<sup>51</sup> Additionally, certain counties are permitted, by constitutional amendment, to allow the playing of certain forms bingo.<sup>52</sup>

Also exempt from this chapter are “bona fide coin-operated amusement machine[s],” games of skill that either reward the player with additional plays at the game or with “noncash merchandise, prizes, toys, gift certificates, or novelties” with “a wholesale value of not more than five dollars.”<sup>53</sup> Also called the “Chuck E. Cheese Law,”<sup>54</sup> this statute allows for certain amusement devices including pinball machines, claw machines, skee-ball machines, billiard tables, and other similar machines.<sup>55</sup> However, it explicitly does not include slot machines or video poker games.<sup>56</sup>

### *B. Alabama’s Gambling Forfeiture Law*

Alabama law allows for the forfeiture of four categories of property: gambling devices,<sup>57</sup> gambling records,<sup>58</sup> vehicles that are “possessed or used” in violation Alabama’s gambling laws, as well as money bets used as stakes in the gambling activities.<sup>59</sup> These first three categories appear to be fairly straightforward in their application. Generally, entertainment machines that pay out money and do not fall under the “bona fide coin-operated amusement machine” exception are considered to be illegal gambling devices.<sup>60</sup> Similarly, the identity of gambling records tends to be fairly broad and straightforward, as they are documents and records, including digital records, related to things such as “winnings, advertising contracts, documents about contracts and pay rates for gaming systems,” and other documents that tend to have some relation to the alleged

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51. ALA. CODE § 13A-12-31 (2015).

52. *See* *Houston Cty. Econ. Dev. Auth. v. State*, 168 So. 3d 4, 9 (Ala. 2014) (noting that while bingo is “a form of lottery” prohibited by the state constitution, local constitutional amendments may allow for its playing subject to a narrow construction).

53. ALA. CODE § 13A-12-76(a) (2015).

54. *State ex rel. Tyson v. Ted’s Game Enters.*, 893 So. 2d 355, 366 (Ala. Civ. App. 2002).

55. ALA. CODE § 13A-12-76(e)(1) (2015).

56. ALA. CODE § 13A-12-76(e)(2) (2015); *see also* *Tyson*, 893 So. 2d at 376 (holding that the application of the Chuck E. Cheese Law to video slot machines would be in violation of section 65 of the Alabama Constitution, even if the games might involve some degree of skill).

57. ALA. CODE § 13A-12-20(5) (2015) (defining *gambling device* as “[a]ny device, machine, paraphernalia or equipment that is normally used or usable in the playing phases of any gambling activity”).

58. ALA. CODE § 13A-12-24(a) (2015) (describing “gambling records” as a writing, paper, instrument, or article commonly used in a bookmaking or lottery scheme).

59. ALA. CODE § 13A-12-30(a)–(c) (2015).

60. *See* *Tyson*, 893 So. 2d at 358, 367–68 (holding that the seizure of twenty video slot machines was valid); *see also* *Wade v. State*, 986 So. 2d 1212, 1218–19 (Ala. Civ. App. 2007) (holding that cash payout being made to at least one player of a machine subjected it to forfeiture); *Houston Cty. Econ. Dev. Auth. v. State*, 168 So. 3d 4, 7 (Ala. 2014) (upholding the seizure of electronic bingo machines).

gambling taking place.<sup>61</sup> Although there is little case law on the seizure of vehicles under this statute, one would typically think that vehicles used in the transportation of gambling machines would be the primary target of forfeiture proceedings, similar to the use of Alabama’s narcotics-forfeiture statute.<sup>62</sup>

The seizure of funds related to gambling shows potential to be the most complex issue in Alabama’s gambling-forfeiture statute. In some cases, the connection between the funds and gambling activity may be incredibly obvious due to the circumstances surrounding the seizure and the disposition of the currency itself, making its connection to the illegal activity an easy determination. For example, when illegal gambling is the “only business being conducted on the premises” of a location, a strong inference is created that any money found at the location must have been bets or stakes that were proceeds of the illegal activity.<sup>63</sup> Without an alternative explanation being put forward, the money having origins in illegal gambling is the only reasonable inference.<sup>64</sup> Additionally, various other circumstances, such as evidence of signs pointing where to “cash out” and witness testimony on the payout of cash, can potentially strengthen the inference that most or all funds on the premises came from illegal gambling.<sup>65</sup>

