U.S. Department of Justice
Criminal Division
*Asset Forfeiture and Money Laundering Section*

# Quick Release

A Monthly Survey of Federal Forfeiture Cases

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## Money Judgment / Substitute Assets / Excessive Fines

- **First Circuit upholds the Government's right to seek a money judgment against a criminal defendant for the amount of criminal proceeds obtained and to satisfy the money judgment by forfeiting substitute assets.**

- **To obtain substitute assets, the Government need only submit a motion and affidavit reciting its efforts to locate the directly forfeitable property.**

- **Forfeiture of substitute assets is solely a matter for the court. The defendant's procedural rights are satisfied by having the jury determine the amount of the money judgment, which sets an upper limit on the value of the substitute property that may be forfeited.**

- **The Government may begin a forfeiture with a civil seizure and then switch to criminal forfeiture once an indictment is returned.**

- **The Government may also strike property listed in the forfeiture count of an indictment and seek its forfeiture as a substitute asset if the prosecutor concludes that there is insufficient evidence to establish a nexus between the property and the offense.**

- **Codefendants are jointly and severally liable for forfeiture of drug proceeds. Ordering even a minor participant to forfeit the full amount of the proceeds does not violate the Excessive Fines Clause.**

Defendant and several codefendants were convicted of a drug conspiracy. The jury returned a special verdict finding that the defendants had obtained $6,000,000 in drug proceeds, and the court entered a money judgment finding each of the defendants jointly and severally liable for forfeiture of that amount. The Government then moved to satisfy the judgment, in part, by forfeiting Defendant's real property, valued at $169,000, as a substitute asset. The court granted the motion and included the substitute property in a final order of forfeiture.

Defendant raised numerous objections to the forfeiture order and appealed. The **First Circuit** affirmed the forfeiture in all respects.

### Notice

- ***City of West Covina v. Perkins***, ___ U.S. ___, 119 S. Ct. 678 (1999) Feb. 1999
- ***Clymore v. United States***, ___ F.3d ___, No. 97-2319, 1999 WL 3366 (10th Cir. Jan. 6, 1999) Feb. 1999

***Whiting v. United States***, ___ F. Supp. 2d ___, No. CIV-A-98-11907-REK, 1998 WL 847933 (D. Mass. Nov. 30, 1998) Jan. 1999

- ***Yskamp v. DEA***, 163 F.3d 767 (3d Cir. 1998) Feb. 1999

### Plea Agreements

***Nichols v. United States***, No. 96-6703, 1998 WL 792049 (6th Cir. Nov. 2, 1998) (Table) (unpublished) Jan. 1999

### Post and Walk

***United States v. 408 Peyton Road***, 162 F.3d 644 (11th Cir. 1998) (*en banc*) Jan. 1999

- ***United States v. Land, Winston County***, 163 F.3d 1295 (11th Cir. 1998) Feb. 1999

### Pretrial Restraint

***United States v. Kouri-Perez***, No. 97-091(JAF) (D.P.R. Dec. 14, 1998) (unpublished) Jan. 1999

### Probable Cause

- ***United States v. $9,041,598.68***, 163 F.3d 238 (5th Cir. 1998) Feb. 1999

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- ***Clymore v. United States***, ___ F.3d ___, No. 97-2319, 1999 WL 3366 (10th Cir. Jan. 6, 1999) Feb. 1999

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- ***City of West Covina v. Perkins***, ___ U.S. ___, 119 S. Ct. 678 (1999) Feb. 1999

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- ***Clymore v. United States***, ___ F.3d ___, No. 97-2319, 1999 WL 3366 (10th Cir. Jan. 6, 1999) Feb. 1999

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### Substitute Assets

- ***United States v. Candelaria-Silva***, ___ F.3d ___, Nos. 96-1711, 96-1712, 96-1713, 96-1714, 96-2275, 96-2362, 96-2364, 1999 WL 16782 (1st Cir. Jan. 22, 1999) Feb. 1999
- ***United States v. Sokolow***, Crim. No. 93-394 (E.D. Pa. Jan. 4, 1999) (unpublished) Feb. 1999

***United States v. Stewart***, No. 96-583 ,1998 WL 961363 (E.D. Pa. Dec. 11, 1998) (unpublished) Jan. 1999

### Summary Judgment

***United States v. One 1987 Velocity Aircraft***, No. 97-CV-1906 BTM (S.D. Cal. Dec. 2, 1998) (unpublished) Jan. 1999

Nor is there anything wrong with the Government's shifting theories of criminal forfeiture from direct forfeiture to substitute assets. The prosecutor's decision to strike the real property from the forfeiture allegation before submitting the forfeiture issue to the jury was "entirely proper in light of the prosecutor's conclusion that there was insufficient evidence to support direct forfeiture under § 853(a)."

Finally, Defendant objected that the forfeiture violated the Excessive Fines Clause of the Eighth Amendment. The court held, however, that it is "well-established that criminal defendants are jointly and severally liable for forfeiture of the full amount of the proceeds of their criminal offense, and that the imposition of such a forfeiture judgment does not constitute an unconstitutionally excessive fine." It was true, the court noted, that Defendant was a relatively minor player in the drug conspiracy, but her role was sufficient to justify holding her liable for the full forfeiture. Moreover, the court concluded, Defendant did not object to the $6,000,000 money judgment, but only to the forfeiture of the real property as a substitute asset. Defendant could not "seriously argue," the court said, "that the forfeiture of property valued at [$169,000] is grossly disproportional to the gravity of a drug conspiracy that realized million of dollars in proceeds."

—*SDC*

***United States v. Candelaria-Silva***, ___ F.3d ___, Nos. 96-1711, 96-1712, 96-1713, 96-1714, 96-2275, 96-2362, 96-2364, 1999 WL 16782 (1st Cir. Jan. 22, 1999). Contact: AFMLS Assistant Chief Stefan D. Cassella, CRM00.WTGATE.scassell.

# Excessive Fines / FIRREA Forfeiture / Innocent Owner

■ **Ninth Circuit holds that property acquired with the proceeds of a false loan application constitutes proceeds of bank fraud and are subject to forfeiture under 18 U.S.C. § 981(a)(1)(C); but the forfeiture is unconstitutionally excessive if the bank suffers no loss.**

Claimant, a 70-year-old widow, applied for a residential mortgage loan for $322,500 on Defendant real property. She claimed at trial that the loan papers were prepared by her nephew and broker. These papers included an unsigned loan application grossly overstating her income, omitting outstanding liabilities, and stating that she had lived on the property for the last 14 years when, in fact, she had resided on the property for three years. Unsigned tax returns for the three-year period were submitted to support her fraudulent claim of income. The returns had been prepared by a CPA but the CPA's cover letter stating that the returns did not purport to represent copies of returns actually filed with the Internal Revenue Service (IRS) had been removed prior to submission of the returns to the lender, a stamp on the face of the returns to the same effect had been obliterated, and the dates of preparation had been removed or changed.

Because of the amount of the loan, the mortgage company submitted the application and supporting documents to its underwriter, an FDIC-insured bank, for approval. The bank approved the loan but required Claimant to sign the loan application and tax returns at closing. As Claimant was signing these documents, she noticed that the tax returns bore the preparer's signature of a person (the CPA) different than the person who had prepared the returns actually submitted to the IRS for the tax years in question.

