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

Quick Release

A Monthly Survey of Federal Forfeiture Cases

Volume 11, Number 2 **February 1998**

Probable Cause / Airport Stop / Dog Sniff

- **Court finds probable cause for seizure of drug proceeds at airport based on "dog sniff" and expert testimony.**

- **Expert says dogs do not react to all contaminated currency, but only alert when they detect currency that has been in close proximity to a large quantity of narcotics in the recent past.**

Claimant traveled frequently between New York and Miami with two other men, always paying for all three tickets with cash. On one such trip, federal agents at the airport in New York stopped one of Claimant's companions as he was about to board the return flight to Miami and found $68,000 in currency in small denominations wrapped in rubber bands in his luggage. A drug dog alerted to the presence of narcotics on the money. The agents then called ahead to Miami so that the local police could intercept Claimant and his remaining companion when they arrived. The police did so, and found $201,700 in currency in Claimant's luggage and a smaller quantity of money in the companion's luggage. Again, the money was in small denominations bundled with rubber bands, and a drug dog alerted to the presence of a controlled substance.

The Government filed a civil forfeiture action against Claimant's $201,700, alleging that the money was drug proceeds. Claimant asserted that the money was the proceeds of the sale of Jamaican produce at small grocery stores in the New York City area, but could produce no documentation for any of the sales. Upon review of the totality of the circumstances, a Magistrate Judge ruled that the Government had satisfied its burden of establishing probable cause.

The court relied on the following factors: Claimant and his companions were all traveling with a large quantity of cash that was bundled in an unusual fashion; Claimant's explanation for the source of the money was "weak" and lacked documentation; Claimant paid for all of the airline tickets with cash; drug dogs alerted positively to the money all three men were carrying; and Claimant had a prior criminal record.

In response to the assertion that the dog sniff should be discounted because most currency in circulation has been contaminated by controlled substances, the court relied on an expert witness, who testified that drug dogs do not react to all contaminated currency, but only to currency that has

assumed names.

When stopped by the agents, Claimant consented to the inspection of his carry-on bag, which contained $86,020 in cash, as well as dog repellant and various items such as wrapping tape used in packaging. A drug dog alerted to the presence of cocaine on the currency. Claimant then explained that he had withdrawn the cash from his bank account and was on the way to Arizona to give the money to a person, whose last name he did not know, as part of a real estate investment.

The Government filed a civil forfeiture action against the currency under 21 U.S.C. § 881(a)(6), and both sides filed motions for summary judgment. The district court entered summary judgment for the Government.

The court began its analysis by noting that, to establish the forfeitability of property under section 881(a)(6), the Government must establish that the defendant's currency is drug proceeds, and not just the proceeds of criminal activity in general. *See United States v. $30,600*, 39 F.3d 1039, 1042 (9th Cir. 1994). The court then discounted the value of the "dog sniff" because, in its view, as much as 90 percent of the currency in the United States is tainted with controlled substances. Nevertheless, the court found the evidence sufficient to establish that the money was drug proceeds.

Most importantly, the court held that carrying a large sum of cash is, by itself, "*strong evidence* of some relationship with illegal drugs." In addition, the court gave weight to the following facts: the purchase of the one-way ticket with cash; the use of an assumed name; the travel to a "major source city"; Claimant's inability to produce any bank records to substantiate the withdrawal of the cash from his bank accounts; his inability to recall the full name of the person to whom he intended to deliver the cash; and the presence of the dog repellant and packaging materials.

The court held that these facts were sufficient to establish probable cause for the forfeiture. Before granting the motion for summary judgment, however, the court had to determine whether Claimant had raised a material issue of fact sufficient to satisfy his affirmative defense that the money came from a legitimate source. Finding that Claimant's explanation regarding the real estate investment was both implausible and totally unsubstantiated by any documentation, the court held that no reasonable jury could find that Claimant had satisfied his burden. Accordingly, the court granted the Government's motion for summary judgment. —*SDC*

United States v. $86,020.00 in U.S. Currency, ___ F. Supp. ___, No. 96-CV-125-TUC-ACM, 1997 WL _____ (D. Ariz. Nov. 12, 1997). Contact: AUSA Henry Z. Brown, AAZT01(hbrown).

The case summaries and comments in ***Quick Release*** are intended to assist government attorneys in keeping up-to-date with developments in the law. They do not represent the policy of the Department of Justice, and may not be cited as legal opinions or conclusions binding on any government attorneys.

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Double Jeopardy / CMIR Forfeitures / Administrative Forfeiture

■ **Court extends *Ursery* to CMIR cases. No double jeopardy when undeclared currency is forfeited prior to commencement of criminal prosecution under section 5316.**

Defendant filed a habeas corpus petition seeking to overturn his criminal conviction on double jeopardy grounds. He argued that his criminal indictment, which contained a charge of violating the currency reporting requirements in 31 U.S.C. § 5316, should have been dismissed because the Government had administratively forfeited the undeclared currency under section 5317, prior to the commencement of the criminal trial.

The court rejected the petition, holding that the Supreme Court's decision in *Ursery* applied to CMIR forfeitures under section 5317.

