FROM THE
NATIONAL
CRIMINAL
JUSTICE
ASSOCIATION

ASSETS SEIZURE & FORFEITURE:
A CASE LAW COMPENDIUM

ARY 1998

n cooperation with the
Justice Assistance, U. S. Department of Justice

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Disclaimer

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PREFACE

I am pleased to present the updated edition of the National Criminal Justice Association's (NCJA) *Assets Seizure & Forfeiture: A Case Law Compendium*. The compendium is a companion to the NCJA's instructional guide to forfeiture, *Assets Seizure & Forfeiture: Developing and Maintaining a State Capability*.

The use of forfeiture by law enforcement officials in conjunction with criminal investigations involving drug trafficking increasingly continues to be the object of court challenges aimed at limiting its applicability. Court decisions have played a large role in defining the use of forfeiture as a law enforcement tool in drug cases.

The compendium of case law summaries provides clear, concise explanations of the facts, findings, and rulings in federal and state court decisions on assets forfeiture. Cases involving due process requirements, "relation back" of property used for illegal purposes, the "innocent owner" defense, the "substantial connection" requirement, self-incrimination, double jeopardy and collateral estoppel, and the Excessive Fines Clause of the U. S. Constitution are included.

It is my hope that this compendium will provide guidance on the various approaches courts have taken in addressing the constitutional and other legal issues related to forfeiture.

Cabell C. Cropper
Executive Director
National Criminal Justice Association

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INTRODUCTION

During the past 20 years, assets forfeiture has come into prominent use by law enforcement officials at all levels of government, particularly in conjunction with criminal investigations involving drug trafficking.

Without question, forfeiture has become the most effective tool for attacking the profit motive behind the crime. It provides a means of depriving the criminal of the resources that he needs to pursue his criminal activity. At the same time, the successful conclusion of a forfeiture proceeding may generate considerable funds and other resources that can be turned back into law enforcement operations.

However, as it has increased in use, forfeiture has become the object of court challenges aimed principally at limiting its applications. In these court challenges, forfeiture has come face to face with several of this country's constitutional principles -- protections against excessive fines, self-incrimination, and double jeopardy.

This compendium of cases provides analyses of topical legal issues related to assets forfeiture and includes representative court decisions on each issue. In instances in which various courts have come to different conclusions on a particular issue, the compendium includes decisions that reflect the various approaches the courts have taken.

U.S. Supreme Court Decisions

Recent U.S. Supreme Court decisions have provided property owners with more protections against the forfeiture of property allegedly connected to illegal activities. For example, the Court in 1993 ruled that real property claimants are entitled to notice and a hearing prior to the seizure of their property. The Court also ruled that "innocent owners," who acquire property without knowledge of, or consenting to, the illegal activity, are entitled to contest a forfeiture even if they did not acquire their interest until after the alleged illegal activity occurred.

In another 1993 decision, the Court ruled that the Eighth Amendment's prohibition against "excessive fines" applies to civil forfeitures of conveyances and real property used to facilitate the transport, sale, or possession of controlled substances. However, the Court did not establish a test for determining whether a particular forfeiture is "excessive," deciding instead to allow the lower courts first to attempt to establish the appropriate test. A number of lower court decisions that address the issue of the proper test are included in the compendium.

Other recent Court decisions have provided property owners with fewer protections. For example, the Court ruled in 1996 that when the government separately institutes a criminal action and a civil forfeiture based upon the same underlying activity, there is no violation of the Double Jeopardy Clause.

Innocent Owners

There are a number of issues that the courts have not resolved. One such issue centers upon requirements for establishing an innocent-owner defense. To establish that he is an innocent owner, a claimant is required by the federal forfeiture statute to prove that he has an ownership interest in the property and that he lacked knowledge of or did not consent to the illegal use of the property. The courts have addressed these requirements in a number of contexts. For example, proving an ownership interest may involve establishing the legitimacy of a lienholder's or heir's claim to the property. While the majority of courts have ruled that proof of either lack of knowledge or consent to illegal activity is sufficient, at least one court has ruled that a claimant must prove lack of both to establish an innocent-owner defense. A number of courts have added an additional requirement for proof of an

innocent-owner defense -- that the claimant did everything reasonably possible to prevent the misuse of the property.

Substantial Connection

Another area of litigation involves discerning the property's relationship to the alleged crime. In most jurisdictions, before the government can forfeit property, it must prove that there is probable cause to believe that the property has a "substantial connection" to the alleged illegal activity. The federal and state courts are divided regarding the tests to be used to determine whether a substantial connection exists. Some courts use a "facilitation" test under which the property is forfeitable if it made the alleged commission of a narcotics crime easier. Other courts use a "totality of circumstances" test under which they examine more broadly all the evidence in the aggregate to determine whether the property is connected sufficiently to the crime to be forfeitable.

Self-Incrimination

Another fertile area for litigation involves the claimant's Fifth Amendment protection against self-incrimination. In criminal forfeitures, this issue arises when a defendant does not want to testify regarding the criminal charges brought in a case involving forfeiture but may wish to testify regarding his interest in the property to be forfeited in the same case.

Some courts handle the Fifth Amendment issue by permitting one proceeding for the determination of both guilt and forfeiture. Under the single-proceeding approach, evidence on both issues is presented simultaneously and the court instructs the jury on both the criminal charges and the forfeiture at the same time. Alternatively, some courts allow the presentation of all evidence at one sitting but do not instruct the jury on the forfeiture unless and until the jury returns a guilty verdict. Finally, some courts require that guilt and forfeiture be treated as separate phases of the trial to ensure that a defendant's Fifth Amendment rights are not violated.

The self-incrimination issue also arises in the context of civil forfeitures. Historically, the courts are divided over application of the Fifth Amendment privilege in civil forfeiture proceedings. Moreover, there has been disagreement over what constitutes adequate Fifth Amendment protections among those courts that have ruled that the privilege is applicable . These latter courts have used a variety of approaches to protect a defendant from self-incrimination in a civil forfeiture proceeding, including a stay or dismissal of the civil proceeding, testimonial immunity during the civil proceeding, and protective orders or seals.

The issue of whether a jury can draw adverse inferences from a claimant's invocation of the Fifth Amendment privilege against self-incrimination arises frequently in civil forfeiture proceedings. Claimants often allege that the courts allow or encourage juries to make inferences of guilt when claimants choose not to testify, thereby violating the claimants' constitutional rights. The courts have responded differently to these allegations. Some courts have declined to review the issue, leaving it open. Other courts have addressed the issue but have been divided over whether juries should be permitted to draw adverse inferences based upon a claimant's assertion of his Fifth Amendment right.

Federal and state courts have played and will continue to play a crucial role in defining the government's ability to use assets forfeiture in drug cases. Public policymakers, legislators, and law enforcement officials can look to the rulings in these cases for guidance in shaping forfeiture laws, policies, and procedures.

FEDERAL FORFEITURE PROVISIONS RELATED TO CONTROLLED SUBSTANCES VIOLATIONS

Criminal Forfeiture 21 U.S.C. § 853

Any person convicted of a violation of the federal controlled substances provisions punishable by imprisonment for more than one year shall forfeit: 1) any property constituting or derived from any proceeds obtained directly or indirectly as a result of the violation and 2) any property used or intended to be used to commit or facilitate the commission of the illegal activity.

Any person convicted of engaging in a continuing criminal enterprise shall also forfeit his interest in the continuing criminal enterprise.

Civil Forfeiture 21 U.S.C. § 881

The following property is subject to civil forfeiture:

- illegally manufactured, distributed, dispensed, or acquired controlled substances;
- raw materials, products, and equipment used, or intended for use, in illegally manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance;
- property used, or intended for use, as a container for illegal controlled substances;
- conveyances, used or intended for use, to transport or facilitate the transportation, sale, receipt, possession, or concealment of controlled substances. This provision does not apply: 1) to common carriers unless the owner was a consenting party to the violation; 2) if the illegal activity occurred while someone other than the owner unlawfully possessed the conveyance; and 3) if the illegal activity was committed without the knowledge, consent, or willful blindness of the owner.
- books, records, and research used, or intended for use, in the commission of a controlled substances violation;
- moneys, negotiable instruments, securities, or other things of value furnished, or intended to be furnished, by any person in exchange for an illegal controlled substance; all proceeds traceable to such an exchange; and all moneys, negotiable instruments, and securities used or intended to be used to facilitate a controlled substances violation. This provision does not apply if the illegal activity was committed without the owner's knowledge or consent;
- real property used, or intended to be used, to commit or facilitate the commission of a controlled substances violation punishable by more than one year in prison. This provision does not apply if the illegal activity was committed without the owner's knowledge or consent;
- illegally possessed controlled substances;
- listed chemicals, drug manufacturing equipment, tableting machines, encapsulating machines, and gelatin capsules imported, exported, manufactured, possessed, distributed, or intended to be illegally distributed, imported, or exported;
- drug paraphernalia.

THE DUE PROCESS CLAUSE

The Due Process Clause of the Fifth Amendment provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law."[1] A person generally is considered to have received due process if the court notifies him of any proceedings in which he has a stake and provides him an opportunity to be heard at such proceedings.

The U.S. Supreme Court has ruled that the Fifth Amendment applies to civil forfeiture proceedings involving real property and that, absent emergency circumstances, owners of real property are entitled to a pre-seizure notice hearing. The Court, in *Fuentes v. Shevin*,[2] held that to prove that emergency circumstances exist, the government must show that: 1) the seizure is necessary to secure an important governmental interest; 2) there is a special need for immediate action; and 3) the state has kept strict control over its monopoly of legitimate force.

A number of courts have ruled that because of the fungible nature of certain types of personal property, emergency circumstances may exist that require immediate seizure. If emergency circumstances do not exist, a claimant may use the delay between the seizure and the commencement of forfeiture proceedings or insufficient notice as a defense.

Real Property

Claimants to real property must receive pre-seizure notice hearings.

Relevant Cases

United States v. James Daniel Good Real Property, 510 U.S. 43 (1993).

HOLDING: A claimant to real property is entitled, absent emergency circumstances, to notice and an opportunity to be heard prior to the seizure of the property under the Due Process Clause of the Fifth Amendment.

FACTS: James Daniel Good pleaded guilty to promoting illegal drugs after police officers, while executing a search warrant, found 89 pounds of marijuana, marijuana seeds, hashish oil, drug paraphernalia, and $7,000 in cash on Good's property in 1985. Good was sentenced to one year in prison and fined $3,187. In August 1989, while Good was out of the United States and renting the property to tenants, the government seized Good's property and filed a claim seeking forfeiture of his home and the four-acre plot of land on which it was located based upon Good's prior conviction. The district court held an *ex parte* hearing prior to the seizure, but did not notify Good. The Court of Appeals for the Ninth Circuit ruled that Good's due process rights were violated when the property was seized before Good had been given an opportunity to be heard. The U.S. Supreme Court affirmed the holding of the appellate court.

COURT'S ANALYSIS: The Court weighed the private interest affected by the seizure, the risk of erroneous deprivation through the procedures used, and the government's interest in not having additional procedural safeguards imposed. The Court concluded that because real property cannot be moved easily or concealed, there is less of a risk that the property will be sold, destroyed, or used for other illegal purposes. A property owner, therefore, is entitled to notice and an opportunity to be heard before his property is seized and the only way in

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[1] U.S. CONST. amend. V.

[2] 407 U.S. 67 (1972).

which the government can seize real property without these procedures is if it can demonstrate the existence of extraordinary circumstances. "Individual freedom finds tangible expression in property rights. At stake in this and many other forfeiture cases are the security and privacy of the home and those who take shelter within it."[3]

Other Property

Claimants to other types of property are not guaranteed pre-seizure hearings. As the court noted in *Organization JD Ltda. v. United States Department of Justice*,[4] because *Good* involved real property, the Court did not decide whether personal property is given the same protection by the Fifth Amendment and left the issue open in the lower courts.[5] The court in *Organization JD Ltda.* specifically declined to consider the issue and decided that the personal property at issue was "fungible and capable of rapid motion"[6] so as to create emergency circumstances requiring immediate seizure. Other lower courts have ruled similarly and have found that either an *ex parte* judicial review of the case or a post-seizure hearing sufficiently complies with the Fifth Amendment when personal property is at issue. These due process decisions often are justified by the U.S. Supreme Court's holding in *Calero-Toledo v. Pearson Yacht Leasing Co.*[7] that the government could seize a yacht subject to civil forfeiture without affording prior notice or a hearing. The Court explained that because the property was of the type that could be removed from the jurisdiction there was a special need for prompt action that justified postponing the hearing until after seizure.

If emergency circumstances do not exist, delay between the seizure and the commencement of forfeiture proceedings or insufficient notice may be a defense.

Delay

In determining whether the delay between seizure of property and the institution of civil forfeiture proceedings violates due process, a court must consider four factors: the length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. None of the factors is a necessary or sufficient condition for finding an unreasonable delay; the factors should be used as a guide in balancing the interests of the claimant and the government.

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[3] Good at 61.

[4] 18 F.3d 91 (2d Cir. 1994), *cert. denied*, 512 U.S. 1207 (1994).

[5] The Good Court did mention, however, that the seizure of a home produces a far greater deprivation than the loss of furniture. Good at 54.

[6] Organization JD Ltda. at 94, quoting United States v. Daccarett, 6 F.3d 37, 49 (2d Cir. 1993), *cert. denied*, 510 U.S. 1191(1994).

[7] 416 U.S. 663 (1974).

Relevant Cases

United States v. $8,850, 461 U.S. 555 (1983).

HOLDING: In determining whether the delay between the seizure of property and the institution of civil forfeiture proceedings violates due process, a court must consider the same four factors relevant in speedy trial cases: the length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

FACTS: On Sept. 10, 1975, Mary Josephine Vasquez arrived in Los Angeles (Calif.) International Airport after a short visit to Canada. During customs processing, Vasquez declared that she was not carrying more than $5,000 in currency; however, a customs inspector seized $8,850 in currency. On Sept. 18, the U.S. Department of the Treasury, U.S. Customs Service informed Vasquez that the currency was subject to forfeiture and that she had the right to petition for remission or mitigation. Vasquez filed a petition, asserting that she had mistakenly believed that she was required to declare only funds that had been obtained in another country and that she had brought the seized funds with her from the United States. From November 1975 until April 1976, the customs service conducted an investigation to determine whether the currency was part of a narcotics transaction. As a result of the investigation, the service concluded that was no evidence to support a narcotics charge. On June 15, 1976, Vasquez was charged with making a false statement and failing to file a currency transaction report. She was convicted of making a false statement on Dec. 24. In March, a civil forfeiture complaint was filed in district court. Vasquez asserted that the government's "dilatory" processing of her petition and commencement of civil forfeiture proceedings violated her due process rights. The court declared the property forfeited after a two-day trial in January 1978; the U.S. Court of Appeals for the Ninth Circuit reversed. The U.S. Supreme Court reversed the appellate court decision.

COURT'S ANALYSIS: The Court said that the "overarching" factor is the length of the delay. "Little can be said on when a delay becomes presumptively improper, for the determination necessarily depends on the facts of a particular case."[8] Although they do not serve as a justification for completely tolling the requirement of filing a civil forfeiture proceeding, the court noted that a pending petition for mitigation or remission or pending criminal proceedings may justify delay in the initiation of civil forfeiture proceedings. According to the court, resolution of a petition for mitigation or remission may obviate the need for civil forfeiture proceedings, benefitting both the claimant and the government. Furthermore, a prior or contemporaneous civil forfeiture proceeding might hamper a criminal proceeding or prejudice a claimant's ability to raise an inconsistent defense in a contemporaneous criminal proceeding. The court must also weight whether a claimant has taken any action to trigger the rapid filing of a civil forfeiture proceeding. Finally, in determining whether a claimant has been prejudiced, the court must look to see if the delay has hampered his ability to present a defense on the merits through, for example, the loss of witnesses or other evidence.

United States v. Certificate of Deposit No. 8101730026, 84 F.3d 1034 (8th Cir. 1996).

HOLDING: Four-year delay in reopening forfeiture action after partial summary judgment was granted evidenced lack of due diligence in prosecuting action.

FACTS: Following the arrest of Billy Thompson in April 1990 for possession with intent to distribute cocaine, the government seized a bank certificate of deposit valued at $7,000 and filed a civil forfeiture proceeding against the property. Thompson's wife, Shari, asserted a claim to the certificate of deposit. When partial summary judgment was granted to the bank in September 1991, the court's docket sheet erroneously reflected the case as terminated. The mistake was detected in September 1995 and the case was reopened, presumably at the government's request.

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[8] $8,850 at 565.

At trial a few weeks later, Shari did not appear. The court denied her motion for a continuance and entered a default judgment against her. The U.S. Court of Appeals for the Eighth Circuit reversed.

COURT'S ANALYSIS: The court noted that the government did not offer an explanation as to why it took four years to discover the docketing error. "The procedural prejudice to [Shari] is apparent from the circumstances surrounding the hasty reopening and entry of default judgment against her."[9] The court also noted that because the government alleged that the certificate of deposit had been redeemed in March 1995, the forfeiture proceeding had either been mooted or made much more complex. Because the government originally seized the certificate of deposit, it was responsible for any mishandling. Therefore, it was appropriate to treat the redemption as mooting the forfeiture proceeding.

United States v. $292,888.04, 54 F.3d 564 (9th Cir. 1995).

HOLDING: Delay of 30 months between seizure of funds and initiation of civil forfeiture proceedings did not violate due process in light of claimant's delay in requesting initiation of proceedings and lack of prejudice to claimant.

FACTS: Calvin L. Robinson was arrested in May 1988 while attempting to smuggle 56 tons of marijuana and hashish into San Francisco, Calif. In June 1988, the government seized $292,888.04 in currency. In December 1988, during Robinson's criminal trial, the government commenced administrative forfeiture proceedings against the currency. In February 1989, Robinson was found guilty of the criminal charges and sentenced to life imprisonment and assessed a fine of $4,000,000. In October 1990, the government filed a complaint for civil forfeiture; Robinson filed a claim for the funds in January 1991. In July 1993, the district court granted the forfeiture. The U.S. Court of Appeals for the Ninth Circuit upheld the forfeiture.

COURT'S ANALYSIS: In upholding the forfeiture, the court noted the complexity of the forfeiture action and the underlying criminal activity and the fact that Robinson did not request commencement of judicial forfeiture proceedings for almost one and one-half years after the seizure. The court also noted that Robinson's ability to defend against the forfeiture was not prejudiced by the delay and that a U.S. Department of the Treasury, Internal Revenue Service notice of deficiency against the funds further mitigated any prejudice to Robinson.

Sufficiency of Notice

Robinson v. Hanrahan, 409 U.S. 38 (1972).

HOLDING:

(1) Although Illinois vehicle forfeiture statute allowed for notice of proceedings to be sent to address listed in secretary of state's records, notice sent to such address was insufficient when government knew owner was incarcerated in county jail.

(2) Notice by publication is not sufficient in case of an individual whose name and address are known or easily ascertainable.

FACTS: Woodie Robinson was arrested for armed robbery in June 1970 and held in the Cook County (Ill) jail until October awaiting trial. The state of Illinois instituted forfeiture proceedings against Robinson's automobile pursuant to the Illinois vehicle forfeiture statute. Notice was sent to Robinson's home address listed on the vehicle records of the secretary of state. The vehicle was forfeited at an *ex parte* hearing in August. Robinson did not receive notice of the forfeiture proceeding until he was released from jail in October. The Supreme Court of Illinois upheld the forfeiture.

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[9] Certificate of Deposit No. 8101730026 at 1034.

COURT'S ANALYSIS: Citing prior case law, the Court stated "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[10] The Court noted, specifically, that under prior case law, notice by publication is not sufficient in the case of an individual whose name and address are known or easily ascertainable.[11] The Court concluded that because the government knew that Robinson was not at the address to which the notice was mailed and also knew that Robinson could not get to that address, the notice was insufficient.

United States v. Rodgers, 108 F.3d 1247 (10th Cir. 1997).

HOLDING: (1) For purposes of determining whether notice of forfeiture proceedings was adequate, it is reasonable to expect the federal government to obtain from the local jurisdiction that seized property whatever evidence it has concerning the claimant's whereabouts.

(2) There are several factors, enumerated below, that the government can, but is not required to, look at in deciding whether to mail notice to a particular address.

FACTS: Local law enforcement authorities in Oklahoma arrested Joe Earl Rodgers for state drug offenses in February 1991. At the time of arrest, they seized vehicles, currency, firearms, drug paraphernalia, knives, stereos, a surveillance camera, an answering machine, a typewriter, and a cellular phone from two of Rodgers' residences. Rodgers posted bond and was released. He failed to appear at his trial and remained a fugitive until August 1991, when he was arrested while attempting to re-enter the United States from Mexico. In March 1991, federal law enforcement officials attempted to serve Rodgers with an arrest warrant pursuant to an indictment on federal drug charges; however, they were unsuccessful because he was a fugitive. They did, however, adopt for federal forfeiture many of the items seized by local law enforcement officials, including U.S. currency and three vehicles. Each item was administratively forfeited separately and the government, in addition to publishing notice in *USA Today*, attempted to provide notice as to each forfeiture separately. Initially, notices were mailed to 4923 S. Yorktown #38, Tulsa, Okla.; each of these of notices was returned unclaimed. Notice of proceedings for one of the vehicles was also sent to 6650 N. Trenton, Tulsa, Okla., but this notice was returned with the advisement that Rodgers had moved and left no forwarding address. The district court upheld the forfeitures; the U.S. Court of Appeals for the Tenth Circuit reversed

COURT'S ANALYSIS: 21 U.S.C. § 881 requires notice by publication as well as written notice to each party that appears to have an interest in the property. The government is required to notify any claimant that it can reasonably identify and locate. In this case, it is reasonable to expect the federal government to have obtained information concerning Rodgers from the local law enforcement authority's seizure records. The court concluded that in addition to the two addresses to which the government sent notice, it should have been aware that Rodgers maintained his primary residence at his mother's home in Terlton, Okla., because one of the vehicles was seized from that address and among the other seized items were numerous pieces of mail addressed to Rodgers at the Terlton address. The court listed numerous factors that can be used by the government to determine whether notice should be sent to a particular address: (1) whether there is physical evidence linking the claimant to the address, such as the storage of possessions; (2) whether there are other indicators of residency, such as the receipt of mail, the listing of a phone number, or the payment of utilities; (3) whether the claimant has a real property interest in the property; (4) whether there is any direct evidence linking the claimant to the address, such as informant testimony or eyewitness observation; (5) whether there is evidence that a notice mailed to the address will be forwarded to the claimant; and (6) whether there are alternative methods of providing actual notice that may be available.

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[10] Robinson at 40 (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

[11] *Id.*

Bye v. United States, 105 F.3d 856 (2d Cir. 1997).

HOLDING: Notice of forfeiture proceeding sent to the attorney representing claimant in a pending related criminal proceeding, which was received and acknowledged, was sufficient.

FACTS: Robert Bye was arrested on drug charges in October 1989. He claimed that the government seized $23,280 from his home. While Bye was in pretrial federal custody, the government published notices of the seizure and impending forfeiture in a newspaper and sent notices of the forfeiture by certified mail to Bye's preincarceration address, the Baltimore, Md., city jail, and to the attorney representing Bye in the criminal proceeding. No notice was sent to the federal detention center at which he was being held. The notices sent to Bye's preincarceration address and the jail were returned as undeliverable. The government received a return receipt indicating that the notice to Bye's attorney had been received. The money was administratively forfeited. Bye claimed that the forfeiture violated his right to due process because he had not received notice of the proceeding. The district court dismissed Bye's petition to set aside the administrative forfeiture; the U.S. Court of Appeals for the Second Circuit affirmed.

COURT'S ANALYSIS: The court reasoned that the notice sent to Bye's attorney was reasonably calculated to apprise Bye of the pendency of the forfeiture proceeding and to afford him an opportunity to present his objections. The court, however, stated that it was "mystified as to why an agency of the United States Department of Justice seeking to give constitutionally adequate notice could not determine the current whereabouts of a person who is in the custody of another agency of the same Department."

Armendariz-Mata v. U.S. Department of Justice, Drug Enforcement Administration, 82 F.3d 679 (5th Cir. 1996).

HOLDINGS: (1) Notice of forfeiture sent to a federal prisoner at home address was inadequate.

(2) Notice of forfeiture sent to prisoner in jail in which he was incarcerated, which was returned as undeliverable, was inadequate.

FACTS: In May 1988, Carlos Armendariz-Mata was arrested on drug charges. The government seized various items including $7,980 cash. On June 7, 1988, the government sent a notice of forfeiture to Armendariz-Mata's home. His sister received the notice and signed the return receipt on June 17, 1988. The government also sent a notice to the Guadalupe County (Texas) Jail where Armendariz-Mata was incarcerated. The notice was returned marked "Return to Sender." The government made no further attempts to notify Armendariz-Mata of the forfeiture proceedings other than to publish notice in *USA Today*. On Sept. 13, 1988, the money was administratively forfeited. In district court, Armendariz-Mata argued defective notice and sought the return of his money. The district court held that the forfeiture notice was constitutionally adequate. The U.S. Court of Appeals for the Fifth Circuit reversed.

COURT'S ANALYSIS: The court reasoned that when notice is sent by mail, the proper inquiry is not whether the government sent the notice, but, whether it acted reasonably under the circumstances in relying on the mail as a means to apprise the claimant of the pending action. Given the government's knowledge of Armendariz-Mata's whereabouts, the notice sent to his home was not adequate to apprise him of the pendency of the forfeiture proceedings. The notice sent to the Guadalupe jail was also inadequate because it was returned undelivered. The government knew that its letter had not notified Armendariz-Mata, and made no additional efforts to inform him of the proceeding.

United States v. Volanty, 79 F.3d 86 (8th Cir. 1996).

HOLDING: When the government provided claimant with improper notice of forfeiture proceeding, district court did not abuse its discretion by allowing the government to commence new judicial forfeiture proceedings rather than order currency returned to claimant because the government did not act in bad faith.

FACTS: In November 1992, officers from the Springfield (Mo.) Police Department (SPD) seized $19,996 from Robert Melvin Volanty's hotel room pursuant to a consent search. The officers also discovered and seized marijuana, cocaine, and a firearm. The officers arrested Volanty and took him into custody. Volanty gave his address as "General Delivery, Springfield, Mo. 65801." In January 1993, the government filed an indictment charging Volanty with various drug and firearm violations. He was convicted in May 1993 and sentenced in July 1993. While the criminal prosecution was underway, the government filed forfeiture proceedings against the currency. In March 1993, while in federal custody, Volanty was sent by certified mail a Notice of Seizure to the address he provided upon arrest. It was returned to sender. The government also published notice of the seizure in the newspaper and no claims for the money were filed. In June 1993, the government declared the currency administratively forfeited. Almost nine months later, Volanty filed a motion for return of the currency. The government acknowledged that Volanty's due process rights were violated in the administrative forfeiture and suggested that the proper remedy would be to initiate a new proceeding. Volanty claimed that the proper remedy was to return the money to him because the government acted in bad faith. In January 1995, the district court denied Volanty's motion for return of the money and held that the proper remedy was to allow the government to file a new forfeiture proceeding in district court. The U.S. Court of Appeals for the Eighth Circuit affirmed the district court's ruling.

COURT'S ANALYSIS: Both parties agreed that the district court has the discretion to choose between remedies and that its decision should be reviewed under an abuse of discretion standard. The court reasoned that the government did not act in bad faith because it tried to notify Volanty at the address he gave to the SPD upon arrest and published notification in the newspaper. The government admitted at the hearing on Volanty's motion that it made a mistake and offered to correct that mistake by instituting new proceedings. The district court did not abuse its discretion by declining to find bad faith on the part of the government.

Martinez-Lorenzo v. Wellington, 911 F.Supp. 383 (W.D. Mo. 1995).

HOLDING:

(1) Government's letter addressed to claimant at institution at which he was incarcerated was sufficient notice of forfeiture proceeding concerning vehicles, even though letter misstated claimant's identification number.