The district court granted the Government's motion for summary judgment of forfeiture of the property under 18 U.S.C. § 981(a)(1)(C) as proceeds of a false-statement-to-a-financial-institution offense and mail and wire fraud offenses affecting a financial institution. The district court granted claims for tax liens and for the outstanding principal and balance on the fraudulently obtained mortgage; Claimant's remaining equity interest (just over $200,000) was forfeited to the Government. The district court declined to consider Claimant's pre-*Bajakajian* Excessive Fines challenge on grounds that the forfeiture of criminal proceeds can never be constitutionally excessive. A divided **Ninth Circuit** panel affirmed in part and reversed in part.

The panel unanimously agreed that the Government established probable cause for forfeiture of the property—*i.e.*, that the property was traceable to the proceeds of offenses under 18 U.S.C. §§ 1014, 1341, and 1343. In doing so, it upheld the use of inadmissible hearsay in the agent's affidavit to establish probable

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• ***Yskamp v. DEA***, 163 F.3d 767 (3d Cir. 1998) Feb. 1999

### Administrative Forfeiture

• ***Clymore v. United States***, ___ F.3d ___, No. 97-2319, 1999 WL 3366 (10th Cir. Jan. 6, 1999) Feb. 1999

***Whiting v. United States***, ___ F. Supp. 2d ___, No. CIV-A-98-11907-REK, 1998 WL 847933 (D. Mass. Nov. 30, 1998) Jan. 1999

• ***Yskamp v. DEA***, 163 F.3d 767 (3d Cir. 1998) Feb. 1999

### Adverse Inference

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### Ancillary Proceeding

***United States v. Pegg***, Crim. No. 97-CR-30(HL) (M.D. Ga. Dec. 9, 1998) (unpublished) Jan. 1999

• ***United States v. Sokolow***, Crim. No. 93-394 (E.D. Pa. Jan. 4, 1999) (unpublished) Feb. 1999

***United States v. Stewart***, No. 96-583 ,1998 WL 961363 (E.D. Pa. Dec. 11, 1998) (unpublished) Jan. 1999

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• ***Wilson v. Blankenship***, 163 F.3d 1284 (11th Cir. 1998) Jan. 1999

### Burden of Proof

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### Circumstantial Evidence

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### CMIR Forfeitures

• ***United States v. $273,969.04 in U.S. Currency***, ___ F.3d ___, No. 95-55882, 1999 WL 2580 (9th Cir. Jan. 6, 1999) Feb. 1999

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• ***United States v. Any and All Radio Station Transmission Equip.***, ___ F.Supp. 2d ___, No. 98-CV-74368-DT, 1998 WL 884468 (E.D. Mich. Nov. 6, 1998) Feb. 1999

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• ***Boggs v. Rubin***, 161 F.3d 37 (D.C. Cir. 1998) Feb. 1999

### Customs Forfeiture

• ***United States v. $273,969.04 in U.S. Currency***, ___ F.3d ___, No. 95-55882, 1999 WL 2580 (9th Cir. Jan. 6, 1999) Feb. 1999

In a footnote, the majority noted in dictum that because the Government conceded that claimant would be entitled to a jury trial on any issue of material fact, this would "presumably . . . include any disputed factual issues material to the excessiveness inquiry."

—*HSH*

***United States v. 3814 Thurman Street,*** ___ F.3d ___, No. 97-35054, 1999 WL 2548 (9th Cir. Jan. 5, 1999). Contact: AUSA Bob Nesler (D. Ore.), CRM00.WTGATE.bnesler.

**Comment:** What has *Bajakajian* wrought? The majority's conclusion that forfeiting a claimant's interest in property directly traceable to the proceeds of criminal activity may be constitutionally excessive—coupled with its "suggestion" (the case was remanded for further proceedings consistent with this opinion) that the forfeiture might be mitigated from the $200,000 value of claimant's equity interest to some amount within the "Guidelines" range of $500 to $5,000—is impossible to reconcile either with *Bajakajian* or the uniform body of pre-*Bajakajian* forfeiture law holding that forfeiture of the proceeds of crime is remedial and can never be considered constitutionally excessive. Even Judge Reinhardt of the Ninth Circuit, prior to *Bajakajian*, observed with respect to a "proceeds forfeiture" that "I might just note for the record that it appears to me that were we to reach the Eighth Amendment claims we would be required to reject it." *United States v. $405,089.23 U.S. Currency*, 122 F.3d 1285 (9th Cir. 1997).

More importantly, the eight-justice majority of the Supreme Court in *United States v. Ursery* observed that "proceeds" forfeitures serve the remedial "goal of ensuring that persons do not profit from their illegal acts," *id.* at 291, and Justice Stevens, the lone dissenter on other issues, readily concurred on this point, *id.* at 298. These are the same justices who decided *Bajakajian*. Although *Ursery* involved application of the Double Jeopardy Clause of the Fifth Amendment while *Bajakajian* involved the Excessive Fines Clause of the Eighth Amendment, it is noteworthy—to say the least—that the four dissenters in *Bajakajian*, a non-proceeds case, declared that:

> As a rule, forfeitures of criminal proceeds serve the nonpunitive ends of making restitution to the rightful owners and of compelling the surrender of property held without right or ownership. *See United States* v. *Ursery*, 518 U.S. 267, 284, 116 S. Ct. 2135, 2145, 135 L. Ed. 2d 549 (1996). Most forfeitures of proceeds, as a consequence, are not fines at all, let alone excessive fines.

118 S. Ct. at 2044 (dissenting opinion of Justice Kennedy). The five-justice majority did not contest this statement. Given this statement concurred in by four justices in *Bajakajian*, the silence of the *Bajakajian* majority on the issue, and the unanimous holding in *Ursery*, it seems clear that the forfeiture, whether criminal or civil, of the proceeds of crime, or property traceable thereto, should never be deemed constitutionally excessive and may, in fact, be entirely exempt from limitation under the Excessive Fines Clause as suggested by the dissenters in *Bajakajian*.

In *Thurman Street*, the record apparently established that the claimant faced foreclosure on the defendant property as a consequence of over $200,000 in liabilities against her true income over three years of only $27,286. The crimes from which she benefitted—and as to which she was at least willfully blind as affirmed by the panel—may now result in her pocketing anywhere from $195,000 to $199,500 (if the district court mitigates the forfeiture to the "Guidelines range" of related criminal fines). Even assuming that she might have had some equity remaining had foreclosure gone forward at the time she applied for the loan, it appears indisputable that rather than suffering a constitutionally excessive fine, she will realize a windfall to which she has no legal entitlement as a consequence of the criminal activity to which she was at least willfully blind.

Finally, the majority's dictum that issues of material fact concerning constitutional excessiveness should be tried to the jury contradicts a substantial body of jurisprudence under the Excessive Fines Clause which holds that the constitutional challenge is to be made post-verdict or post-judgment and tried to the court.

—*HSH*

(unpublished). Contact: Richard Hoffman, CRM00.WTGATE.rhoffman3.

**Comment:** The opinion was placed under seal when decided and was unsealed in January 1999.

## Substitute Assets / Ancillary Proceeding

■ **Four-year delay between entry of a criminal order of forfeiture and a motion to forfeit property as substitute assets does not violate due process.**

The Government obtained a criminal forfeiture order against the defendant in 1995. Almost four years later, the Government moved to forfeit certain property as a substitute asset to satisfy the order of forfeiture. Defendant complained that the four-year delay in seeking substitute assets violated his due process rights under the Supreme Court's decision in *United States v. $8,850*, 461 U.S. 555 (1983).

The court held that *$8,850* was inapplicable to this case. In the pretrial context to which *$8,850* applies, the Government is depriving a citizen of the use and enjoyment of his property without providing him with a forum to reclaim it. In contrast, in the post-conviction context, "the [G]overnment is a judgment creditor seeking to enforce the judgment." Without deciding how much a delay between the entry of an order of forfeiture and the filing of a motion to forfeit substitute assets might be too long, the court held that a four-year delay was "well within the time limits."