Even with the existence of alternative explanations on the source of the money, seizures may still be valid. For example, there may be a lack of credibility on the part of the owner that makes their explanation less than believable. For example, an owner arrested while paying out a bet may try to explain away her possession of several large, unmarked packages of money as funds that she’d taken out of her safe deposit box to buy furniture.<sup>66</sup> While this may certainly be true, several other factors, such as her close association with a professional gambler, her possession of several other smaller envelopes of money with bets written on them, her possession of other items such as checks and betting sheets, and inconsistencies with her accounting of how much she had spent that day sufficiently undermined her explanation to such a degree that forfeiture was deemed to be proper.<sup>67</sup> On the other hand, it is plainly obvious that evidence was insufficient to

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61. *Houston Cty. Econ. Dev. Auth. v. State*, 168 So. 3d 4, 22 (Ala. 2014).

62. *Cf.* ALA. CODE § 20-2-93(a)(5) (2015) (allowing for the seizure of vehicles that are used to transport or conceal controlled substances or raw materials related to the production of controlled substances); *Hitchcock v. State*, 106 So. 3d 896, 897–98 (Ala. Civ. App. 2012) (holding that the forfeiture of a car in which marijuana was found was valid).

63. *See Wade v. State*, 986 So. 2d 1212, 1220–21 (Ala. Civ. App. 2007).

64. *Id.* at 1221.

65. *See id.* at 1215–16 (describing the testimony of a law enforcement officer that visited an arcade three times and witnessed the illegal activities and surrounding circumstances).

66. *See Ward v. State*, 592 So. 2d 581, 582–83 (Ala. 1992).

67. *Id.*

support forfeiture even when the claimant admitted that he'd won the money gambling out of state, due to the fact that such actions were not against the law.<sup>68</sup> Although it is unclear whether any specific combination of factors would be sufficient to create a threshold of validity in seizure, these cases can serve as some basic guidelines to determine whether a forfeiture is legitimate.

Additionally, it is incredibly important to note the standard of review in these proceedings. During the initial forfeiture proceedings, the Government must make a prima facie case for the forfeiture of property, with the standard of proof being reasonable satisfaction<sup>69</sup> under a strict construction of the statute.<sup>70</sup> Once a prima facie case is established, the claimant has the burden of proving the innocence of the property by a preponderance of the evidence.<sup>71</sup> If the claimant fails to do so, they face an even steeper challenge on appeal. When reviewing a forfeiture proceeding in which a trial court has heard ore tenus evidence, "its findings based on that evidence are presumed to be correct."<sup>72</sup> Because of this, an appellate court may only reverse a decision if the findings of fact are "clearly erroneous" after "consideration of evidence and all reasonable inferences to be drawn therefrom."<sup>73</sup>

Because of these relatively low standards, forfeiture actions can be very easy to lose at trial and almost impossible to effectively appeal. When looking at all seventeen appeals under Alabama's gambling-forfeiture law, there is only one instance of a reversal of a trial decision.<sup>74</sup> And if that case is not counted since its reversal came likely only because of a typographical error incorrectly referring to the gambling-forfeiture statute instead of the controlled substances statute,<sup>75</sup> it is arguable that there has in fact never been an appellate reversal of a genuine gambling-forfeiture proceeding against funds in Alabama.

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68. *Thompson v. State*, 715 So. 2d 224, 224–27 (Ala. Civ. App. 1997).