(2) Government failed to meet requirement that it provide actual notice to claimant of its intent to pursue forfeiture of seized electronic equipment where government knew of claimant's whereabouts as evidenced by notice provided to claimant regarding vehicles. Notice sent to claimant's former attorney was insufficient because government could ascertain that former attorney did not represent claimant on related federal charges.

FACTS: On April 1, 1992, the Jackson County (Mo.) Sheriff's Office executed a search warrant at Roland Martinez-Lorenzo's residence and seized, among other things, three cars and electronic equipment. Martinez-Lorenzo was arrested and in federal custody from April 14, 1992, until the court heard this appeal. On July 8, 1992, attorney John Frankum entered his appearance on Martinez-Lorenzo's behalf. On July 22 and 23, 1992, the government mailed notice of seizure to two addresses supposedly belonging to Martinez-Lorenzo. Both notices were returned as undeliverable. Notices also were mailed to Leonard S. Hughes, Esq. based upon an April 3, 1992, letter supplied by the Kansas City Police Department indicating that Hughes represented Martinez-Lorenzo in a state court proceeding to recover his property. Notice of the forfeiture was also published in the *New York Times*. On July 28, 1992, notice of the seizure of the cars -- but not the electronic equipment -- was mailed to Martinez-

Lorenzo at the federal penitentiary at which he was incarcerated. The notices identified Martinez-Lorenzo as the addressee but mistakenly identified his inmate number. No one filed a claim for the property and it was administratively forfeited on March 16, 1993. On Aug. 5, 1994, Martinez-Lorenzo filed a claim seeking the return of two of the three cars and the electronic equipment. The court granted the government's request for summary judgment with respect to the vehicles and ordered the government to return the electronic equipment to Martinez-Lorenzo or to institute forfeiture proceedings in district court.

COURT'S ANALYSIS: Regarding the vehicles, the government's attempts were calculated to notify Martinez-Lorenzo of the forfeiture notwithstanding the error regarding his inmate number. The letter correctly identified him by name and was sent to the institution in which he was incarcerated. Additionally, Martinez-Lorenzo never denied receiving the notice; he claimed only that the notice was inadequate. Regarding the electronic equipment, the notice to Hughes did not constitute sufficient notice. If the government is incarcerating a property owner when it elects to impose the additional burden of defending a forfeiture proceeding, fundamental fairness requires that he or his counsel receive actual notice. Contacting an attorney that as far as the government knew last represented the claimant three months prior to the forfeiture proceedings was not adequate notice when the claimant's whereabouts were readily discoverable and were actually known to the government.

RELATION BACK OF PROPERTY USED FOR ILLEGAL PURPOSE

Government actions for civil forfeiture of property purchased with the proceeds of drug activity are supported by the doctrine of "relation back." Under the relation back doctrine, the title to property used for an illegal purpose vests in the government at the moment the illegal act occurs. Therefore, no third party can acquire a subsequent interest in the property. This vesting of title in the government, however, is not self-executing and requires a judicial forfeiture proceeding, or "condemnation," before the government may claim full ownership of the property -- known as "perfecting" title. According to the U.S. Supreme Court,

> "forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed; and the condemnation, when obtained, *relates back* to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith."[12]

The Comprehensive Drug Abuse Prevention and Control Act of 1970 codified this common law relation back doctrine.[13] The Congress expressly provided for immediate vesting of title in the government at the time illegal use occurs. According to the act,

> "all right, title and interest in property ... shall vest in the United States upon commission of the act giving rise to the forfeiture under this section."

This statutory version of the relation back doctrine also requires a judicial decree of forfeiture before the government takes ownership of the property. However, the statute altered the more harsh rule that third parties who acquire an interest after the illegal use have no remedy in the face of the government's forfeiture interest. The statute was amended in 1978 and now explicitly provides a defense to government forfeiture for "innocent owners" who have no knowledge and do not consent to the illegal activity.

Relevant Cases

United States v. 92 Buena Vista Ave., 507 U.S. 111 (1993).

HOLDING: The relation back doctrine does not give the government ownership of property acquired with the proceeds of illegal drug activity until a judicial decree of forfeiture is obtained.

FACTS: Beth Ann Goodwin purchased a home with $240,000 that she received as a gift from her boyfriend,

Joseph Brenna, an alleged drug dealer. The government sought forfeiture under 18 U.S.C. §881(a)(6), because the proceeds used to purchase the house were traceable to Brenna's illegal drug trafficking.

The district court rejected Goodwin's innocent-owner claim on the grounds that she had not acquired her interest in the property until after the alleged illegal activity. The Court of Appeals for the Third Circuit reversed. The U.S. Supreme Court affirmed the appellate court's decision.

COURT'S ANALYSIS: The Court held that the relation back doctrine does not prevent third parties, who acquire an interest in property after the illegal drug activity has occurred, from contesting forfeiture. The Court rejected the

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[12] United States v. Stowell, 133 U.S. 1, 10 (1890) (emphasis added).

[13] 21 U.S.C. § 881(h).

government's argument that Goodwin had never owned the property because title vested in the United States at the moment proceeds from Brenna's illegal drug activity were used to purchase the house. Noting that the government's interpretation of 21 U.S.C. § 881(h)'s relation back provision would have the practical effect of eliminating the innocent-owner defense provided in the statute, and that the Congress did not intend to create a meaningless defense, the Court decided to clarify the application of relation back. Still recognizing that title to the property vests in the United States on the date of illegal use, the Court held that both the common law and statutory versions of the relation back doctrine require a judicial decree of forfeiture before the government can claim ownership.

INNOCENT-OWNER DEFENSE

Individuals who have an interest in seized property may contest its forfeiture at a judicial proceeding. A forfeiture proceeding is an "*in rem*" action in which jurisdiction is based upon a property seizure and the seized property is treated as the defendant. This procedural format is based upon the legal fiction that the property itself has committed an offense. In a forfeiture proceeding, the government initially must show probable cause that the property has been used for an illegal purpose. After the government has established probable cause, the burden shifts to the claimant, who must prove by a preponderance of the evidence that the property was not used for an illegal purpose or establish a recognized defense to forfeiture.

The federal forfeiture statute expressly provides for one defense to forfeiture. "Innocent owners," who acquire property without knowledge of or consenting to the illegal activity, are protected under the 1978 amendments to the Comprehensive Drug Abuse Prevention and Control Act of 1970.[14] To establish a claim as an innocent owner in a government forfeiture proceeding, the claimant must prove: 1) an ownership interest in the property, and 2) lack of knowledge of or consent to the illegal use of the property. Courts in some jurisdictions also require the claimant to prove he took reasonable steps to prevent the misuse of the property.[15]

Establishing Standing

The first requirement for contesting government forfeiture as an innocent owner is to establish "standing" to assert the defense. Standing is a doctrine requiring individuals seeking judicial action to demonstrate a significant stake in the outcome of a legal controversy. The Congress has indicated that the term "owner" in 21 U.S.C. § 881 should be broadly construed to include "any person with a recognizable legal or equitable interest in the property seized."[16]

Legal Title

Courts have found a variety of property interests to be adequate to assert an innocent-owner defense. For example, acquiring legitimate title through a bona fide purchase can serve as a basis for an innocent-owner claim. However, mere custody of property or legal documentation of ownership may be insufficient to establish standing. Ownership implies that the owner has dominion and control over the property, not just a bare legal interest.

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[14] 21 U.S.C. § 881(a)(6).

[15] The U.S. Supreme Court upheld the constitutionality of a state forfeiture statute that did not provide for an innocent-owner defense. Bennis v. Michigan, 116 S.Ct. 994 (1996).

[16] JOINT EXPLANATORY STATEMENT OF THE PSYCHOTROPIC SUBSTANCES ACT OF 1978, 95th Cong., 2nd Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 9518, 9522.

Relevant Cases

United States v. Tracts 10 & 11 of Lakeview Heights, Texas 51 F.3d 117 (8th Cir. 1995).

HOLDING: Possession of real property, even when coupled with an expectancy interest, does not equate with ownership in forfeiture action.

FACTS: In 1988, Bruce Johnson paid $50,000 cash for a small house on Washington Island, Wis. Bruce never lived on the property. However, he allowed his parents, Carl and Ingrid Johnson ("the Johnsons") to live on the property, which they did until the forfeiture. From the date of purchase until the date of forfeiture, Bruce was the only record title holder and paid taxes on the property. In 1992, Bruce pleaded guilty to drug charges, and the court determined that he purchased the house with drug proceeds. A default judgment was entered forfeiting the property. The Johnsons filed a motion to overturn the default judgment claiming they did not know that any of the purchase monies were drug proceeds. The Johnsons argued that they were entitled to a constructive trust based upon their work in expanding and refurbishing the original house and upon Bruce's "mistake" in not giving them legal title. Carl testified that he worked on the house for more than two years, at least 40 hours per week, 50 weeks per year. He estimated the value of his labor at $80,000 and the value of materials he purchased at $27,000. The district court denied the motion.

COURT'S ANALYSIS: The court held that the district court did not abuse its discretion in denying the Johnson's motion. The court said that the holdings of *92 Buena Vista Ave.*[17] -- that an "owner" for purposes of the innocent-owner defense need not be a *bona fide* purchaser -- and *1945 Douglas C-54*[18] -- ownership of may be defined as a possessory interest, with its attendant characteristics of dominion and control -- were inapplicable. Unlike the Johnsons, the claimant in *92 Buena Vista Ave.* had title of the property at issue. The property involved in *1945 Douglas C-54* was personal property, which is generally susceptible to a broader definition of ownership than is real property. While the Johnsons possessed the property, they showed no indicia of title nor adequate proof of a financial stake. Additionally, the court held that, with respect to the constructive trust claim, the Johnson's property interest was governed by Wisconsin law and the Johnsons had not proven the elements of a constructive trust under Wisconsin law.

Mercado v. U.S. Customs Service, 873 F.2d 641 (2nd Cir. 1989).

HOLDING: A mere claim of possession is insufficient to establish standing unless the individual is aware of the presence of the property and asserts a controlling interest.

FACTS: In March 1985, Manuel Mercado attempted to pass a bag containing more than $147,000 in cash through an X-ray screening point at John F. Kennedy Airport in New York, N.Y. Airport personnel told Mercado that he would have to comply with customs reporting requirements, and informed police of the discovery. Another suitcase Mercado had checked on a flight to Athens, Greece contained $34,000. Mercado made inconsistent statements about the contents of the bags, first claiming he was unaware they contained money, and then stating incorrectly the amount of money present. Mercado did not assist police in determining the money's origin, refused to accept a receipt for the money, and said he did not care what police did with the money.

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[17] 507 U.S. 111 (1993). (This case is summarized in the section of this compendium titled "Relation Back of Property Used for Illegal Purpose.")

[18] 604 F.2d 27 (8th Cir. 1981). (This case is summarized later in this section.)

After Mercado filed suit asking the government to release the money, the government instituted forfeiture proceedings. The district court held that Mercado lacked standing to contest the forfeiture. The U.S. Court of Appeals for the Second Circuit affirmed.

COURT'S ANALYSIS: Possession requires a right or interest beyond mere custody, including knowledge of the presence of the property and intent to control. In addition to a bare claim of ownership, there must be some reliable indicators of ownership in order to prevent false claims. The court held that a naked claim of possession, in which the claimant appears to be an unknowing custodian, is insufficient to establish standing. Mercado did not describe accurately the contents of the luggage and disavowed any authority over the money found in his bags. Mercado's behavior was inconsistent with intent to assert authority over the money; therefore, he could not be considered an owner.

United States v. One 1945 Douglas C-54 Aircraft, 604 F.2d 27 (8th Cir.), *aff'd on rehearing*, 647 F.2d 864 (1981), *cert. denied sub. nom.*, Stumpff v. United States, 454 U.S. 1143 (1982).

HOLDING: Absent evidence of dominion and control, bare legal title is insufficient to establish standing to contest forfeiture.

FACTS: The claimant, J. Michael Stumpff, and his partner Albert Kammerer, purchased an airplane to facilitate their alleged drug trafficking activities. Kammerer provided the money to purchase the plane, but the title and registration were placed in Stumpff's name. Federal law enforcement officials seized several thousand pounds of marijuana from Kammerer's house, and the government subsequently instituted a forfeiture proceeding under 21 U.S.C. § 881(a)(4) against the airplane. Stumpff challenged the forfeiture as the aircraft's legal owner. The U.S. Court of Appeals for the Eighth Circuit affirmed the district court's decision that Stumpff did not have standing.

COURT'S ANALYSIS: The court held that Stumpff lacked standing to assert a defense to the forfeiture. Defining ownership broadly as "a possessory interest . . . with its attendant characteristics of dominion and control,"[19] the court refused to equate the fact that the airplane was registered in Stumpff's name to ownership. The court held that "bare legal title" was not sufficient to create standing.

United States v. New Silver Palace Restaurant, Inc., 810 F. Supp. 440 (E.D.N.Y. 1992).

HOLDING: Shareholders of a corporation lack standing to assert a claim against forfeiture because mere equitable title to property, without exercise of dominion or control, is insufficient to meet the standing requirement.

FACTS: In October 1989, the government brought a forfeiture action under 21 U.S.C. § 881(a)(6) against a New York restaurant allegedly used to facilitate drug transactions. The government further claimed that the restaurant was acquired through drug proceeds, and that the restaurant manager laundered money through the restaurant. Shareholders filed a claim to the property as innocent owners, and the government contended that the shareholders lacked standing. The district court denied the shareholders' claim.

COURT'S ANALYSIS: A claimant must demonstrate an ownership interest in the seized property to challenge a forfeiture action. Because the corporation is vested with title to the property, shareholders do not have a legal ownership or lien interest in the restaurant. Instead, the shareholders assert that they should be permitted to intervene based upon their "equitable interest" in the corporation. An equitable owner is "one who is recognized in

[19] 604 F.2d at 28.

equity as the owner of the property, because the real and beneficial use and title belong to him, although the bare legal title is vested in another."[20]

The court held the shareholders' claim invalid because the restaurant filed a claim against forfeiture on its own behalf, and shareholders may not take action to preserve corporate assets unless the corporation fails to act directly. In addition, the court pointed out that "bare legal title" without dominion or control does not establish standing to contest a forfeiture. Shareholders do not exercise dominion or control over the daily affairs of the corporation and, therefore, lack standing to intervene in a forfeiture proceeding.

United States v. One 1977 36 Foot Cigarette Ocean Racer 624 F.Supp. 290, 294 (S.D.Fla. 1985).

HOLDING: Legal title alone is not sufficient to confer standing for a claimant to assert an innocent-owner defense if the claimant's involvement with the property does not amount to ownership.

FACTS: In March 1983, U.S. customs agents seized an abandoned racing boat in Key Largo, Fla., and discovered a large quantity of marijuana residue aboard. Special modifications to the vessel, including the removal of the cabin interior and installation of powerful engines, indicated that the boat had been used to ship marijuana. Hours after seizure, the legal titleholder, Rebecca Martinez, reported the boat stolen and asserted an innocent-owner defense to its forfeiture.

The district court did not specifically address the government's claim that Martinez lacked standing but held that Martinez failed to prove that she was an innocent owner. However, the court stated that if it had addressed the standing issue, it would have ruled for the government.

COURT'S ANALYSIS: The rationale for requiring a property interest beyond bare legal title is to prevent drug dealers from setting up "strawmen" to shield their illegal activities. To prevent drug offenders from disguising their interest in property, the courts will look beyond formal legal documents to other evidence of ownership.

Marital Property

The illegal use of marital property by one spouse creates a unique challenge for claimants seeking to establish an innocent-owner defense. While courts recognize the legitimate claim of an innocent spouse to challenge the forfeiture of jointly owned property, proving lack of knowledge and consent within the context of marriage is difficult. Even if the innocent spouse's defense succeeds, courts rarely provide guidance as to how the property should be divided. The complex law of marital property may prevent partitioning the property between the innocent spouse and the government.

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[20] 810 F.Supp. at 443.

United States v. 717 So. Woodward Street, 2 F.3d 529 (3d Cir. 1993). (see also **Establishing an Innocent-Owner Defense**)

HOLDING: Spouses seeking to assert an innocent-owner defense to forfeiture cannot base their standing upon a state marital property statute because the law only confers an ownership interest in marital property being distributed pursuant to divorce proceedings.

FACTS: The government brought a civil forfeiture action against three parcels of property located in Allentown, Pa. One parcel was Jaime and Wyrma Rivera's residence, where Jaime arranged to transact a three-kilogram cocaine sale in July 1991, and where officers discovered drugs and paraphernalia. The second property was a food market the couple operated, where Jaime kept cocaine, received drug deliveries, and arranged meetings with a government informant. Jaime was the sole record owner of the third parcel, known as the Liederkranz Club, which was used to facilitate several cocaine transactions.

Wyrma was a joint owner of the first two parcels, and also claimed an interest in the third parcel because the property was purchased during her marriage to Jaime. Wyrma based her claim upon the definition of "marital property" contained in Pennsylvania's divorce code. The U.S. Court of Appeals for the Third Circuit affirmed the district court's decision that Wyrma could not assert an ownership interest in the Liederkranz Club property.

COURT'S ANALYSIS: Although Jaime was the sole record owner of the third property, it was purchased during his marriage to Wyrma. The court held that Wyrma's claim of ownership based upon her marital property interest was invalid. The court's holding was based upon prior decisions by the Pennsylvania Superior Court and decisions in prior forfeiture proceedings in which federal courts applied similar provisions of other states' divorce codes. In these decisions, the courts held that the definition of marital property does not apply beyond the context of the distribution of property in a divorce proceeding.

United States v. 15621 S.W. 209th Ave., 894 F.2d 1511 (11th Cir. 1990).

HOLDING: A spouse who proves she is an innocent owner and holds title to property as a tenant by the entirety may retain the entire property.

FACTS: In April 1988, the government sought forfeiture of residential property in Miami, Fla., that was jointly owned by Carlomilton and Ibel Aguilera as "tenants by the entireties." Tenancy by the entirety is an interest in real property held by a husband and wife. The married couple hold the property interest as a whole and may not divide it. The forfeiture action was based upon a February 1986 cocaine transaction that was arranged by a government informant, William Nichols, and took place at the Aguileras' home. Nichols arrived at the Aguilera home wearing a concealed microphone and negotiated the sale with Carlomilton in the kitchen. During these negotiations, Ibel was in the living room watching television and was unaware of the substance of the conversation between her husband and Nichols. While Carlomilton and Nichols were talking, Ibel left to go to a department store with her daughter and returned after Nichols had gone.

Carlomilton was arrested the next day after he sold two kilograms of cocaine to a federal agent. A subsequent search of the residence revealed weapons and a sensitive scale, but the agents did not discover any drugs in the house. Agents located drugs stored in an outbuilding approximately 300 feet from the home. Ibel was at work during the sale and arrest.

The district court ruled that Ibel was an innocent owner and entitled to keep the entire property. The U.S. Court of Appeals for the Eleventh Circuit affirmed.

COURT'S ANALYSIS: The court ruled that Ibel's interest in the home "was that of a tenant by the entireties, that is, an indivisible right to own and occupy the entire property otherwise subject to forfeiture."[21] The court explained that under Florida law, for property to be held in tenancy by the entireties, the joint owners must be married to each other; the owners must both have title to the property, which they received at the same time; they each must have an equal interest in the whole property; and they both must have the right to use the entire property. The court rejected the adoption of a rule, superseding all contrary state laws, under which the United States could receive a one-half interest through forfeiture proceedings in property held in tenancy by the entireties that is used by one spouse for narcotics trafficking without the knowledge or consent of the other spouse.

United States v. 6109 Grubb Road, 886 F.2d 618 (3d Cir. 1989). (see also *Lack of Knowledge, Consent, or Willful Blindness is Sufficient*)

HOLDING: In order to establish that he is an innocent owner, a spouse who holds title to property as a tenant by the entirety must prove either that the illegal use of the property was without the spouse's knowledge or without the spouse's consent. The court commented on particular problems that arise in forfeiture proceedings involving property owned as tenancy by the entirety.

FACTS: In April 1988, the government filed civil forfeiture proceedings pursuant to 21 U.S.C. § 881(a)(7) against two parcels of real property located in Erie, Pa., allegedly used for narcotics trafficking. One parcel, known as the Grubb Road parcel, was a family residence that Richard and Jane DiLoreto owned as tenants by the entirety.

Following Richard's conviction for conspiring to possess and distribute cocaine, Jane challenged the forfeiture of the Grubb Road parcel, claiming that she was an innocent owner. The district court held that Jane failed to show innocent ownership by a preponderance of the evidence, and entered an order forfeiting both parcels to the government. The U.S. Court of Appeals for the Third Circuit returned the case to the district court, ruling that the lower court had erred in not permitting Jane the opportunity to prove that the property was used without her consent.

COURT'S ANALYSIS: The court noted that the issue of consent is "particularly daunting" when the property owned is owned by a married couple. The court noted further that the government's suggestion that the non-consenting spouse seek partition of the property held in tenancy by the entirety "not only lacks legal substance but, in any event, defies marital reality."[22]

Lien interest

Lienholders who possess a security interest in property used to facilitate illegal activities may have standing to assert an innocent-owner defense. However, the court may require some showing that the security holder took reasonable steps in advance to discover the possible connection of the property to illegal drug activities.

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[21] 894 F.2d at 1515.

[22] 886 F.2d at 627.

United States v. $20,193.39, 16 F.3d 344 (9th Cir. 1994).

HOLDING: Because general creditors, unlike secured creditors, cannot claim an interest in any particular asset of a debtor's estate they do not have standing to challenge the civil forfeiture of their debtors' property.

FACTS: Vahe Andonian, Nazareth Andonian, and eight others were convicted of money laundering for transactions involving approximately $30,000,000 from June 1988 through December 1988. As a result of this conviction, the federal government filed a civil forfeiture action against $20,193.39 and hundreds of pieces of gold jewelry. Zareh Berberian, a friend of Vahe's, filed a claim in the action alleging that he had made four $75,000 loans to Vahe. The loans were evidenced by canceled checks and unnotarized promissory notes. The district court ruled that Berberian did not have standing; the U.S. Court of Appeals for the Ninth Circuit affirmed.

COURT'S ANALYSIS: The court reasoned that because general creditors, unlike secured creditors, cannot claim an interest in any particular asset of a debtor's estate they do not have standing to challenge the civil forfeiture of their debtors' property. The court rejected Berberian's argument that he should be permitted to make a claim because there were no other Andonian assets available from which he could satisfy the debt owed to him. The court distinguished case law cited by Berberian in support of his argument on the grounds that the cases involved criminal forfeitures, not civil forfeiture proceedings.

United States v. 6960 Miraflores Avenue, 995 F.2d 1558 (11th Cir. 1993).

HOLDING: The innocent-owner defense is based upon a lienholder's having no "actual knowledge" that drug proceeds are traceable to mortgaged property, not that the lienholder "should have known."

FACTS: In 1988, Ramon Puentes approached Republic National Bank in Miami, Fla., for an $800,000 loan secured by a mortgage on a Coral Gables, Fla., residence. Puentes, who had a long-standing relationship with Republic, stated that he and a partner owned the property. Title to the property was held by a Panamanian shell corporation, and the true owner of the property had purchased it with proceeds of narcotics trafficking. The bank made the loan secured by a mortgage to the record owner (the Panamanian holding company), without knowing who the true owner was. Prior to granting the loan, Republic's president inspected the property with the senior vice president in charge of real estate loans and a loan officer. The bank officers proceeded quickly in approving the loan because the holding company already had obtained loan approval from another lender. Puentes and the sole shareholder of the Panamanian holding company guaranteed the loan.

The government sought forfeiture of the property, and Republic claimed it was an innocent owner. The U.S. Court of Appeals for the Eleventh Circuit reversed the district court's denial of Republic's claim.

COURT'S ANALYSIS: Republic asserted that it had no knowledge of, and did not consent to, the illegal conduct that formed the basis for the forfeiture action. The government argued that the bank must show that it took reasonable steps to ensure that it was not acquiring an interest in property that was purchased with drug proceeds. The court rejected the government's argument because the bank lacked any knowledge of the tainted source of funds, which would put it on notice to take reasonable steps.

The court ruled that Republic's loan approval procedure was adequate, even though the titleholder was a Panamanian shell corporation, because this is a common way of holding property in South Florida. Furthermore, personal inspection of collateral property by bank officials is not unusual for a loan of this magnitude, and the loan was approved by the bank's loan committee. No reasonable steps that could have been taken by the bank would have revealed the Panamanian holding company's connection to drug trafficking or the connection between the proceeds of illegal transactions and the residence.

United States v. $41,305, 802 F.2d 1339 (11th Cir. 1986)

HOLDING: Lienholders who complete the legal steps necessary to "perfect" their security interest in property prior to the property's involvement in illegal activity have a sufficient interest in the property to allow them to intervene in a forfeiture action.

FACTS: In October 1983, federal officers arrested Jack Hoback while he was attempting to sell cocaine in West Memphis, Ark. The officers subsequently searched Hoback's home in Shelby County, Ala., and discovered incriminating documents and more than $41,000 in cash and traveler's checks. The government instituted forfeiture proceedings against the money.

Cessna Finance filed a motion to intervene based upon a 1974 security agreement it had negotiated with a corporation partly owned by Hoback. The agreement granted Cessna a secured interest in a plane. The plane later was sold without Cessna's permission, and Cessna contends that the money at issue constitutes the proceeds from the sale of the plane. Cessna also based its motion for intervention upon a 1975 personal judgment it obtained against Hoback in a Kansas court for the value of the airplane. According to Cessna, this judgment, which was recorded in Alabama in March 1984, gave it a lien against all Hoback's property in Shelby County.

The district court denied the motion to intervene as moot. The U.S. Court of Appeals for the Eleventh Circuit reversed.

COURT'S ANALYSIS: The court found that Cessna had a right to intervene because, if it can prove a "perfected" security interest in the property, it may have a legally protected interest. "Perfection" of a security interest requires a party to complete the legal steps necessary to establish an interest in the property against the debtor's other creditors. The court implied that the judgment lien also might have been sufficient interest to permit intervention except for the fact that the judgment was recorded in 1984, after the property was used for an allegedly illegal purpose.

United States v. 2901 S.W. 118th Court, 683 F.Supp. 783 (S.D. Fla. 1988).

HOLDING: Bail bondholders may not assert an innocent-owner defense if they fail to investigate the nature of the charges against the defendant or the potential connection between their security interest and illegal drug transactions.

FACTS: Miguel Alvarez was arrested in October 1985 for drug possession after cocaine was found in a closet at his home. A representative of the American Banker's Insurance Co. (ABI) attended Alvarez's hearing, at which bond was set at $50,000. At the hearing, the U.S. attorney stated the charges against Alvarez and the facts upon which they were based. The ABI issued a $50,000 bail bond and received a $50,000 promissory note and a $50,000 mortgage on Alvarez's home.

In April 1986, the government instituted forfeiture proceedings against Alvarez's home. When Alvarez failed to appear for his June 1986 court date, the ABI paid $50,000 on the forfeited bond to the government. The ABI asserted that its mortgage interest in Alvarez's house entitled it to contest forfeiture as an innocent owner. The district court rejected the ABI's innocent-owner defense.

COURT'S ANALYSIS: The ABI did not satisfy the requirements of the innocent-owner defense because it failed to establish that it lacked actual knowledge of the act giving rise to forfeiture *and* it did everything reasonable to determine whether the property was subject to forfeiture. The company merely asserted it was unaware of the connection between Alvarez's house and the illegal drugs. The court stated that the ABI could not claim innocent-owner status by "hiding its head in the sand." The court noted that an ABI representative attended Alvarez's

hearing and that "reasonable inquiry ... would probably have prompted [the ABI] to seek other security or not to post the bond."[23]

United States v. 2306 North Eiffel Court, 602 F.Supp. 307 (N.D. Ga. 1985).

HOLDING: Lienholders have standing to contest a civil forfeiture action under 21 U.S.C. § 881, and need not rely on a petition for remission to the U.S. attorney general for return of the property or for a portion of the proceeds from the sale of the property.