The court concluded, however, that, when property is added to an order of forfeiture as substitute assets, the Government must conduct a new ancillary proceeding to give third parties the opportunity to challenge the forfeiture. Thus, the court granted the Government's motion to amend the order of forfeiture and ordered the Government to commence an ancillary proceeding under 21 U.S.C. § 853(n). —*SDC*

***United States v. Sokolow***, Crim. No. 93-394 (E.D. Pa. Jan. 4, 1999) (unpublished). Contact: AUSA Sarah Grieb, CRM00.WTGATE.sgrieb.

## Communications Act of 1934

■ **In a civil forfeiture action under the Communications Act of 1934 against radio equipment being operated without a license, the district court held that the Act required claimant to present his First Amendment arguments to the court of appeals, not to the district court.**

■ **The district court rebuffed Claimant's attempt to invoke the doctrine of primary jurisdiction to require the United States to present its forfeiture arguments in the first instance to the FCC. But the court invoked that doctrine in ruling that Claimant had to present his attacks on the FCC rules and regulations to the FCC and not in the context of a forfeiture action.**

■ **Claimant was not entitled to notice and a hearing prior to the seizure of his radio transmitting equipment.**

The United States brought suit, pursuant to 47 U.S.C. § 510, part of the Communications Act of 1934 (the Act), to forfeit radio station transmission equipment because it was being used by an unlicenced FM station. The district court denied claimant's motions to dismiss the complaint, to quash the *in rem* warrant and for a preliminary injunction.

Claimant argued that his constitutional rights were violated when the equipment was "arrested" without

The panel next addressed the "excessiveness" challenge. It held that its conclusion that the forfeitures were not "punishment" for double jeopardy purposes was not controlling as to whether the forfeitures were sufficiently "punitive" to be subject to limitation under the Excessive Fines Clause. Turning first to the CMIR forfeiture, the panel found that such forfeitures were punitive at least in part, citing the absence of any limit on the forfeiture and the fact that forfeiture was tied to a criminal violation. It thus concluded that such forfeitures are subject to "excessiveness" limitation. However, it found that the record was not sufficiently developed for application of the *Bajakajian* "gross disproportionality" standard. It cited, as an example, the absence of any finding as to whether or not the currency was illegally acquired or intended for an unlawful purpose. It thus vacated the CMIR forfeiture and remanded it to the district court for a "gross disproportionality" determination.

The panel indicated that forfeiture of the jewelry under 19 U.S.C. § 1497 might also be found sufficiently punitive to be subject to the Excessive Fines Clause under the *Bajakajian* rationale. However, it found that it was barred from reaching this conclusion by the *Bajakajian* Court's statement that forfeitures under section 1497 are "entirely remedial and thus nonpunitive." 118 S. Ct. at 2041 n.19 (citing *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972)). The panel thus affirmed forfeiture of the jewelry, stating that "[s]ection 1497 fails the precondition for application of the Excessive Fines Clause."

—*HSH*

***United States v. $273,969.04 U.S. Currency***, ___ F.3d ___, No. 95-55882, 1999 WL 2580 (9th Cir. Jan. 6, 1999). Contact: AUSA Carla Ford (C.D. Cal.), CRM00.WTGATE.cford3.

**Comment:** This panel's somewhat extended double jeopardy analysis under the *Hudson* standard is surprising given that the issue could have been disposed of under the *Blockburger* "different elements" analysis. The claimant's prior criminal conviction was under the "false statement" statute and the subsequent civil forfeitures were under the CMIR civil forfeiture statute and a Customs smuggling statute. Thus, there would be no double jeopardy bar under *Blockburger*. *See United States v. Woodward*, 469 U.S. 105 (1985) (per curiam) (a person may properly be convicted of both a CMIR offense and a "false statement" offense even though both offenses arose out of the same transaction, incident, or course of conduct).

The panel—in stating that "[s]ection 1497 fails the *precondition* for application of the Excessive Fines Clause" (emphasis added)—effectively holds that civil *in rem* forfeitures under the customs smuggling statute, 19 U.S.C. § 1497, are entirely exempt from limitation under the Excessive Fines Clause. The Asset Forfeiture and Money Laundering Section believes that the same rule should apply to civil *in rem* forfeiture under other customs smuggling statutes that are devoid of any scienter element.

The same, at least arguably, should be true as to civil *in rem* forfeitures under the CMIR statute, 31 U.S.C. § 5317, which, like the customs smuggling forfeiture statutes, contains no scienter element. *Bajakajian*, which subjected a CMIR forfeiture to limitation under the Excessive Fines Clause, arguably would be distinguishable on grounds that it involved an *in personam* criminal forfeiture which may be imposed only as a consequence of conviction of the owner for a CMIR offense upon proof of criminal scienter beyond a reasonable doubt. Thus, one might argue that civil CMIR forfeitures—which, like customs smuggling forfeitures, do not turn on owner culpability—are remedial in nature, whereas criminal CMIR forfeitures, which may only be imposed upon clear proof of owner culpability, are punitive in nature. Support for this distinction might be drawn from the rationale of the *Bajakajian* majority and from *One Lot Emerald Cut Stones*, which the *Bajakajian* majority cited with evident approval. However, the Ninth Circuit panel in *$273,969.04* implicitly rejects this view. —*HSH*

(summarized in the *Quick Release*, October 1998, at 2-3), have ruled that, when the statute of limitations for forfeiture has expired, the proper remedy for inadequate notice of administrative forfeiture is for the court to consider the forfeiture on the merits. Another panel of the Tenth Circuit held the same thing in *Juda v. Nerney*, 149 F.3d 1190, 1998 WL 317474 (10th Cir. 1998) (Table) (if notice is inadequate, court should proceed directly to the merits). —*JHP*

# Search and Seizure / Due Process / Notice

■ **Supreme Court holds that officers who seize property from a private residence are not required to leave behind notice of what procedures exist to file a claim to recover the seized property.**

Local police officers executed a search warrant at a private residence. Neither the owner of the residence nor any members of his family were present at the time the residence was searched. The officers were looking for evidence belonging to a former boarder at the residence whom they suspected of murder.

The police seized a photograph of the boarder, an address book, a shotgun, a starter pistol, ammunition and about $2,629 in cash. The officers left behind a "Notice of Service" stating that the residence had been searched by the local police department pursuant to a warrant, the date of the search, the name of the judge that issued the warrant, the names and phone numbers of three police officers to contact for further information, and an itemized list of the property seized. It did not include the warrant number because the warrant remained under seal. In a public index maintained by the court clerk, however, the warrant was recorded by both the address of the residence searched and the search warrant number.

Not long after the search, the owner of the residence contacted one of the detectives by telephone to inquire about seeking return of the seized property. He was told that he had to obtain a court order. The owner later went to the court to contact the judge who had issued the warrant but was told that the judge was on vacation. He tried to have another judge release the property but was told the judge had nothing under the owner's name. The owner thereupon filed suit in federal district court against the municipality and police officers who had conducted the search, alleging violations of the Fourth Amendment premised on lack of probable cause, exceeding the scope of the warrant, and an alleged city policy of permitting unlawful searches. The district court granted summary judgment to the city and its officers but requested supplemental briefing on an issue not previously raised: whether available remedies for the return of seized property adequately satisfied due process.