Defendant also argued that the district court lost jurisdiction over his criminal case once the Government initiated the administrative forfeiture proceeding. For this proposition, Defendant relied on *United States v. One 1987 Jeep*, 972 F.2d 472 (2d Cir. 1992), which held that once an administrative forfeiture is commenced, the court lacks jurisdiction to decide the merits of the forfeiture. The court, however, rejected this argument, holding that an administrative forfeiture action has no effect whatsoever on the district court's jurisdiction over matters unrelated to the forfeiture, such as the criminal proceedings against the defendant. —*SDC*

United States v. Ogbonna, No. CV-95-2100 (CPS), 1997 WL 785612 (E.D.N.Y. Nov. 13, 1997) (unpublished). Contact: AUSA Paul Weinstein, ANYE14(pweinste).

Rule 41(e) Motion / Restitution

■ **If the Government returns seized property to a victim as restitution without benefit of a forfeiture order, and the defendant then files a Rule 41(e) motion for the return of his property, the Government must establish by a preponderance of the evidence that the property belonged to the victim and not to the defendant.**

Police found the proceeds of a Brink's armored truck robbery in Defendant's apartment and seized the money for possible forfeiture and/or restitution. After Defendant was convicted of conspiracy to possess stolen money, he filed a Rule 41(e) motion for the return of the seized property. The Government responded that it had decided to forego forfeiture of the money and had in fact already returned it to the victim.

The Government argued that its burden in the Rule 41(e) proceeding was the same as it would have been in a civil forfeiture proceeding if the Government had chosen to forfeit the property before returning it to the victim. That is, the Government asserted that it only had to show probable cause to believe that the property was stolen, at which point the burden would shift to the defendant to show that the money had a legitimate source.

Proceeds

- **Seventh Circuit affirms money judgment against all members of a drug conspiracy for the value of the drugs sold over the course of the conspiracy.**

- **District courts are entitled to engage in reasonable estimation and speculation in calculating value of drugs sold; the same calculation applies both to the determination of the offense level for sentencing purposes and the calculation of amount subject to forfeiture under section 853.**

Defendants were convicted of running a large-scale heroin operation and were ordered to forfeit $3.3 million in drug proceeds pursuant to 21 U.S.C. § 853. They appealed the forfeiture order, arguing that the $3.3 million figure was based on a speculative calculation of their net profits over an extended period of time. The **Seventh Circuit** affirmed the forfeiture order.

The district court had used an elaborate calculation to determine the amount of the forfeiture order. Starting with the gross amount of heroin purchased by Defendants (approximately 18 kg.), the court multiplied by a factor intended to estimate the degree to which the heroin was diluted before it was sold. The court then calculated the number of units of sold on the street by dividing the total quantity of diluted heroin by the average package size, and finally multiplied this number by the average street price. This yielded a gross total of 75 kg. of heroin sold for $5.9 million. The court then subtracted the cost of the original 18 kg. and concluded that Defendants had made a net profit of $3.3 million, which was subject to forfeiture as a money judgment. *See United States v. McCarroll*, 1996 WL 355371 (N.D. Ill. June 19, 1996) (holding that all defendants are liable for the total amount of proceeds realized by the organization).

On appeal, Defendants argued that the district court's calculation was based on raw speculation and could not be used as the basis for the entry of a forfeiture judgment. Instead, they argued that the court should have based its calculation only on the amount of heroin actually seized. The Seventh Circuit disagreed. District courts must proceed cautiously in making quantity determinations, the court said, but sentencing calculations should be based on a realistic appraisal of a large-scale drug conspiracy's activities over a long period of time. Because the district court had based its calculations on reasonable assumptions which may in fact have been overly conservative in some respects, its calculation of Defendants' net profits could be used to calculate both the offense level under the Sentencing Guidelines and the amount subject to forfeiture under section 853.

Furthermore, the court concluded that each member of the conspiracy was liable for the full amount because the scope and results of the conspiracy were foreseeable to all Defendants.

—SDC

United States v. Jarrett, ___ F.3d ___, 1998 WL 4386 (7th Cir. Jan. 8, 1998). Contact: AUSA Dan Parish, (312) 353-5300.

Comment: There is no discussion in this opinion of the district court's decision that the defendants were entitled to credit for the cost of the heroin sold. Apparently, the Government did not appeal on that point. *But see United States v. McHan*, 101 F.3d 1027 (4th Cir. 1996) (gross proceeds forfeitable in drug case; defendant not entitled to credit for cost of drug sold). *—SDC*

Appointment of Trustee / Victims

■ **Court appoints trustee to determine if funds in seized brokerage accounts actually belong to third parties, and upholds trustee's determination that the third-party claims should be denied.**

The U.S. Customs Service seized several brokerage accounts pursuant to 18 U.S.C. § 981(a)(1)(C). When it appeared that some of the funds in the seized accounts belonged to third parties, the Government entered into a stipulation with the account holders whereby the court vacated the seizure warrants and appointed a trustee to review all third-party claims and to recommend a just and equitable distribution of the money. When the trustee finished reviewing the claims, the Government moved the court to adopt the trustee's accounting and to remit the balance to the U.S. Customs Service for administrative forfeiture.

Several parties opposed the Government's motion and asserted claims against the funds in the seized accounts. These parties were: investors whose claims the trustee had rejected (the "individual investors"); an individual seeking unpaid interest on an account subject to the original warrants, but later released (the "interest claimant"); and three parties seeking the funds to satisfy criminal restitution orders in a related case (the "restitution claimants").