FACTS: In March 1984, the federal government instituted a forfeiture action against property located in DeKalb County, Ga., pursuant to a federal indictment for violation of drug laws. Goldome Realty asserted an interest in the property, which it obtained when it merged with the company holding the mortgage on the property. The property was purchased with proceeds allegedly traceable to drug trafficking after Goldome obtained its interest in the property. Goldome contested the forfeiture proceeding as an innocent owner under 21 U.S.C. § 881. Goldome also filed a petition of remission, which the U.S. attorney granted up to the amount of Goldome's net equity interest in the property.

The district court rejected the government's claim that Goldome's only remedy was the petition for remission and that it lacked standing to pursue its innocent-owner claim in the forfeiture proceeding.

COURT'S ANALYSIS: The legislative history of 21 U.S.C. § 881 indicates that the term "owner" should be broadly construed to include lienholders with a security interest in the seized property. The court held that lienholders are not limited exclusively to petitioning the attorney general for remission, but also may contest the forfeiture as an innocent owner under § 881.

Other property interests

The term "owner" goes beyond legal, marital, and lien interests to encompass other property interests. For example, the U.S. Supreme Court recently held that the term "owner" in 21 U.S.C. § 881 is not limited to bona fide purchasers but includes persons who receive gifts of property. Other courts accept the "assignment" of an interest in property as adequate grounds for standing. However, the relation back doctrine may invalidate the property interests of heirs, finders of lost property, and state officials.

Relevant Cases

United States v. 92 Buena Vista Ave., 507 U.S. 111 (1993). (see also "Relation Back of Property Used for Illegal Purpose" section of this compendium)

HOLDING: The protection afforded innocent owners under 21 U.S.C. § 881 is not limited to bona fide purchasers but may include individuals who receive gifts of property.

FACTS: Beth Ann Goodwin purchased a home with $240,000 she received as a gift from her boyfriend, Joseph Brenna, an alleged drug dealer. The government sought forfeiture under 18 U.S.C. § 881(a)(6) because the proceeds used to purchase the house were traceable to Brenna's illegal drug trafficking.

The district court rejected Goodwin's claim that she was an innocent owner, ruling that the innocent-owner defense only is available to bona fide purchasers. The U.S. Court of Appeals for the Third Circuit reversed and

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[23] 683 F.Supp. at 789.

remanded the case to the district court for a determination of whether Goodwin was an innocent owner. The U.S. Supreme Court affirmed the appellate court's decision.

COURT'S ANALYSIS: Examining the text of 21 U.S.C. § 881, the high Court found that the Congress did not expressly qualify the term "owner" in the statute. Therefore, the Court held that the term "owner" is not limited to bona fide purchasers, but gives standing to individuals with a variety of property interests.

In re One 1985 Nissan 300ZX, 889 F.2d 1317 (4th Cir. 1989).

HOLDING: Heirs' interest in illegal drug proceeds is not protected from forfeiture because title to the property had vested in the government prior to alleged drug dealer's death. The alleged drug dealer, therefore, had no interest in the property for his heirs to inherit.

FACTS: In May 1986, police from Prince George's County, Md., discovered the bodies of Dennis Constantine White and his daughter, Donna Marie White, in their Temple Hills, Md., residence. During the murder investigation, the police discovered cash, checks, jewelry, and electronic equipment in the residence. White was allegedly a key drug figure in the Washington, D.C., area. The government instituted forfeiture proceedings against cash, real estate, cars, and jewelry allegedly derived from White's drug trafficking.

Alvin Walker, the personal representative of White's estate, filed a claim on behalf of the estate and four Jamaican minors, who claimed to be White's illegitimate daughters. Walker asserted that forfeiture is primarily a punitive action and should abate on the death of the alleged offender. In addition, Walker contended that the heirs were protected from forfeiture as innocent owners. The district court granted summary judgment in favor of the government and ordered the property forfeited. The U.S. Court of Appeals for the Fourth Circuit affirmed.

COURT'S ANALYSIS: The court held that forfeiture proceedings under 21 U.S.C. § 881 are civil actions and, therefore, unlike criminal proceedings, do not abate on the death of the property owner. The court also held that the estate and heirs did not acquire an interest in the property prior to White's illegal activities. Therefore, they were barred from contesting forfeiture by the relation back doctrine, under which title and interest to property vest in the government upon commission of the act giving rise to the forfeiture proceeding.

United States v. $10,694, 828 F.2d 233 (4th Cir. 1987).

HOLDING: Property assigned to a claimant is not subject to forfeiture unless the person receiving the assignment had actual knowledge that the money was derived from drug proceeds.

FACTS: In April 1984, George Terry was arrested in Carrboro, N.C., for first-degree murder. Terry contacted attorney Steven Bernholz, who agreed to represent him but required a fee retainer. Terry told Bernholz that he had approximately $12,000 cash in his apartment that could be used as a retainer, and gave the attorney permission to take the money.

Bernholz was not admitted to the apartment because the police were searching it pursuant to a valid warrant. The police seized drugs, paraphernalia, and cash from the apartment. Bernholz obtained a written statement from Terry indicating that he had assigned the funds to his attorney. When Bernholz went to the police station to gain possession of the money, however, federal authorities already had seized the money as proceeds from illegal drug trafficking. The U.S. Court of Appeals for the Fourth Circuit affirmed the district court's decision in the forfeiture proceeding that Bernholz was an innocent owner.

COURT'S ANALYSIS: Because Terry assigned the money to Bernholz *before* the police conducted the search of the apartment, Bernholz had no actual knowledge that the money was derived from drug proceeds. The court rejected the government's argument that the inquiry should be whether the attorney knew or *should have known*

that the money was derived from drug proceeds. The court held that nothing in 21 U.S.C. § 881 required it to adopt such a standard. However, the court held that the innocent owner bears the burden of proving lack of knowledge.

United States v. $5,644,540, 799 F.2d 1357 (9th Cir. 1986).

HOLDING: State "lost property" and tax laws do not apply to the proceeds of drug activity because title vests in the federal government before the state laws become applicable to the property.

FACTS: In October 1984, Ann Kamali and Nelson Garrett, employees of Budget Rent-A-Car, discovered a car that had been missing from Budget's inventory in a San Francisco, Calif., airport parking lot. The employees contacted the sheriff's department after they discovered approximately $1.4 million in cash and more than $600,000 in gold coins and platinum ingots in the trunk of the rental car. Two sheriff's detectives investigated the report, took custody of the contents of the trunk, and contacted the federal law enforcement officials.

Federal officials ascertained that the missing owner was involved in drug trafficking because cocaine residue was found in the trunk of the rental car and the owner used false identification to rent the car. In addition, the owner listed his address as Miami, Fla., a known source city for cocaine, and gave his local residence as a motel known for past drug trafficking. The federal government subsequently brought forfeiture proceedings against the property.

Three Budget employees contested the forfeiture as finders of lost property. In addition, the California controller asserted that the unclaimed property belonged to the state, and the California Tax Board claimed that an 11 percent income tax was owed on the property. The district court denied the claims, ruling that the property should be forfeited to the federal government. The U.S. Court of Appeals for the Ninth Circuit affirmed.

COURT'S ANALYSIS: The court held that the government made the requisite showing of probable cause to support forfeiture and established its legal title to the property. The court relied on the relation back doctrine to reach its holding that none of the claimants asserted property interests that were sufficient to establish standing to contest the forfeiture. Under the relation back doctrine, the federal government received title to the property when the act giving rise to the forfeiture proceeding was committed, before any of the claimants even knew the property existed.

Establishing an Innocent-Owner Defense

After establishing standing to assert a defense against forfeiture, an owner must prove his "innocence" by a preponderance of the evidence.

The statutory innocent-owner defense for forfeiture proceedings involving proceeds traceable to drug offenses and real property used to facilitate illegal exchanges of controlled substances provides that no owner's interest in property may be forfeited "by reason of any act or omission established by that owner to have been committed or omitted without the *knowledge or consent* of that owner."[24] The statutory language of the innocent-owner defense for conveyances used or intended to be used to facilitate the transportation, sale, receipt, possession, or concealment of controlled substances states that no owner's interest shall be forfeited "by reason of any act or omission established by that owner to have been committed or omitted without the *knowledge, consent, or willful blindness* of the owner."[25]

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[24] 21 U.S.C. §§ 881(a)(6), (7) (1994).

[25] 21 U.S.C. § 881(a)(4) (1994).

The issue of innocence usually is a question of fact to be determined at trial, unless the court believes that no reasonable trier of fact could find that the owner lacked knowledge of or did not consent to the illegal activities. In such a case, the court may dismiss a claimant's challenge to the forfeiture prior to trial.

Relevant Cases

United States v. Route 2, Box 472, 136 Acres More or Less, 60 F.3d 1523 (11th Cir. 1995).

HOLDING: Where a corporate employee engages in criminal activity outside the scope of his employment, with no benefit accruing to the corporation, and other shareholders had no knowledge of the criminal activity, the criminal activity is not imputable to the corporation so as to deny the corporation an innocent-owner defense.

FACTS: On Sept. 10, 1991, agents of the Georgia Bureau of Investigation discovered a number of marijuana plants growing on a 135-acre parcel of land owned by Dyer's Trout Farms, Inc. in Towns County, Ga. William Dyer, president and majority shareholder of the farm owned 68 percent of the corporation's stock while his brothers, Willard and Willis, owned 16 percent each. All three brothers lived and worked full time on the farm. In June of 1992, William was convicted of possession of marijuana and on Oct. 20, 1992, the United States filed a complaint pursuant to § 881(a)(7) for forfeiture of the property. The district court found that the farm had received no income or benefit from the cultivation of marijuana; neither Willard or Willis was aware of or consented to the cultivation of marijuana on the corporate property. The district court rejected the farm's innocent-owner defense and said that a defendant who owns 68 percent of a corporation's shares and controlling authority of the daily activities of a family-owned corporation provides that corporation with knowledge of his activities; the U.S. Court of Appeals for the Eleventh Circuit reversed.

COURT'S ANALYSIS: The court ruled that the corporation was entitled to assert an innocent-owner defense because William's brothers were unaware of his illegal activities and the activities did not in any way benefit the corporation. No evidence was offered to suggest that the corporation was not an entirely legitimate company. Applicability of the innocent-owner defense should not turn on an individual's ownership and authority over the corporate parcel, but rather on whether the individual vested with such authority was acting within the scope of his corporate employment.

United States v. 10936 Oak Run Circle, 9 F.3d 74 (9th Cir. 1993).

HOLDING: An innocent-owner defense will not be successful if the owner is on notice that he should inquire further into the origin of the property transferred to him.

FACTS: In May 1990, Grace and Ruben Alexander forgave a loan debt of $11,000 and assumed the mortgage on a house located in Moreno Valley, Calif., which had belonged to their daughter's boyfriend, Eddie Edwards. In exchange, the Alexanders received title to the house, which was worth at least $190,000 and had an outstanding mortgage of $102,000. The house allegedly was bought with drug proceeds and Edwards later became a fugitive.

In a forfeiture proceeding, the district court denied the Alexanders' claim that they were innocent owners. The district court relied upon the relation back doctrine and the fact that the deed to the property was recorded two months after the property was seized and Edwards became a fugitive. The U.S. Court of Appeals for the Ninth Circuit reversed and remanded the case.

COURT'S ANALYSIS: The appellate court, relying on the U.S. Supreme Court's decision in *United States v. 92 Buena Vista Ave.*,[26] rejected the district court's application of the relation back doctrine. The court held further that "innocence is incompatible with knowledge that puts the owner on notice that he should inquire further."[27] The court stated that the Alexanders were offered what appeared to be a "remarkable bargain,"[28] and returned the case to the trial court for further proceedings on whether they had inquired as to how Edwards obtained the property.

United States v. 717 So. Woodward Street, 2 F.3d 529 (3d Cir. 1993). (see also *Marital Property*)

HOLDING: Absent government evidence to the contrary, a claimant's sworn statement that he was unaware of the illegal activity relating to an asset is sufficient to raise a question of fact, which must be determined at trial.

FACTS: In July 1991, the government brought a civil forfeiture action against three parcels of property located in Allentown, Pa. One parcel was Jaime and Wyrma Rivera's residence, where Jaime arranged to transact a three-kilogram cocaine sale, and where officers discovered drugs and paraphernalia. The second property was a food market the married couple operated, where Jaime kept cocaine, received deliveries, and arranged meetings with a government informant. Jaime was the sole record owner of the third parcel, which was a social club used to facilitate several cocaine transactions.

Both Wyrma and Luis Rivera asserted innocent-owner defenses against the proposed forfeiture. Wyrma was joint owner of the first two parcels, and claimed a marital interest in the third parcel. Luis Rivera claimed an ownership interest in the third parcel because he contributed to the down payment. The district court granted the government's pretrial motion for "summary judgment," stating that bare denial of knowledge of illegal activity was insufficient to create a question of fact and the need for a trial. The U.S. Court of Appeals for the Third Circuit reversed.

COURT'S ANALYSIS: For claimants asserting an innocent-owner defense, bare denial of knowledge or consent may be insufficient to withstand a pretrial motion for summary judgment. However, a sworn assertion of an absence of knowledge may raise a genuine factual question and, therefore, create the need for a trial. When the state of mind of a person is at issue, and the record contains direct evidence in the form of a sworn statement, conflicting circumstantial evidence offered by the government creates an issue of credibility. Unless the court finds that no reasonable trier of fact could believe the claimant's denial, the claimant is entitled to present his case at trial.

A rational trier of fact might believe Luis' sworn testimony that he had no knowledge of the activities related to the third parcel of property. No evidence indicated that Luis was on the premises when it was used to conduct drug transactions. With respect to Wyrma, there was no evidence that she knew of her husband's activities. Despite the fact that law enforcement officials conducted extensive surveillance of the residence and the market, no evidence placed Wyrma at the scene of any illicit transaction. The court held that the claimants were entitled to a trial because the government's evidence was not strong enough to preclude a reasonable trier of fact from crediting Wyrma or Luis's testimony and deciding in their favor.

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[26] 507 U.S. 111 (1993) (This case is summarized in the section of this compendium titled "Relation Back of Property Used for Illegal Purpose.")

[27] 9 F.3d. at 76.

[28] *Id.*

United States v. Sixty Acres in Etowah County, Ala., 930 F.2d 857 (11th Cir. 1991).

HOLDING: A wife's generalized fear of her husband's persecution does not satisfy the requirement of "no consent" if the threat of physical harm is not immediate and if the wife fails to take some steps to prevent the criminal misuse of her property.

FACTS: The government instituted a forfeiture proceeding against 60 acres of property in Etowah County, Ala., owned by Evelyn Ellis. Evelyn lived on the property with her husband, Hubert. In May 1989, Hubert pleaded guilty to possession with intent to distribute as a result of an undercover sting operation that occurred on the property. After the raid, officers had entered the house and found Evelyn in bed.

After a forfeiture proceeding was instituted against the property, Evelyn claimed that her fear of her husband prevented her from taking steps to end the illegal use of her property. She stated that she lived in fear because Hubert had beaten his previous wife to death and had threatened to kill her. The district court found that Evelyn was physically and mentally incapable of stopping her husband's illegal drug activities. In view of her husband's threats and violence, the court held that Evelyn had not consented to the illegal use of her property. The U.S. Court of Appeals for the Eleventh Circuit reversed.

COURT'S ANALYSIS: Evidence presented by Evelyn did not establish a defense of duress. To show duress, a party must show that he consented to an unlawful act because: (1) he was under an immediate threat of death or serious bodily injury, (2) he had a well-grounded fear that the threat would be carried out, and (3) he had no reasonable opportunity to escape. Evelyn presented evidence that Hubert had been violent with her in the past and had beaten his previous wife to death. However, the court found that Evelyn had an opportunity to escape, and there was no evidence that Hubert threatened Evelyn with immediate bodily injury if she did not cooperate in his illegal activities.

United States v. 7.6 Acres of Land on Chapel Rd., Bennington, VT, 907 F.Supp. 782 (D. Vermont 1995).

HOLDING: State attempting to assert property tax liability, which arose as a result of marijuana sales on property, was not an innocent owner.

FACTS: George and Candace Rogers owned 7.6 acres of land on Chapel Rd. in Bennington, Vt. During August and September 1987 they manufactured and distributed marijuana growing on their property. In December 1987, the state of Vermont filed a lien against the property for income and sales taxes due as a result of the marijuana sales. In January 1988, the federal government initiated a civil forfeiture proceeding against the property. In April 1989, the state of Vermont filed a verified claim of superior tax lien against the Rogers' property in an amount exceeding $62,000. In 1995, the federal government settled its claim with the Rogers, leaving the tax lien unresolved. The U.S. district court ruled that the state's lien did not take precedence over the federal forfeiture.

COURT'S ANALYSIS: The court concluded that because the state's tax lien arose as a result of its knowledge of the illegal activity on the property, the state was not entitled to raise an innocent-owner defense.

United States v. 2011 Calumet, 699 F.Supp. 108 (S.D.Tex 1988).

HOLDING: If agents and employees of a company have knowledge of illegal activities, the company owner is not eligible to make an innocent-owner claim in a forfeiture proceeding.

FACTS: In March 1986, Utotem Inc., leased property to Mary Whitt, which was to be used exclusively as a lounge. The lease provided that no alterations could be made to the property and that the premises could not be used for illegal purposes. Utotem Inc., through its agents, knew of unapproved alterations to the property, including the addition of steel doors, barricaded windows, and an unusual mirror system above the door. A sign on

the building identified it as a "Senior Citizen's Hall," but when the company's employees arrived to inspect the premises, they could not get in. Utotem Inc.'s property manager was aware that the property was raided frequently, but never questioned the suspicious circumstances.

The government sought forfeiture of the property, alleging that it was used to further the sale of crack cocaine. The district court ruled in favor of the government.

COURT'S ANALYSIS: The district court held that the innocent-owner defense is not available to an owner whose employees were aware of unauthorized structural alterations to the premises consistent with fortification and knew of frequent raids to the premises. The employees' knowledge of suspicious activity created a duty to do all that reasonably could be expected to prevent illegal use of the property.

"Willful Blindness" Prong

Although the statutory language referring to an owner's "willful blindness" to illegal activity appears only in § 881(a)(4) -- the provision dealing with forfeiture of conveyances -- some courts have required a showing of a lack of willful blindness to illegal activities in forfeiture proceedings involving proceeds traceable to drug transactions and real property.

To determine whether a claimant was willfully blind to illegal activity, the courts have adopted a subjective test of deliberate ignorance.

Relevant Cases

United States v. Milbrand, 58 F.3d 841 (2d Cir. 1995).

HOLDING: A property owner who has engaged in willful blindness as to drug activities occurring on the property is not entitled to avoid forfeiture based on the innocent-owner defense.

FACTS: In January 1985, Mark Milbrand purchased an 85-acre parcel of land with money supplied mostly by his mother, Marcia Milbrand. In December 1986, Mark conveyed the land to Marcia for one dollar. In August 1990, law enforcement agents searched the property and found 1,362 marijuana plants growing on and around the farm. Inside the house, agents found a film canister containing marijuana seeds on top of a dresser in Mark's bedroom and an electronic seed separator in the closet. In a kitchen/dining room cupboard, the agents found a small cellophane bag containing marijuana and inside a hutch in the dining room several packages of rolling paper and a silver marijuana pipe were found. Canisters containing marijuana seeds labeled by year, size, quality, and height were found in the basement. The United States commenced a civil forfeiture action against the property pursuant to 21 U.S.C. § 881(a)(7). Marcia filed a claim to the property contending that she was an innocent owner. In January 1993, a bench trial was held. Agents testified that at the time of the search, Marcia knew that Mark had a marijuana problem, and that he had been arrested several years earlier for growing marijuana at her house. Additionally, she visited the farm once a week to cook, clean, and do her son's laundry, but she said she had no knowledge of her son's marijuana farming despite the fact that she admitted having gone into cabinets and drawers where the police discovered marijuana and marijuana paraphernalia. The district court denied Marcia's claim; the U.S. Court of Appeals for the Second Circuit affirmed.

COURT'S ANALYSIS: The court relied upon the district court's express finding that Marcia's testimony was not credible, that she was not an innocent owner, and that Marcia "would have had to be blind not to have been aware of her son's marijuana activities, or would have to have consciously and purposefully ignored signs of such activities." Matters of willful avoidance of knowledge are questions of fact not to be set aside unless they are clearly erroneous. The court said that based upon the evidence presented to the district court, its findings were not clearly erroneous.

United States v. One 1973 Rolls Royce, V.I.N. SRH-16266, 43 F.3d 794 (3d Cir. 1994). (see also *Lack of Knowledge, Consent, or Willful Blindness is Sufficient* section of this compendium)

HOLDING: To demonstrate that a he was not willfully blind to illegal activity, a claimant must demonstrate that the he was not subjectively aware of a high probability that the vehicle to be forfeited either was used or was going to be used to facilitate the transaction, or, if he was, that he took affirmative steps reasonable under the circumstances to determine whether the vehicle was going to be or had been so used.

FACTS: Oscar Goodman was a prominent criminal defense lawyer who represented clients throughout the country. Nicodemo Scarfo, Sr., a co-defendant of one of Goodman's former clients, gave Goodman a 1973 Rolls Royce in repayment for $16,000 that Goodman had paid to the Four Seasons Hotel in Philadelphia, Pa., to cover the cost of a lavish party given by Scarfo's son and his friends at the hotel to celebrate Scarfo's acquittal at a murder trial in which Goodman was one of the defense lawyers. The government seized the car pursuant to § 881(a)(4) on the grounds that members of the Scarfo family had used the Rolls Royce to shuttle people to and from meetings conducted as part of the Scarfo family's "La Costa Nostra" drug distribution activities. Goodman alleged that he did not know about, did not consent to, and was not willfully blind to the car's use in drug transactions. The district court rejected Goodman's innocent-owner claim and held that the Rolls Royce was subject to forfeiture; the U.S. Court of Appeals for the Third Circuit remanded the case to the district court for application of the "willful blindness" test established.

COURT'S ANALYSIS: To determine whether a claimant displayed willful blindness, the court adopted the subjective "deliberate ignorance" test articulated in *United States v. Caminos.*[29] Under this test, much greater culpability than simple negligence or recklessness is required. The claimant must be subjectively aware of the high probability that the property was used in an illegal transaction; it is not enough that a reasonable man would have been aware of the probability. The court noted that courts that have required a showing of a lack of willful blindness under § 881 (a)(6) & (7) have applied the deliberate ignorance test; thus application of the test in § 881 (a)(4) cases will ensure that the innocent-owner defense is the same in all three types of cases.

United States v. One 1989 Jeep Wagoneer, 976 F.2d 1172 (8th Cir. 1992).

HOLDING: To demonstrate that he was not willfully blind to illegal activity a claimant must prove that he did not deliberately close his eyes to what otherwise would have been obvious and that his acts or omissions did not show a conscious purpose to avoid knowing the truth.

FACTS: Lucille Weimart was the majority owner of Ponderosa of Blue Earth County, Inc. Her sons, Mark and Steve Weimart, were minority shareholders. Mark worked at Kato Sanitation, a separate corporation also owned by the Weimarts, from 1984 to early 1989. Mark became addicted to drugs in 1983 or 1984 and received treatment for his addiction in 1984, 1986, 1987, and 1988. Mark resumed working at Kato in late 1989 or early 1990. He attended Alcoholics Anonymous meetings and was monitored by others in the business. Ponderosa bought a Jeep Wagoneer that Mark chose as his company car. In 1991, Mark pleaded guilty to distribution of cocaine and admitted that he used the Jeep to facilitate a drug transaction by transporting cocaine in it. The government brought a civil forfeiture action against the Jeep. The district court entered summary judgment for the government on the grounds that Ponderosa failed to establish that it was an innocent owner. Ponderosa appealed the district court's ruling, arguing that its controlling owners had no knowledge that the Jeep was connected to drug use, did not consent to its illegal use, and took reasonable steps to monitor Mark's activities. The court reversed the granting of summary judgment and remanded the case to the district court for trial

[29] 770 F.2d 361 (3d Cir. 1985).

COURT'S ANALYSIS: The court concluded that the legislative history made clear that willful blindness was intended to apply to a property owner who "deliberately closes his eyes to what otherwise would have been obvious and whose acts or omissions show a conscious purpose to avoid knowing the truth."[30] From this standard, knowledge can be inferred.

Lack of Knowledge, Consent, or Willful Blindness is Sufficient

Courts disagree about whether a claimant, in establishing an innocent-owner defense, must prove that he lacked both knowledge and consent and was not willfully blind to the illegal activity or whether proof of one prong is sufficient. However, most courts have found that the express "or" language of 21 U.S.C. § 881 implies that proof of one prong is sufficient.

Relevant Cases

United States v. One 1973 Rolls Royce, V.I.N. SRH-16266, 43 F.3d 794 (3d Cir. 1994). (see also *"Willful Blindness" Prong*)

HOLDINGS: The innocent-owner defense of § 881(a)(4)(C) is available to any owner who can prove either a lack of knowledge, lack of consent, *or* willful blindness. Therefore, a post-illegal act transferee may utilize the innocent-owner defense if he did not consent to the illegal use of the property.

FACTS: Oscar Goodman was a prominent criminal defense lawyer who represented clients throughout the country. Nicodemo Scarfo, Sr., a co-defendant of one of Goodman's former clients, gave Goodman a 1973 Rolls Royce in repayment for $16,000 that Goodman had paid to the Four Seasons Hotel in Philadelphia, Pa., to cover the cost of a lavish party given by Scarfo's son and his friends at the hotel to celebrate Scarfo's acquittal at a murder trial in which Goodman was one of the defense lawyers. The government seized the car pursuant to § 881(a)(4) on the grounds that members of the Scarfo family had used the Rolls Royce to shuttle people to and from meetings conducted as part of the Scarfo family's "La Costa Nostra" drug distribution activities. Goodman alleged that he did not know about, did not consent to, and was not willfully blind to the car's use in drug transactions. The district court rejected Goodman's innocent-owner claim and held that the Rolls Royce was subject to forfeiture; the U.S. Court of Appeals for the Third Circuit remanded the case to the district court.

COURT'S ANALYSIS: The court applied the *6109 Grubb Road* (see next case) disjunctive analysis to § 881(a)(4)(C). *6109 Grubb Road* relied principally on the canon of statutory construction that words separated by an "or" must be given independent meaning. The court reasoned also that although the willful blindness language appears only in § 881(a)(4) -- the provision dealing with forfeiture of conveyances -- the tests for innocent ownership under §§ 881(a)(4), (6), and (7) are virtually identical and their construction should be consistent.

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[30] 976 F.2d at 1175.

United States v. 6109 Grubb Rd., 886 F.2d 618 (3d Cir. 1989). (see also *Marital Property*)

HOLDING: A spouse can show innocent ownership if she proves by a preponderance of the evidence that illegal use of property occurred *either* without her knowledge or without her consent.

FACTS: In April 1988, the government filed civil forfeiture proceedings pursuant to 21 U.S.C. § 881(a)(7) against two parcels of real property located in Erie County, Pa., allegedly used for narcotics trafficking. The Grubb Road parcel was a family residence that Richard and Jane DiLoreto owned. The forfeiture proceeding was stayed pending the outcome of Richard's criminal trial. Richard was convicted in federal district court of conspiring to possess and distribute cocaine, based upon an investigation conducted by the federal and state law enforcement officials.

Following Richard's conviction, the stay was lifted and the forfeiture proceedings recommenced. Jane challenged the forfeiture of the Grubb Road parcel, claiming that she was an innocent owner. The district court held that Jane failed to prove by a preponderance of the evidence that she had no knowledge of her husband's illegal activities. The court entered an order forfeiting both parcels of land to the government. The U.S. Court of Appeals for the Third Circuit reversed and remanded the case to the district court for a re-examination of Jane's claim.

COURT'S ANALYSIS: The court held that, under 21 U.S.C. § 881, knowledge of illegal use does not deprive the owner of a defense if the owner can demonstrate the property was used without his consent. The statute states that the phrase "knowledge *or* consent," and the rules of statutory construction, require courts to give separate meanings to terms connected by "or." Therefore, Jane should have been permitted the opportunity to prove by a preponderance of the evidence that the illegal use of the property occurred *either* without her knowledge or without her consent.