The district court ultimately found that the available remedies comported with due process and reaffirmed its order of summary judgment. The Ninth Circuit reversed on due process grounds. The panel held that the city was required to give notice of state procedures for return of property and the information necessary to invoke those procedures. It further held that the notice must include, in addition to the information contained on the notice actually left by the police officers: the procedure for contesting the seizure or retention of the property; additional information for implementing that procedure in the appropriate court; the search warrant number or a statement that the search warrant is sealed and, in the latter event, the means for identifying the court file; and the necessity of filing a written notice or motion to the court stating why the property should be returned. The **Supreme Court** unanimously reversed.

The Court found that the "expansive notice requirement" imposed by the Ninth Circuit "lacks support in our case law and mandates [a form of ] notice not now prescribed by the Federal Government or by any one of the 50 states." It held that due process only requires law enforcement agents, upon seizing property pursuant to a warrant, to "take reasonable steps to give notice that the property has been taken" so as to permit the owner to pursue available remedies for its return. The court found no requirement in due process for individualized notice of remedies which are generally available in published state rules, statutes, and case law. Notice of remedies is required only when the procedures are arcane or not set forth in any publicly-

went on to list what steps the Government could take in the future to preserve its interest in real property without committing a *Good* violation. "The [G]overnment may file a *lis pendens* and may post on the property a summons, a copy of the verified complaint for forfeiture, and a notice of the forfeiture action. This provides notice to the owner without seizing the property. Such notice could even indicate that a warrant of arrest *in rem* will be sought in the future by the [G]overnment."

The court then turned to Claimant's remedy for the *Good* violation. In *Peyton Woods*, the court held that the proper remedy is not dismissal of the forfeiture action; to the contrary, a claimant's only remedy is "the return of any rents received or other proceeds realized from the property during the period of illegal seizure." Accordingly, the panel remanded the case to the district court to determine whether Claimant was deprived of any rents or other proceeds.

The court then turned to Claimant's Eighth Amendment claim. It noted, as a threshold matter, that Claimant had properly preserved her Eighth Amendment claim by stating it as an affirmative defense in her answer to the Complaint, and by incorporating her answer in her response to the Government's motion for summary judgment. The court's discussion suggests that if Claimant had not taken these steps, her Eighth Amendment claim would have been waived.

The court also noted that it is unclear whether the Supreme Court's decision in *Bajakajian* applies to civil forfeiture cases. But it held, based on prior Eleventh Circuit law, that the Excessive Fines Clause does apply to forfeitures under section1955(d). The panel also noted that the Eleventh Circuit's excessiveness test under *United States v. One Parcel Property Located at 427 and 429 South Hall Street*, 74 F.3d 1165 (11th Cir. 1996), is a "pure proportionality" test that is very similar to the "gross disproportionality" test articulated by the Supreme Court in *Bajakajian.* Thus, the panel remanded the case to the district court to determine, in the first instance, whether the forfeiture of the real property constituted an excessive fine.

Finally, Claimant argued that the application of the probable cause standard of proof in a civil forfeiture case is unconstitutional. In response, the court simply noted that Eleventh Circuit precedents have repeatedly recognized the constitutionality of 19 U.S.C. § 1615, the statute from which the probable cause standard is derived. Thus, the court affirmed the district court's use of the probable cause standard of proof. —*SDC*

***United States v. Land, Winston County***, 163 F.3d 1295 (11th Cir. 1998). Contact: AUSA James D. Ingram (N.D. Ala.), CRM00.WTGATE.jingram3.

**Comment:** While the situation in the Eleventh Circuit regarding the "post and walk" policy is becoming clearer, this opinion still leaves uncertain whether the Government may post the property with an arrest warrant *in rem* that avoids any language authorizing a seizure, or whether, as the panel seems to suggest, the proper procedure is to post the property with "a summons, a copy of the verified complaint for forfeiture, and a notice of the forfeiture action" that indicates "that a warrant of arrest *in rem* will be sought in the future." The obvious question, of course, is what is the purpose of getting an arrest warrant *in rem* "in the future?" Prosecutors in the Eleventh Circuit are urged to consult with each other and with the Asset Forfeiture and Money Laundering Section on this matter. —*SDC*

## Administrative Forfeiture / 21 U.S.C. § 877 / Excessive Fines / Innocent Owner / Notice / *Good* Hearing

- **Judicial review under 21 U.S.C. § 877 of administrative forfeiture is not a review *de novo* of the merits of the agency's decision not to return forfeited property.**

- **Million-dollar aircraft used to transport illegal drugs was properly forfeited administratively pursuant to 19 U.S.C. § 1607(a)(3) despite 19 U.S.C. § 1607(a)(1)'s general**

The district court also acted properly in granting the Government's motion to stay the civil forfeiture case until Abrego's criminal prosecution was completed. Even though Claimant was not the defendant in the criminal case, the two cases were sufficiently related, within the meaning of sections 981(g) and 881(i), to justify the stay. Moreover, it was proper, in the circumstances, for the district court to receive the Government's evidence in support of the stay *ex parte,* and to review it *in camera*. Claimants in civil forfeiture cases, the panel noted, have no rights under the Sixth Amendment's confrontation clause. "As a result, submission of evidence *ex parte* is more readily justified in a civil forfeiture action than in a criminal case."

The panel also found no error in the district court's refusal to give Claimant access to the sealed affidavit that the Government submitted in support of its initial seizure warrant. The only purpose access to the affidavit would serve, the court said, was to allow Claimant to move to suppress the seized money for lack of probable cause. But the Government never sought to admit the seized money into evidence in the trial. Lack of probable cause for the seizure will result in the suppression of the seized evidence at trial, but it has "no further bearing on the forfeitability of the property." Therefore, Claimant could not have suffered any prejudice from the lack of access to the original probable cause affidavit.

Finally, the court found no error in the admission of the testimony of the two witnesses over Claimant's objection. The testimony of a person who has first-hand knowledge that drug traffickers pay bribes to Mexican officials is relevant to whether the money Claimant deposited into his Texas bank account was forfeitable under sections 881 and 981, even though the witness did not know of any bribes that had been paid to Claimant personally. And the Government agent was properly permitted to offer an opinion, as an expert on money laundering, that the evidence he had heard during the course of the trial was consistent with the way drug money is laundered.

Accordingly, the forfeiture of the full $9 million was affirmed.

—*SDC*

***United States v. $9,041,598.68***, 163 F.3d 238 (5th Cir. 1998). Contact: AUSAs Sue Kempner and Paula Offenhauser (S.D. Tex.), CRM00.WTGATE.skempner2 and CRM00.WTGATE.poffenha, respectively.

# Rule 41(e) / Administrative Forfeiture / Notice / Statute of Limitations

- **Extensive federal possession or control of seized property is necessary for federal court to have subject matter jurisdiction over Rule 41(e) motion for return of state-forfeited property.**
- **When the statute of limitations for forfeiture has expired, the remedy for inadequate notice of administrative forfeiture proceedings is not to rule on the merits of the forfeiture but to vacate the void forfeiture.**
- **When the underlying criminal proceedings have concluded, the trial court no longer has Rule 41(e) jurisdiction over property that was seized in a different district.**

After his guilty plea and incarceration for drug offenses, Plaintiff/Defendant filed a Rule 41(e) motion with the district court for return of various items of forfeited property. Some of the property had been forfeited in federal judicial proceedings and some in state judicial proceedings. Other items had been forfeited in federal administrative proceedings. One of the items forfeited in federal administrative proceedings had been seized in another district. The district court dismissed all of Plaintiff's claims with prejudice, and Plaintiff/Defendant appealed.