The court approved the trustee's denial of the individual investors' claims because they either failed to trace their funds into the seized accounts or failed to establish an ownership interest in funds traceable to the accounts. The court also rejected the interest claimant's application on the ground that he was entitled to recover money held in his name, but not to assert any claim for interest against the Government.

The restitution claimants sought the remaining funds to satisfy restitution orders issued by a federal district court in California in a criminal case. The California defendant had been convicted of wire fraud and was a principal of the holder of one of the seized accounts. The restitution claimants were among several defrauded investors granted restitution by the California court. The Government opposed the applications because: (1) the restitution claimants failed to establish an ownership interest in the seized accounts; and (2) the funds in the accounts were not the property of the California defendant. The court concurred with the Government's position and added that the claimant's considerable assistance in the investigation was commendable, but did not elevate her claim above other claimants where she could not establish an ownership interest in the funds.

Finally, the Government withdrew its motion to return the remaining funds to the U.S. Customs Service for administrative forfeiture. In describing the Government's change in position, the court stated that "the Attorney General has now undertaken to commence a judicial forfeiture proceeding in accordance with 28 C.F.R. § 9.8." The court noted that these regulations permit a *pro rata* distribution among claimants who meet the criteria of section 9.8 and were appropriate where claimants cannot establish an ownership interest in the forfeited funds and where the aggregate claims exceed the amount of the available funds. The court, therefore, ordered the seized accounts "forfeited to the United States for the express purpose of commencing a judicial forfeiture proceeding under 28 C.F.R. § 9.8." —*EK*

United States v. Contents of Brokerage Account No. 519-40681-1-9-524, No. M9-150, 1997 WL 786949 (S.D.N.Y. Dec. 23, 1997) (unpublished). Contact: AUSA Gary Stein, ANYS11(gstein).

would be permitted to use a defendant's statements for impeachment purposes if he testifies at trial and also such statements would be admissible at sentencing to determine the propriety of forfeiture.

—HSL

United States v. Salemme, ___ F. Supp. ___, Nos. CR-94-10287, CR-97-10009, 1997 WL 774660 (D. Mass. Nov. 5, 1997). Contact: AUSA Richard Hoffman, AMA01(rhoffman).

Comment: The decision to rely on the *ex parte in camera* submissions by the defendants was apparently driven in significant part by two concerns that may not be clear in the order.

First, this is an unusually complicated RICO case, in which pretrial proceedings have already consumed three years and threaten to continue for quite a while longer, involving such things as a claim that the recently disclosed longtime informant status of one of the defendants (and of another defendant who is presently a fugitive) is a basis for either an authorization/immunity defense for him, or for suppression of various Title III evidence, or for dismissal of the indictment concerning all defendants. Thus, the judge had to consider whether it was prudent to open up hearings on yet another issue.

Second, the judge expressed concerns that any disclosures that might have been made in a hearing on the nonrestrained assets available for attorneys' fees would lead to potential *Simmons/Kastigar*-based problems in the future, which would also further complicate the case.

The defendants argued in the alternative that: (1) they had no unrestrained assets; and (2) if they did have unrestrained assets, the Government would certainly seek to restrain and forfeit them upon disclosure, so even such hypothetical unrestrained assets were "unavailable" for use as attorneys' fees. The Government argued that the defendants should be forced to elect between paying for their own attorneys with any assets available to them, at the risk that the Government might be able to make a case for forfeiting and trying to recoup the assets used for payment, or making the disclosures necessary to establish that there actually were no such other assets. Because the defendants' submissions to the judge were *ex parte*, it is unknown whether or not the defendants disclosed other assets. But under the judge's ruling, the Government should be able to obtain that information at the time of sentencing.

—RH

Settlement / Bankruptcy / Attorneys' Fees

- **Settlement of forfeiture case by bankruptcy trustee and the United States dividing bankrupt corporation's seized assets between forfeiture and the bankruptcy estate was reasonable because the intersection of civil forfeiture and bankruptcy is "uncharted legal territory" and is "in many respects unsettled and contradictory."**

- **Attorney who agreed that his fee was to come from bankrupt corporation's assets gathered by the bankruptcy trustee must look to assets marshalled by the trustee for his fee and not to forfeited assets.**

The attorney for claimant corporation appealed the civil forfeiture of the corporation's assets on the grounds that the district court abused its discretion by denying his application to pay his fees out of the

Bankruptcy

- **Automatic stay of other actions upon filing of bankruptcy petition applies to civil forfeiture actions against debtors' property.**

- **Bankruptcy court grants limited relief from automatic stay of civil forfeiture action to the extent necessary to resolve the merits of the forfeiture, but if the Government prevails, it will be treated as a creditor in the bankruptcy proceedings.**

After local police arrested and charged two alleged drug dealers for selling cocaine on real property that they owned, the State filed a civil forfeiture action against the property in state court. The drug dealers subsequently filed a petition for bankruptcy and invoked the provisions of 11 U.S.C. § 362(a) for an automatic stay of the forfeiture action. State authorities asked the U.S. Bankruptcy Court for relief from the stay arguing that the exceptions to automatic bankruptcy stays at 11 U.S.C. § 362(b) exempt civil forfeiture actions from such stays as actions or proceedings "by a governmental unit to enforce such governmental unit's police or regulatory power." 11 U.S.C. §§ 362(b)(4) and (5). Alternatively, the State argued that the drug dealers should not be allowed to forestall the forfeiture action merely by filing for bankruptcy protection and that the automatic stay of the forfeiture action should be ended or modified for cause pursuant to 11 U.S.C. § 362(d)(1).