The court noted that under certain circumstances "knowledge can imply consent ... The illegal use of marital property by the spouse of a claimant can present a classic example of that situation. Certainly in resolving such a claim, emotional considerations must be kept in proper perspective lest they be employed subconsciously to negate the objectives of the forfeiture statute and to encourage titling of such property to that end."[31]

United States v. 908 T Street, NW, 770 F.Supp. 697 (D.D.C. 1991)

HOLDING: Although an owner knows that his house has been used in the past to distribute narcotics, the fact that he did not consent to the illegal activities is sufficient to prove an innocent-owner defense.

FACTS: On three separate occasions between 1984 and 1988, District of Columbia Metropolitan Police detectives searched William Akers' residence and found drugs, paraphernalia, guns, and other incriminating evidence. When the government brought forfeiture proceedings against the residence under 21 U.S.C. § 881, Akers asserted an innocent-owner defense.

Akers had nine children, some of whom have been incarcerated for past drug infractions. However, Akers was acquitted each time drug charges were brought against him and removed his drug-addicted children from the home. Akers' daughter Gail testified that her father took other steps to prevent the use of his house for illegal purposes, including changing the locks on the house and barricading the windows. The government offered no evidence indicating that the current residents were involved in drug dealing, and did not offer evidence to contradict Akers' daughter. The district court held that these facts were sufficient to show lack of consent and satisfy the innocent-owner defense requirements.

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[31] 886 F.2d at 627.

COURT'S ANALYSIS: The government offered no evidence to contradict Akers' contention that he did not consent to the illegal use of his house. Furthermore, the court found Akers' daughter was an articulate and credible witness who corroborated her father's claim of lack of consent.

United States v. 171-02 Liberty Avenue, 710 F.Supp. 46 (E.D.N.Y. 1989).

HOLDING: An owner can assert an innocent-owner defense even though he was aware of drug trafficking on his property if he shows lack of consent.

FACTS: In 1986, Redino Greco purchased a Queens, N.Y., building from his family with the intention of repairing and reselling it. The building was in a dangerous neighborhood and police believed that most of the drug-related activity was generated from Greco's building and facilitated by Eddie Abbott, the building caretaker. Greco agreed to press charges against anyone arrested for trespassing on his premises. Greco also gave police permission to tear down the fences and steel doors that had been erected on the premises to obstruct police surveillance and to fortify the building against raids. Whenever the police tore down the fences and doors, they were quickly replaced. Although Abbott claimed ignorance, police suspected he was involved in drug trafficking and asked Greco to fire the caretaker, but Greco refused.

The government brought forfeiture proceedings against the building, which Greco contested, claiming that he was an innocent owner. The court denied the government's pretrial motion for summary judgment, holding that Greco's lack of consent remained a factual question to be determined at trial.

COURT'S ANALYSIS: The court held that normal rules of statutory construction required it to give the word "or" in 21 U.S.C. § 881 its ordinary meaning. The statute permits the innocent-owner defense if the unlawful act is committed without the owner's "knowledge *or* consent." Because Greco's lack of consent was in dispute, he was entitled to a trial to prove his claim. The court found that Greco could not be regarded as having consented to the illegal activity simply because he declined to take heroic personal risks in the war on drugs.

Claimant Must Prove Lack of Knowledge, Consent, and Willful Blindness

Relevant Cases

United States v. Real Estate at 6640 SW 48 St., Miami, Fla. 41 F. 3d 1448 (11th Cir. 1995).

HOLDING: A post-illegal act transferee who has knowledge of the illegal activity at the time of forfeiture cannot rely on the innocent-owner defense.

FACTS: Reinaldo Luis and Maria del Carmen Miguel de Mendicuti purchased property located at 6640 S.W. 48th Street in Miami, Fla. on Dec. 12, 1984. They held the property as joint tenants with right of survivorship. Luis was arrested Sept. 7, 1990, at the property on drug smuggling charges. On Sept. 9, 1990, he retained Jose A. Larraz, Sr. as legal counsel. On Sept. 12, 1990, Luis transferred his entire interest in the property to Mendicuti in exchange for $10. Mendicuti then executed a $50,000 promissory note and a mortgage deed on the property in favor of Larraz for legal fees. Both deeds and the promissory note were recorded on Sept. 12, 1990. Luis was convicted of conspiracy to import cocaine. On March 5, 1991, the United States filed a civil forfeiture action against the property pursuant to § 881(a)(7). Larraz filed a claim on the property and an answer to the government's complaint on June 4, 1991. As an affirmative defense, Larraz conceded that he knew of the illegal activity when he took his mortgage interest in the property, but that he was entitled to assert an innocent-owner defense because he did not consent to the illegal activity on the property. The government moved for summary judgment, arguing that Larraz was not an innocent owner. The district court granted the government's motion; the U.S. Court of Appeals for the Eleventh Circuit affirmed.

COURT'S ANALYSIS: The court reasoned that allowing post-illegal act transferees who knowingly take an interest in forfeitable property to assert an innocent-owner defense because they were not on the scene early enough to consent to the illegal activity would be an absurd construction of the statute. Therefore, the court concluded that the lack of consent defense is not available to post-illegal act transferees. The court explicitly rejected the holding in *United States v. One 1973 Rolls Royce.*[32]

United States v. Lot 111-B, 902 F.2d 1443 (9th Cir. 1990)

HOLDING: The innocent-owner defense is unavailable unless the claimant can prove both lack of knowledge and consent to the illegal activity.

FACTS: The government seized property in Hawaii, which allegedly was used to facilitate drug activity in violation of federal narcotics laws. Richard Stage held a 42 percent interest in the property and contested the forfeiture, claiming he was an innocent owner because he did not consent to the illegal activity. The district court held that Stage did not qualify as an innocent owner because he was aware of the illicit activity that allegedly occurred on the property. The U.S. Court of Appeals for the Ninth Circuit affirmed.

COURT'S ANALYSIS: The court rejected Stage's innocent-owner defense because he was aware of the illegal activities occurring on the property. The court held that a claimant must prove both lack of knowledge and consent to successfully maintain an innocent-owner defense.

Requirement of Reasonable Effort to Prevent Illegal Use

Some courts, in addition to requiring that a claimant asserting an innocent-owner defense prove lack of knowledge, consent, and/or willful blindness, require him to prove that he did everything reasonably possible to prevent the misuse of the property. The express language of 21 U.S.C. § 881 does not contain a reasonable-efforts requirement. The conflict among courts concerning the reasonable efforts requirement stems from a U.S. Supreme Court case, *Calero-Toledo v. Pearson Yacht Co.*,[33] which it decided prior to the enactment of § 881. In *Calero-Toledo*, the Court said that a *constitutional* defense to forfeiture might be available to an owner who "had done all that reasonably could be expected to prevent the proscribed use of his property."[34] Some courts have suggested that the *statutory* innocent-owner defense of § 881 incorporates the *constitutional* reasonable-efforts doctrine established in *Calero-Toledo* and that claimants asserting a defense under § 881 must prove this additional factor.

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[32] 43 F.3d 794 (3d Cir. 1994). (This case is summarized in the section of this compendium titled *Lack of Knowledge, Consent, or Willful Blindness is Sufficient.*)

[33] 416 U.S. 666 (1974).

[34] *Id.* at 689.

United States v. $124,813 in U.S. Currency, 53 F.3d 108 (5th Cir. 1995).

HOLDING: Claimant was not entitled, under the statutory innocent-owner defense, to recover property seized by customs officials after his sister failed to declare currency in excess of $10,000 upon entering the United States because he failed to make the requisite showing that the property had been taken without his consent or that he had done all that could reasonably be expected to prevent the use of the property for illegal purposes.

FACTS: On Feb. 10, 1994, Veena Sivamani Sivaskandan was convicted of several federal offenses arising out of her failure to declare $124,813 in U.S. currency to customs officials when entering the United States. On April 4, 1994, the United States commenced an action seeking forfeiture of the seized funds. Veena's brother, Somnath, filed a claim for possession of the funds asserting that he was the lawful owner of the money through assignment and inheritance and that the funds were illegally seized. The government moved for summary judgment and claimed that there was probable cause to believe that the currency was subject to seizure and forfeiture under 31 U.S.C. § 5317(c) because, on Aug. 14, 1993, Veena failed to comply with the reporting requirements of § 5316(a). On Aug. 15, 1993, Somnath denied any interest in the money. In opposition to the government's motion for summary judgment, he asserted that he was entitled to the money because he was an innocent owner and was unaware of any illegal activity. In support of his claim, Somnath produced his deceased father's will, which disinherited Veena, and an affidavit from his mother, which said that the cash had belonged to his father and that Veena was to give the cash to Somnath. On Oct. 4, 1994, the district court granted the government's motion for summary judgment and determined that the cash was in Veena's possession for her use, irrespective of the ultimate obligation she may have had to give it to Somnath.

COURT'S ANALYSIS: The Fifth Circuit held that *Calero-Toledo* did not create a general "innocent-owner" defense to statutory forfeiture. It was not enough for Somnath to prove that he was innocent, that he did not know about or aid in the illegal activity, or that Veena did not have ownership rights in the money. He would have had to produce evidence that the property had been taken from him without his consent, or that he had done all that could reasonably be expected to prevent the use of the property for illegal purposes. He produced no such evidence.

United States v. 141st St. Corp., 911 F.2d 870 (2nd Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991).

HOLDING: In order to prove that he did not consent to illegal activity, an individual asserting an innocent-owner defense must prove that he took all reasonable steps to prevent illicit use of premises once he acquired knowledge of the illegal use.

FACTS: In 1987, New York City police contacted Mark Hersh, the manager of a Manhattan apartment building owned by Realty Corp. that was allegedly the site of extensive drug activity. Hersh also was the president and principal stockholder of Realty Corp. Hersh failed to return the officers' repeated calls. Police spoke to the building superintendent, Morris Nahmias, who they believed was involved with the narcotics trafficking on the premises. After police conducted undercover purchases of narcotics in several of the apartments and executed search warrants, the government instituted forfeiture proceedings against the entire building. Realty Corp. challenged the forfeiture, claiming it was an innocent owner. At trial, the jury returned a verdict in favor of the government, which the U.S. Court of Appeals for the Second Circuit affirmed.

COURT'S ANALYSIS: The court held that, once an owner's knowledge of illegal activity is established, consent to the illegal activity is presumed unless the owner further shows that he took all reasonable steps to prevent further illicit use of the premises. The court adopted this standard from the U.S. Supreme Court's opinion in *Calero-Toledo*. Although the legislative history of § 881 contained no reference to the *Calero-Toledo* standard, the court ruled that the reasonable-efforts requirement furthered the policies of civil forfeiture by taking the profit out of drug

trafficking and by protecting innocent owners. The court stated that the word "consent" in the statute was meant to be "something more than a state of mind."[35] Based upon the Congress' intended meaning for "consent," the court held that the reasonable-efforts standard of *Calero-Toledo* must be incorporated into the statutory innocent-owner defense.

United States v. One 1980 Bertram 58' Motor Yacht, 876 F.2d 884 (11th Cir. 1989).

HOLDING: To prevail on a defense of innocent ownership, a claimant must prove not only that he was uninvolved in and unaware of the activity upon which forfeiture is sought, but also that he did everything that reasonably could be expected of it to prevent the activity.

FACTS: Luis Pru was the president of Vene Investments (Vene), a corporation engaged in the buying and selling of yachts in the United States. In May 1985, Pru entered into a contract to sell a yacht named Mologa to Rene Rodriguez. Pru received from Rodriguez a $50,000 cash deposit for the Mologa, and agreed to make the sale contingent upon a satisfactory survey and sea trial of the Mologa. Pru authorized Rodriguez to conduct the sea trial. Rodriguez and one of his captains discussed, both on and off the Mologa, proposed alterations to the yacht to optimize its drug-carrying capability. Before any plans could be executed and before the Mologa was used to transport drugs, Rodriguez was arrested and the Mologa was seized by federal agents. The district court concluded that the yacht was not subject to forfeiture; however, the court also stated that Vene failed to establish that Pru "did those things which reasonably could have been done by a prudent person to avoid having the vessel illicitly used." The U.S. Court of Appeals for the Eleventh Circuit reversed, ruling that the yacht was subject to forfeiture and that Pru had not done everything that could reasonably be expected to prevent illegal activity.

COURT'S ANALYSIS: The Eleventh Circuit held that for a claimant to prevail as an innocent owner, he must prove that he was uninvolved in and unaware of any illegal activity, and that he did everything that reasonably could be expected to prevent the illegal activity. The court reasoned that because Pru had advertised the Mologa for sale in Miami, Fla. -- a known center for drug-smuggling activities -- and had been given a large cash deposit on the yacht, he should have made inquiries to insure himself that Rodgriguez' intentions were legitimate. For example, he should have asked Rodriguez for identification, inquired of local law enforcement officials regarding Rodriguez, or inquired concerning Rodriguez' reputation in the community.

United States v. Lots 12, 13, 14, and 15, Keeton Heights Subdivision, Morgan County, Ky., 869 F.2d 942 (6th Cir. 1989).

HOLDING: Claimant asserting innocent-owner defense under § 881(a)(7) need not establish that he did all that he could reasonably be expected to do to prevent the use of his property for illegal purposes.

FACTS: In March 1986, Eugene Allen, the county executive of Morgan County, Ky., was indicted by the federal government for various felonies as the result of an investigation of public corruption. An undercover agent, who posed as a drug dealer, alleged that he arranged with Allen to fly into an airport near Allen's house from Florida with two kilograms of cocaine; that Allen met him at the airport, armed with shoulder weapons, and drove him to Allen's nearby house; and that another undercover agent met them at the house and paid $90,000 for the cocaine. The government instituted a forfeiture action against Allen's property. Allen's wife, Bernice, filed a claim contesting the forfeiture in which she asserted that she was an innocent owner. The district court granted the government's motion for summary judgment, and denied Bernice a trial. The U.S. Court of Appeals for the Sixth Circuit reversed and remanded the case to the district court for trial.

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[35] 911 F.2d at 879.

COURT'S ANALYSIS: The court stated that Bernice's assertion on appeal that she had done all that could reasonably be expected to prevent the illegal use of her property was "inspired by dicta in *Calero-Toledo*." The court concluded, however, that the constitutional issue raised in *Calero-Toledo* was not present in this case because § 881(a)(7) imposes no requirement that an owner do establish that he has done all that could reasonably be expected to prevent the illegal use of his property. "It is enough, under the statute, that the owner establish that the proscribed act was committed 'without the knowledge or consent of that owner.'"

SUBSTANTIAL CONNECTION REQUIREMENT

Before the government can forfeit property, it must prove that there is probable cause to believe that the property has a connection to a narcotics offense. Previously, most courts required a substantial connection. Although most courts still use the "substantial connection" terminology, the connections that the courts hold to be substantial have become more tenuous, thereby permitting a greater number of forfeitures.

There is a split in the federal circuits and the state courts regarding the tests that are used to determine whether a substantial connection exists. Some of the courts use a "facilitation theory" grounded in the language of the forfeiture statutes. If the property that the government seeks to forfeit made the alleged commission of a narcotics crime easier, i.e., it "facilitated" the crime, the property is deemed to be connected substantially and therefore forfeitable. Other courts use a "totality of the circumstances" test in which the court examines all the evidence in the aggregate to determine whether the property is connected sufficiently to the crime.

Some courts have held that a substantial connection is not required -- as long as there is some link between the property and the offense, the property is forfeitable.

Facilitation Theory

Relevant Cases

United States v. Two Tracts of Real Property Located in Carteret County, N.C., 998 F.2d 204 (4th Cir. 1993).

HOLDING: Real property whose only connection with a drug offense is to furnish a quasi-easement over which drug smugglers haul contraband is not connected substantially to the criminal activity and, therefore, is not forfeitable.

FACTS: A small North Carolina peninsula jutting west into the Core Sound was divided into four adjoining tracts of land. The largest tract consisted of almost three acres, and abutted the only road immediately accessible from the peninsula. The three other parcels were sealed off from access to the road because of the larger tract. The parcel adjoining the three-acre tract on the peninsula was the site of a marina called the M. W. Willis & Son Boat Works. Persons traveling to and from the marina were forced to use a sandy pathway traversing the three-acre tract before reaching the road. Both parcels of land belonged to Kenneth Willis Sr. The marina was managed by Kenny, Mr. Willis' son.

Individuals who had pleaded guilty to drug offenses confessed to customs agents that, in March 1986, Kenny Willis had agreed to allow 8,000 pounds of marijuana to be unloaded at the marina for a fee of $25,000. Kenny Willis received the money and a small bale of marijuana as a bonus for serving as a look-out. The marijuana was driven across the sandy pathway and onto the road. Sometime between April 1986 and mid-autumn 1991, Kenneth Willis Sr., transferred the larger parcel to his son. Kenny Willis then subdivided the parcel into four lots, and conveyed two of the lots to a third party. In February 1991, Kenny Willis pleaded guilty to charges of violating various narcotics laws as a result of his role in the marijuana off-load operation.

On Nov. 1, 1991, the United States instituted forfeiture proceedings against the two lots from the original three-acre tract that remained under Kenny Willis' ownership. The marina still belonged to Kenneth Willis Sr., and the government did not seek forfeiture of it. It also did not seek forfeiture of the two parcels from the original three-acre lot that had been transferred to a third party. The U.S. Court of Appeals for the Fourth Circuit affirmed the U.S. district court's ruling that the property was not forfeitable because it was not "substantially connected" to the criminal activity.

COURT'S ANALYSIS: The court rejected the government's argument that land providing a means of access by which contraband reached a public highway was "substantially connected" to the criminal activity, and, therefore, forfeitable. The court characterized the government's argument as a "disguised attempt to persuade [the court] to adopt that which [it] twice [has] rejected: the notion that simply because land is the situs of crime, it is forfeitable.... If the phrase `substantial connection' means anything, it means that for real property to be forfeitable human agency somehow must bear responsibility for the property's `use' for or `facilitation' of crime."[36]

The court noted that "the amount of contraband present on real property is irrelevant to the government's legal capacity to bring a civil action for its forfeiture."[37]

The court also rejected the government's argument that the fact that the real property shielded the unlawful activity from public view made it subject to forfeiture. The court distinguished previous case law allowing the forfeiture of a dentist's office that had "provided an air of legitimacy and protection from outside scrutiny"[38] for a dentist who was writing illegal prescriptions. The court noted that, in the case of the dentist's office, "the guilty owner's intent establishe[d] a sufficient connection with the crime to render the property forfeitable."[39] On the other hand, the court stated, the quasi-easement was "not only not substantially connected with crime; it [was] simply not `connected' with crime at all."[40]

The court noted that Kenny Willis possessed no legal interest in the property at the time of the criminal activity. According to the court, the existence of a legal interest in the property is one factor to consider in applying the substantial connection test for forfeiture. "The fact that the guilty party has no legal interest in the property necessarily renders the connection between the land and the underlying criminal activity less `substantial' and more tenuous,"[41] the court stated.

United States v. Schifferli, 895 F.2d 987 (4th Cir. 1990).

HOLDING: There was a substantial connection between a dentist's office building and his illegal distribution of controlled substances by writing prescriptions that lacked legitimate purposes. Therefore, the office building and land was forfeitable.

FACTS: Dr. H. Allan Schifferli was convicted in 1986 of conspiring to distribute illegally and dispense certain prescription drugs, and of more than 200 counts of illegally distributing and dispensing quantities of controlled substances. Although most of the illegal acts occurred outside of the dentist's South Carolina office, the dentist had used his office more than 40 times during a four-month period to write illegal prescriptions. The government sought to forfeit the dentist's office building and land under 21 U.S.C. 881 (a)(7). The Court of Appeals for the Fourth Circuit affirmed the district court's decision allowing the forfeiture.

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[36] 998 F.2d at 212.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* at 213.

COURT'S ANALYSIS: There must be a substantial connection between the property and the underlying criminal activity for the property to be subject to forfeiture. However, the court rejected Schifferli's argument that the property must play an "integral part" in facilitating the crime. "Under the substantial connection test, the property either must be used or intended to be used to commit a crime, or must facilitate the commission of a crime. At minimum, the property must have more than an incidental or fortuitous connection to criminal activity ... [I]t is ... irrelevant whether the property's role in the crime is integral, essential or indispensable. The term `facilitate' implies that the property need only make the prohibited conduct `less difficult' or `more or less free from obstruction or hindrance.'"[42]

If Schifferli did not have an office, he could not have held himself out as a dentist, and therefore, his ability to write illegal prescriptions would have been hindered. The office provided an air of legitimacy and protection from outside scrutiny because a dentist office is where prescriptions often are dispensed. Therefore, the office made the prohibited conduct easier.

United States v. Eleven Vehicles, 836 F.Supp. 1147 (E.D.Pa 1993).

HOLDING: Forfeiture of property purchased by an employee of an entity engaged in money laundering and wire fraud is permissible provided that the government is able to prove that the employee purchased the property with his salary and that the salary was traceable to the illegal activity.

FACTS: The ISC Corp. allegedly was engaged in illegal arms trading with South Africa between Nov. 1, 1986, and Dec. 31, 1989. As part of the arms-running operation, the corporation allegedly engaged in money laundering and wire fraud. ISC and several of its employees, including Robert Ivy, were charged with conspiracy, violation of the Arms Export Control Act, and various other crimes. The government sought forfeiture of property, including vehicles, savings bonds, and stocks, pursuant to 18 U.S.C. § 981(a)(1)(A)(c), allegedly purchased by Ivy, with his salary. During the period in question, Ivy received approximately $796,000 in salary. The district court ruled that the property which was traceable to illegal activity, was subject to forfeiture.

COURT'S ANALYSIS: In ruling that the property was subject to forfeiture, the court relied on a combination of the facilitation and "proceeds" theories of forfeiture. Although §981 does not contain the phrase "facilitating property," the statute has been interpreted to apply to property that "facilitates" illegal activity. In this case, the corporation was the facilitating property.

The "proceeds" theory requires that the property to be forfeited can be traced to property involved in the alleged illegal activity. Ivy's salary came from the proceeds of money laundering. To obtain the property acquired by Ivy, the court noted that it was "extending the reach of §981 to properties acquired with the `proceeds' of a `facilitating property.'"[43] The court explained that such an expansive reading of the statute was necessary because "`the degree of sophistication and complexity in a laundering scheme is virtually infinite, and is limited only by the creative imagination and expertise of the criminal entrepreneurs who devise such schemes.'"[44]

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[42] 895 F.2d at 990 (quoting United States v. Premises Known as 3639 - 2nd St., N.E., Minneapolis, Minn., 869 F.2d 1093, 1096 (8th Cir. 1989).

[43] 836 F.Supp. at 1154.

[44] 836 F.Supp. at 1155 (quoting S.Rep.No.433, 99th Cong., 2d Sess. 2 (1986)).

Jenkins v. Pensacola, 602 So.2d 988 (Fla. Dist. App. 1992).

HOLDING: Jewelry worn during a drug sale was not subject to forfeiture because there was no connection between the jewelry and the alleged illegal activity.

FACTS: The government instituted forfeiture proceedings pursuant to Fla. Stat. ch. 923.701 et. seq. (1989) against jewelry that was worn during an alleged drug sale in Pensacola, Fla. The appellate court reversed the trial court's forfeiture of jewelry.

COURT'S ANALYSIS: The government must show a substantial connection between the property sought to be forfeited and the alleged illegal activity by clear and convincing proof. There was no indication that the jewelry was employed as an instrument in the commission of, or aided an abetted in the commission of, the felony possession of cocaine, sale of cocaine, or possession with intent to distribute cocaine.

People v. One 1986 Mazda Pickup Truck, 621 N.E.2d 250 (Ill. App. Ct. 2d Dist. 1993).

HOLDING: A car being driven by the defendant when he was stopped for an outstanding traffic warrant did not facilitate the possession of cocaine later found hidden in the claimant's underwear and, therefore, was not subject to forfeiture.

FACTS: Police officers stopped Mark Brown in October 1991 for an outstanding warrant, which had been issued as a result of Brown's failure to appear on a traffic violation. In a search during the stop, police found a clear plastic straw in Brown's right interior coat pocket and a plastic bag containing cocaine in his underwear. Brown pleaded guilty to possession of a controlled substance. The government sought to forfeit the car he was driving when he was arrested under the Illinois Controlled Substances Act.[45]

COURT'S ANALYSIS: The Illinois forfeiture statute provides:

"(a) The following are subject to forfeiture:

> (1) all substances which have been manufactured, distributed, dispensed, or possessed in violation of this Act;
>
> (2) all raw materials, products, and equipment of any kind which are used, or intended for use in manufacturing, distributing, dispensing, administering, or possessing any substance in violation of this Act;
>
> (3) all conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession or concealment of property described in paragraphs (1) and (2)...."

The court rejected the argument that the Illinois forfeiture statute should be construed in light of federal court decisions interpreting federal forfeiture provisions. It stated that the legislative history of the Illinois statute does not suggest that the statute should be interpreted according to federal law.

The court distinguished this case from cases in which the vehicle provides an additional dimension of privacy or serves as a container in which to keep the contraband, such as when drugs fall out of a person's clothing or drugs are found in the glove compartment of a car. In such cases, the vehicle may be forfeitable.

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[45] ILL.REV.STAT. 1991, ch. 56 ½, par. 1505(a)(3).

The key issue is whether the car "facilitates" commission of the offense, that is, whether the car makes the possession "easier or less difficult."[46] In this case, the car was entirely incidental to possession because the contraband was secreted in Brown's underwear. Brown did not use the vehicle in any manner to make, or try to make, possession easier. The court stated further, "This construction of the statute at issue accords with the general rule that forfeitures are not favored at law and statutes authorizing them must be strictly construed in favor of the property owner."[47]

Pennsylvania v. One 1983 Toyota Corolla, 578 A.2d 90 (Pa. Cmwlth. 1990).

HOLDING: An exception to the Pennsylvania criminal code that requires the dismissal of "trivial" offenses does not apply to a civil forfeiture case in which a search of the owner of a vehicle who was stopped and arrested for possession of marijuana revealed that the vehicle owner possessed cocaine.

FACTS: On Sept. 17, 1988, Philadelphia, Pa., police observed John Cardamone drive up to a man in his Toyota and exchange money for a plastic bag containing what was later discovered to be marijuana. Cardamone was stopped and a search revealed a plastic packet containing cocaine. The commonwealth of Pennsylvania petitioned to forfeit the Toyota pursuant to the state's forfeiture law.[48] The trial court held that the car should be returned to the defendant because it would be unfair to forfeit the car when the original reason for the stop was to search for a small amount of marijuana. The appellate court reversed.

COURT'S ANALYSIS: Section 6801(a)(4) requires forfeiture of a conveyance used in any manner to facilitate the transportation, sale, receipt, possession or concealment of controlled substances. The lower court, in denying the government's petition for forfeiture, relied upon the "de minimus" provision of Pennsylvania criminal code, which requires the dismissal of actions that "did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction."[49]

The appellate court stated that if a conveyance is used to transport a controlled substance, regardless of the amount, the conveyance is subject to forfeiture. Here, the car was used to transport cocaine. The de minimis statute only applies to criminal proceedings, and forfeiture proceedings are of a civil nature.

A 1985 Cadillac Limousine v. Texas, 835 S.W.2d 822 (Tex. Ct. App. 1992).

HOLDING: Evidence was sufficient that there was a substantial connection between a limousine in which drug paraphernalia was found and the sale and/or possession of cocaine, therefore subjecting the car to forfeiture.

FACTS: Harris County, Texas, police officers responded to a call by Debbie Goodney's mother in January 1990. Ms. Goodney's mother told police that her daughter and Gary Pepper were dumped from a limousine in front of her house. Debbie Goodney appeared to be intoxicated on a substance other than alcohol and was suffering from a head wound. Ms. Goodney's mother described the limousine, and when the ambulance arrived at the house, the driver told the police officer that he had passed a limousine matching the description. The officer took Goodney and Pepper to a bar where the limousine was located. When they arrived, officers were holding Michael Neubauer,

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[46] 621 N.E.2d at 253 (quoting BLACK'S LAW DICTIONARY 531 (5th ed. 1979)).