69. *See Wade*, 986 So. 2d at 1222–23 (comparing the standard of proof to the standard present in Alabama's controlled substance forfeiture laws); *see also Miller v. State*, 567 So. 2d 331, 331 (Ala. Civ. App. 1990) (although this is the standard for forfeiture related to controlled substance charges, the standard is the same for gambling forfeitures); MICHAEL GREIBROK, FREEDOMWORKS FOUND., CIVIL ASSET FORFEITURE: GRADING THE STATES 5, <https://www.scribd.com/document/267761329/Civil-Asset-Forfeiture-Grading-the-States>.

70. *State v. Smith*, 578 So. 2d 1374, 1376 (Ala. Civ. App. 1991) (holding that because the drug-forfeiture statute is penal in nature, it should be strictly construed, though there is no such guidance on gambling forfeiture specifically).

71. *See Wade*, 986 So. 2d at 1223 (holding that "[b]ecause [claimants] did not rebut the State's prima facie evidence, they did not meet their burden of proof"). *See generally* Stuteville, *supra* note 14, at 1182 (although there is no specific law or holding in an Alabama court establishing this standard for gambling forfeiture).

72. *Ward v. State*, 592 So. 2d 581, 581 (Ala. 1992).

73. *Id.*

74. *See Thompson v. State*, 715 So. 2d 224, 227 (Ala. Civ. App. 1997).

75. *Id.*

### C. Gambling Forfeiture: In Other States

Because there have been relatively few cases comprehensively dealing with the forfeiture of currency in Alabama, a comparison of statutes and court decisions from other jurisdictions may prove helpful in establishing a better baseline on standards for successful forfeiture.

#### 1. Hawaii

Under Hawaii’s gambling-forfeiture law, gambling devices, implements, personal property, vehicles, or gambling records used to violate gambling laws, in addition to “any money or personal property used as a bet or stake” in illegal gambling activity, may be subject to forfeiture.<sup>76</sup> However, forfeiture may be limited in scope by the court due in consideration of “[t]he degree to which the property was used to facilitate the conduct,” “[t]he gain received or expected by an owner from the conduct that subjects property to forfeiture,” “[t]he nature and extent of the owner’s culpability,” and “[t]he owner’s effort to prevent the conduct or assist in prosecution.”<sup>77</sup> These provisions seek to protect against grossly disproportionate effects.<sup>78</sup>

Unlike Alabama’s gambling-forfeiture statute, which requires only the establishment by the Government of a prima facie case in order to meet their burden,<sup>79</sup> Hawaii requires establishment that currency is subject to forfeiture “by a preponderance of the evidence.”<sup>80</sup> Once this is done, the claimant must establish by a preponderance of the evidence that the currency is not subject to forfeiture in order to recover.<sup>81</sup> However, Hawaiian courts have created an even more stringent standard for the Government’s forfeiture action to be effective, demanding that the State must “prove the existence of a substantial connection between the currency being forfeited and the illegal activity.”<sup>82</sup> However, it is not necessary to “trace the proceeds exactly.”<sup>83</sup>

In its application, Hawaii’s’ forfeiture statute appears to make things more difficult for the Government compared to Alabama’s statute. For

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76. HAW. REV. STAT. ANN. § 712-1230 (LexisNexis 2016).

77. HAW. REV. STAT. ANN. § 712A-5.5 (LexisNexis 2016).

78. *Id.*

79. *See Wade v. State*, 986 So. 2d 1212, 1222–23 (Ala. Civ. App. 2007) (comparing the standard of proof to the standard present in Alabama’s controlled substance forfeiture laws); GREIBROK, *supra* note 69.

80. *Carlisle ex rel. State v. Ten Thousand Four Hundred Fourty-Seven Dollars in U.S. Currency*, 89 P.3d 823, 827 (Haw. 2004).

81. *Id.*

82. *Id.* at 837.

83. *Id.*

example, while the close proximity of gambling records to cash was not sufficient to prove beyond a preponderance of the evidence that it helped to facilitate illegal gambling activity in Hawaii,<sup>84</sup> a similar situation led to the complete seizure of all funds on a person in Alabama.<sup>85</sup> This appears to be a result of Hawaii's higher initial standard for the Government to establish a *prima facie* case combined with its requirement of a substantial connection between funds and illegal activity.