The bankruptcy court held that civil forfeitures are subject to the automatic stay provisions in section 362(a). The court pointed out that, by its terms, the automatic stay exception under section 362(b)(4) applies only to actions which otherwise would be stayed pursuant to section 362(a)(1), which stays only actions "against the debtor . . . or to recover a claim against the debtor." The court reasoned that, because civil forfeitures are actions against the property itself and not against the debtor who owns the property, civil forfeitures would not be stayed by section 362(a)(1) and are, thus, outside the scope of section 362(b)(4)'s exception.

However, the court agreed with the State that governmental entities that wish to continue civil forfeiture proceedings against the property of a debtor, who files for bankruptcy, may obtain relief from the automatic stay "for cause" under 11 U.S.C. § 362(d)(1). The court noted that abuse of the bankruptcy process and the need for resolution of questions of state law in order to administer the bankruptcy are among the appropriate grounds for granting such relief. The court found "some degree of cause for stay relief on the State's behalf" because "by consequence, if not by design" the bankruptcy had forestalled the forfeiture action and because the State's claim for forfeiture turned on questions of state law, which would be more easily resolved in state court. As a result, the court granted the State relief from the stay, but only to the extent necessary to litigate the propriety and viability of the forfeiture in the state court proceeding.

The court ruled that the State would remain prohibited by the automatic stay from recording or enforcing any ensuing forfeiture that it might obtain. The court pointed out that, under the state forfeiture statute, a forfeiture judgment would relate back to the time of the underlying criminal conduct and, thus, might have the effect of removing the forfeited property from the bankruptcy estate established under 11 U.S.C. § 541 by reference to the debtors' property at the time of the filing of the bankruptcy petition. The court reasoned that it should not allow "such a complete and retroactive circumvention of the bankruptcy process" and, thus, only would "allow the State to establish its substantive entitlement to a forfeiture claim, which debt may thereafter be treated in accordance with bankruptcy's standard distribution mechanism." In passing, the court suggested that unsecured creditors might have the benefit of an

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United States v. One Parcel of Land etc. 13 Maplewood Drive, No. Civ-A-94-40137, 1997 WL 567945 (D. Mass. Sept. 4, 1997) (unpublished) Jan. 1998

United States v. Parise, No. 96-273-01, 1997 WL 431009 (E.D. Pa. July 15, 1997) (unpublished) Jan. 1998

United States v. Salemme, ___F. Supp.___, Nos. CR-94-10287, CR-97-10009, 1997 WL 774660 (D. Mass. Nov. 5, 1997) Feb. 1998

United States v. Williams, ___F.3d ___, No. 96-20823, 1998 WL 5450 (5th Cir. Jan. 9, 1998) Feb. 1998

Tax Deduction for Forfeiture

- ***Murillo v. Commissioner of Internal Revenue***, No. 18163-96, 1998 WL 6462 (U.S. Tax Court Jan. 12, 1998) — Feb. 1998

Territorial Waters

United States v. One Big Six Wheel, ___F. Supp.___, No. 97-CV-6500, 1997 WL 760229 (E.D.N.Y. Dec. 3, 1997) — Jan. 1998

Third-Party Rights

United States v. Barnette, 129 F.3d 1179 (11th Cir. 1997) — Jan. 1998

Venue

United States v. All Funds in "The Anaya Trust" Account, No. C-95-0778, 1997 WL 578662 (N.D. Cal. Aug. 26, 1997) (unpublished) — Jan. 1998

Victims

- ***United States v. Contents of Brokerage Account No. 519-40681-1-9-524***, No. M9-150, 1997 WL 786949 (S.D.N.Y. Dec. 23, 1997) (unpublished) — Feb. 1998

RICO

United States v. DeFries, 129 F.3d 1293 (D.C. Cir. 1997) — Jan. 1998

Rule 41(e)

- ***United States v. Moloney***, ___F. Supp.___, No. 93-CR-292L, 1997 WL 765795 (W.D.N.Y. Dec. 8, 1997) — Feb. 1998

Safe Harbor

Lopez v. First Union National Bank, 129 F.3d 1186 (11th Cir. 1997), *rev'g* 931 F. Supp. 86 (S.D. Fla. 1996) — Jan. 1998

Settlement

- ***U.S. v. All Assets of Revere Armored, Inc.***, 131 F.3d 132 (2d Cir. 1990) (Table) — Feb. 1998

State Court Foreclosure Proceedings

United States v. 1993 Bentley Coupe, ___F. Supp.___, No. CIV-A-93-1282, 1997 WL 751483 (D.N.J. Nov. 26, 1997) — Jan. 1998

Statute of Limitations

United States v. 657 Acres of Land in Park County, 978 F. Supp. 999 (D. Wyo. 1997) — Jan. 1998

Structuring

United States v. Funds in the Amount of $170,926.00, No. C-95-0778, 1997 WL 578662 (N.D. Cal. Aug. 26, 1997) (unpublished) — Jan. 1998

Substitute Assets

United States v. Parise, No. 96-273-01, 1997 WL 431009 (E.D. Pa. July 15, 1997) (unpublished) — Jan. 1998

Summary Judgment

- ***United States v. $86,020.00 in U.S. Currency***, ___F. Supp.___, No. 96-CV-125-TUC-ACM, 1997 WL _____ (D. Ariz. Nov. 12, 1997) — Feb. 1998