[47] 621 N.E.2d at 254.

[48] 42 PA.CONS.STAT. §681.

[49] 18 PA.CONS.STAT. §312.

the owner of the limousine, after stopping a fight in the parking lot. Goodney and Pepper identified Neubauer and several others.

During an inventory search of the limousine, officers found four plastic syringes, a prescription bottle containing a number of tablets, a baggie containing a white powdery substance, a piece of foil containing a brown powdery substance, a metal measuring spoon containing a white powdery substance, a box of baking soda, a prescription bottle, and a number of knives. Field tests and laboratory analysis showed that the brown substance was heroin and the white substance was cocaine. The government instituted forfeiture proceedings against the vehicle. Pepper's and Goodney's sworn statements, in which they said the occupants of the limousine had shot cocaine and heroin and smoked cocaine, were introduced at the forfeiture trial. Neubauer claimed that he had had a party in the limousine, which he said he purchased with $25,000 in cash he received as a settlement from a lawsuit. The appellate court affirmed the trial court's forfeiture of the vehicle.

COURT'S ANALYSIS: The Texas forfeiture statute provides that a vehicle is subject to forfeiture if it is "used or intended to be used in the commission of ... any felony under the [Texas Controlled Substances Act]."[50] Neubauer asserted in the appeal that there was insufficient evidence to show that the limousine was used to facilitate a drug offense. The court rejected Neubauer's reliance upon the facilitation theory, stating that the facilitation language was included in a repealed version of the state's forfeiture statute.

The court ruled instead that the state must show there is probable cause to seize the property. Probable cause "is a reasonable belief that a `substantial connection exists between the property to be forfeited and the criminal activity defined by the statute.'"[51]

In this case, the limousine was used to transport Neubauer and others to a location where Neubauer allegedly purchased cocaine. After the purchase, the passengers allegedly prepared and consumed drugs in the car. The allegations were supported by the paraphernalia recovered from the vehicle and the fact that the officers noted that the passengers were intoxicated by something other than alcohol.

Therefore, the court ruled it "was more probable than not that the limousine was instrumental in the possession and abuse of cocaine by a number of individuals, including [Neubauer]."[52]

"Totality of the Circumstances" Test

Relevant Cases

United States v. $67,220 in U.S. Currency, 957 F.2d 280 (6th Cir. 1992).

HOLDING: The following facts established probable cause to believe that currency was connected substantially to illegal drugs: the property owner used a credit card to buy a one-way ticket to a drug-source city, arrived late to the airport, appeared nervous, carried a large amount of cash, lied about the amount and the source of the money, and a drug-sniffing dog reacted positively to the cash and luggage.

FACTS: On March 9, 1990, Robert Easterly Jr. drove a borrowed truck to Knoxville (Tenn.) Airport to catch a flight to Miami, Fla. Earlier in the day, Easterly had purchased a one-way ticket with his American Express card.

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[50] TEX. CODE CRIM.P.ANN. art. 59.01(2)(B)(I) (Vernon Supp. 1992).

[51] 835 S.W.2d at 825 (quoting $56,700 in U.S. Currency, 730 S.W.2d 659, 661 (Tex. 1987).

[52] 835 S.W.2d at 825.

Lt. Kelly Camp, a plainclothes airport police officer, noticed a rubber-banded stack of money protruding from one of Easterly's pockets and bulges in several other pockets as Easterly approached the Delta Airlines counter. Camp followed Easterly to the departure gate, and asked Easterly if he could speak with him. Camp asked to see Easterly's plane ticket, then confirmed his identity by checking his driver's license. Camp and Lt. Don Moore searched Easterly and found five bundles of large denomination bills. Easterly told Camp he was carrying about $20,000 that he intended to use to buy jewelry in Florida for a business owned by Ira Grimes. Camp found and removed $67,220 from Easterly.

Easterly accompanied the officers to the airport police office, and his luggage was pulled off the flight. A drug-sniffing dog reacted positively to the money, a camera bag, and Easterly's suitcase, according to the dog's handler. Easterly was permitted to leave the airport, but the officers kept the money.

The next day Easterly told Grimes about the seizure, saying that he had borrowed most of the money to buy jewelry. He asked Grimes to vouch that the money was for Easterly to purchase jewelry for Grime's business, but Grimes refused.

At the forfeiture hearing, the government presented testimony that Easterly and Grimes were cocaine dealers but refused to provide any basis for the statement on the grounds that the investigation was continuing. Grimes testified that he had no knowledge of any illegal drug activity involving Easterly. The appellate court reversed the trial court's refusal to forfeit the cash.

COURT'S ANALYSIS: To determine whether the evidence presented by the government is sufficient to prove a substantial connection between the property the government seeks to forfeit and the alleged illegal activity, the court must weigh the "aggregation of facts ... [A] court must `weigh not the individual layers but the `laminated' total!'"[53]

In reviewing the evidence, the court noted that it previously held that "air travel to and from Miami and nervousness at an airport, while innocent in themselves, may be considered in deciding whether the government has established probable cause."[54] The court noted further, however, that several factors reduced the suspiciousness of Easterly's travel. He bought the ticket in advance with his American Express card, traveled under his own name, and checked luggage.

No court has held that the presence of a large sum of cash is alone sufficient to establish probable cause for forfeiture; however, carrying a large sum of cash is strong evidence of some relationship with illegal drugs. Easterly did little to conceal his money. On the other hand, Easterly carried the money on his person rather than in a satchel or briefcase so as to avoid detection by the X-ray device used to screen carry-on baggage.

The reaction of a drug-sniffing dog is strong evidence of a connection with drugs. However, the government's evidence on this point was weak. There was no evidence introduced on the reliability of the dog and Camp did not realize that the dog had alerted to the property until the handler told him so.

Easterly's misstatements about the amount and source of the money were indicative of possible criminal activity.

A property owner's record of drug activity is also highly relevant in determining probable cause, but in this case, the government refused to offer any basis for its belief that Easterly had sold drugs.

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[53] 957 F.2d at 284 (quoting United States v. Nigro, 727 F.2d 100, 104 (6th Cir. 1984)).

[54] *Id.* at 285.

Although the court conceded that there were weaknesses in the government's case, it held that, viewed together the evidence could support a reasonable belief that the currency substantially was connected to illegal drug transactions.

United States v. 28 Emery Street, 914 F.2d 1 (1st Cir. 1990).

HOLDING: The totality of the circumstances of the government's evidence in support of forfeiture did not establish a substantial connection between the property sought to be forfeited and the alleged criminal activity. Therefore, the property owners should have been given the opportunity to rebut the government's evidence.

FACTS: Donald and Catherine McLaine owned a residence at 28 Emery St., Merrimac, Mass. An informant of unproven reliability informed the police that Donald McLaine was selling cocaine from his pickup truck. More than one year later, after receiving a tip from another informant, a police detective observed a friend of Donald McLaine's make what the police officer thought was a drug order to a telephone number registered to Catherine McLaine. No one, however, showed up at the time and place the alleged sale was to occur. Later that day, a third informant of known reliability told police that a sale would occur at the same place the first sale was to occur.

Based upon this information, the Merrimac police searched Donald McLaine, his truck, and the McLaines' residence pursuant to a warrant. The search of the truck revealed extensive evidence of drug trafficking.

Donald McLaine was arrested and charged with trafficking in cocaine and possession of marijuana. The search of the house revealed less than five grams of a powdery substance resembling cocaine and a plastic bag containing vegetable matter. The police also found some marijuana cigarettes, drug paraphernalia, and numerous firearms. McLaine pleaded guilty to charges of unlawful possession of marijuana, possession of a dangerous weapon, and possession with intent to distribute cocaine.

The government sought forfeiture of the house, claiming that the house was used for or facilitated cocaine trafficking. The trial court granted forfeiture without allowing the McLaines the opportunity to rebut the government' evidence. The appellate court reversed.

COURT'S ANALYSIS: According to the appellate court, the government's evidence failed to provide "a solid evidentiary basis linking the house to the sale of drugs."[55] There was no evidence that drugs were sold, processed, produced or stored at the residence, that the claimant drove directly from the residence to the site of the sale, or that any substance found in the search of the residence was actually a drug. The court stated that although tools of the drug trade were found in the house, "such evidence does not in and of itself create a necessary connection between the property and drug trafficking substantial enough to forfeit the house."[56]

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[55] 914 F.2d at 4.

[56] *Id.* at 6.

Pennsylvania v. $1,920 U.S. Currency, 612 A.2d 614 (Pa.Cmwlth. 1992).

HOLDING: Both the money and the vehicle in which it was found were forfeited properly in a case in which drug paraphernalia was found in the car, defendants acted suspiciously and gave conflicting explanations regarding the source of the money, and a canine detected the scent of narcotics in the vehicle and on the money.

FACTS: On April 19, 1989, Police Officer Artim attempted to stop a car in Allentown, Pa., because he suspected that the driver was under the influence of alcohol. The car did not stop and a chase ensued. In the course of the chase, the car failed to obey traffic laws and the police observed a passenger throwing objects out the window. The driver of the car, Kevin Boll, lost control and the officers were able to stop the car and arrest Boll. The passenger, Sherri Jasper, was identified as the owner of the vehicle. During a search of the car, the officers found 13 marijuana seeds, empty cough drop boxes, rolling papers, a pager, and a wallet containing $1,920 in cash. The wallet contained no identification. They also found a knife, an amplifier-speaker, footswitches, and a guitar, all of which were seized.

A narcotics dog detected the scent of drugs in the glove compartment, the trunk, and on the money in the wallet. The trial court ordered forfeiture of the money, the car, and all the contents of the vehicle, pursuant to 42 Pa.Cons.Stat. § 6801(a). The court of appeals upheld the forfeiture of the paraphernalia, the pager, the money, and the car, but reversed the forfeiture of the other contents of the vehicle on the grounds that the government offered no evidence in support of the forfeiture of these items.

COURT'S ANALYSIS: In order for the state to meet its burden of proof that probable cause exists for forfeiture, it must show there is a nexus between the unlawful activity and the property subject to forfeiture.

Equipment used or intended for use in delivering controlled substances is forfeitable under the Pennsylvania statute. Testimony that pagers often are used to conduct drug transactions was admitted. The trial court rejected Boll's testimony that he used the pager for his business because of evidence indicating its sporadic use.

Money exchanged for drugs, or used to facilitate a violation of the state's controlled substances act, also may be forfeited.

The discovery of the paraphernalia, the suspicious conduct of the defendants, and the sniff search verification were enough to satisfy the state's burden of proof that the money was connected substantially to the alleged drug activity.

The appellate court also affirmed the forfeitures of the vehicle based upon the discovery of the drug paraphernalia and the pager, the defendants' conduct, the sniff search verification of narcotics in the vehicle, and Jasper's prior drug conviction.

No Substantial Connection Required

United States v. 1990 Toyota 4Runner, 9 F.3d 651 (7th Cir. 1993).

HOLDING: The car driven to a meeting to discuss a drug deal was forfeitable as property that "facilitated" a drug offense. A causal connection between the vehicle and the meeting was not required for the vehicle to be subject to forfeiture, although there must be a link between the car and its use for a drug offense.

FACTS: Abiodun Oloko wanted to import heroin from the Philippines. He approached an undercover agent and asked him to pick up the drugs in Manila. Oloko and others met the agent in a Chicago, Ill., restaurant in September 1990, and agreed to pay the agent $10,000 for transporting the heroin. Oloko drove to and from the meeting in a Toyota 4Runner. The agent completed the transaction, and Oloko was arrested. Oloko pleaded guilty

to conspiracy to import a controlled substance. The government moved to forfeit the car under 21 U.S.C. § 881, and the U.S. Court of Appeals for the Seventh Circuit upheld the forfeiture.

COURT'S ANALYSIS: "Conveyances" are subject to forfeiture under 21 U.S.C. § 881(a)(4) if they are used in federal drug offenses. The conveyances must be "used or intended for use, to transport, or in any manner facilitate the transportation, sale, receipt, possession, or concealment of controlled substances or the equipment or raw materials used to make controlled substances."[57]

To import the heroin and place it in Oloko's possession, arrangements had to be made to send someone to Manila to transport it. Developing a plan required the conspirators to meet. Oloko's presence at the meeting was facilitated by the Toyota, his mode of conveyance to and from the meeting. The car was used for the business purpose of dealing in drugs and was, therefore, forfeitable.

Oloko's lawyer conceded that if a sale had taken place at the meeting, the automobile would be forfeitable. The court stated that the statute is not limited to conveyances used to facilitate a sale. It applies to conveyances used to facilitate transportation, receipt, or possession of controlled substances. It does not make sense to distinguish between meetings where drugs actually change hands and meetings where all the arrangements are made to complete a transaction. Both activities are essential to the completion of the transaction, and both are covered under the statute.

The court stated that the obvious purpose of the statute is to deprive drug dealers of the tools of their trade, and therefore, the statute should be read broadly. By requiring that the term "facilitate" include a causation element, the statute would be narrowed impermissibly. However, there must be a link between the drug business and the car that is distinct from the personal use by a drug dealer.

United States v. 785 St. Nicholas Ave., New York, N.Y., 983 F.2d 396 (2nd Cir. 1993), *cert. denied*, 508 U.S. 913 (1993).

HOLDING: To forfeit property under §§ 881(a)(6) & (7), the government need not establish a substantial connection between the property and the drug trafficking, but only a nexus between them.

FACTS: The federal government sought forfeiture of four buildings in New York, N.Y., owned by Norma and Lloyd Beckford, and two bank accounts in their names. According to the government, the buildings had been used to facilitate drug trafficking and bank accounts contained drug-trafficking proceeds. In support of its case, the government cited numerous narcotics-related arrests that had been made at the properties. The government also introduced evidence of substantial deposits into the accounts and tax returns showing low levels of legitimate income. The district court ordered the properties forfeited; however the court dismissed the government's forfeiture claims against the bank accounts. The U.S. Court of Appeals for the Second Circuit affirmed the forfeiture of the properties and remanded the case to the district court for further proceedings on the bank accounts.

COURT'S ANALYSIS: To establish probable cause that property is connected with drug trafficking, the government need not establish a substantial connection between the drug activities and the property, but only a nexus between them. The court concluded that due to the extraordinary volume of drug transactions occurring on the properties, the district court had not erred in finding probable cause that the properties had facilitated drug trafficking. Because the record was unclear as to whether the trial court's finding of probable cause included the bank accounts, the court remanded the case for further proceedings.

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[57] 21 U.S.C. §881(a)(4).

United States v. 916 Douglas Ave., 903 F.2d 490 (7th Cir. 1990), *cert. denied sub. nom.*, Born v. United States, 498 U.S. 1126 (1991).

HOLDING: A substantial connection is not required between the property and the drug-related offense in order for the property to be subject to forfeiture. The government need only show that the nexus is more than incidental or fortuitous.

FACTS: Paul F. Born III used his home phone in the spring of 1986 to negotiate the price of cocaine and to arrange a transaction with a Cook County, Ill., undercover agent. The actual sale took place elsewhere. Born was convicted of conspiracy to possess with intent to deliver five kilograms of cocaine and was given a 23-year sentence. The U.S. Court of Appeals for the Seventh Circuit upheld the forfeiture of Born's one-third interest in the house.

COURT'S ANALYSIS: According to the statute, if the property is used "in any manner or part" to facilitate a drug transaction, it is forfeitable. The court found no substantial connection test articulated in the statute. Because, according to the court, the statutory language was clear, there was no need to resort to legislative history.

The court noted that while other circuits have required a substantial connection between the property to be forfeited and the drug offense, the "distinction between [a substantial connection] approach and our own appear largely to be semantic rather than practical."[58]

[58] 903 F.2d at 494.

SELF-INCRIMINATION

The Fifth Amendment of the U.S. Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." Courts handle this issue in the context of both civil and criminal forfeiture.

Criminal Forfeitures

Criminal forfeiture differs from civil forfeiture in that its primary purpose is to punish the defendant. The owner or possessor of the property is the defendant rather than the property itself. The burden of proof is on the government to prove the elements of the underlying crime beyond a reasonable doubt before it can establish that the property is subject to forfeiture.

Because criminal forfeiture requires a finding of guilt, some courts have allowed for the determination of both guilt and forfeiture in the same proceeding. In this unitary proceeding, evidence relevant to guilt and forfeiture are presented to the jury simultaneously. At the end of the trial, and prior to the jury rendering a verdict, the judge instructs the jury on both the criminal charges and the forfeiture. Some courts allow the presentation of all evidence in one sitting, but do not instruct the jury on forfeiture until it returns a guilty verdict.

Bifurcation allows the jury to deliberate on each of the issues individually and gives the defense and prosecution an opportunity to make arguments and introduce evidence during the forfeiture phase.

Some courts have bifurcated the trial because merging the issues in one proceeding creates a "potential for clashes between competing constitutional rights."[59] These courts ruled that a defendant should not have to choose between invoking his Fifth Amendment privilege against self-incrimination during the guilt phase of the trial and challenging the taking of his property during the forfeiture phase of the trial.[60] According to the *Sandini* court:

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[59] United States v. Sandini, 816 F.2d 869, 873 (3rd Cir. 1987).

[60] Many courts have partially bifurcated forfeiture proceedings from the guilt phase of a criminal trial on grounds unrelated to the Fifth Amendment privilege against self-incrimination. In United States v. Cauble, 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005, 104 S.Ct 991 (1984), for example, the court held that the forfeiture issue in a racketeering prosecution should be kept from the jury until after it returns a verdict on the issue of guilt in order to facilitate the jurors' duty to determine guilt or innocence, to prevent the forfeiture penalty from influencing this determination, to provide fairness to the defendant, and to convenience the judge. The court continued that upon return of a verdict, the judge can instruct jurors about forfeiture and request a verdict on that issue. Other cases addressing this issue include: United States v. Desmarais, 938 F.2d 347 (1st Cir. 1991) (district court's bifurcating trial on criminal forfeiture count from narcotics counts was not reversible error in that it did not prejudice defendant who argued that bifurcation prevented him from urging the jury to invoke its power of nullification); United States v. Elgersma, 929 F.2d 1538 (11th Cir. 1991), *reh'g granted and opinion vacated*, 938 F.2d 179 (11th Cir. 1991), *aff'd on reh'g*, 971 F.2d 690 (11th Cir. 1992) (in forfeiture proceeding held after drug trafficking and continuing criminal enterprise convictions, but on the same day and before the same jury, the judge instructed the jury to incorporate the evidence from the criminal trial into the forfeiture proceeding); United States v. Lizza Indus., Inc., 775 F.2d 492 (2nd Cir. 1985), *cert. denied*, 475 U.S. 1082, 106 S.Ct. 1459 (1986) (trial judge bifurcated trial and did not permit a determination of amounts to be forfeited until a jury first found defendants guilty of violating the Racketeer Influenced and Corrupt Organizations Act (RICO); United States v. Conner, 752 F.2d 566 (11th Cir. 1985), *cert. denied*, 474 U.S. 821, 106 S.Ct. 72 (1985) (following racketeering convictions, jury informed of the forfeiture section of the indictment and

> A criminal defendant has the right to decline to testify at trial. He also may insist that his property not be taken without due process of law. Where some reasonable accommodation of both is available, the defendant's right to retain property arguably not subject to forfeiture should not be compromised or defeated by his decision to stay off the witness stand during the guilt phase of the trial.[61]

While some courts have required bifurcation in all criminal forfeiture cases, other courts have placed limitations on the blanket rule and have mandated bifurcation only in certain circumstances, such as where the guilt and forfeiture issues do not converge or when the defendant requests bifurcation.

The U.S. Supreme Court addressed the constitutional issues surrounding bifurcated and unitary proceedings in *McGautha v. California*.[62] In *McGautha*, a defendant objected to the jury's hearing evidence on his homicide charge and capital sentencing in one proceeding on the grounds that it violated his Fifth Amendment privilege against self-incrimination. He argued that the threat of death forced him to testify on issues relating to his guilt. The Court held that the privilege was not violated where a unitary proceeding compelled a defendant to choose between silence on guilt and sentencing and pleading for mercy while risking damage to his case. The Court continued that there is no right to speak to a jury free of any adverse consequences. The Court's decision left the states free to decide whether they wanted to use a single proceeding to determine issues of guilt and punishment.

Relevant Cases

Bifurcation Required

United States v. Sandini, 816 F.2d 869 (3rd Cir. 1987).

HOLDING: Criminal forfeiture proceedings, including introduction of evidence on the forfeiture issue, must be bifurcated completely from the guilt phase of criminal trials to prevent Fifth Amendment violations. Both the defense and prosecution may present evidence on the forfeiture issue to the jury after it returns a guilty verdict. Evidence introduced in the forfeiture phase cannot be used in a post-trial motion or to sustain the conviction on appeal.

FACTS: In the guilt phase of his trial on charges resulting from his operation of a major cocaine ring in western Pennsylvania between October 1981 and May 1984, Milmer Burdette Sandini chose not to take the witness stand. The government presented all its evidence, including that relevant to forfeiture, in this phase of the trial. Sandini was convicted of conspiracy, possession and distribution of cocaine, and operating a continuing criminal enterprise. He was sentenced to a term of incarceration. The district court did not allow Sandini to testify during the subsequent forfeiture proceeding, after which the court ordered forfeiture of a mobile home, a house, a car wash, and a building containing a laundromat and delicatessen. The defendant appealed the conviction on several grounds, which were deemed without merit by the U.S. Court of Appeals for the Third Circuit. The court, however, agreed that Sandini's due process rights under the Fifth Amendment were violated when he was barred from taking the stand during the forfeiture proceeding and ordered a new forfeiture proceeding.

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counsel was afforded opportunity to make arguments to the jury and the court instructed the jury on the applicable law); United States v. Martino, 681 F.2d 952 (5th Cir. 1982), *aff'd*, 464 U.S. 16 (1983) (following a jury's convictions of 16 defendants for RICO violations, forfeiture question was submitted to the jury for its verdict on the extent of the interest or property subject to forfeiture).

[61] 816 F.2d 869 at 873.

[62] 402 U.S. 183 (1971), *vacated on other grounds sub nom.*, Crampton v. Ohio, 408 U.S. 941 (1972).

COURT'S ANALYSIS: The trial court's decision not to bifurcate completely the proceedings upon Sandini's request presented him with the "Hobson's choice"[63] of forgoing the opportunity to present testimony that might serve to protect his property from forfeiture or waiving his Fifth Amendment privilege not to testify at his criminal trial. Even if he took the stand on the narrow issue of the forfeiture during the guilt phase, mentioning the property could subject him to cross-examination on broader issues related to the offenses charged. "Realistically, from the jurors' standpoint, the temptation to draw an adverse and impermissible inference from the defendant's failure to testify cannot but be intensified if he testifies about his property yet remains conspicuously silent about the charges against him."[64] Therefore a criminal forfeiture proceeding must be bifurcated from the guilt phase of a criminal trial. Evidence introduced in the forfeiture phase cannot be used in a post-trial motion or to sustain the conviction on appeal.

Bifurcation Necessary Under Certain Circumstances

United States v. Jenkins, 904 F.2d 549 (10th Cir. 1990), *cert. denied*, 498 U.S. 962, 111 S.Ct. 395 (1990).

HOLDING: A defendant who invokes his privilege against self-incrimination during his trial on substantive criminal charges must inform the trial court of his desire to testify on related forfeiture issues. If a defendant fails to do so, the trial court may hear all the evidence concerning guilt and forfeiture together.

FACTS: Keith Lynn Jenkins was indicted on charges of conspiracy, multiple substantive drug violations, and other related crimes as a result of his alleged involvement in a Utah-based cocaine and marijuana distribution network between 1980 and 1983. The government also initiated proceedings under 21 U.S.C. § 853, seeking forfeiture of certain real estate, aircraft, businesses, money market funds, and bank accounts in which Jenkins allegedly had invested, using profits from drug sales. At trial, Jenkins invoked his Fifth Amendment privilege against self-incrimination and did not take the witness stand. Evidence was introduced during the guilt phase of the trial related to the assets, which were the subject of the forfeiture action, and the jury returned its guilty verdict at the same time it ordered forfeiture of the property. At no time did Jenkins object to the trial procedure. The U.S. Court of Appeal for the Tenth Circuit rejected Jenkins' argument that the court erred in not allowing the jury to hear the guilt and forfeiture issues in two separate sittings and affirmed the lower court's decision.

COURT'S ANALYSIS: The constitutional dilemma a criminal defendant faces when a jury hears evidence pertaining to criminal forfeiture and guilt in one sitting disappears when a defendant does not intend to testify with regard to the forfeiture. Jenkins never expressed an intention to testify or a desire for bifurcated proceedings. Although the preferable procedure is to instruct the jury on forfeiture after a return of a guilty verdict, Jenkins failed to request such bifurcated instructions.

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[63] 816 F.2d at 874.

[64] *Id.*

United States v. Feldman, 853 F.2d 648 (9th Cir. 1988), *cert. denied*, 489 U.S. 1030 (1989).

HOLDING: A trial court should bifurcate a forfeiture proceeding from the ascertainment of a defendant's guilt. The court must allow argument of counsel and require separate jury deliberation during the forfeiture portion. Whether a separate evidentiary hearing should be allowed as part of the forfeiture portion is a matter of the trial court's discretion. If the defendant can show that a hearing is required on the extent of his assets subject to forfeiture, the court should allow a separate evidentiary hearing before a new jury.

FACTS: Evidence of Robert Feldman's activities over a 10-year period at his trial for mail fraud, interstate transportation of funds obtained by fraud, use of a false name in furtherance of a scheme to defraud, and conducting an enterprise through a pattern of racketeering, showed that four of his businesses in California and Massachusetts had been destroyed by arson, which led to his recovery of insurance proceeds. Evidence also showed that Feldman hid the proceeds from his creditors through fraudulent financial and real estate representations. During trial, the government presented evidence on the amount of the insurance proceeds and Feldman produced no rebuttal evidence, invoking his Fifth Amendment privilege against self-incrimination.

After the jury returned a guilty verdict and without hearing any additional arguments or admitting new evidence, the court instructed the jury on forfeiture. Before the jury returned to deliberate, Feldman requested a special evidentiary hearing on the extent of his interest in the insurance proceeds. The district court denied the request for a hearing, explaining that Feldman had forgone his opportunity to rebut the government's evidence on this issue at trial. The jury returned a verdict of forfeiture in the amount $1,986,990, the amount it determined that Feldman had recovered in insurance proceeds from the arson. On appeal, the U.S. Court of Appeals for the Ninth Circuit remanded the case to the trial court to allow Feldman to present evidence in support of his claim that an evidentiary hearing is necessary.[65]

COURT'S ANALYSIS: In some circumstances a single procedure may be unfair, and bifurcation of the forfeiture and guilt phases of the trial necessary. When the government seeks forfeiture of the proceeds of illegal activity, the jury must determine the amount of the proceeds and whether they were in fact obtained illegally. These are issues about which a defendant is not likely to wish to testify during the guilt phase of his trial because they relate to the underlying alleged criminal acts. He may, therefore, invoke his privilege against self-incrimination. To prevent him from testifying about these issues after guilt is determined may lead to the deprivation of his property without due process of law. If the defendant feels the tension between his right not to self-incriminate and his right to due process, he must be allowed to present affidavits and other documents to support his claim that a separate evidentiary hearing is necessary with regard to the forfeiture of the proceeds.

There are cases, however, in which these constitutional rights are not in jeopardy, and a single proceeding is not unfair. When the evidence presented by the defendant after the trial will not influence a jury's decision on forfeiture, a single proceeding will not prejudice the defendant unduly. For example, when the government seeks forfeiture in a defendant's interest in a racketeering enterprise and the forfeiture of the interest flows automatically from a finding of racketeering, a jury's decision on forfeiture would not be affected by a separate proceeding because the issues of guilt and forfeiture converge.

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[65] The appellate court noted that if Feldman failed to make a showing justifying an evidentiary hearing, no relitigation would be necessary in this case because Feldman had never requested the right to present forfeiture arguments to the jury in the absence of an evidentiary hearing.