On appeal, the **Tenth Circuit** held that the district court properly denied relief from the federal judicial forfeitures on the grounds that Rule 41(e) cannot be

**Circuit** relied on the plain language of the statute to hold that section 1607 creates four distinct classes of property subject to administrative forfeiture, one of which, section 1607(a)(3), covers any conveyance used to transport drugs. The panel ruled that, because the seized aircraft was being used to transport drugs (as shown by DEA's seizure of the 300 kilograms of cocaine on board) it was not subject to the $500,000 threshold of section 1607(a)(1). Thus, the court concluded, DEA did not abuse its discretion in using administrative forfeiture.

The insurance company also argued that the forfeiture violated the Eighth Amendment prohibition on excessive fines. The **Third Circuit** concluded that the forfeiture of the aircraft was not excessive. The panel pointed to several factors leading to its decision: (1) the forfeiture of aircraft used to transport drugs was clearly authorized by statute; (2) the 300 kilograms of cocaine involved was comparatively large for a drug case; (3) an offense involving 150 kilograms or more of cocaine was in the highest base offense level under the Sentencing Guidelines; and (4) DEA had found the insurance company culpable because it failed to take reasonable precautions to assure that the jet was not used illegally. The court pointed out that DEA had found that the insurance policy effectively insured criminals from the loss consequences of their crimes by reimbursing losses even though the property seized was used for illegal drug trafficking.

The **Third Circuit** found the insurance company's other arguments equally without merit and denied the petition for review. On the insurance company's Fifth Amendment due process claim of inadequate notice, the court ruled that there was no question that the company's counsel was aware of the forfeiture proceedings and could have preserved the company's rights to a judicial forfeiture by timely submission of the cost bond, but failed to do so. The court also ruled that the insurance company's reliance on *James Daniel Good* for the proposition that it deserved a hearing was misplaced because *Good* does not apply to personal property such as an aircraft.

The insurance company also asserted 21 U.S.C. § 881(a)(4)(A)'s common carrier exception to forfeiture of conveyances used to transport drugs. The court ruled that the exception applies only where the owner neither consents nor is willfully blind to the property's use in transporting drugs. The panel noted that the insurance company offered no explanation to overcome DEA's findings concerning its failure to prevent the aircraft's use in transporting illegal drugs.

*—JHP*

***Yskamp v. DEA***, 163 F.3d 767 (3d Cir. 1998).
Contact: AUSA Robert A. Zauzmer, CRM00.WTGATE.bzauzmer.

# Money Laundering / Fungible Property / Excessive Fines

- **The Government may use sections 981 and 984 to forfeit money from a correspondent bank account that a corrupt bank uses to launder drug money. Because the "fungible property" statute applies, it does not matter that none of the laundered money remained in the correspondent account.**

- **A bank cannot hide behind the protection for interbank accounts in section 984(d) when the bank's own employees knowingly participated in the money laundering offense. The doctrine of corporate criminal liability applies.**

- **Forfeiture of the full amount that the bank laundered through its correspondent bank account does not violate the Excessive Fines Clause where the bank itself was not an innocent participant.**

Undercover agents collected drug proceeds from drug traffickers and deposited the money in bank accounts at a Venezuelan bank. The Venezuelan bank then used its correspondent account in the United States to convert the money to cashiers checks, and

ment responded that it would be premature to entertain a motion to dismiss on Eighth Amendment grounds before the court heard any evidence in the case or determined what property, if any, was subject to forfeiture. But the court skipped over the procedural issue and ruled directly on the merits.

First, the court said, the bank's primary argument was that it would be unfair to allow the Government to forfeit $4 million in "fungible property" when the undercover agents had already recovered the full $4 million in the form of the cashiers checks. Essentially, the bank argued that the Eighth Amendment barred the Government from realizing a "double recovery." But whatever the merits of this argument, the court said, it did not fit the facts of this case. Here, the forfeiture would not result in any double recovery because the Government had passed the laundered funds on to the drug traffickers.

Second, the court held that the bank's Eighth Amendment claim failed under *Bajakajian*. The Supreme Court's holding, the court said, only applies to claimants who are themselves innocent. Here, the Government alleged that the bank had itself committed a money laundering offense involving drug proceeds. Thus, the bank could not use *Bajakajian* as a reason to dismiss the forfeiture complaint. —*SDC*

***United States v. $4,007,891.28 United States Currency***, No. CV-98-5762-WDK (C.D. Cal. Dec. 30, 1998) (unpublished). Contact: AFMLS Assistant Chief Stefan D. Cassella, CRM00.WTGATE. scassell, and AUSAs Janet Hudson, CRM00.WTGATE.jhudson7, and Greg Staples, CRM00.WTGATE.gstaples.

# Probable Cause / Bifurcated Trial / Stay / Expert Witness

- **Fifth Circuit upholds forfeiture of $9 million deposited by Mexican law enforcement official into a Texas bank account. Deposit of large quantities of $20 bills, wrapped in rubber bands and cellophane, and testimony that drug traffickers regularly bribe Mexican law enforcement, was sufficient to establish probable cause.**

- **Because hearsay evidence, admissible only to establish probable cause, was submitted outside the presence of the jury, the district court did not abuse its discretion in declining to bifurcate the civil forfeiture trial.**

- **The district court properly granted the Government's motion to stay the civil case until a criminal case involving another defendant was completed. A stay may be based on evidence submitted by the Government *ex parte*, and considered by the court *in camera*.**

- **Government agent, qualified as a money laundering expert, may testify that the facts admitted into evidence are "consistent" with money laundering activity.**

Claimant, who was the Deputy Attorney General of Mexico, deposited more than $9 million in U.S. currency into a bank account in Texas. Having reason to believe that the money constituted bribes that Claimant had received from drug traffickers, the U.S. Attorney obtained a civil seizure warrant, seized the bank account, and sometime thereafter, filed a civil forfeiture complaint against the deposited funds. The complaint alleged that the money was forfeitable under 21 U.S.C. § 881(a)(6) as drug proceeds, and under 18 U.S.C. § 981(a)(1)(A) as property involved in money laundering offenses in violation of 18 U.S.C. §§ 1956(a)(1) and (a)(2) and 1957.

Claimant immediately sent the U.S. Attorney numerous requests for civil discovery, including a demand for the sealed affidavit that the Government submitted in support of the civil seizure warrant. The Government declined to provide discovery on the

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On appeal, the **Tenth Circuit** held that the district court properly denied relief from the federal judicial forfeitures on the grounds that Rule 41(e) cannot be

went on to list what steps the Government could take in the future to preserve its interest in real property without committing a *Good* violation. "The [G]overnment may file a *lis pendens* and may post on the property a summons, a copy of the verified complaint for forfeiture, and a notice of the forfeiture action. This provides notice to the owner without seizing the property. Such notice could even indicate that a warrant of arrest *in rem* will be sought in the future by the [G]overnment."

The court then turned to Claimant's remedy for the *Good* violation. In *Peyton Woods*, the court held that the proper remedy is not dismissal of the forfeiture action; to the contrary, a claimant's only remedy is "the return of any rents received or other proceeds realized from the property during the period of illegal seizure." Accordingly, the panel remanded the case to the district court to determine whether Claimant was deprived of any rents or other proceeds.

The court then turned to Claimant's Eighth Amendment claim. It noted, as a threshold matter, that Claimant had properly preserved her Eighth Amendment claim by stating it as an affirmative defense in her answer to the Complaint, and by incorporating her answer in her response to the Government's motion for summary judgment. The court's discussion suggests that if Claimant had not taken these steps, her Eighth Amendment claim would have been waived.