- ***United States v. $201,700.00 in U.S. Currency***, No. 97-0073-CIV-HIGHSMITH (S.D. Fla. Jan. 5, 1998) (unpublished) — Feb. 1998

Importation of Illegal Goods

United States v. 863 Iranian Carpets, ___ F. Supp. ___, No. 96-CV-1488, (N.D.N.Y. Nov. 17, 1997) — Jan. 1998

United States v. An Antique Platter of Gold, Civ. No. 95-10537 (S.D.N.Y. Nov. 14, 1997) (unpublished) — Jan. 1998

Indictment

United States v. DeFries, 129 F.3d 1293 (D.C. Cir. 1997) — Jan. 1998

Innocent Owner

United States v. 1993 Bentley Coupe, ___ F. Supp. ___, No. CIV-A-93-1282, 1997 WL 751483 (D.N.J. Nov. 26, 1997) — Jan. 1998

United States v. An Antique Platter of Gold, Civ. No. 95-10537 (S.D.N.Y. Nov. 14, 1997) (unpublished) — Jan. 1998

Jurisdiction

United States v. All Funds in "The Anaya Trust" Account, No. C-95-0778, 1997 WL 578662 (N.D. Cal. Aug. 26, 1997) (unpublished) — Jan. 1998

Money Laundering

United States v. 657 Acres of Land in Park County, 978 F. Supp. 999 (D. Wyo. 1997) — Jan. 1998

United States v. All Funds in "The Anaya Trust" Account, No. C-95-0778, 1997 WL 578662 (N.D. Cal. Aug. 26, 1997) (unpublished) — Jan. 1998

United States v. Funds in the Amount of $170,926.00, No. C-95-0778, 1997 WL 578662 (N.D. Cal. Aug. 26, 1997) (unpublished) — Jan. 1998

Notice

United States v. One Parcel of Land etc. 13 Maplewood Drive, No. Civ-A-94-40137, 1997 WL 567945 (D. Mass. Sept. 4, 1997) (unpublished) — Jan. 1998

Particularity

United States v. Funds in the Amount of $170,926.00, No. C-95-0778, 1997 WL 578662 (N.D. Cal. Aug. 26, 1997) (unpublished) — Jan. 1998

Attorneys' Fees

- ***U.S. v. All Assets of Revere Armored, Inc.***, 131 F.3d 132 (2d Cir. 1990) (Table) — Feb. 1998

Bankruptcy

- ***Bell v. Bell***, ___B.R.___, No. N97-11673-WHD, 1997 WL 751670 (Bankr. N.D. Ga. Nov. 13, 1997) — Feb. 1998

- ***U.S. v. All Assets of Revere Armored, Inc.***, 131 F.3d 132 (2d Cir. 1990) (Table) — Feb. 1998

Burden of Proof

United States v. DeFries, 129 F.3d 1293 (D.C. Cir. 1997) — Jan. 1998

CMIR

- ***United States v. Ogbonna***, No. CV-95-2100(CPS), 1997 WL 785612 (E.D.N.Y. Nov. 13, 1997) (unpublished) — Feb. 1998

Criminal Forfeiture

United States v. Barnette, 129 F.3d 1179 (11th Cir. 1997) — Jan. 1998

Disclosure of Bank Records

Lopez v. First Union National Bank, 129 F.3d 1186 (11th Cir. 1997), *rev'g* 931 F. Supp. 86 (S.D. Fla. 1996) — Jan. 1998

Dog Sniff

United States v. $13,570.00, No. CIV-A-97-1997, 1997 WL 722947 (E.D. La. Nov. 18, 1997) (unpublished) — Jan. 1998

United States v. $14,876.00, No. CIV-A-97-1967, 1997 WL 722942 (E.D. La. Nov. 18, 1997) (unpublished) — Jan. 1998

- ***United States v. $201,700.00 in U.S. Currency***, No. 97-0073-CIV-HIGHSMITH (S.D. Fla. Jan. 5, 1998) (unpublished) — Feb. 1998

Double Jeopardy

Hudson v. United States, ___S. Ct.___, No. 96-976, 1997 WL 756641 (Dec. 10, 1997) — Jan. 1998

- ***United States v. Ogbonna***, No. CV-95-2100(CPS), 1997 WL 785612 (E.D.N.Y. Nov. 13, 1997) (unpublished) — Feb. 1998

"innocent owner" defense against the forfeiture because the trustee could assert the rights of a bona fide purchaser of real property from a debtor on behalf of the bankruptcy estate. *See* 11 U.S.C. § 544(a)(3). —*JHP*

Bell v. Bell, ___ B.R. ___, No. N97-11673-WHD, 1997 WL 751670 (Bankr. N.D. Ga. Nov. 13, 1997). Contact: Attorney Alan W. Jackson, (770) 253-4330.

Quick Notes

■ Tax Deduction for Forfeiture

The United States Tax Court denied a claimant's attempt to take a tax deduction for the amount forfeited to the United States under the anti-structuring statutes, 31 U.S.C. § 5324(a)(3) and 18 U.S.C. § 981(a)(1)(A). The court held that allowing the deduction would place some of the burden of the forfeiture on the United States, and would thus undermine the congressional policy against structuring.