## 2. *Illinois*

Illinois allows for the seizure of gambling devices, along with “[a]ny money or other thing of value integrally related to acts of gambling.”<sup>86</sup> The burden of proof is on the State, which is required to prove by “a preponderance of the evidence.”<sup>87</sup> Appellate proceedings “will reverse the trial court’s determination only if it is against the manifest weight of the evidence.”<sup>88</sup> It is not necessary for a trial court to determine that an item is “inherently illegal” or “contraband *per se*.”<sup>89</sup> Rather, it must only be proven that the item “had a rational relationship to an unlawful purpose before that item is subject to forfeiture.”<sup>90</sup>

Illinois case law gives one of the best examples of a determination on whether intermingled goods in the context of a business are forfeitable.<sup>91</sup> In *Whitmore*, a supper club owner who had illegal coin-operated gambling machines in his establishment sought to recover approximately \$1,258 in quarters, \$306.50 of which was found inside publicly accessible gambling machines.<sup>92</sup> Using the rational relationship standard, the appellate court found that the lower court’s decision that all quarters should be forfeited “was not against the manifest weight of the evidence.”<sup>93</sup> This determination was supported by “evidence regarding the use of quarters in defendant’s gambling enterprise, including where defendant kept the quarters, how

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84. *Id.* (holding that only \$1,300 of approximately \$10,000 in cash seized from a man’s pants was substantially connected to his illegal gambling); *see also* *State v. Nobuhara*, 474 P.2d 707, 708 (Haw. 1970) (holding that money without evidence linking it to illegal gambling was improperly seized even when it was carried alongside properly forfeitable money linked to illegal bets).

85. *See Ward v. State*, 592 So. 2d 581, 582–83 (Ala. 1992) (holding that, despite an explanation otherwise, all funds on a claimant arrested for promoting gambling were properly forfeited).

86. 720 ILL. COMP. STAT. ANN. 5/28-5(a)–(b) (West Supp. 2017).

87. 720 ILL. COMP. STAT. ANN. 5/28-5(c) (West Supp. 2017).

88. *People v. Whitmore*, 608 N.E.2d 1304, 1311 (Ill. App. Ct. 1993).

89. *See id.* at 1312 (construing *People v. Massey*, 579 N.E.2d 1259, 1264 (Ill. App. Ct. 1991)).

90. *See id.* (construing *People v. Massey*, 579 N.E.2d 1259, 1264 (Ill. App. Ct. 1991)).

91. *See id.* at 1308, 1312.

92. *Id.* at 1307.

93. *Id.* at 1312.

patrons used the quarters, and how employees gathered, counted, and rolled the quarters.”<sup>94</sup>

Claimant still argued, however, that only the quarters found in publicly accessible gambling machines could sufficiently be linked to illegal gambling, as all other currency was “commingled with [claimant’s] bar and Illinois State Lottery receipts,” thus making them “not separately identifiable as gambling proceeds.”<sup>95</sup> The court, however, refused to buy into this argument, holding that it was not “manifestly erroneous” that the rational relationship standard encompassed all quarters in the establishment and that a claimant should not be shielded from forfeiture by “comingling his gambling proceeds with his legitimate business proceeds.”<sup>96</sup>

Parallels may be drawn between Illinois’s rational relationship standard<sup>97</sup> and the only reasonable inference<sup>98</sup> and “only logical inference”<sup>99</sup> standards that have been used in Alabama. However, once again it is arguable that gambling forfeiture is easier under Alabama law due to its lower initial evidentiary threshold in establishing a *prima facie* case. While Illinois requires the forfeiture’s validity to be shown by “a preponderance of the evidence,”<sup>100</sup> Alabama’s reasonable satisfaction<sup>101</sup> standard increases the chance of the Government winning the initial forfeiture action which, in turn, makes an appeal under deferential standards of review even more difficult for a claimant.