The court also noted that it is unclear whether the Supreme Court's decision in *Bajakajian* applies to civil forfeiture cases. But it held, based on prior Eleventh Circuit law, that the Excessive Fines Clause does apply to forfeitures under section1955(d). The panel also noted that the Eleventh Circuit's excessiveness test under *United States v. One Parcel Property Located at 427 and 429 South Hall Street*, 74 F.3d 1165 (11th Cir. 1996), is a "pure proportionality" test that is very similar to the "gross disproportionality" test articulated by the Supreme Court in *Bajakajian*. Thus, the panel remanded the case to the district court to determine, in the first instance, whether the forfeiture of the real property constituted an excessive fine.

Finally, Claimant argued that the application of the probable cause standard of proof in a civil forfeiture case is unconstitutional. In response, the court simply noted that Eleventh Circuit precedents have repeatedly recognized the constitutionality of 19 U.S.C. § 1615, the statute from which the probable cause standard is derived. Thus, the court affirmed the district court's use of the probable cause standard of proof. —*SDC*

***United States v. Land, Winston County***, 163 F.3d 1295 (11th Cir. 1998). Contact: AUSA James D. Ingram (N.D. Ala.), CRM00.WTGATE.jingram3.

**Comment:** While the situation in the Eleventh Circuit regarding the "post and walk" policy is becoming clearer, this opinion still leaves uncertain whether the Government may post the property with an arrest warrant *in rem* that avoids any language authorizing a seizure, or whether, as the panel seems to suggest, the proper procedure is to post the property with "a summons, a copy of the verified complaint for forfeiture, and a notice of the forfeiture action" that indicates "that a warrant of arrest *in rem* will be sought in the future." The obvious question, of course, is what is the purpose of getting an arrest warrant *in rem* "in the future?" Prosecutors in the Eleventh Circuit are urged to consult with each other and with the Asset Forfeiture and Money Laundering Section on this matter. —*SDC*

## Administrative Forfeiture / 21 U.S.C. § 877 / Excessive Fines / Innocent Owner / Notice / *Good* Hearing

- **Judicial review under 21 U.S.C. § 877 of administrative forfeiture is not a review *de novo* of the merits of the agency's decision not to return forfeited property.**

- **Million-dollar aircraft used to transport illegal drugs was properly forfeited administratively pursuant to 19 U.S.C. § 1607(a)(3) despite 19 U.S.C. § 1607(a)(1)'s general**

(summarized in the *Quick Release*, October 1998, at 2-3), have ruled that, when the statute of limitations for forfeiture has expired, the proper remedy for inadequate notice of administrative forfeiture is for the court to consider the forfeiture on the merits. Another panel of the Tenth Circuit held the same thing in *Juda v. Nerney*, 149 F.3d 1190, 1998 WL 317474 (10th Cir. 1998) (Table) (if notice is inadequate, court should proceed directly to the merits). —*JHP*

# Search and Seizure / Due Process / Notice

## ■ Supreme Court holds that officers who seize property from a private residence are not required to leave behind notice of what procedures exist to file a claim to recover the seized property.

Local police officers executed a search warrant at a private residence. Neither the owner of the residence nor any members of his family were present at the time the residence was searched. The officers were looking for evidence belonging to a former boarder at the residence whom they suspected of murder.

The police seized a photograph of the boarder, an address book, a shotgun, a starter pistol, ammunition and about $2,629 in cash. The officers left behind a "Notice of Service" stating that the residence had been searched by the local police department pursuant to a warrant, the date of the search, the name of the judge that issued the warrant, the names and phone numbers of three police officers to contact for further information, and an itemized list of the property seized. It did not include the warrant number because the warrant remained under seal. In a public index maintained by the court clerk, however, the warrant was recorded by both the address of the residence searched and the search warrant number.

Not long after the search, the owner of the residence contacted one of the detectives by telephone to inquire about seeking return of the seized property. He was told that he had to obtain a court order. The owner later went to the court to contact the judge who had issued the warrant but was told that the judge was on vacation. He tried to have another judge release the property but was told the judge had nothing under the owner's name. The owner thereupon filed suit in federal district court against the municipality and police officers who had conducted the search, alleging violations of the Fourth Amendment premised on lack of probable cause, exceeding the scope of the warrant, and an alleged city policy of permitting unlawful searches. The district court granted summary judgment to the city and its officers but requested supplemental briefing on an issue not previously raised: whether available remedies for the return of seized property adequately satisfied due process.

The district court ultimately found that the available remedies comported with due process and reaffirmed its order of summary judgment. The Ninth Circuit reversed on due process grounds. The panel held that the city was required to give notice of state procedures for return of property and the information necessary to invoke those procedures. It further held that the notice must include, in addition to the information contained on the notice actually left by the police officers: the procedure for contesting the seizure or retention of the property; additional information for implementing that procedure in the appropriate court; the search warrant number or a statement that the search warrant is sealed and, in the latter event, the means for identifying the court file; and the necessity of filing a written notice or motion to the court stating why the property should be returned. The **Supreme Court** unanimously reversed.

The Court found that the "expansive notice requirement" imposed by the Ninth Circuit "lacks support in our case law and mandates [a form of ] notice not now prescribed by the Federal Government or by any one of the 50 states." It held that due process only requires law enforcement agents, upon seizing property pursuant to a warrant, to "take reasonable steps to give notice that the property has been taken" so as to permit the owner to pursue available remedies for its return. The court found no requirement in due process for individualized notice of remedies which are generally available in published state rules, statutes, and case law. Notice of remedies is required only when the procedures are arcane or not set forth in any publicly-

The panel next addressed the "excessiveness" challenge. It held that its conclusion that the forfeitures were not "punishment" for double jeopardy purposes was not controlling as to whether the forfeitures were sufficiently "punitive" to be subject to limitation under the Excessive Fines Clause. Turning first to the CMIR forfeiture, the panel found that such forfeitures were punitive at least in part, citing the absence of any limit on the forfeiture and the fact that forfeiture was tied to a criminal violation. It thus concluded that such forfeitures are subject to "excessiveness" limitation. However, it found that the record was not sufficiently developed for application of the *Bajakajian* "gross disproportionality" standard. It cited, as an example, the absence of any finding as to whether or not the currency was illegally acquired or intended for an unlawful purpose. It thus vacated the CMIR forfeiture and remanded it to the district court for a "gross disproportionality" determination.

The panel indicated that forfeiture of the jewelry under 19 U.S.C. § 1497 might also be found sufficiently punitive to be subject to the Excessive Fines Clause under the *Bajakajian* rationale. However, it found that it was barred from reaching this conclusion by the *Bajakajian* Court's statement that forfeitures under section 1497 are "entirely remedial and thus nonpunitive." 118 S. Ct. at 2041 n.19 (citing *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972)). The panel thus affirmed forfeiture of the jewelry, stating that "[s]ection 1497 fails the precondition for application of the Excessive Fines Clause."

*—HSH*

***United States v. $273,969.04 U.S. Currency***, ___ F.3d ___, No. 95-55882, 1999 WL 2580 (9th Cir. Jan. 6, 1999). Contact: AUSA Carla Ford (C.D. Cal.), CRM00.WTGATE.cford3.

**Comment:** This panel's somewhat extended double jeopardy analysis under the *Hudson* standard is surprising given that the issue could have been disposed of under the *Blockburger* "different elements" analysis. The claimant's prior criminal conviction was under the "false statement" statute and the subsequent civil forfeitures were under the CMIR civil forfeiture statute and a Customs smuggling statute. Thus, there would be no double jeopardy bar under *Blockburger*. *See United States v. Woodward*, 469 U.S. 105 (1985) (per curiam) (a person may properly be convicted of both a CMIR offense and a "false statement" offense even though both offenses arose out of the same transaction, incident, or course of conduct).