Murillo v. Commissioner of Internal Revenue, No. 18163-96,1998 WL 6462 (U.S. Tax Court Jan. 12, 1998). Contact: Andrew J. Mandell and Lewis J. Abrahams, (516) 832-2400.

■ Post and Walk

Last month, we reported that the Solicitor General had authorized the filing of a *cert.* petition in *United States v. 408 Peyton Road*, the Eleventh Circuit decision that ruled the "post-and-walk" policy unconstitutional. The petition was due to be filed on January 30, 1998. On the eve of our filing the *cert.* petition, however, the Eleventh Circuit *sua sponte* voted to vacate the opinion in *408 Peyton Road* and to grant rehearing *en banc*. Thus, there will be no appeal to the Supreme Court for the time being.

United States v. 408 Peyton Road, 112 F.3d 1106 (11th Cir. 1997), *reh'g en banc ordered*, ___ F.3d ___, No. 95-8330, 1998 WL 27289 (11th Cir. Jan. 23, 1998). Contact: AUSA Al Kemp, AGAN01(akemp).

corporation's forfeited assets, and by approving the settlement between the United States and the U.S. Bankruptcy Trustee that was the basis for the forfeiture order. The **Second Circuit** affirmed.

Before the attorney was retained to represent the corporation, the assets of the client corporation were seized for civil forfeiture under 18 U.S.C. § 981(a)(1)(C) in connection with the investigation and prosecution of the corporation's owners for bank fraud (18 U.S.C.§ 1344). Consequently, the attorney had obtained his initial payment in the form of a loan to the corporation from a third party. After exhausting these funds, the attorney twice unsuccessfully sought to have some of the corporation's assets released to pay his additional fees. The occasion for the second attempt was the U.S. Bankruptcy Trustee's intervention in the civil forfeiture proceeding.

The attorney, the United States, and the U.S. Bankruptcy Trustee subsequently entered into a stipulation which the court "so ordered." The stipulation provided that the attorney would receive a reasonable fee out of assets marshalled and held by the U.S. Bankruptcy Trustee. At the time of the stipulation, the attorney had expected that there were $4 to $5 million in accounts receivable that could be marshaled by the trustee for the bankruptcy estate. However, such assets never materialized.

Three years later, the United States sought the forfeiture of $231,000 from the corporation. The trustee objected, contending that the $231,000 should be part of the bankruptcy estate. When the trustee and the United States agreed to a settlement under which $171,000 would be forfeited and $60,000 would go into the bankruptcy estate, the corporation's attorney objected on the ground that the trustee had an obligation to oppose the forfeiture and maximize the assets available to pay his fee. Hence, he requested the district court to order payment of his unpaid fees out of the $171,000 forfeiture. The district court denied the attorney's request based upon the stipulation that the attorney would receive his fee from assets marshaled and held by the bankruptcy trustee. The court approved the settlement between the trustee and the United States,

and or[illegible] forfeited. The attorney appea[illegible]

Or[illegible] **ond Circuit** ruled that the tru[illegible] $60,000 in settlement did not bre[illegible] gation to marshal assets for the bar[illegible] he contrary, the decision of the [illegible] ed Sates to settle rather than lit[illegible] y $231,000" was reasonable be[illegible] ing at the intersection of civil fo[illegible] and the Bankruptcy Code is in m[illegible] respe[illegible] and contradictory" and "[illegible] rted l[illegible] v."

[illegible] attorn[illegible] ued that the district court sh[illegible] have i[illegible] his agreement with the United States and the [illegible] guaranteeing payment of his fees from wha[illegible] ce necessary. However, the **Second Circ**[illegible] d the attorney's agreement as a contract su[illegible] he rule that, when the terms are clear and u[illegible] ous, a court will not look beyond them t[illegible] the parties' intentions. The panel ruled that [illegible] ecause the agreement was clear, the attorney w[illegible] to be paid from the assets marshaled into the bankru[illegible] cy estate by the trustee, the attorney was contractua[illegible] y obligated to look only to those assets for his fee [illegible]

—*JHP*

U.S. v. Assets [illegible] ***of Rev*** [illegible] ***Armored, Inc.***, 131 F.3d 132 ([illegible] d Cir. 1[illegible]) (Table). Contact: AUSA Sarah L[illegible] m, AN[illegible]12(slum).

Comment: In its Memorandum and Order, the court misstates the Government's position. Judicial forfeiture proceedings, of course, are not brought under 28 C.F.R. § 9.8. What the Government actually told the court was that it intended to commence civil forfeiture proceedings against the funds pursuant to 18 U.S.C. § 981(a)(1)(C). The Government noted during oral argument that the Attorney General has the authority to entertain Petitions for Remission from non-owner victims and that 28 C.F.R. § 9.8 is an administrative provision that governs the consideration of such petitions. The Government pointed out that this avenue may provide relief for some unsatisfied claimants. The court, however, has no authority to order remission proceedings and we construe the court's order in this regard to be merely descriptive of the remission process.