Bifurcation Not Required

United States v. Perholtz, 842 F.2d 343 (D.C. Cir.), *cert. denied*, 488 U.S. 821(1988).

HOLDING: A unitary proceeding, in which issues of guilt and the forfeiture of assets are determined, is consistent with due process and does not violate the defendant's Fifth Amendment privilege against self-incrimination.

FACTS: Ronald J. Perholtz was charged with racketeering crimes and mail fraud in the District of Columbia, subjecting him to the forfeiture of certain assets. Before his trial on these charges, the trial court denied Perholtz's request for a separate proceeding on the forfeiture issues. At the conclusion of the trial and before a verdict was rendered, the trial judge instructed the jury not to consider forfeiture unless it found Perholtz guilty. Perholtz did not object to this instruction. He subsequently was convicted and several assets, including consulting fees; royalty payments; Perholtz's ownership interests in his businesses; his rights in his patents, copyrights and licensing agreements; and certain bank accounts, were forfeited to the government. The U.S. Court of Appeals for the D.C. Circuit rejected Perholtz's argument on appeal that bifurcated guilt and forfeiture proceedings are required constitutionally and affirmed the forfeiture verdict.

COURT'S ANALYSIS: Perholtz did not rely upon any precedent in his constitutional challenge and did not make any showing that he was prejudiced by the trial court's denial of his pretrial request to bifurcate the proceedings. His constitutional rights were protected adequately by the judge's instructions to the jury in which the judge properly explained the sequential inquiry into guilt and forfeiture. Furthermore, the jury did not subject all the assets in question to forfeiture, indicating that it considered separately the issues of guilt and forfeiture. The trial judge is entitled to hold a unitary proceeding on issues of guilt and punishment when the evidence regarding each issue is related.

In reaching this conclusion, the court relied upon the U.S. Supreme Court's decision in *McGautha*, in which the Court held that a unitary proceeding on guilt and punishment in a capital case did not violate due process. The D. C. Circuit followed the reasoning of the Court and held that a unitary proceeding in the forfeiture context did not present a constitutional dilemma under the Fifth Amendment and specifically declined to adopt the rule announced by the Third Circuit in *Sandini*.

Civil Forfeitures

The U.S. Supreme Court held that the Fifth Amendment privilege against self-incrimination applies to civil forfeiture proceedings, which essentially are criminal proceedings "in substance and effect."[66] In *United States v. U.S. Coin & Currency*,[67] the U.S. government instituted a forfeiture action, pursuant to 26 U.S.C. § 7302, against $8,674, which allegedly had been used to violate gambling laws. The Court ruled that the lower court had not protected the property owner's Fifth Amendment right against self-incrimination and reversed the forfeiture. The Court said that, despite the fact that § 7302 did not specifically state that property shall be seized only if its owner significantly participated in criminal activity, civil forfeiture proceedings are initiated due to alleged criminal acts by the owner of the assets subject to forfeiture. Civil forfeiture proceedings are "quasi-criminal" and trigger Fifth Amendment protections because:

> From the relevant constitutional standpoint there is no difference between a man who "forfeits"...[money] because he has used...[it] in illegal...activity and a man who pays a "criminal fine"...as a result of the same

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[66] Boyd v. United States, 116 U.S. 616, 634 (1886).

[67] 401 U.S. 715 (1971).

course of conduct. In both instances, money liability is predicated upon a finding of the owner's wrongful conduct; in both cases the Fifth Amendment applies with equal force.[68]

In *United States v. Ward*,[69] in a case not involving forfeiture, the Court restricted the holdings in the *Boyd* and *U.S. Coin & Currency* cases and ruled that the fact that the underlying conduct in a civil action is criminal does not automatically render the penalty criminal. The Court explained that the relevant inquiry is whether the Congress intended to impose a civil penalty and if the Congress had such an intent, whether the "statutory scheme [is] so punitive either in purpose or effect as to negate that intention."[70] The *Ward* case left open for consideration whether all forfeiture proceedings are "quasi-criminal" so as to bring them within the bounds of the Fifth Amendment self-incrimination privilege. Although the *Ward* case did not expressly overrule *Boyd*, lower courts apply the *Ward* test and do not extend Fifth Amendment protection against self-incrimination automatically to a particular forfeiture case.[71]

Once a court has determined that the Fifth Amendment is implicated in a civil forfeiture case, it must safeguard the constitutional right. Courts have varied in what they consider to be adequate Fifth Amendment protections to claimants in civil forfeiture proceedings. The courts have examined whether a stay of the civil proceeding, a dismissal of the civil proceeding, testimonial immunity during the civil proceeding, or protective orders or seals sufficiently guard a claimant from Fifth Amendment violations.[72]

Many civil forfeiture courts, when confronted with Fifth Amendment challenges, have granted stays of the civil proceedings until any related criminal matters have been resolved. As a result of the stay, the criminal defendant is protected against any possible damage from his testimony because he is not forced to testify during a civil proceeding before the charges against him are resolved. Anything he says at a subsequent civil proceeding can be used in relation to the forfeiture, but will not affect his previously adjudicated criminal charges. A stay also prevents impediments to the government deriving information from a claimant at a civil proceeding. Because stays potentially can benefit the claimant and the government, both parties request them. Some courts have held, however, that stays can be granted only upon a claimant's request or with the claimant's consent. Stays must be for a "reasonable" period of time.

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[68] 401 U.S. at 718.

[69] 448 U.S. 242 (1979).

[70] *Id.* at 248-49.

[71] The courts have ruled that a claimant who asserts his Fifth Amendment privilege against self-incrimination and fails to assert a specific interest in the property does not have standing to challenge the forfeiture. See Baker v. United States, 722 F.2d 517 (9th Cir. 1983);United States v. $38,000, 1987 WL 10192 (E.D.La. April 23, 1987);United States v. $558,110, 626 F.Supp. 517 (S.D. Ohio 1985);In Re Property Seized from Aronson, 440 N.W. 2d 394 (Iowa 1989).

[72] The U.S. Court of Appeals for the Second Circuit has ruled that district courts should take a liberal view toward a claimant's request to withdraw his assertion of a Fifth Amendment privilege particularly if there are no grounds for believing that opposing parties suffered under prejudice from a claimant's decision to invoke the privilege. However, if it appears that a claimant has sought to use the Fifth Amendment to abuse or obstruct the discovery process, trial courts, to prevent prejudice to opposing parties, may adopt remedial procedures, impose sanctions, or bar a claimant from testifying later about matters previously hidden from discovery through an invocation of the privilege. United States v. 4003-4005 5th Ave., Brooklyn, N.Y., 55 F.3d 78 (2d Cir. 1995).

Courts do not favor dismissal of the civil forfeiture proceeding as a means of protecting a claimant's Fifth Amendment privilege against self-incrimination. Courts generally deny motions to dismiss civil forfeiture actions, ruling that a Fifth Amendment challenge cannot be a defense to the government's forfeiture action and the courts must try to accommodate not only the claimant's testimonial privilege but the congressional intent behind the forfeiture provision. Some courts, however, grant claimants' motions requesting dismissal of a case if there are no alternatives available that would uphold adequately the claimants' constitutional rights.

Some courts suggest that a way in which to accommodate a claimant's Fifth Amendment privilege against self-incrimination is to grant claimants immunity from subsequent criminal proceedings being brought against them based upon their testimony at civil forfeiture proceedings. The court, in *United States v. U.S. Currency*,[73] explained that this option requires the cooperation of prosecutors because the federal courts have no inherent power to grant such immunity. Still other alternatives are to seal affidavits filed in civil forfeiture actions and to grant protective orders prohibiting the use of a claimant's testimony in a civil forfeiture action from being used in any related criminal proceeding.

Relevant Cases

Stays and Continuances

United States v. 6250 Ledge Road, 943 F.2d 721 (7th Cir. 1991).

HOLDING: A property owner is not entitled to a stay of civil forfeiture proceedings until there is a resolution of criminal charges against him if he claims a violation of his Fifth Amendment privilege against self-incrimination but fails to indicate with precision how he would be prejudiced if the civil action went forward while the criminal action was pending.[74]

FACTS: James Gordon was charged with felonies in two state criminal actions in March 1989 based upon evidence gathered during an investigation of allegations that he sold and distributed cocaine. In May of the same year, the government instituted a civil forfeiture action against property used in relation to the drug sales, including a five-acre tract of land in Egg Harbor, Wis., and a residence and outbuildings located on the land. Gordon asserted an interest in the property subject to forfeiture and moved for a stay of the proceeding pending a resolution of the felony charges against him. The district court denied the motion and Gordon did not object on Fifth Amendment or other grounds. The parties agreed to stipulated facts and the court entered an order of forfeiture of Gordon's property.

Gordon appealed the forfeiture order, arguing that the court erred and violated his Fifth Amendment rights in not granting his motion to stay the forfeiture proceedings until the completion of his criminal trial. The appellate court rejected his contentions and affirmed the lower court's holding.

COURT'S ANALYSIS: When Gordon agreed to the stipulated facts and did not persist in his objection to the court's denial of the stay, it had the same effect as if he had not objected in the first place. Even if his failure to object did not constitute a waiver of his right to challenge the denial of the stay, he never made a showing as to why the stay was justified. Although the Fifth Amendment privilege against self-incrimination applies to civil forfeiture proceedings, the district court was not required to grant a stay based upon a blanket assertion of the privilege. "[A] stay contemplates `special circumstances' and the need to avoid `substantial and irreparable

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[73] 626 F.2d 11 (6th Cir. 1980). (This case is summarized in this section.)

[74] Other courts have held similarly. See, e.g., United States v. 566 Hendrickson Blvd., 986 F.2d 990 (6th Cir. 1993).

prejudice.' The very fact of a parallel criminal proceeding, however, does not alone undercut a [claimant's] privilege against self-incrimination, even though the pendency of the criminal action force[s] him to choose between preserving his privilege against self-incrimination and losing the civil suit."[75]

United States v. 35 Fulling Ave., 772 F.Supp. 1433 (S.D.N.Y. 1991).

HOLDING: To protect a claimant's privilege against self-incrimination a reasonable continuance of a civil forfeiture proceeding must be granted until the related criminal proceeding is resolved in state court.

FACTS: On Feb. 1, 1991, federal law enforcement officials performed a consensual search on the car of William Henry on the Henry Hudson Parkway in New York, which led to their discovery of 10 pounds of marijuana and $70,000 in cash. In April, other federal agents performed a search at Patterson Wine and Spirits in Patterson, N.Y., at which Henry had been observed making what appeared to be drug transactions. Henry was the store's president and lived above it. An indictment was returned on June 13, 1991, against Henry related to the marijuana seizure. The U.S. government then filed a complaint seeking the forfeiture of property used in connection with drug trade, including the wine store. Henry claimed his Fifth Amendment privilege against self-incrimination would be violated by the simultaneous proceedings. In response, the court granted a continuance of the civil proceeding.

COURT'S ANALYSIS: If Henry testified in the civil proceeding while the criminal proceeding was pending, he would subject himself to incriminating admissions that could be used against him in the criminal case. A continuance of the civil proceeding, therefore, had to be granted until the criminal case has closed.

United States v. Property at 297 Hawley St., 727 F.Supp. 90 (W.D.N.Y 1990).

HOLDING: The government may be granted a stay of a civil forfeiture proceeding pending resolution of related criminal charges in order to protect the criminal case from potentially broad civil discovery.

FACTS: The United States filed an action for civil forfeiture against real property located at 297 Hawley St., Rochester, N.Y. Roberta Sturgis, the defendant in a criminal action related to the forfeiture proceeding, filed a claim on the property. The government then moved for a stay of the civil proceedings until the criminal matters against Sturgis were resolved. The court rejected Sturgis' objection that the government had failed to demonstrate good cause for a stay.

COURT'S ANALYSIS: The court rejected the government's argument that a stay was necessary to prevent Sturgis from frustrating its civil discovery demands by invoking her privilege against self-incrimination at her criminal trial. However, the court granted the stay based upon the government's argument that without such a stay, liberal civil discovery rules effectively would force the government to disclose prematurely its criminal case to Sturgis.

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[75] 943 F.2d at 729 (quoting United States v. Little Al, 712 F.2d 133, 136 (5th Cir. 1983)).

Dismissals

United States v. 566 Hendrickson Boulevard, 986 F.2d 990 (6th Cir. 1993).

HOLDING: A blanket assertion of the Fifth Amendment privilege is no defense to a forfeiture proceeding.[76]

FACTS: In 1991, Leonard Willis remodeled the attic of his home to cultivate marijuana plants and began growing marijuana. He and his wife had an argument, after which his wife called the police and reported the marijuana cultivation. The police obtained a search warrant for Willis' home and seized several marijuana plants and some growing apparatus from the premises. The government filed a civil forfeiture proceeding against the $65,000 home, located in Clawson, Mich.

During discovery, Willis was deposed and admitted he was the owner of the relevant property, but otherwise asserted his Fifth Amendment privilege against self-incrimination due to a pending criminal proceeding against him for the manufacture of marijuana. After finding that there were no material facts in dispute, the court ordered forfeiture of the property.

Willis appealed the order on several grounds, one being that the forfeiture violated his Fifth Amendment right against self-incrimination. Specifically, he asserted that he faced the dilemma of remaining silent and allowing the forfeiture or testifying against the forfeiture and possibly damaging the criminal case against him. He argued that the existence of this dilemma mandated dismissal of the forfeiture action. The U.S. Court of Appeals for the Sixth Circuit disagreed and upheld the forfeiture.

COURT'S ANALYSIS: A claimant cannot avoid his burden to show by a preponderance of the evidence that the property is not subject to forfeiture by asserting his Fifth Amendment privilege. "`While the assertion of the Fifth Amendment privilege against self-incrimination may be a valid ground upon which a witness ... declines to answers questions, it has never been thought to be in itself a substitute for evidence that would assist in meeting a burden of production. [Such a view] would convert the privilege from the shield against compulsory self-incrimination which it was intended to be into a sword whereby a claimant asserting the privilege would be freed from adducing proof in support of a burden which would otherwise have been his.'"[77] A claimant must show how testifying would prejudice the criminal case against him. If he is able to show such prejudice, the court is not required to dismiss the forfeiture action, but may take other steps to protect the privilege, such as granting a stay of the proceeding until the criminal case is resolved. However, a claimant must ask for such relief. The court has no affirmative duty to protect the privilege when a claimant, by his words or actions, has waived the privilege.

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[76] See, also, United States v. $75,040 in United States Currency, 785 F.Supp. 1423 (D. Or. 1991); United States v. 15824 W. 143rd St., 736 F.Supp. 822 (N.D. Ill. 1990); United States v. One 1984 Pontiac Firebird, 1990 U.S. Dist. LEXIS 3980 (D. Or. March 30, 1990).

[77] 986 F.2d at 996 (quoting United States v. Rylander, 460 U.S. 752, 758 (1983).

United States v. U.S. Currency, 626 F.2d 11 (6th Cir. 1980), *cert. denied sub nom.*, Woodrow v. United States, 449 U.S. 993 (1980).

HOLDING: The U.S. Supreme Court's holding in *U.S. Coin and Currency* that the Fifth Amendment privilege could be invoked in a civil forfeiture proceeding does not require dismissal of the forfeiture proceeding upon such invocation. Alternatives to dismissal, such as stays of the civil proceedings until the resolution of potential criminal matters, should be considered to protect the claimant's privilege.[78]

FACTS: In December 1975, pursuant to search warrants, federal law enforcement officials conducted a raid and seized currency, records, and other items allegedly used in illegal gambling activities in Tennessee from Woodrow John Gregory, James Albert Banks, and George Sidney Garmon. Agents seized $33,401 from Gregory, $45,707 from Banks, and $5,900 from Garmon. No indictments were returned as a result of the raid but in September 1977, the federal government initiated civil forfeiture proceedings against the seized items. Gregory, Garmon, and Banks moved to dismiss the action on the grounds that it violated their Fifth Amendment privilege against self-incrimination. The district court found that the interrogatories that accompanied the forfeiture complaint were designed to gain information regarding possible criminal activities from the property owners and dismissed the case, citing *U.S. Coin and Currency*. The lower court ordered any property other than contraband to be returned to the owners and required the government to file a certificate of fact stating whether any criminal investigation related to the seized property was underway. On appeal, the court reversed.

COURT'S ANALYSIS: There are solutions other than dismissal by which the privilege against self-incrimination can be protected and the forfeiture action can proceed. Although there may be occasions on which the privilege does not allow the forfeiture proceedings to go forward, this is not such a case. Here, the court must select the alternative that "strikes a fair balance ... and accommodates both parties."[79] For example, if property owners do not testify, the government can prove its claims through the testimony of other witnesses; the government could grant immunity to the property owners; the government could guarantee not to prosecute for any offenses related to the forfeiture action; or the courts could choose to stay the forfeiture proceedings until the completion of any criminal prosecutions or until the statutes of limitations for the relevant criminal offenses have expired.

United States v. 136 Plantation Drive, 911 F.2d 1525 (11th Cir. 1990).

HOLDING: When a government witness has been granted immunity from prosecution based upon his testimony at a criminal trial, the government cannot use the testimony at subsequent civil forfeiture proceedings that are "quasi-criminal in nature."

FACTS: In 1987, Charles McVadon was charged with conspiracy to import and distribute cocaine and marijuana and with importing and possessing cocaine with intent to distribute. The federal government filed a civil forfeiture action against McVadon's Tavernier, Fla., home, alleging the property was used to further the drug operation. McVadon pleaded guilty to one count of conspiracy to import cocaine. In the plea agreement, McVadon promised to cooperate with law enforcement officers, and the government promised not to use any statements made by McVadon, or any evidence derived from his statements, against him. McVadon testified as a government witness. At the trial, McVadon testified that he and his partner purchased the Tavernier property with the proceeds of drug transactions.

After the trial, the United States deposed McVadon as part of its discovery in the forfeiture action. In his disposition, McVadon again stated he used the drug proceeds to buy the property. At the forfeiture proceeding, the

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[78] See, also, Resek v. State, 706 P.2d 288 (Alaska 1985).

[79] 656 F.2d at 16 (quoting Shaffer v. United States, 528 F.2d 920, 922 (4th Cir. 1975)).

trial court allowed the government to argue to the jury that the property was subject to forfeiture both because it had been used to facilitate drug transactions and it had been purchased with drug proceeds. The court also allowed the government to introduce into evidence the statements McVadon made during the deposition.

The jury found that the property had not been used to facilitate drug transactions, but that it had been purchased with drug proceeds. The court ordered forfeiture. McVadon appealed, claiming that his deposition testimony was derived from his testimony at the criminal trial and, therefore, under the plea agreement, could not be used against him in a quasi-criminal proceeding. The government countered that forfeiture is a civil proceeding, and, therefore, did not fall within the scope of the plea. The U.S. Court of Appeals for the Eleventh Circuit vacated the district court's order and remanded the case for further proceedings to determine the meaning of the plea agreement.

COURT'S ANALYSIS: The plea agreement was ambiguous with respect to the extent of the immunity granted to McVadon. It was unclear whether the agreement meant only that McVadon's statements could not be used in any criminal prosecution of McVadon or whether it meant that his statements could not be used in any criminal proceeding or quasi-criminal forfeiture proceeding against McVadon's property. Therefore, the case was remanded to the trial court for further proceedings on this issue.[80]

United States v. Property at 850 S. Maple, 743 F.Supp. 505 (E.D.Mich. 1990).

HOLDING: In order to protect a claimant's privilege against self-incrimination, a stay of civil forfeiture proceedings is necessary until the claimant is given "full immunity" from state or federal criminal prosecution or there is a final adjudication of any criminal action for offenses arising out of his use of the property subject to forfeiture. Full immunity prevents the government from prosecuting the claimant in the future for any activity related to the alleged illegal activity underlying the forfeiture action. "Use immunity," which prevents the government from using the claimant's testimony against him, is not sufficient to avoid a stay of the proceedings.

FACTS: On April 23, 1990, the U.S. government filed a civil forfeiture action against the premises located at 850 South Maple in Ann Arbor, Mich., a public housing unit leased to Charlotte Juide, based upon allegations that the apartment had been used in a cocaine distribution operation. On April 27, 1990, pursuant to a seizure warrant obtained by the government, the apartment was seized and Juide was evicted. In response to the seizure of her apartment, Juide filed several motions, including a motion for a stay of the civil forfeiture proceedings pending a grant of immunity or the resolution of any criminal charges that might be brought against her. The court granted the stay.

COURT'S ANALYSIS: Because the burden of proof in civil forfeiture proceedings shifts to claimants once the government has established probable cause, the claimants must choose between incriminating themselves or defending their property, unless they are granted immunity from criminal prosecution by the government. Accordingly, the court has the power to stay the forfeiture proceeding if such immunity is not granted by the government. Because the federal government only granted Juide use immunity and no grants of full immunity were provided by state or local officials, a stay was ordered.

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[80] The appellate court also stated that if the trial court determined that the immunity agreement applies to quasi-criminal forfeiture proceedings, it would have to determine whether the forfeiture proceeding against McVadon's property was quasi-criminal in nature. Subsequent case law in which the U.S. Supreme Court ruled that civil forfeitures are quasi-criminal in nature may make the second inquiry unnecessary. (See summary of United States v. Austin in "The Excessive Fines Clause of the Eighth Amendment" section of this compendium.)

Protective Orders and Sealed Affidavits

United States v. Parcels of Land, 903 F.2d 36 (1st Cir. 1990).

HOLDING: A court is not required to seal affidavits submitted by a claimant in a forfeiture proceeding in order to protect the claimant's privilege against self-incrimination if the court has made other reasonable efforts to accommodate the claimant's Fifth Amendment right.

FACTS: The government sought forfeiture of several parcels of real property located in Massachusetts that were owned by Lionel Laliberte, alleging that the property constituted proceeds from illegal sales of drugs. The forfeiture action was based upon evidence indicating that Laliberte's and his wife's expenditures between 1979 and 1988 greatly exceeded their reported average annual adjusted gross income of $27,690.

The district court ordered forfeiture of the property. The court refused to consider Laliberte's affidavit in opposition to the forfeiture because Laliberte had asserted his Fifth Amendment privilege against self-incrimination at a deposition. The court ruled "that Laliberte could not state his account of the `facts' when he wished (e.g., in the affidavit), and yet shield this account from scrutiny by invoking the Fifth Amendment at his deposition."[81] However, the court did enter a protective order prohibiting the use of Laliberte's deposition transcript, interrogatory answers, and affidavit in any criminal proceeding brought against him by the U.S. attorney for the District of Massachusetts, except in connection with perjury charges or for purposes of impeachment. Laliberte appealed the forfeiture on several grounds, one being that even if the district court had the power to strike his affidavit, it should not have done so without first trying to accommodate the Fifth Amendment dilemma he faced in having to decide between relinquishing his property to avoid incriminating himself or defending his property and subjecting himself to self-incrimination. Specifically, he argues that the court should have granted his motion to seal his affidavit and deposition testimony so that they could not be used against him in any other proceedings. The U.S. Court of Appeals for the First Circuit affirmed the judgment of the district court.

COURT'S ANALYSIS: The court stated that courts should attempt to accommodate claimants' Fifth Amendment privileges in forfeiture actions through means other than dismissal of the proceedings. However, no particular level of accommodation is required. In this case, the trial court did accommodate the claimant's dilemma when it entered a limited protective order. As long as there is an attempt to accommodate, the extent of such accommodation is left to the trial court's discretion, absent a contention that the court failed to act in good faith.

United States v. Leasehold Interest in 121 Nostrand Ave., Apartment 1-C, Brooklyn, N.Y., 760 F.Supp. 1015 (E.D.N.Y. 1991).

HOLDING: When the trial court in a civil forfeiture action involving a public housing apartment allowed the filing of sealed affidavits that could be withdrawn by the affiants if at some later time the court decided to unseal them and eventually stayed the civil forfeiture proceeding until any related criminal matters were resolved, claimant's Fifth Amendment rights were protected sufficiently.

FACTS: Clara Smith lived in a public housing unit in Brooklyn, N.Y., with her daughters, grandchildren, and great-grandchildren and was the leaseholder of 32 years. There were a total of 18 people living in the apartment in February 1990 when the government brought drug charges against four of the inhabitants, including Chenelle Smith, Clara Smith's granddaughter, based upon evidence gathered during an investigation.

In May 1990, the government initiated civil forfeiture proceedings against the apartment. At the civil forfeiture hearing, the court allowed the filing of sealed affidavits, which could be withdrawn by the affiants if at

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[81] 903 9.F.2d at 43.

some later time the court decided to unseal them. The affidavits were not to be used in any criminal proceedings against the affiant. The court also granted a stay of any forfeiture actions until all criminal matters against the Smiths were resolved. However, Chenelle Smith did not file an affidavit under seal, and instead invoked her Fifth Amendment privilege against self-incrimination.

COURT'S ANALYSIS: The measures taken by the court to protect Chenelle's asserted privilege were more than adequate. It was her choice not to take advantage of the sealed affidavit procedure.

Adverse Inferences

The issue of whether a jury can draw adverse inferences from a claimant's invocation of the Fifth Amendment privilege against self-incrimination arises frequently in civil forfeiture proceedings. Claimants often allege that the courts allow or encourage juries to make inferences of guilt when claimants choose not to testify, thereby violating the claimants' constitutional rights. The courts have responded differently to these allegations. Some courts have declined to review the issue, leaving it open. In *United States v. 15 Black Ledge Drive*,[82] for example, the court held that because the adverse inference drawn from a claimant's invocation of her Fifth Amendment privilege against self-incrimination in a civil forfeiture proceeding did not influence the district court's determination of forfeiture, it was unnecessary to consider whether it was made properly. The court recognized the claimant's argument, however, that these inferences can jeopardize claimants' Fifth Amendment rights in civil forfeiture proceedings, especially when criminal matters are pending. The court noted that this scenario "poses a troubling question, given the severity of the deprivation at risk."[83] The circuits that have examined the issue have taken conflicting positions.

Relevant Cases

Adverse Inferences Permissible

United States v. 900 Rio Vista Blvd., Ft. Lauderdale, Fla., 803 F.2d 625 (11th Cir. 1986).

HOLDING: District court did not err in drawing inference from witness' failure to testify in civil forfeiture proceeding that testimony would not have been favorable to innocent-owner defense.

FACTS: Heidi of South Florida, Inc. was incorporated under the laws of Florida on Aug. 27, 1979. Heidi Hartline, the girlfriend of alleged drug trafficker Jonathan Scot Baldwin, was listed as the president, director, and sole shareholder. Baldwin was arrested for drug trafficking in November 1982, and subsequently pleaded guilty. The federal government instituted a civil forfeiture action against property purchased by the corporation, allegedly with illegal proceeds from Baldwin's drug trafficking. At a hearing on the corporation's innocent-owner defense, a government witness read a deposition by Baldwin into the record in which Baldwin asserted a Fifth Amendment

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[82] 897 F.2d 97 (2nd Cir. 1990).

[83] 897 F.2d at 103. See, also, United States v. Leasehold Interest in 121 Nostrand Ave., Apartment 1-C, Brooklyn, N.Y., 760 F.Supp. 1015 (E.D.N.Y. 1991) (because court did not rely on a negative inference from claimant's invocation of her Fifth Amendment right to determine that drugs were sold in the apartment in which she lived, it was unnecessary to determine whether drawing such inferences in improper in civil forfeiture proceedings). (see summary of this case in *Protective Orders and Sealed Affidavits*).

privilege on behalf of both himself and the corporation.[84] The district court inferred from Baldwin's failure to testify that his testimony would not have been favorable to the corporation's innocent-owner defense. The district court forfeited the property and the U.S. Court of Appeals for the Eleventh Circuit affirmed.