The panel—in stating that "[s]ection 1497 fails the *precondition* for application of the Excessive Fines Clause" (emphasis added)—effectively holds that civil *in rem* forfeitures under the customs smuggling statute, 19 U.S.C. § 1497, are entirely exempt from limitation under the Excessive Fines Clause. The Asset Forfeiture and Money Laundering Section believes that the same rule should apply to civil *in rem* forfeiture under other customs smuggling statutes that are devoid of any scienter element.

The same, at least arguably, should be true as to civil *in rem* forfeitures under the CMIR statute, 31 U.S.C. § 5317, which, like the customs smuggling forfeiture statutes, contains no scienter element. *Bajakajian*, which subjected a CMIR forfeiture to limitation under the Excessive Fines Clause, arguably would be distinguishable on grounds that it involved an *in personam* criminal forfeiture which may be imposed only as a consequence of conviction of the owner for a CMIR offense upon proof of criminal scienter beyond a reasonable doubt. Thus, one might argue that civil CMIR forfeitures—which, like customs smuggling forfeitures, do not turn on owner culpability—are remedial in nature, whereas criminal CMIR forfeitures, which may only be imposed upon clear proof of owner culpability, are punitive in nature. Support for this distinction might be drawn from the rationale of the *Bajakajian* majority and from *One Lot Emerald Cut Stones*, which the *Bajakajian* majority cited with evident approval. However, the Ninth Circuit panel in *$273,969.04* implicitly rejects this view. *—HSH*

(unpublished). Contact: Richard Hoffman, CRM00.WTGATE.rhoffman3.

**Comment:** The opinion was placed under seal when decided and was unsealed in January 1999.

## Substitute Assets / Ancillary Proceeding

■ **Four-year delay between entry of a criminal order of forfeiture and a motion to forfeit property as substitute assets does not violate due process.**

The Government obtained a criminal forfeiture order against the defendant in 1995. Almost four years later, the Government moved to forfeit certain property as a substitute asset to satisfy the order of forfeiture. Defendant complained that the four-year delay in seeking substitute assets violated his due process rights under the Supreme Court's decision in *United States v. $8,850*, 461 U.S. 555 (1983).

The court held that *$8,850* was inapplicable to this case. In the pretrial context to which *$8,850* applies, the Government is depriving a citizen of the use and enjoyment of his property without providing him with a forum to reclaim it. In contrast, in the post-conviction context, "the [G]overnment is a judgment creditor seeking to enforce the judgment." Without deciding how much a delay between the entry of an order of forfeiture and the filing of a motion to forfeit substitute assets might be too long, the court held that a four-year delay was "well within the time limits."

The court concluded, however, that, when property is added to an order of forfeiture as substitute assets, the Government must conduct a new ancillary proceeding to give third parties the opportunity to challenge the forfeiture. Thus, the court granted the Government's motion to amend the order of forfeiture and ordered the Government to commence an ancillary proceeding under 21 U.S.C. § 853(n). —*SDC*

***United States v. Sokolow***, Crim. No. 93-394 (E.D. Pa. Jan. 4, 1999) (unpublished). Contact: AUSA Sarah Grieb, CRM00.WTGATE.sgrieb.

## Communications Act of 1934

■ **In a civil forfeiture action under the Communications Act of 1934 against radio equipment being operated without a license, the district court held that the Act required claimant to present his First Amendment arguments to the court of appeals, not to the district court.**

■ **The district court rebuffed Claimant's attempt to invoke the doctrine of primary jurisdiction to require the United States to present its forfeiture arguments in the first instance to the FCC. But the court invoked that doctrine in ruling that Claimant had to present his attacks on the FCC rules and regulations to the FCC and not in the context of a forfeiture action.**

■ **Claimant was not entitled to notice and a hearing prior to the seizure of his radio transmitting equipment.**

The United States brought suit, pursuant to 47 U.S.C. § 510, part of the Communications Act of 1934 (the Act), to forfeit radio station transmission equipment because it was being used by an unlicenced FM station. The district court denied claimant's motions to dismiss the complaint, to quash the *in rem* warrant and for a preliminary injunction.

Claimant argued that his constitutional rights were violated when the equipment was "arrested" without

In a footnote, the majority noted in dictum that because the Government conceded that claimant would be entitled to a jury trial on any issue of material fact, this would "presumably . . . include any disputed factual issues material to the excessiveness inquiry."

*—HSH*

***United States v. 3814 Thurman Street,*** ___ F.3d ___, No. 97-35054, 1999 WL 2548 (9th Cir. Jan. 5, 1999). Contact: AUSA Bob Nesler (D. Ore.), CRM00.WTGATE.bnesler.

**Comment:** What has *Bajakajian* wrought? The majority's conclusion that forfeiting a claimant's interest in property directly traceable to the proceeds of criminal activity may be constitutionally excessive—coupled with its "suggestion" (the case was remanded for further proceedings consistent with this opinion) that the forfeiture might be mitigated from the $200,000 value of claimant's equity interest to some amount within the "Guidelines" range of $500 to $5,000—is impossible to reconcile either with *Bajakajian* or the uniform body of pre-*Bajakajian* forfeiture law holding that forfeiture of the proceeds of crime is remedial and can never be considered constitutionally excessive. Even Judge Reinhardt of the Ninth Circuit, prior to *Bajakajian*, observed with respect to a "proceeds forfeiture" that "I might just note for the record that it appears to me that were we to reach the Eighth Amendment claims we would be required to reject it." *United States v. $405,089.23 U.S. Currency*, 122 F.3d 1285 (9th Cir. 1997).

More importantly, the eight-justice majority of the Supreme Court in *United States v. Ursery* observed that "proceeds" forfeitures serve the remedial "goal of ensuring that persons do not profit from their illegal acts," *id.* at 291, and Justice Stevens, the lone dissenter on other issues, readily concurred on this point, *id.* at 298. These are the same justices who decided *Bajakajian*. Although *Ursery* involved application of the Double Jeopardy Clause of the Fifth Amendment while *Bajakajian* involved the Excessive Fines Clause of the Eighth Amendment, it is noteworthy—to say the least—that the four dissenters in *Bajakajian*, a non-proceeds case, declared that:

> As a rule, forfeitures of criminal proceeds serve the nonpunitive ends of making restitution to the rightful owners and of compelling the surrender of property held without right or ownership. *See United States* v. *Ursery*, 518 U.S. 267, 284, 116 S. Ct. 2135, 2145, 135 L. Ed. 2d 549 (1996). Most forfeitures of proceeds, as a consequence, are not fines at all, let alone excessive fines.

118 S. Ct. at 2044 (dissenting opinion of Justice Kennedy). The five-justice majority did not contest this statement. Given this statement concurred in by four justices in *Bajakajian*, the silence of the *Bajakajian* majority on the issue, and the unanimous holding in *Ursery*, it seems clear that the forfeiture, whether criminal or civil, of the proceeds of crime, or property traceable thereto, should never be deemed constitutionally excessive and may, in fact, be entirely exempt from limitation under the Excessive Fines Clause as suggested by the dissenters in *Bajakajian*.