### 3. *Pennsylvania*

Under Pennsylvania law, “[a]ny gambling device possessed or used in violation of [gambling provisions] shall be seized and forfeited to the Commonwealth.”<sup>102</sup> The Government must establish “by a preponderance of the evidence that the seized [property] was derived from gambling transactions and constituted either a reserve from which winners were to be paid or profits from the operation.”<sup>103</sup> If the Government fulfills this burden, the burden shifts to the claimant to prove that the property “was lawfully acquired and that it was not unlawfully used or possessed.”<sup>104</sup>

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94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Wade v. State*, 986 So. 2d 1212, 1221 (Ala. Civ. App. 2007).

99. *Ward v. State*, 592 So. 2d 581, 583 (Ala. 1992).

100. 720 ILL. COMP. STAT. ANN. 5/28-5(c) (West Supp. 2017).

101. *See Wade*, 986 So. 2d at 1222–23 (comparing the standard of proof to the standard present in Alabama’s controlled substance forfeiture laws); GREIBROK, *supra* note 69.

102. 18 PA. STAT. AND CONS. STAT. ANN. § 5513 (West 2015).

103. *See Commonwealth v. McDermond*, 560 A.2d 901, 905 (Pa. Commw. Ct. 1989).

104. *Id.* at 904–05.

With regards to currency, under Pennsylvania law “money may be seized and forfeited . . . if it is derivative contraband of an illegal gambling operation.”<sup>105</sup> This may be proved by showing that from the circumstances “it is clearly apparent that the money formed an integral part of the illegal gambling operation.”<sup>106</sup> Money that is comingled cannot be forfeited if, before the seizure, it is reclaimed by the player or is in the “exclusive possession of the winner or owner of the gambling device, or proprietor of the gambling establishment.”<sup>107</sup> Thus, money may only be seized if it is “floating,” either awaiting a winner or existing within the gambling organization itself as profits.<sup>108</sup> For example, most of \$1,500,000 found in boxes in various parts of a house suspected of being a gambling den was not properly forfeitable because most of the money had “no connection with gambling, gambling devices or paraphernalia” and there was no basis to conclude that this money was “simply awaiting the determination of a winner.”<sup>109</sup> However, forfeitures have been affirmed when a trial court may have inferred that the claimant was acting as a stakeholder or awaiting the results of a race.<sup>110</sup>

Pennsylvania’s particularized forfeiture standard is more stringent than Alabama’s in several respects. Once again, Alabama requires the Government to only prove to reasonable satisfaction<sup>111</sup> that the property is forfeitable in order to shift the burden to the claimant, compared to Pennsylvania’s more demanding preponderance of the evidence standard.<sup>112</sup> Additionally, Pennsylvania’s requirement that the funds effectively be floating and not in the exclusive possession of a person greatly narrows the application of forfeiture to cases where either money is part of a pot that has not yet been decided or is “house” money that has not yet been distributed to the proprietors of the gambling enterprise.

#### IV. ALABAMA’S ALTERNATIVE FORFEITURE: CONTROLLED SUBSTANCES

Alabama’s drug-forfeiture statute also provides useful context as to the forfeitability of funds, given Alabama’s relative lack of case law on the

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105. *Id.* at 903.

106. *Id.*

107. *Id.*

108. *Id.* at 904–05.

109. *Sugalski v. Cochran*, 529 A.2d 1104, 1107–08 (Pa. Super. Ct. 1987).

110. *Pannulla v. Rosenberg*, 90 A.2d 267, 267–69 (Pa. Super. Ct. 1952); *Commonwealth v. Petrillo*, 45 A.2d 404, 404–05 (Pa. Super. Ct. 1946).

111. *See Wade v. State*, 986 So. 2d 1212, 1222–23 (Ala. Civ. App. 2007) (comparing the standard of proof to the standard present in Alabama’s controlled substance forfeiture laws); GREIBROK, *supra* note 69.