The sequence of events in this case is also unusual. The court apparently took jurisdiction over the matter, and appointed the trustee, when the case was still in the administrative forfeiture stage. Having prevailed on the court to accept the trustee's recommendation to deny third party claims at that stage, the Government must now initiate a judicial forfeiture proceeding. Are the same third parties entitled to file claims in that case? —*NR*

Right to Counsel

- **In determining whether to appoint counsel in a criminal case, the court must be concerned that whatever evidence defendant produces regarding his financial situation may be used by the Government for the purpose of forfeiture.**

- **To protect defendants from unwilling waiver of their Fifth Amendment rights, financial affidavits may first be received *ex parte* for *in camera* review by the court. If the court cannot decide based upon the submissions, then an adversary hearing would be conducted with use immunity granted to defendants.**

Criminal defendants, in asking the court to appoint counsel pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, argued the court should receive financial affidavits *ex parte* from the defendants for *in camera* review to prevent the Government from using it to determine whether they have any assets subject to forfeiture. The Government argued for an adversary hearing, in which the defendants would be provided use immunity for their statements.

The court acknowledged that an adversary hearing involved a conflict between the Fifth Amendment right not to incriminate oneself and the Sixth Amendment right to effective assistance of counsel. In addition, the court noted that:

> "[t]he judicial inquiry into financial eligibility shall not be utilized as a forum to discover whether the person has assets subject to forfeiture, or the ability to pay a fine . . . or other purposes not related to the appointment of counsel."

Administrative Office of the United States Courts, *Guide to Judiciary Policies and Procedures*, Appointment of Counsel in Criminal Cases § 2.03(C) (1993).

As a compromise, the court held that it will first receive *ex parte* submissions from the defendants and Government to review *in camera* and will try to decide the issue upon the submissions, but if not, the court will order the submissions be exchanged and conduct adversary hearings focusing on any material fact(s) in dispute. In that hearing, the defendants would be entitled to the same use immunity they would receive in a suppression hearing. However, the court noted *in dicta* that it appears the Government

Administrative Forfeiture / Plea Agreement

■ **Where property was administratively forfeited prior to the time a plea agreement dismissing the forfeiture count in the indictment was reached, the dismissal of the forfeiture count has no effect on the administrative forfeiture.**

Defendant was indicted as a member of a drug organization that sold crack cocaine in Philadelphia. He was charged in three counts with conspiracy to distribute, distribution, and aiding and abetting the distribution of cocaine base, and with criminal forfeiture of his residence. Meanwhile, the Government instituted administrative forfeiture proceedings against Defendant's car and other personal property.

Ultimately, the defendant pled guilty to the drug counts and agreed to cooperate with the Government provided that the forfeiture count was dismissed at sentencing. Defendant was sentenced and subsequently appealed. The Third Circuit remanded the case for re-sentencing, at which time the defendant received the same sentence as the one originally imposed. Defendant then filed a *pro se* motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255, based upon several grounds including ineffective assistance of counsel. The Defendant contended, *inter alia,* that his counsel failed to argue that the Government had violated his plea agreement.

The essence of Defendant's argument was that the Government breached the plea agreement by refusing to return the personal property that was seized when he was arrested. The Government contended that the plea agreement applied only to the real property named in the indictment, and did not apply to the personal property that was forfeited administratively. The court agreed with the Government.

The court found that notice of the seizures of his car and jewelry was received by Defendant, who failed to file a claim and cost bond. The administrative forfeiture order vesting title of the property in the Government was issued three months prior to the signing of the plea agreement. Accordingly, at the time the plea was entered, Defendant held no right, title, or interest in the personal property, and the property, thus, could not serve as consideration for his agreement to enter a plea. The court noted further that the plea agreement stipulated only that the forfeiture count would be dismissed; and the record indicated that, at the plea hearing, the return of Defendant's residence was recited in relation to dismissal of the forfeiture count. No mention of the return of the automobile and jewelry was noted in the plea agreement or at the hearing.

The court's determination that the Government did not breach the plea by forfeiting the personal property defeated petitioner's contention of ineffective assistance of counsel. —*WJS*

Hampton v. United States, Nos. CIV-A-96-7829, CRIM-A-93-009-02, 1997 WL 799457 (E.D. Pa. Dec. 30, 1997) (unpublished). Contact: AUSA Chris Hall, APAE11(chall).

The district court disagreed. It held that when the Government returns property to a victim without benefit of a forfeiture order, it is required in the Rule 41(e) proceeding to establish by a preponderance of the evidence that the money belonged to the victim and not to the defendant. In this case, however, the evidence that Brink's was the true owner of the money was substantial. Thus, the Government met its burden and the Rule 41(e) motion was denied.

—SDC

United States v. Moloney, ___ F. Supp. ___, No. 93-CR-292L, 1997 WL 765795 (W.D.N.Y. Dec. 8, 1997). Contact: AUSA Christopher Buscaglia, ANYW01(cbuscagl).

Comment: Unfortunately, most civil forfeiture statutes do not authorize the Attorney General to return the forfeited funds to the victim as restitution. *See* 18 U.S.C. § 981(e) authorizing victim restitution only in civil forfeiture cases based on bank fraud. Thus, in a case such as this one, even if the property is initially seized for forfeiture, the Government must find a way to return it to the victim without actually obtaining a forfeiture order. Here, the Government did this simply by giving the property to the victim at the end of the criminal case instead of returning it to the defendant. That is entirely proper, but, as this case illustrates, when the Government takes such action on behalf of a victim, it must be prepared to prove that the property belonged to the victim and not the defendant. Presumably, if the Government failed to meet its burden in the Rule 41(e) proceeding, it would either have to recover the money from the victim or pay an equal amount to compensate the defendant.