In *Thurman Street*, the record apparently established that the claimant faced foreclosure on the defendant property as a consequence of over $200,000 in liabilities against her true income over three years of only $27,286. The crimes from which she benefitted—and as to which she was at least willfully blind as affirmed by the panel—may now result in her pocketing anywhere from $195,000 to $199,500 (if the district court mitigates the forfeiture to the "Guidelines range" of related criminal fines). Even assuming that she might have had some equity remaining had foreclosure gone forward at the time she applied for the loan, it appears indisputable that rather than suffering a constitutionally excessive fine, she will realize a windfall to which she has no legal entitlement as a consequence of the criminal activity to which she was at least willfully blind.

Finally, the majority's dictum that issues of material fact concerning constitutional excessiveness should be tried to the jury contradicts a substantial body of jurisprudence under the Excessive Fines Clause which holds that the constitutional challenge is to be made post-verdict or post-judgment and tried to the court.

*—HSH*

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• ***Boggs v. Rubin***, 161 F.3d 37 (D.C. Cir. 1998) Feb. 1999

### Customs Forfeiture

• ***United States v. $273,969.04 in U.S. Currency***, ___ F.3d ___, No. 95-55882, 1999 WL 2580 (9th Cir. Jan. 6, 1999) Feb. 1999

Nor is there anything wrong with the Government's shifting theories of criminal forfeiture from direct forfeiture to substitute assets. The prosecutor's decision to strike the real property from the forfeiture allegation before submitting the forfeiture issue to the jury was "entirely proper in light of the prosecutor's conclusion that there was insufficient evidence to support direct forfeiture under § 853(a)."

Finally, Defendant objected that the forfeiture violated the Excessive Fines Clause of the Eighth Amendment. The court held, however, that it is "well-established that criminal defendants are jointly and severally liable for forfeiture of the full amount of the proceeds of their criminal offense, and that the imposition of such a forfeiture judgment does not constitute an unconstitutionally excessive fine." It was true, the court noted, that Defendant was a relatively minor player in the drug conspiracy, but her role was sufficient to justify holding her liable for the full forfeiture. Moreover, the court concluded, Defendant did not object to the $6,000,000 money judgment, but only to the forfeiture of the real property as a substitute asset. Defendant could not "seriously argue," the court said, "that the forfeiture of property valued at [$169,000] is grossly disproportional to the gravity of a drug conspiracy that realized million of dollars in proceeds."

—*SDC*

***United States v. Candelaria-Silva***, ___ F.3d ___, Nos. 96-1711, 96-1712, 96-1713, 96-1714, 96-2275, 96-2362, 96-2364, 1999 WL 16782 (1st Cir. Jan. 22, 1999). Contact: AFMLS Assistant Chief Stefan D. Cassella, CRM00.WTGATE.scassell.

# Excessive Fines / FIRREA Forfeiture / Innocent Owner

■ **Ninth Circuit holds that property acquired with the proceeds of a false loan application constitutes proceeds of bank fraud and are subject to forfeiture under 18 U.S.C. § 981(a)(1)(C); but the forfeiture is unconstitutionally excessive if the bank suffers no loss.**

Claimant, a 70-year-old widow, applied for a residential mortgage loan for $322,500 on Defendant real property. She claimed at trial that the loan papers were prepared by her nephew and broker. These papers included an unsigned loan application grossly overstating her income, omitting outstanding liabilities, and stating that she had lived on the property for the last 14 years when, in fact, she had resided on the property for three years. Unsigned tax returns for the three-year period were submitted to support her fraudulent claim of income. The returns had been prepared by a CPA but the CPA's cover letter stating that the returns did not purport to represent copies of returns actually filed with the Internal Revenue Service (IRS) had been removed prior to submission of the returns to the lender, a stamp on the face of the returns to the same effect had been obliterated, and the dates of preparation had been removed or changed.

Because of the amount of the loan, the mortgage company submitted the application and supporting documents to its underwriter, an FDIC-insured bank, for approval. The bank approved the loan but required Claimant to sign the loan application and tax returns at closing. As Claimant was signing these documents, she noticed that the tax returns bore the preparer's signature of a person (the CPA) different than the person who had prepared the returns actually submitted to the IRS for the tax years in question.

The district court granted the Government's motion for summary judgment of forfeiture of the property under 18 U.S.C. § 981(a)(1)(C) as proceeds of a false-statement-to-a-financial-institution offense and mail and wire fraud offenses affecting a financial institution. The district court granted claims for tax liens and for the outstanding principal and balance on the fraudulently obtained mortgage; Claimant's remaining equity interest (just over $200,000) was forfeited to the Government. The district court declined to consider Claimant's pre-*Bajakajian* Excessive Fines challenge on grounds that the forfeiture of criminal proceeds can never be constitutionally excessive. A divided **Ninth Circuit** panel affirmed in part and reversed in part.

The panel unanimously agreed that the Government established probable cause for forfeiture of the property—*i.e.*, that the property was traceable to the proceeds of offenses under 18 U.S.C. §§ 1014, 1341, and 1343. In doing so, it upheld the use of inadmissible hearsay in the agent's affidavit to establish probable

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- ***Clymore v. United States***, ___ F.3d ___, No. 97-2319, 1999 WL 3366 (10th Cir. Jan. 6, 1999) Feb. 1999

***Whiting v. United States***, ___ F. Supp. 2d ___, No. CIV-A-98-11907-REK, 1998 WL 847933 (D. Mass. Nov. 30, 1998) Jan. 1999

- ***Yskamp v. DEA***, 163 F.3d 767 (3d Cir. 1998) Feb. 1999

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## Substitute Assets

- ***United States v. Candelaria-Silva***, ___ F.3d ___, Nos. 96-1711, 96-1712, 96-1713, 96-1714, 96-2275, 96-2362, 96-2364, 1999 WL 16782 (1st Cir. Jan. 22, 1999) Feb. 1999
- ***United States v. Sokolow***, Crim. No. 93-394 (E.D. Pa. Jan. 4, 1999) (unpublished) Feb. 1999

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U.S. Department of Justice
Criminal Division
*Asset Forfeiture and Money Laundering Section*

# Quick Release

A Monthly Survey of Federal Forfeiture Cases

Volume 12, Number 2

February 1999

## Money Judgment / Substitute Assets / Excessive Fines

- **First Circuit upholds the Government's right to seek a money judgment against a criminal defendant for the amount of criminal proceeds obtained and to satisfy the money judgment by forfeiting substitute assets.**

- **To obtain substitute assets, the Government need only submit a motion and affidavit reciting its efforts to locate the directly forfeitable property.**

- **Forfeiture of substitute assets is solely a matter for the court. The defendant's procedural rights are satisfied by having the jury determine the amount of the money judgment, which sets an upper limit on the value of the substitute property that may be forfeited.**

- **The Government may begin a forfeiture with a civil seizure and then switch to criminal forfeiture once an indictment is returned.**

- **The Government may also strike property listed in the forfeiture count of an indictment and seek its forfeiture as a substitute asset if the prosecutor concludes that there is insufficient evidence to establish a nexus between the property and the offense.**

- **Codefendants are jointly and severally liable for forfeiture of drug proceeds. Ordering even a minor participant to forfeit the full amount of the proceeds does not violate the Excessive Fines Clause.**

Defendant and several codefendants were convicted of a drug conspiracy. The jury returned a special verdict finding that the defendants had obtained $6,000,000 in drug proceeds, and the court entered a money judgment finding each of the defendants jointly and severally liable for forfeiture of that amount. The Government then moved to satisfy the judgment, in part, by forfeiting Defendant's real property, valued at $169,000, as a substitute asset. The court granted the motion and included the substitute property in a final order of forfeiture.

Defendant raised numerous objections to the forfeiture order and appealed. The **First Circuit** affirmed the forfeiture in all respects.