112. *Commonwealth v. McDermond*, 560 A.2d 901, 905 (Pa. Commw. Ct. 1989).

seizure of funds through gambling forfeiture. Money and other things of value that are “furnished or intended to be furnished by any person in exchange for a controlled substance in violation of any law,” as well as “all proceeds traceable to such an exchange” and “all moneys . . . used or intended to be used to facilitate any violation” are forfeitable.<sup>113</sup> On its face this appears to be a broader standard than is used by the gambling-forfeiture statute, which simply allows for the forfeiture of money “used as bets or stakes in gambling activity.”<sup>114</sup> However, in its application, it appears that this standard is not quite as strict as it first appears, since the circumstances surrounding gambling funds may potentially create an inference that the funds fall into the category of *bets or stakes* even without proof of particular monies being associated with particular betting.<sup>115</sup>

In practice, applications of the drug-forfeiture statute might even be less successful than the seizure of gambling funds due to the strong circumstantial component of the latter. For example, under the drug forfeiture statute the State failed to make a *prima facie* case that \$8,000 was properly forfeitable despite being on the person of a person who purchased a small amount of illegal drugs, other drugs in close proximity, and a statement by the claimant expressing “his intent to continue purchasing controlled substances.”<sup>116</sup> Since any future illicit transaction using the funds was simply speculation and not traceable to any specific drug transaction, it was not sufficient to validate a forfeiture.<sup>117</sup> Similarly, the presence of instruments commonly associated with drug dealing in the proximity of cash is insufficient to warrant forfeiture because it was against the great weight of the evidence that a drug transaction had actually taken place.<sup>118</sup> Thus it appears that it is more difficult in the context of drug forfeiture to successfully seize funds simply through a simple analysis of circumstance and environment, while it seems to be quite viable in the context of gambling forfeiture.<sup>119</sup>

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113. ALA. CODE § 20-2-93(a)(4) (2015).

114. ALA. CODE § 13A-12-30(c) (2015).

115. *See* *Wade v. State*, 986 So. 2d 1212, 1220–21 (Ala. Civ. App. 2007).

116. *Ex parte* *McConathy*, 911 So. 2d 677, 678, 681–82 (Ala. 2005).

117. *Id.* at 688.

118. *See* *Thompson v. State*, 715 So. 2d 224, 225–26 (Ala. Civ. App. 1997) (“[U]nlike in Hitler’s Germany or in Stalin’s Soviet Union, in the United States mere suspicions of illegal activity cannot support the state’s decision to confiscate an individual’s property.”).

119. *See* *Ward v. State*, 592 So. 2d 581, 582–83 (Ala. 1992); *see also* *Wade v. State*, 986 So. 2d 1212, 1220–21 (Ala. Civ. App. 2007).

## V. THE PROBLEM OF INTERMINGLED AND PROXIMATE FUNDS

Now that the scope of gambling forfeiture in Alabama has been fleshed out, the question remains how the hypotheticals presented at the beginning of this article should resolve.

### A. *The Poor Pawn Shop Owner*

The first scenario involved a pawn shop owner who ran an illegal gambling operation out of his store, leading to the seizure of both funds that he admitted were linked to gambling and other funds in a safe nearby.<sup>120</sup> However, the owner claimed that these funds were a loan from his mother that he used in the operation of his pawn shop and were completely unrelated to any of his gambling operations.<sup>121</sup> Under Alabama law, what should happen to these funds?

Absent some convincing evidence corroborating the claimant's story on the origin of the money, the funds are likely forfeitable, although he may have a fighting chance depending on the decision of the trial court. The circumstances surrounding the money are nowhere near as damning as in *Wade*, where the only business occurring on the property was the illegal gambling.<sup>122</sup> Here, the pawn shop owner has a very legitimate story for both the origin and use of the money. While this may be sufficient to convince the trial court beyond a preponderance of the evidence, a loss by the claimant at that level will almost certainly lead to failure on appeal unless the court finds his story about the origins of the money so credible that it could find the trial court was clearly erroneous.<sup>123</sup>

### B. *Gamble on the Bank*

The second hypothetical, dealing with a professional gambler's "bag man" who is caught with money that she claims came from her safe deposit box,<sup>124</sup> is virtually identical to the facts of an Alabama case<sup>125</sup> with one important distinction: the existence of concrete video evidence backing up her presence at the bank on the morning of her arrest. In *Wade*, the court specifically points to the plaintiff's utter lack of credibility as an important

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120. *See supra* Part I.