COURT'S ANALYSIS: The appellate court relied on the U.S. Supreme Court's decision in *Baxter v. Palmigiano*[85] in ruling that the district court's adverse inference was permissible. In *Palmigiano*, a state prison inmate charged with inciting a prison disturbance, was summoned before prison authorities and informed that he might be prosecuted for violating state law and that he had a right to remain silent during the prison disciplinary hearing but that his silence would be held against him. As a result of the hearing, the inmate was placed in "punitive segregation" for 30 days. He filed a civil rights action, claiming that the disciplinary hearing violated his constitutional rights. The Court rejected the inmate's claim, noting that the state had not sought to make evidentiary use of the inmate's silence in any criminal proceeding. The Court also noted that, under state law, an inmate's silence alone was insufficient to support an adverse decision by the prison disciplinary board.

Adverse Inferences Impermissible

United States v. Rural Route 1, Box 137-B, 24 F.3d 845 (6th Cir. 1994).

HOLDING: A judge in a civil forfeiture proceeding may not instruct the jury that it may draw adverse inferences if a claimant invokes his Fifth Amendment privilege against self-incrimination.

FACTS: On July 8, 1991, the U.S. government brought a forfeiture action against real property located in Cutler, Ohio, that was owned by John Mayle. The action was filed after the property was searched, pursuant to a warrant, based upon allegations that the Mayle family was operating a large drug ring. At the forfeiture hearing, Mayle asserted his right to remain silent under the Fifth Amendment. The judge instructed the jury: "The law does not require the claimant in a forfeiture proceeding to testify on his own behalf. You may draw whatever inference reason and common sense permit from the failure of the claimant to testify in this case." The jury found in favor of the government and the court ordered the property forfeited.

On appeal, Mayle argued, among other things, that the judge's instructions to the jury violated his constitutional rights. The U.S. Court of Appeals for the Sixth Circuit ruled in favor of Mayle on this issue and ordered the judge not to instruct in this way on retrial. The court did not determine whether the jury instruction was a reversible error in itself because the court was able to grant a new trial on other grounds.

COURT'S ANALYSIS: The instruction unnecessarily drew the jurors' attention to Mayle's invocation of his right to remain silent, which may have influenced improperly the jury's decision. The instruction was in error because, when viewed as a whole, it was prejudicial to Mayle. The court rejected the government's argument that the law permits the drawing of an adverse inference against a party who elects not to testify in a civil proceeding, stating that civil forfeiture is similar to a criminal sanction.

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[84] The court notes that the assertion of a Fifth Amendment privilege on behalf of the corporation was improper because organizations have no privilege against self-incrimination. 803 F.2d at 630.

[85] 425 U.S. 308 (1976).

United States v. Route 13, Kilburn Beach, Florence, Ala., 946 F.2d 749 (11th Cir. 1991).

HOLDING: There is an exception to the Eleventh Circuit's general rule that adverse inferences are permissible for situations in which a person who is a defendant in both civil and criminal cases would be forced to choose between waiving his privilege against self-incrimination and losing the civil case on summary judgment.

FACTS: The federal government instituted forfeiture proceedings in October 1989 against the home of Leland and Rose Marie Sharpe and a clothing store owned by Andy and Thomas Ray Smith. Both properties had allegedly been used for illegal gambling purposes. The district court scheduled a probable cause hearing from March 30, 1990. The Sharpes and Smiths filed discovery requests for tapes and transcripts gathered in the criminal investigation. On Feb. 20, 1990, the government moved to stay the proceedings. The Smiths objected to the stay and moved to compel discovery because the government had not yet complied with their discovery request. On March 12, 1990, the district court denied the stay and granted the Smiths' motion to compel discovery. The court noted, however, that the Smiths would have to comply with discovery requests on the merits after the probable cause hearing. The court implied that if the Smiths did not withdraw their objection to the government's request for a stay, they might have to waive their possible Fifth Amendment privilege against self-incrimination in order to comply with the government' discovery requests. The Smiths withdrew their objection to the stay on March 16, 1990, and the court imposed a stay until June 29, 1990. After that date passed, both the Smiths and the Sharpes moved for summary judgment. The district court granted both parties' motions. The U.S. Court of Appeals for the Eleventh Circuit reversed and remanded the case to the district court for further proceedings.

COURT'S ANALYSIS: The court noted that in *United States v. 900 Rio Vista Blvd., Ft. Lauderdale, Fla.*[86] it had ruled that "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them."[87] However, the court also noted that it had recently recognized an exception to the general rule in cases in which a person who is a defendant in both a civil and criminal case is forced to choose between waiving his privilege against self-incrimination or losing the civil case on summary judgment.[88] The exception is triggered, however, only when the invocation of the privilege will result in an adverse judgment, not merely the loss of the defendant's most effective defense.

The court stated that the exception probably applied to Andy Smith, who had been indicted in August 1990, and might apply to the other defendants who had not yet been indicted. However, the court stated that it was unclear from the record whether the defendants' invocation of the Fifth Amendment would cause an adverse judgment in the forfeiture proceedings. The court remanded the case to the district court for additional proceedings on whether the defendants would be able to rebut the government's probable cause evidence with evidence other than their own testimony.

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[86] 803 F.2d 625 (11th Cir. 1986) (see summary of this case in *Adverse Inferences Permissible* section of this compendium).

[87] *Id.* at 629 n. 4.

[88] Pervis v. State Farm Fire & Casualty Co., 901 F.2d 944 (11th Cir.), *cert. denied*, 498 U.S. 899 (1990).

DOUBLE JEOPARDY & COLLATERAL ESTOPPEL

The Fifth Amendment of the U.S. Constitution, the Double Jeopardy Clause, states "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . "[89]. The Double Jeopardy Clause prohibits 1) a second prosecution for the same offense following conviction or acquittal and 2) multiple criminal punishments for the same offense.

Double jeopardy arises as a defense to forfeiture in cases in which a defendant is subjected to both a civil penalty and criminal prosecution for the same conduct. In such cases, the court must decide whether the civil forfeiture constitutes a "punishment," which when combined with criminal punishment would be a violation of the Fifth Amendment prohibition against multiple punishments.

The U.S. Supreme Court in *United States v. Ursery*[90] addressed a conflict that existed among the federal courts of appeal regarding whether the government violates the Double Jeopardy Clause by separately instituting a criminal action and a civil forfeiture proceeding based upon the same underlying activity. The conflict arose as a result of the federal appellate courts' application of the Court's decisions in a trio of cases -- *United States v. Halper*,[91] *Austin v. United States*,[92] and *Department of Revenue of Montana v. Kurth Ranch*.[93]

According to the *Halper* Court, civil fines were "punitive" whenever the penalty was "overwhelmingly disproportionate" to the damage the government sustained as a result of the violation of the underlying statute. The Court said that "punishment" could arise from either civil or criminal proceedings. Under *Halper*, the imposition of "punishment" of any kind was subject to double jeopardy constraints and whether a sanction constituted "punishment" depended on whether it served traditional goals of punishment -- retribution and deterrence. If a sanction was "overwhelmingly disproportionate" to the injury caused so that it would not "solely" serve a remedial purpose, it would be deemed punishment under *Halper* and would violate the Double Jeopardy Clause.

The federal appeals courts were split concerning whether *Halper* applied in civil assets forfeiture cases. Some circuits distinguished *Halper* because the fraudulent claims statute at issue in *Halper* imposed civil fines to compensate the government for violations, whereas the civil forfeiture statute allows the government to take possession of property allegedly connected to illegal activity. Other circuits interpreted *Halper* to require a court to evaluate the proportionality between the value of property forfeited and the amount of government loss associated with the illegal activity to determine whether the forfeiture was punitive.

Even if *Halper* were to apply to civil forfeiture, a number of circuits have ruled that the "dual sovereignty doctrine" may make the Double Jeopardy Clause inapplicable to civil forfeiture. The "dual sovereignty doctrine" states that no double jeopardy violation occurs when separate governments prosecute a defendant for the same offense. In these circuits, a double jeopardy claim will not be successful when criminal proceedings are prosecuted in state court followed by civil forfeiture proceedings in federal court.

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[89] U.S. CONST. amend. V, § 2.

[90] 116 S.Ct. 2135 (1996) (This case is summarized in this section of the compendium).

[91] 490 U.S. 435 (1989), *overruled by* Hudson v. United States, 118 S.Ct. 488 (1997).

[92] 509 U.S. 602 (1993) (This case is summarized in the "Excessive Fines" section of the compendium).

[93] 511 U.S. 767 (1994).

In *Austin*, the Court held that civil penalties that go beyond remedial purposes to attempt to punish or deter offenders may violate the Excessive Fines Clause of the Eighth Amendment. The opinion relied heavily upon *Halper* in determining that the Excessive Fines Clause reaches civil assets forfeiture cases, which, according to the Court, are punitive in nature.

However, "punishment" for the purposes of the Eighth Amendment is not necessarily identical to "punishment" under the Fifth Amendment. The Court noted this distinction in a footnote in which it stated that the express language of the Fifth Amendment limits its application to criminal actions and that the prohibition against double jeopardy only would apply in cases in which a civil forfeiture would serve no remedial purpose.[94]

In *Kurth Ranch*, the Court held that a state tax on the possession and storage of dangerous drugs, imposed after any state or federal fines or forfeitures have been satisfied, constituted a second punishment and violated the prohibition against successive punishments for the same offense. The Court explained that a tax on the possession of goods that no longer exist and that the taxpayer never lawfully possessed was punitive for double jeopardy purposes. The Court did not rely on *Halper* to determine whether the tax was punitive because, according to the Court, tax statutes serve different purposes than civil penalties. Additionally, the state of Montana did not claim that its tax assessment approximated the actual damages sustained by the state.

While the Court in *Ursery* did not fully resolve the conflict among the lower courts, it held that when the government separately institutes a criminal action and a civil forfeiture proceeding based upon the same underlying activity, there is no violation of the Double Jeopardy Clause.

The issue was further clouded by the Court's recent decision in *Hudson v. United States*[95] in which the Court disavowed *Halper*'s method of determining whether the Double Jeopardy Clause is implicated. The *Hudson* Court, reviving its pre-*Halper* double jeopardy analysis, said the *Halper* analysis was flawed because it applied the Double Jeopardy Clause without first determining whether the successive punishment at issue was criminal. Whether a particular punishment is civil or criminal initially is a matter of statutory construction. Citing its earlier decision in *United States v. Ward*,[96] the Court said that the first inquiry regarding statutory construction is whether the legislature expressly or implicitly indicated a preference for one label or the other. If the legislature indicated an intention to establish a civil penalty, a court must then ask "'whether the statutory scheme was so punitive either in purpose or effect . . . as to transform what was clearly intended as a civil remedy into a criminal penalty.'"[97] According to the *Hudson* Court, the *Halper* Court applied the Double Jeopardy Clause without first determining whether the successive punishment at issue was criminal. Rather, it focused on whether the sanction, regardless of its civil or criminal nature, was so grossly disproportionate to the harm caused as to constitute punishment. The Court held that *Halper* deviated from longstanding double jeopardy principles and has proved unworkable, and its double jeopardy analysis should be abandoned. The Court explained,

> Under *Halper's* method of analysis, a court must also look at the 'sanction actually imposed' to determine whether the Double Jeopardy Clause is implicated. Thus, it will not be possible to determine whether the Double Jeopardy Clause is violated until a defendant has proceeded

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[94] *Id.* at 2804 n. 4.

[95] 118 S.Ct. 488 (1997).

[96] 448 U.S. 242 (1980).

[97] 118 S.Ct. at 493 (*quoting* Ward, 448 U.S. at 248-249 and Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956)).

> through a trial to judgment. But in those cases where the civil proceeding follows the criminal proceeding, this approach flies in the face of the notion that the Double Jeopardy Clause forbids the government from even 'attempting a second time to punish criminally.'[98]

The combined effect of the *Ursery* and *Hudson* decisions on future forfeiture cases is unclear.

Under the collateral estoppel doctrine, once a factual issue has been determined through litigation, that issue cannot again be litigated between the same parties. Courts have come to different conclusions on whether the collateral estoppel doctrine applies in cases in which both criminal proceedings and civil forfeiture proceedings are instituted.

Subsequent Proceedings Not Barred by Either Double Jeopardy or Collateral Estoppel

Relevant Cases

United States v. Ursery, 116 S.Ct. 2135 (1996).[99]

HOLDING: When a state separately institutes a criminal action and a civil forfeiture proceeding based upon the same underlying activity, there is no violation of the Double Jeopardy Clause.

FACTS (United States. v. $405,089.23): James Wren and Charles Arlt were indicted on charges of conspiracy and money laundering related to their running a methamphetamine manufacturing operation through a legal corporation. Five days later, the government initiated a civil forfeiture action against various items of property. The government claimed that the property was subject to forfeiture under 21 U.S.C. § 881 and under 18 U.S.C. § 981. Wren and Arlt were convicted in the criminal proceedings and one year later all of the property was forfeited to the federal government.

The defendants appealed the forfeiture to the U.S. Court of Appeals for the Ninth Circuit on the grounds that the civil forfeiture action was prohibited by the Double Jeopardy Clause. The court agreed and found that the parallel actions were separate proceedings carrying separate punishments. The U.S. Supreme Court reversed.

FACTS (United States v. Ursery): Police obtained a warrant to search the property of Guy Ursery. The search revealed 142 marijuana plants, marijuana seeds, a growing light, and two loaded firearms. Two months later, the federal government began a civil forfeiture action against Ursery and his wife, seeking forfeiture of their residence. The action was brought under 21 U.S.C. § 881 (a)(7). A trial on the forfeiture action was scheduled but the Urserys and the government entered into a consent agreement in which the Urserys paid the government $13,250.

During the course of the civil proceedings, a criminal indictment was returned against Ursery charging him with one count of manufacturing marijuana. He was convicted before a different judge than had presided over the civil forfeiture proceedings. He filed post-trial motions for a new trial and for dismissal on the ground that the criminal conviction violated the Double Jeopardy Clause because he already had been punished for manufacturing marijuana in the civil forfeiture action. These motions were denied and Ursery was sentenced to 63 months' imprisonment and four years' supervised release. Ursery

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[98] 118 S.Ct. at 495 (*quoting* Helvering v. Mitchell, 303 U.S. 391, 399 (1938)).

[99] Two cases were joined for purposes of appeal.

appealed his conviction and sentence to the U.S. Court of Appeals for the Sixth Circuit, which reversed. The U.S. Supreme Court upheld his conviction.

COURT'S ANALYSIS: The Court held that the Sixth and Ninth Circuits had improperly interpreted its decisions in *Halper*, *Austin*, and *Kurth Ranch*. According to the Court, its decisions in those cases did not overrule its long line of cases allowing civil forfeiture proceedings and criminal prosecutions based upon the same criminal actions.

The *Ursery* Court held *Halper* was inapplicable to these two cases because it involved a civil penalty, not a civil forfeiture. *Austin* was irrelevant, according to the Court, because it involved the Eighth Amendment rather than the Double Jeopardy Clause of the Fifth Amendment. Finally, the Court concluded that *Kurth Ranch* did not govern because it analyzed a tax proceeding rather than a civil forfeiture proceeding.

The Court applied the two-part test established in *U.S. v. One Assortment of 89 Firearms*[100] to determine whether a civil proceeding is so criminal in nature as to invoke the Fifth Amendment. The Court first found that the Congress' intent, under 21 U.S.C. § 881 and 18 U.S.C. § 981, was to create a civil proceeding and second that the forfeiture statutes serve significant non-punitive goals.

One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972).

HOLDING: The collateral estoppel doctrine does not bar a subsequent civil forfeiture proceeding unless the defendant can show that the jury, which acquitted him previously on criminal charges, conclusively found that he did not commit the alleged unlawful act involving the property.

FACTS: In June 1969, Francisco Klementova was indicted for entering the United States without declaring to customs officials one lot of emerald cut stones and one ring in violation of 18 U.S.C. § 545. The criminal statute required the government to prove 1) the defendant committed the act of smuggling and 2) the defendant committed the act knowingly, willfully, and with intent to defraud. Klementova was acquitted and the government subsequently instituted a civil forfeiture action, pursuant to 19 U.S.C. § 1497.

The district court held that the forfeiture was barred by the doctrine of collateral estoppel and the Double Jeopardy Clause. The U.S. Court of Appeals for the Fifth Circuit reversed, holding that the forfeiture was not barred in these circumstances. The U.S. Supreme Court affirmed.

COURT'S ANALYSIS: The U.S. Supreme Court held that the collateral estoppel doctrine did not bar the forfeiture proceeding because acquittal of the criminal charge did not resolve necessarily the issues at stake in the civil action. Because there are two elements the government must prove to obtain a criminal conviction under 18 U.S.C. § 545 -- the act of unlawful importation and the intent to defraud -- the acquittal did not show conclusively that Klementova did not unlawfully import the stones. The jury may have decided merely that he lacked the intent to defraud required for a criminal conviction.

The Court also held that the prohibition against double jeopardy did not bar the civil forfeiture proceeding because the case did not involve two criminal punishments, nor two criminal prosecutions.

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[100] 465 U.S. 354 (1984).

United States v. Cretacci, 62 F.3d 307 (9th Cir. 1995), *cert. den.* 116 S.Ct. 2528 (1996).

HOLDING: A criminal prosecution following an administrative forfeiture of unclaimed property does not violate the Double Jeopardy Clause.

FACTS: Joel Cretacci allegedly participated in two automatic teller machine (ATM) robberies. On Oct. 4, 1993, a federal magistrate issued a criminal arrest warrant against Cretacci and a civil seizure warrant for a Toyota MR-2 pursuant to 18 U.S.C. § 981(a)(1)(a). The government informed Cretacci, in a letter dated Oct. 27, 1993, of the pending administrative forfeiture. Cretacci did not respond to the notice and the government administratively forfeited the car. On Jan. 5, 1994, after the forfeiture became final, Cretacci moved to dismiss the pending criminal indictment against him on double jeopardy grounds. He argued that his criminal prosecution would violate the Double Jeopardy Clause because the administrative forfeiture of the Toyota was a prior punishment and a criminal prosecution would seek to impose upon him a second punishment. The district court denied his motion on the ground that no double jeopardy violation occurred because the Toyota had been purchased with stolen money. Cretacci appealed and the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's holding on other grounds.

COURT'S ANALYSIS: The Ninth Circuit concluded that an administrative forfeiture of unclaimed property constitutes the taking of abandoned property. Such a taking does not impose punishment for purposes of the Double Jeopardy Clause. The court reasoned that by not claiming the Toyota after receiving sufficient notice of the pending forfeiture, Cretacci abandoned the property and its forfeiture did not punish him. The court rejected Cretacci's argument that, by requiring him to claim his property, he would be forced to sacrifice his right against self-incrimination to preserve his right against double jeopardy. The court said, "[a]t some point, a defendant who seeks to prove that a prior forfeiture 'punished' him would have to claim that he owned the forfeited property. The effect of our rule is only to require that such claim be asserted in the civil forfeiture proceeding itself and not simply in the motion to dismiss the criminal indictment."[101]

United States v. 18755 North Bay Road, 13 F.3d 1493 (11th Cir. 1994).

HOLDING: A civil suit seeking forfeiture of a home used in an illegal gambling operation was not barred by the Double Jeopardy Clause, despite prior criminal action against the homeowner. The simultaneous pursuit of criminal and civil sanctions under a gambling statute was a single coordinated prosecution.

FACTS: A civil forfeiture action was instituted by the government under 18 U.S.C. § 1955(b) in October 1990 against a single-family residence in Miami Beach, Fla., valued at $150,000. The property was the home of Emilio and Yolanda Delio. The forfeiture proceeding resulted from the government's investigation of poker games conducted by Emilio Delio at the home. In the forfeiture proceeding, the Delios denied the property was the site of an illegal gambling business. Emilio Delio was convicted in October 1991 of conducting an illegal gambling operation. The district court subsequently ordered forfeiture of the real property, relying upon Emilio Delio's criminal conviction. The U.S. Court of Appeals for the Eleventh Circuit rejected Emilio Delio's reliance on *Halper*, but reversed the forfeiture on other grounds and remanded the case to the district court for further proceedings.

COURT'S ANALYSIS: The court rejected Delio's reliance upon *Halper*, stating that the *Halper* decision does not "prevent the Government from seeking and obtaining both the full civil penalty and the full range

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[101] 62 F.3d at 311.

of statutorily authorized criminal penalties in the same proceeding."[102] The simultaneous pursuit by the government of criminal and civil sanctions, pursuant to 18 U.S.C. § 1955, was a single, coordinated prosecution and was not prohibited by the Double Jeopardy Clause. Furthermore, the court noted that "there is no problem here that the government acted abusively by seeking a second punishment because of dissatisfaction with the punishment levied in the first action."[103] Finally, as stated in *Halper*, because the legislature can authorize cumulative punishment under two statutes for the same course of conduct, the relevant inquiry is whether the legislature actually made such an authorization, which it had for illegal gambling operations.

The court also ruled that, under the collateral estoppel doctrine, factual determinations made by the court at Emilio's criminal trial were not dispositive of any interest in the property asserted by Yolanda because she was not a party in the criminal proceeding. The court acknowledged the "general proposition that in a forfeiture action the defendant property is alleged to have committed the offense. The property is considered the guilty party, not necessarily the individuals who make claims therein. However, that concept does not deny the rights of a claimant who seeks to introduce evidence of disputed facts."[104]

United States v. Millan, 2 F.3d 17 (2nd Cir. 1993), *cert. denied sub. nom.*, Bottone v. United States, 510 U.S. 1092 (1994).

HOLDING: The Double Jeopardy Clause does not bar a criminal proceeding on underlying drug charges after settlement of a civil forfeiture proceeding that was brought based upon the same alleged conduct underlying the criminal charges if both are part of a single, contemporaneous prosecution.

FACTS: In August 1991, Alfred V. Bottone Sr., Anthony Bottone, and Alfred Bottone Jr. were indicted, along with 40 other individuals, for conspiracy to distribute narcotics. The government seized assets allegedly used to facilitate their illegal acts. The government then sought forfeiture of the property and bank accounts connected to the criminal activity, including a used car business.

Due to the seizure of their assets, the Bottones asserted that they would be unable to pay attorneys' fees incurred to defend themselves against the criminal charges. In a stipulation agreement, the Bottones agreed to relinquish their claim to the seized properties in exchange for $101,000 to cover reasonable attorney fees. The forfeiture action was dismissed in accordance with the settlement agreement and the government retained $240,000 in seized bank accounts, as well as two parcels of real estate and two business interests.

The Bottones then sought dismissal of the criminal charges, claiming that the settlement agreement had been a "punishment" and, therefore, subsequent criminal proceedings would violate the Double Jeopardy Clause's prohibition against multiple punishments. The district court ruled that the prohibition of the Double Jeopardy Clause did not apply because: 1) the civil and criminal proceedings constituted a single proceeding; 2) the value of the seized property was not overwhelmingly disproportionate to the value of the narcotics giving rise to the criminal charges; and 3) the Bottones voluntarily had entered into the settlement agreement. The U.S. Court of Appeals for the Second Circuit affirmed.

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[102] 13 F.3d at 1499 (*quoting* Halper, 490 U.S. at 450).

[103] *Id.*

[104] *Id.* at 1496.

COURT'S ANALYSIS: The U.S. Supreme Court recognized in *Halper* that the prohibition against double jeopardy does not prevent the government from "seeking and obtaining *both* the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding."[105] The court concluded that the settlement agreement was part of a single, coordinated proceeding. The warrants for arrest and seizure were issued the same day and were based upon the same affidavit. The fact that the civil and criminal actions were filed separately does not indicate they were separate proceedings because the rules of court procedure require that civil and criminal actions be filed separately. The actions were contemporaneous, not consecutive, and did not implicate the Double Jeopardy Clause.

United States v. Cullen, 979 F.2d 992 (4th Cir. 1992).

HOLDING: The Double Jeopardy Clause does not limit the government's recovery in a civil forfeiture proceeding to costs incurred by the government in investigating and prosecuting the underlying criminal activity.

FACTS: Dr. Robert Cullen was convicted in July 1989 of knowingly distributing controlled substances outside the scope of his legitimate medical practice. In a separate civil proceeding, the government sought the forfeiture of a Wise, Va., building housing Cullen's clinic and pharmacy, which allegedly was used to facilitate the drug offense.

The U.S. Court of Appeals for the Fourth Circuit affirmed the district court's decision, holding that the forfeiture did not constitute a punishment in violation of the Double Jeopardy Clause. The court refused to find that the forfeiture was punitive merely because the value of the forfeited building exceeded the amount necessary to compensate the government for its costs in investigating and prosecuting the prior criminal case.

COURT'S ANALYSIS: Cullen, relying on the U.S. Supreme Court's 1989 decision in *Halper*, argued that the forfeiture violated the Double Jeopardy Clause. The court noted that in the *Halper* case, the civil penalty was imposed to compensate the government for the loss resulting from the defendant's fraud. In contrast, in this case, the government sought to forfeit Cullen's property "not to compensate itself for any costs of investigation or prosecution, but to remove what had become a harmful instrumentality in the hands of [Cullen]."[106] Proportionality between the value of the assets forfeited and government costs in such a case is not required. Indeed, insulating valuable assets from forfeiture would hinder the purpose of protecting public welfare from the misuse of property. The court noted that, "the Ferrari is at least as harmful an instrumentality as the Chevette."[107]

United States v. McCaslin, 959 F.2d 786 (9th Cir.), *cert. denied*, 506 U.S. 942 (1992).

HOLDING: Under *Halper*, the government is not required to provide an accounting of its losses unless the civil forfeiture proceeding can be characterized only as a deterrent or retribution. Otherwise, there is no necessary relation between the value of the property forfeited and the government's loss in a civil forfeiture proceeding.

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[105] 490 U.S. at 450.

[106] 979 F.2d at 995.

[107] *Id.*

FACTS: In September 1989, the government seized property located in King County, Wash., that Duane McCaslin allegedly used to grow marijuana. The court subsequently ordered the property forfeited to the government. In June 1990, McCaslin was indicted for growing marijuana on his property. McCaslin moved to dismiss the criminal case on the grounds that his conviction would violate the Double Jeopardy Clause. The district court denied the motion to dismiss and the U.S. Court of Appeals for the Ninth Circuit affirmed.

COURT'S ANALYSIS: McCaslin relied on *Halper*, claiming that the forfeiture of his property was punitive. The court noted that the *Halper* Court "was careful to point out that the rule it announced would apply only in the `rare case' where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused."[108] Otherwise, there is "no necessary relation between the value of the property forfeited and the loss to the government"[109] in civil forfeiture proceedings.

United States v. Cunningham, 943 F.2d 53 (6th Cir. 1991).

HOLDING: The prohibition against double jeopardy does not bar a prosecution for alleged criminal activity that was the basis for a prior civil forfeiture proceeding because civil forfeiture is remedial, not punitive, in nature.

FACTS: In April 1990, Alex Cunningham was indicted on 28 counts of cocaine distribution and money laundering. Cunningham was a fugitive at the time the indictment was returned. A week prior to his indictment, the government instituted forfeiture proceedings against $423,850, which Cunningham allegedly used to purchase cocaine from undercover officers in a reverse sting operation.

No one appeared to contest the forfeiture and the district court entered a default judgment in favor of the government. Cunningham was arrested subsequently and moved to dismiss the criminal charges on double jeopardy grounds. Cunningham claimed that the civil forfeiture proceeding was a punishment for double jeopardy purposes and barred his subsequent criminal prosecution.

The district court refused to dismiss the charges and Cunningham was convicted. The U.S. Court of Appeals for the Sixth Circuit affirmed.

COURT'S ANALYSIS: The court found that *Halper* was inapplicable to civil forfeiture proceedings, which are remedial rather than punitive.

United States v. 40 Moon Hill Road, 884 F.2d 41 (1st Cir. 1989).

HOLDING: Double jeopardy is inapplicable in civil forfeiture proceedings.

FACTS: The federal government sought forfeiture of a 17.9-acre tract of land in Massachusetts that was used to cultivate marijuana. The property owners had been convicted previously in Massachusetts state court for criminal possession with intent to manufacture and distribute marijuana. The district court ruled that the government was entitled to forfeiture because the property owner's prior conviction for drug violations collaterally estopped them from protesting forfeiture. The U.S. Court of Appeals for the First Circuit affirmed.

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[108] 959 F.2d at 787-88 (*quoting* Halper, 490 U.S. at 449).