121. *See supra* Part I.

122. *Wade v. State*, 986 So. 2d 1212, 1220 (Ala. Civ. App. 2007).

123. *Cf. Ward*, 592 So. 2d at 582 (holding that a trial court could have found evidence that money was connected to gambling, even though claimant had an alternative explanation, because of issues with her credibility).

124. *See supra* Part I.

125. *Cf. Ward*, 592 So. 2d at 582–83 (holding that forfeiture was proper).

consideration.<sup>126</sup> Additional evidence such as security footage or bank receipts would certainly strengthen her ability to prove her case at trial beyond a preponderance of the evidence, though it is doubtful whether it would sway an appellate court to overturn a verdict.

### C. Bar None

The third hypothetical deals with a bar owner whose attempt to drum up business ended with the complete seizure of all funds in the bar.<sup>127</sup> This case differs from the original case, *People v. Whitmore*,<sup>128</sup> in that in addition to quarters, paper currency was also seized. This is perhaps the most difficult case because of the intermingled nature of the funds due to bar patrons buying drinks with their illicit winnings.<sup>129</sup> Unlike in *Wade*, substantial business besides gambling occurs on the premises, leading to a fairly substantial amount of intermingling between bar cash and gambling coins. As they are more directly linked to the coin-operated machines, quarters would likely have a sufficient nexus to be forfeitable. As for the cash, an appellate court would face a difficult choice. On one hand, allowing for ill-gotten gains to effectively be laundered through the bar certainly cuts against public policy.<sup>130</sup> On the other hand, paper currency, which is completely incompatible with the method of gambling being used, may not have enough of a significant nexus to the illegal activity to constitute a finding of forfeiture.

## VI. CONCLUSION

Overall, it appears as though Alabama has earned its reputation as one of the worst states where you can have your assets seized.<sup>131</sup> While a claimant may have a fighting chance at trial, the Government's low initial burden of proof combined with stringent standards of review on appeal create a situation in which it can be very difficult for any funds that are even only proximately related to illegal gambling to be salvaged. These low standards, combined with the fact that the state keeps 100% of forfeited funds and lacks reporting requirements,<sup>132</sup> may create an environment in which the ease of forfeiture leads to abusive practices by authorities.

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126. *Id.* at 583.

127. *See supra* Part I.

128. 608 N.E.2d 1304, 1307 (Ill. App. Ct. 1993).

129. *See supra* Part I.

130. *Cf. Whitmore*, 608 N.E.2d at 1312.

131. GREIBROK, *supra* note 69.

132. *See id.* at 5.

To remedy this abuse, the Alabama judiciary should apply a reasoned standard closer to the state's drug-forfeiture laws. Rather than simply relying on the proximity of currency to gambling or gambling equipment, the State should be forced to make a prima facie case that the funds themselves are proximately linked to gambling. By refusing to allow for mere speculation of a connection to gambling to merit forfeiture, the possessions of accused individuals will be more safeguarded from abuse. Alternatively, an adoption of the preponderance of the evidence standards present in Hawaii, Illinois, and Pennsylvania gambling forfeiture statutes would make it more difficult for police to seize funds that are ultimately tangential to gambling enterprises. Finally, additional standards that allow for the "tracing of proceeds" could help to resolve situations such as the bar owner, whose books may be able to delineate between gambling and nongambling funds and prevent the forfeiture of the latter. Any of these proposals would create a fairer, clearer system. When it comes to seized assets, the game should not be rigged in favor of one side. Every player should at least have a chance to make his case.

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