[109] *Id.* at 788.

COURT'S ANALYSIS: The court rejected defendant's argument that the forfeiture violated the Double Jeopardy Clause. Interpreting *Halper*, the court cited three reasons for its decision. First, the court reaffirmed that forfeiture actions are "predominantly civil in nature"[110] and, therefore, the Double Jeopardy Clause does not prevent civil forfeiture proceedings following a criminal case. Second, the Double Jeopardy Clause does not apply to suits brought by separate sovereigns. The criminal conviction occurred in Massachusetts state court, but the forfeiture proceeding was brought in federal court. Finally, the court noted the remedial purpose of forfeiture is to correct the injury to the government from the illicit marijuana operation, not to deter or punish.

Subsequent Proceedings May Be Barred by Either Double Jeopardy or Collateral Estoppel

Relevant Cases

United States v. All Assets of G.P.S. Automotive Corp., 66 F.3d 483 (2d Cir. 1995).

HOLDING: The Double Jeopardy Clause may be violated despite single prosecutions by separate sovereigns when one prosecuting sovereign can be said to be acting as a tool of the other.

FACTS: Skip Schaffer, his wife Grace, and their son Phil jointly owned G.P.S. Automotive Corp. (G.P.S.), an automotive salvage and repair shop in Medford, N.Y. Skip and Phil were responsible for the overall operations of G.P.S. and Phil served as president of the company through 1992.

In June 1990, Suffolk County police began an investigation of G.P.S. after learning that G.P.S. had purchased stolen car parts on a regular basis since 1980. Police officers executed search warrants and seized numerous cars, trucks, and automotive parts. Phil and G.P.S. were tried and convicted in state court on multiple counts of criminal possession of stolen property, illegal possession of Vehicle Identification Numbers (VINs), and falsifying business records.

In January 1991, the federal government filed a civil forfeiture action pursuant to 18 U.S.C. § 981. G.P.S. and Phil moved to dismiss the forfeiture action on the ground that, after their convictions in state court, the forfeiture action was barred by the Double Jeopardy Clause. The district court denied the motion and the case went to trial. In January 1994, after a bench trial, the district court ruled that the assets of G.P.S. and the real property interests of Skip and Phil were to be forfeited to the government. Phil and G.P.S. challenged the forfeiture under the Double Jeopardy Clause, arguing that they were twice punished for the same act. The government argued that the dual sovereignty doctrine permitted the forfeiture. Phil and G.P.S. countered, arguing that an exception to the dual sovereignty doctrine applied. The U.S. Court of Appeals for the Second Circuit remanded the case to the district court for further fact finding.

COURT'S ANALYSIS: The Second Circuit in *38 Whalers Cove Dr.*[111] said that the Double Jeopardy Clause does not apply "when separate governments prosecute the same defendant [because] the defendant has offended both sovereigns."[112] The *G.P.S.* court acknowledged that the dual sovereignty doctrine "rests on the notion that a defendant whose conduct violates the laws of two sovereigns has 'committed two

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[110] 884 F.2d at 42 (*quoting* United States v. $250,000 in U.S. Currency, 808 F.2d. 895,900 (1st. Cir. 1987)).

[111] 954 F.2d. 29 (2nd Cir.), *cert. denied, 506 U.S. 815 (1992).* This case is summarized in this section of the compendium.

[112] 66 F.3d at 493 (*quoting* 38 Whalers Cove Dr., 954 F.2d at 38 (2nd Cir. 1992)).

different offenses by the same act.'"[113] Therefore, a conviction by one sovereign for the offense against it is not a conviction for the different offense against the other sovereign, and double jeopardy does not apply.

However, the U.S. Supreme Court recognized, in *Bartkus v. Illinois*,[114] an exception to the dual sovereignty doctrine. The *Bartkus* exception provides that "'[t]he Double Jeopardy Clause may be violated despite single prosecutions by separate sovereigns when one prosecuting sovereign can be said to be acting as a tool of the other.'"[115] While the court acknowledged that the *Bartkus* exception applies only in extraordinary cases, the court said that there is a factor unique to forfeiture cases that may make it applicable. In forfeiture cases, the state has a significant interest in the outcome of the federal forfeiture proceeding because the state may receive a large portion of the forfeiture proceeds obtained in a federal action. Further, in this case, the Suffolk County district attorney referred the forfeiture case to the U.S. attorney, much of the evidence used in the federal forfeiture action was developed in connection with the state proceedings, and the district attorney was cross-designated as a special assistant U.S. attorney for the purpose of prosecuting the federal forfeiture action. The court said that, in this case, there was a possibility that the state would receive "nearly all, or a disproportionate share, of the forfeiture proceeds."[116]

Further, G.P.S. and Phil argued that the federal forfeiture was instigated by the state and conducted almost exclusively by state officials from state offices. In such a case, the federal government may be serving simply as a "tool" for the advancement of the state's interests. The court remanded the case to the district court to gather more facts concerning the financial arrangements and the division of labor and proceeds between the two sovereigns.

United States v. 38 Whalers Cove Drive, 954 F.2d 29 (2nd Cir.), *cert. denied*, 506 U.S. 815 (1992).

HOLDING: When property that is the subject of forfeiture proceedings is not an instrumentality of the alleged criminal activity *Halper* requires courts to presume that the forfeiture is punitive in nature if the value of the property is overwhelmingly disproportionate to the value of the controlled substances allegedly involved. In such cases, the government may rebut this presumption with an accounting of its losses. The prohibition against double jeopardy does not apply to prosecutions brought by different jurisdictions.

FACTS: In July 1988, Edward Levin twice sold cocaine to a government informant for a total sum of $250. Both sales took place in Levin's Babylon, N.Y., condominium. Levin was arrested and charged with criminal sale of a controlled substance. He subsequently pleaded guilty to the charge and was released on probation. The government instituted forfeiture proceedings against the condominium, which was valued at $145,000 and had approximately $77,000 in outstanding mortgages. The district court denied Levin's motion to dismiss, holding that the forfeiture did not violate the Fifth or Eighth Amendments. The U.S. Court of Appeals for the Second Circuit affirmed.

COURT'S ANALYSIS: The court interpreted *Halper* as requiring an examination of whether the forfeiture is fully justified by remedial goals, or whether a portion of the forfeiture serves punitive goals.

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[113] *Id.*

[114] 359 U.S. 121 (1959).

[115] 66 F.3d at 494 (*quoting* 38 Whalers Cove Dr., 954 F.2d at 38).

[116] *Id.* at 496.

The court held that forfeiture under 21 U.S.C. § 881 will not be presumed punitive in cases in which the seized property was "used substantially" to accomplish illegal activities. However, the forfeiture of property that has not been used as an instrumentality of crime will be *presumed punitive* if "overwhelmingly disproportionate" to the value of the controlled substances allegedly involved. In such cases, the government must provide an accounting to show that the value of the property it seeks to forfeit is proportionate to permissible remedial goals, such as compensating the government for investigation and enforcement expenditures.

The court did not, however, apply its rebuttable presumption rule to this case, but resolved the double jeopardy issue on other grounds. The Double Jeopardy Clause is inapplicable when separate governments punish the same defendant for the same conduct. The state of New York pursued criminal charges, but the federal government sought civil forfeiture. Even if the forfeiture was entirely punitive, the prohibition against double jeopardy did not attach in this case to separate prosecutions brought by different sovereigns. The exception to the dual sovereignty doctrine, under which the Double Jeopardy Clause may be invoked if one "prosecuting sovereign can be said to be acting as a `tool' of the other,"[117] is "not triggered simply by cooperation between the two authorities."[118]

People v. Buonavolanto, 606 N.E.2d 509 (Ill.App. 1992), *cert. denied*, 612 N.E.2d 517 (1993).

HOLDING: When the government previously has failed to satisfy the burden of proof in a civil forfeiture proceeding, it is collaterally estopped from pursuing criminal charges involving the same issues and parties because a higher "reasonable doubt" standard of proof would be required for a conviction.

FACTS: In September 1988, an Illinois narcotics agent arranged to purchase narcotics from Giovanni Dominguez. The agent observed Dominguez enter a Ford Taurus driven by James Buonavolanto. Buonavolanto exited the car, retrieved a bag from a nearby trash can, and went back to the car. Dominguez then returned to the agent with a bag filled with cocaine.

The state of Illinois brought civil forfeiture proceedings against the car owned by Buonavolanto, claiming a violation of Illinois' Controlled Substances Act. The government failed to prove by a preponderance of evidence that the Ford Taurus was used to facilitate the transport of narcotics.

In a subsequent criminal proceeding, Buonavolanto was tried for delivering a controlled substance, and was convicted based upon a finding that he was the driver of the Ford Taurus automobile that was used to transport Dominguez and the cocaine to the site of the drug transaction. The Appellate Court of Illinois reversed.

COURT'S ANALYSIS: The court ruled that the subsequent criminal action was barred by the collateral estoppel doctrine, which prohibits the relitigation of issues decided in prior litigation.

The collateral estoppel doctrine is applicable only if each lawsuit involves the *same parties*. The court found that, although the initial action was a civil forfeiture action brought against the car, Buonavolanto had an interest in the property. Because Buonavolanto was a "nominal party" in the civil forfeiture action and the defendant in the criminal action, the "same parties" requirement was satisfied.

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[117] United States v. Aboumousallem, 726 F.2d 906, 910 (2nd.Cir. 1984) (*quoting* Boutkus v. Illinois, 359 U.S. 121, 123 (1959)).

[118] 954 F.2d at 38.

The collateral estoppel doctrine also only applies if the *same issue* is being litigated in a subsequent proceeding. The court found that the same issue was at stake in the civil forfeiture and criminal actions because both were premised solely upon Buonavolanto's alleged use of the Ford Taurus to transport the narcotics.

Since the government had failed to prove illegal use of the car under the lower "preponderance of the evidence" standard at the civil forfeiture proceeding, it was barred from bringing the criminal proceeding, which would require a higher standard of proof for conviction.

THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT

The Eighth Amendment of the U.S. Constitution restricts the government's ability to impose "excessive fines" as punishment. The U.S. Supreme Court determined in *United States v. Austin*[119] that the Excessive Fines Clause of the Eighth Amendment applies to civil forfeitures of conveyances and real property used to facilitate the transport, sale, or possession of controlled substances, pursuant to 21 U.S.C. § 881(a)(4) and (7).[120] The Court reasoned that historically civil forfeitures had been viewed at least partially as punishment. Therefore, the Excessive Fines Clause could apply even in a civil context.

The High Court declined to establish a multifactor test for determining whether a particular forfeiture is "excessive" in violation of the Eighth Amendment, deciding instead to allow the lower courts to first attempt to establish an appropriate test.

A number of courts have handled with Eighth Amendment challenges to forfeiture since *Austin* and have adopted a variety of approaches to defining constitutionally excessive civil penalties. Some courts have examined the proportionality between the value of the property forfeited and the harm caused by the illegal conduct. Other courts look to Justice Antonin Scalia's concurring opinion in *Austin*, which suggests that the proper inquiry is whether the property was instrumental in the commission of the offense.

Relevant Cases

United States v. Austin, 509 U.S. 602 (1993).

HOLDING: The Excessive Fines Clause of the Eighth Amendment applies to civil forfeitures under 21 U.S.C. §§ 881(4) & (7).

FACTS: In August 1990, Richard Austin was indicted on four counts of violating South Dakota drug laws. Austin pleaded guilty in state court to possession of cocaine with intent to distribute. According to a police affidavit, Austin met Keith Engebretson in Austin's auto body shop in June 1990 and agreed to sell him two grams of cocaine. Austin then left the shop, went to his mobile home, and retrieved the cocaine. The following day, the police executed a search warrant on the body shop and the mobile home and discovered small amounts of marijuana, cocaine, a .22-caliber revolver, drug paraphernalia and $4,700 in cash.

The federal government brought a civil forfeiture action against the property under 21 U.S.C. §§ 881(a)(4) & (7), which permit forfeiture of "conveyances" and "real property" used to facilitate a violation of federal drug laws. The district court rejected Austin's claim that forfeiture would violate the Eighth Amendment and the U.S. Court of Appeals for the Eighth Circuit affirmed. The U.S. Supreme Court reversed and remanded the case to the lower court for a determination of whether the forfeiture was excessive in violation of the Eighth Amendment.

COURT'S ANALYSIS: Unlike the Fifth and Sixth Amendments, the Eighth Amendment is not limited expressly to criminal cases. The Excessive Fines Clause is designed to limit the government's capacity to extract payments as punishment for an offense. In holding that the Eighth Amendment applies to civil

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[119] 509 U.S. 602 (1993).

[120] The Austin case does not apply to forfeitures of contraband, drug paraphernalia, or firearms used to facilitate the transportation, sale, or possession of controlled substances.

forfeitures, the Court relied on its decision in *United States v. Halper*,[121] in which it stated: "The notion of punishment ... cuts across the division between the civil and the criminal law."[122]

The *Austin* Court looked at the history of civil forfeitures and held that "forfeiture serves, at least in part, to punish the owner."[123] The Court refused to establish a multifactor test for determining whether a particular forfeiture is constitutionally excessive, but remanded the question to the lower courts.

Scalia filed a concurring opinion, proposing that the proper test for an excessive forfeiture under § 881 "is ... the relationship of the property to the offense: [Is] it close enough to render the property under traditional standards, 'guilty' and hence forfeitable?"[124]

United States v. Lot 41, Berryhill Farm Estates, 128 F.3d 1386 (10th 1997).

HOLDING: The forfeiture of drug proceeds pursuant to § 881(a)(6) can never be excessive under the Eighth Amendment.

FACTS: Tommy Lee Dunmore was convicted in federal court of conspiracy and attempt to distribute cocaine, distribution of cocaine, income tax evasion, and money laundering. The federal government sought and obtained forfeiture of his home and personal property, alleging that they were obtained with proceeds traceable to his drug trafficking. The U.S. Court of Appeals for the Tenth Circuit affirmed.

COURT'S ANALYSIS: The court ruled that the forfeiture of drug proceeds can never be excessive and stated that its ruling was consistent with those of other circuits. "[T]he forfeiture of proceeds of illegal drug sales serves the wholly remedial purposes of reimbursing the government for the costs of detection, investigation, and prosecution of drug traffickers and reimbursing society for the costs of combating the allure of illegal drugs, unsuccessful, lost productivity, etc."[125] According to the court, "on a macroeconomic level, the estimated proceeds of illegal drug sales are roughly equivalent to the yearly costs drugs inflict on society and government . . . Finally, on a microeconomic level, the forfeiture of drug proceeds, contrasted with the types of properties considered by the Supreme Court in *Austin* extracts from the particular drug trafficker with some precision an amount of money equivalent to the costs that the drug dealer has imposed on society."[126] The court explained further that "the forfeitures of conveyances and real property have no correspondence to, or proportionality with, the costs incurred by the government and society because of the large and unpredictable variance in the values of real estate and conveyances in comparison to the harm inflicted upon government and society by the criminal act. Unlike the real estate forfeiture statute that can result in the confiscation of the most modest mobile home or the stateliest

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[121] 490 U.S. 435 (1989), *overruled in part on other grounds* by Hudson v. United States, 118 S.Ct. 488 (1997) (see "Double Jeopardy and Collateral Estoppel" section of this compendium). It is unclear at the time of this writing what effect the overruling of Halper will have on subsequent case law involving the applicability of the Eighth Amendment to civil forfeiture.

[122] 490 U.S. at 448.

[123] 509 U.S. at 618.

[124] *Id.* at 628.

[125] 128 F.3d at 1395 (quoting United States v. Tilley, 18 F.3d 295, 299 (5th Cir. 1994)).

[126] 128 F.3d at 1395.

mansion, the forfeiture of drug proceeds will always be directly proportional to the amount of drugs sold. The more drugs sold, the more proceeds that will be forfeited."[127]

Proportionality

United States v. Alexander, 509 U.S. 544 (1993).

HOLDING: A proportionality review is required to determine whether a criminal forfeiture violates the Eighth Amendment's prohibition against excessive fines. In determining whether a criminal forfeiture is disproportionate and, therefore, excessive, a court should consider the extent of the defendant's criminal activities and the period of time over which the illegal conduct occurred.

FACTS: Ferris Alexander owned more than a dozen stores and theaters in Minneapolis, Minn., that dealt in sexually explicit materials. He was convicted in 1990 of 17 obscenity counts and three counts of violating the Racketeer Influenced and Corrupt Organizations Act (RICO). The jury found that four magazines and three videos were obscene. The district court ordered Alexander to forfeit his business and $9 million in assets acquired through racketeering activity. The U.S. Court of Appeals for the Eighth Circuit affirmed, ruling that the Eighth Amendment "`does not require a proportionality review of any sentence less than life imprisonment without the possibility of parole.'"[128] The U.S. Supreme Court reversed, ruling that a proportionality review is required under the Excessive Fines Clause. The Court remanded the case to the appellate court for a determination of whether the forfeiture was excessive.

COURT'S ANALYSIS: Relying on *Austin*, the Court ruled that the Excessive Fines Clause limits the government's power to extract payments as punishment for an offense. Criminal forfeiture is a form of monetary punishment, no different from a traditional fine, and is subject to the Eighth Amendment's Excessive Fines Clause. The question of whether the forfeiture was excessive must be considered "in light of the extensive criminal activities that [Alexander] apparently conducted through his enormous racketeering enterprise over a substantial period of time"[129] and not in light of the number of materials found to be obscene.

United States v. 427 & 429 Hall Street, 74 F.3d 1165 (11th Cir. 1996).

HOLDING: A proportionality test should be used for determining whether a civil forfeiture is excessive.

FACTS: In August 1991, a Montgomery, Ala., drug task force received a call from a confidential informant, who claimed that illegal narcotics were being sold at the G & G Grocery, owned by George Jenkins. Over a nine-day period, the confidential informant made two controlled purchases of one-half gram of cocaine, paying $25 for each. Agents then executed a search warrant on the premises and discovered three grams of cocaine and cigarettes containing a total of 0.6 grams marijuana.

Jenkins pleaded guilty in state court to unlawful possession of cocaine and forfeited $1,764, which was found on the premises. The federal government instituted forfeiture proceedings against the store, which was valued at between $60,000 and $65,000. At trial, Jenkins denied selling illegal drugs, claiming

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[127] 128 F.3d at 1395 (quoting Tilley, 18 F.3d at 300)).

[128] Alexander v. Thornburgh, 943 F.2d 825, 836 (8th Cir. 1991) (quoting United States v. Pryba, 900 F.2d 748, 757 (4th Cir.), *cert. denied*, 498 U.S. 924 (1990)).

[129] 509 U.S. at 545.

that he found the cocaine on the steps of his store on the morning of the search. The district court ordered forfeiture of the property. The U.S. Court of Appeals for the Eleventh Circuit affirmed.

COURT'S ANALYSIS: While upholding the forfeiture, the appellate court ruled that the district court had erred in considering both whether the property was an instrumentality of the offense and whether the value of the property forfeited was disproportionate to the offense. According to the appellate court, the Excessive Fines Clause only requires a proportionality review.

Its conclusion was based on the *Austin* Court's reasoning that the clause applies to civil forfeiture; the plain meaning of the clause; and the history of the clause. The court stated that because § 881(a)(7) is intended to punish individuals involved in drug trafficking, an instrumentality test is inappropriate. Furthermore, according to the court, because the Excessive Fines Clause protects individuals punished, the prohibition on excessive fines implies a comparison of the amount of the fine with the acts of the individual. Finally, the court noted that the historical antecedents to the Excessive Fines Clause required a proportionality review.

United States v. 6380 Little Canyon Rd., 59 F.3d 974 (9th Cir. 1995).

HOLDING: Once it is determined that property subject to civil forfeiture was an instrumentality of the offense, the court must determine whether the worth of the property is proportional to the culpability of the owner.

FACTS: Robert Price pleaded guilty in California state court to possession of marijuana for sale after sheriffs discovered a marijuana-growing operation on his property in El Dorado, Calif., in August 1988. After his plea, the federal government sought forfeiture of his 29.6 acres of property. The district court ordered the property forfeited. The U.S. Court of Appeals for the Ninth Circuit remanded the case to the district court for a determination of whether the forfeiture was excessive under the test it established.

COURT'S ANALYSIS: The court rejected an instrumentality test as the sole test for excessiveness because of the potentially harsh results. It adopted a "proportionality test as a check on the instrumentality approach."[130] The court noted, however, that an instrumentality test is required as a threshold -- if the government fails to show a substantial connection between the property and the offense, the forfeiture is invalid. Once a substantial connection has been established, the claimant has the burden of showing that the forfeiture would be grossly disproportionate given the nature and extent of his criminal culpability.

The court cited the following reasons for its adoption of a proportionality test: civil forfeiture is intended to punish; "it is difficult to imagine, apart from a wholly arbitrary 'ceiling figure,' how a fine could ever be found 'excessive' without some analysis of the relationship between the penalty and the offense for which it is imposed;"[131] the majority in *Austin* refused to endorse the instrumentality test as the sole measure of excessiveness; *Alexander* suggests that a proportionality test is required under the Excessive Fines Clause; and because civil forfeitures are a source of revenue for the government, "it makes more sense to scrutinize governmental action more closely when the state stands to benefit."[132]

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[130] 59 F.3d at 983.

[131] *Id.* (quoting Lyndon F. Bittle, Comment, *Punitive Damages and the Eighth Amendment: An Analytical Framework for Determining Excessiveness*, 75 CAL. L. REV. 1433, 1450 (1987)).

[132] 59 F.3d at 984 (quoting Harmelin v. Michigan, 501 U.S. 957, 978 n. 9 (1991)).

In determining the harshness of the forfeiture, the court should consider the fair market value of the property; the intangible, subjective value of the property; and the hardship to the defendant. In determining the culpability of the owner, the court should consider whether the owner was negligent or reckless in allowing the illegal use of his property; whether the owner was directly involved in the illegal activity, and to what extent; and the harm caused by the illegal activity.

Finally, the court concluded, "[i]n any instance in which the forfeiture of a single tract would contravene the Excessive Fines Clause, the court should limit it to an appropriate portion or the more poisonously tainted portion of the property."[133]

United States v. 9638 Chicago Heights, 27 F.3d 327 (8th Cir. 1994).

HOLDING: Although the appellate court did not articulate a test for determining whether a civil forfeiture is excessive because it ruled that the forfeiture of the property violated the Due Process Clause, the court noted its dissatisfaction with the instrumentality test used by the district court.

FACTS: Carol Long was convicted in Missouri state court of selling approximately two grams of cocaine. The federal government sought forfeiture of her residence located in St. Louis where the illegal activity occurred. The property was valued at $37,210. The district court ordered the property forfeited. On appeal, the U.S. Court of Appeals for the Eighth Circuit reversed, ruling that Long had not received notice and a hearing prior to the forfeiture.

COURT'S ANALYSIS: The court stated that even though it need not reach the issue of excessiveness, it felt compelled to point out its dissatisfaction with instrumentality test employed by the district court. According to the appellate court, the instrumentality test failed to consider "the monetary value of the property, the extent of criminal activity associated with the property, the fact that the property was a residence, the effect of forfeiture on innocent occupants of the residence, including children, or any other factors that an excessive fine analysis might require."[134]

United States v. Premises RR No. 1, Box 224, 14 F.3d 864 (3d Cir. 1994).

HOLDING: In determining whether a forfeiture is excessive, a trial court should consider not only the nexus between the property and the criminal act but also whether the forfeiture is disproportionate to the alleged criminal activity.

FACTS: Christopher Winslow was convicted of possession with intent to distribute in August 1992. Evidence introduced at the trial indicated that Winslow used a phone in his Lackawanna County, Pa., home to arrange drug transactions and that he stored cocaine and scales there as well. Several individuals testified that they purchased cocaine numerous times from Winslow at his home. One witness identified 40 checks he had written as payment for cocaine.

The jury could not agree on the criminal forfeiture of Winslow's home, and the district court granted a mistrial on this issue. The government subsequently instituted civil forfeiture proceedings against the house, and the district court ordered forfeiture of the property. The U.S. Court of Appeals for the Third Circuit reversed the lower court's forfeiture order and remanded the case to the trial court for further

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[133] 59 F.3d at 987.

[134] 27 F.3d at 331.

proceedings. The appellate court provided guidance to the trial court for determining whether the forfeiture was excessive.

COURT'S ANALYSIS: The court noted that Scalia in his concerning opinion in *Austin* said that the relevant test for determining whether a forfeiture is excessive is the relationship of the property to the offense. The Third Circuit cautioned, however, that this "is by no means the only possible inquiry."[135]

The court said one possible test for determining proportionality is to assess the "`costs and damages attributable to the criminal misconduct of the claimant[,]' costs of investigation and detection, as well as a reasonable allocation of the general cost of enforcing the statute that had been violated."[136]

The court also mentioned the following factors outlined in *Solem v. Helm*:[137] "(I) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[138]

The court stated that, while a court does not need to take all three factors into account in every case, some proportionality analysis is necessary. Other factors to consider include: the personal benefit reaped by the defendant, the defendant's motive and culpability, and the extent that defendant's interest and the enterprise itself are tainted by criminal conduct.

Under the last potential method for analyzing the excessiveness of the forfeiture mentioned by the court, the value of the property to be forfeited would be compared to the potential fine permitted under the federal sentencing guidelines for the alleged criminal offense. However, this method may require the government to prove the amount of drugs that actually were distributed from the property.

Instrumentality

U.S. v. Chandler, 36 F.3d 358 (4th Cir. 1994).

HOLDING: In determining whether civil forfeiture is excessive under Eighth Amendment, a court must apply a three-part instrumentality test that considers the nexus between the offense and the property and the extent of the property's role in the offense, the role and culpability of owner, and the possibility of separating the offending property from the remainder of property.

FACTS: In July 1991, the federal government instituted civil forfeiture proceedings against 33 acres of property known as Little River Farms in Orange County, N.C., on the grounds that it had been used to commit or facilitate the commission of drug offenses. The property was owned by Robert H. Chandler, II and valued at approximately $569,000. Government witnesses testified that they had distributed, packaged, sold, purchased, and used controlled substances, including marijuana, cocaine, and Quaaludes, on the property. Among other things, they testified that Chandler had paid them in marijuana and cocaine

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[135] 14 F. 3d at 873.

[136] 14 F.3d at 874 (quoting 38 Whalers Cove Dr., 954 F.2d 29, 35-36 (2nd Cir. 1992)). (38 Whalers Cove Dr. is summarized in the section of this compendium titled "Double Jeopardy & Collateral Estoppel.")

[137] 14 F.3d at 873.

[138] 463 U.S. 277 (1983).

for work they had done on the property. The district court ordered the property forfeited. The U.S. Court of Appeals for the Fourth Circuit affirmed.

COURT'S ANALYSIS: The court ruled that the proper test for determining whether a forfeiture is excessive is a three-part instrumentality test that considers the nexus between the offense and the property and the extent of the property's role in the offense, the role and culpability of owner, and the possibility of separating the offending property from the remainder of the property. In measuring the nexus between the property and the offense, a court may consider whether the use of the property was deliberate or merely incidental; whether the property was important to the success of the illegal activity; the time during which the property was illegally used and spacial extent of its use; whether its illegal use was an isolated event or had been repeated; and whether the purpose of acquiring, maintaining, or using the property was to carry out the illegal activity. While no factor is dispositive, the court said to sustain a forfeiture "the court must be able to conclude, under the totality of circumstances, that the property was a substantial and meaningful instrumentality in the commission of the offense."[139]

The court noted that the Congress in enacting the civil forfeiture statute "did not intend to punish or fine by a particular amount or value; instead it intended to punish by forfeiting property of whatever value which was tainted by the offense. Accordingly, the constitutional limitation on the government's action must be applied to the degree and the extent of the taint, and not to the value of the property of the gravity of the offense."[140]

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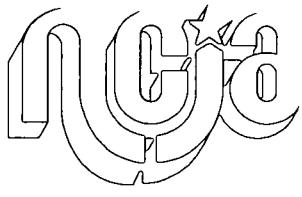
[139] 36 F.3d at 365.

[140] 36 F.3d at 364.



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