An alternative that would protect the Government from such double exposure would be to proceed with the civil forfeiture action and allow both the defendant and the victim to file claims. Assuming the victim was still the owner of the property and not just a general, unsecured creditor, the victim would presumably prevail in the forfeiture proceeding and the defendant would lose. The victim of a theft is indeed an "owner victim," so that approach likely would have worked in this case. The victim of a fraud, however, is only a creditor and would lack standing to challenge the forfeiture of the fraud proceeds.

In that case, the best alternative might be a criminal forfeiture action which would extinguish any interest the defendant had in the property and result in forfeiture to the Government. Since the criminal forfeiture statutes *do* authorize the Attorney General to use forfeited funds for victim restitution, the property could then be restored to the victims.

The Department of Justice has asked Congress to address this problem by amending section 981 to authorize victim restitution in all civil forfeiture cases.

—SDC

Double Jeopardy / Alien Smuggling

■ Fifth Circuit extends *Ursery* to forfeitures for alien smuggling under 8 U.S.C. § 1324(b).

Defendant was convicted of using his airplane to smuggle illegal aliens into the United States. On appeal, he asserted that the district court should have dismissed his indictment on double jeopardy grounds because the Government had previously forfeited the airplane in a civil case under 8 U.S.C. § 1324(b).

Claimant acknowledged that the Supreme Court held in *Ursery* that civil forfeitures under the drug and money laundering statutes do not constitute punishment for double jeopardy purposes, but he noted that *Ursery* said nothing about alien smuggling cases and, thus, could be distinguished.

In *Ursery*, the Supreme Court set forth criteria to be used to determine if a civil forfeiture statute should be considered punitive for double jeopardy purposes. The court must first determine whether Congress intended the statute to be civil or criminal, and then must determine whether, notwithstanding the congressional intent, the forfeiture proceedings were in fact so punitive that they "may not legitimately be viewed as civil in nature." Applying these criteria, the **Fifth Circuit** held that section 1324(b) is indistinguishable from sections 881 and 981 and therefore was not a punitive statute.

The court found that Congress clearly intended section 1324(b) to be a civil sanction. It provides for *in rem* forfeiture in accordance with the procedures found in the Customs laws. Most important, however, the court held that section 1324(b) merely served the "nonpunitive goal of forfeiting only property used to commit a federal violation." Thus, the statute could not be construed as punitive for double jeopardy purposes. —*SDC*

United States v. Williams, ___ F.3d ___, No. 96-20823, 1998 WL 5450 (5th Cir. Jan. 9, 1998). Contact: AUSAs David R. Millard, ATXS01(rmillard).

Comment: The court's conclusion seems tantamount to a holding that a statute that authorizes forfeiture of facilitating property can never be considered punitive for double jeopardy purposes. This is highly significant for two reasons. First, it extends *Ursery* to a great many civil forfeiture statutes by establishing a *per se* rule regarding the forfeiture of facilitating property. Second, it illustrates just how far we have come from the "double jeopardy days" when courts, including the Fifth Circuit, were routinely holding just the opposite—that the forfeiture of facilitating property was *per se* punitive for double jeopardy purposes. —*SDC*

been in close or actual proximity to a large amount of narcotics just prior to packaging. (*See* comment, *infra*.) Thus, the court declined to discount the dog sniff as unreliable evidence. —*SDC*

United States v. $201,700.00 in U.S. Currency, No. 97-0073-CIV-HIGHSMITH (S.D. Fla. Jan. 5, 1998) (unpublished). Contact: AUSA Arimentha Walkins, AFLS03(awalkins).

Comment: The Government's expert witness in this case was Dr. Kenneth Furton, Chairman of the Chemistry Department at Florida International University. Dr. Furton has studied the question of what makes drug dogs alert to currency that is contaminated with cocaine. He has concluded that the dogs do not alert to cocaine at all, but to methyl benzoate, a highly volatile by-product of the cocaine manufacturing process.

According to Dr. Furton's affidavit, the difference between the cocaine itself, which allegedly contaminates a high percentage of all currency in circulation in the United States, and methyl benzoate is that the latter "dissipates quickly when handled or exposed to air, while pure cocaine hydrochloride has almost no gaseous odor and is transferred rather easily by physical contact."

Thus, Dr. Furton concludes that a positive dog alert "indicates that the currency had *recently, or just before packaging,* been in close or actual proximity to a significant amount of narcotics and is not the result of any alleged innocent environmental contamination of circulated U.S. currency by microscopic traces of cocaine."

Dr. Furton's affidavit is available from the Asset Forfeiture and Money Laundering Section and is on the Asset Forfeiture Bulletin Board. In addition, Dr. Furton has agreed to present the results of his study at the Advanced Asset Forfeiture Conference in Charleston, S.C., on February 17, 1998. Any materials he provides at the conference will be available from the Asset Forfeiture and Money Laundering Section thereafter. —*SDC*

Probable Cause / Airport Stop / Summary Judgment

- **Discounting dog sniff, district court nevertheless finds probable cause to believe currency seized in airport stop was drug proceeds.**
- **Large quantity of cash, use of assumed name, and other courier "profile" factors were sufficient to establish probable cause.**
- **Court may enter summary judgment for the Government even if the claimant offers evidence of a legitimate source for seized currency, if the explanation is so implausible that no reasonable jury could find for the claimant.**

Acting on a tip from an airport surveillance task force, DEA agents stopped Claimant and a companion in the Tucson, Arizona airport as they exited a flight from Florida. Both men fit the usual drug courier profile: they had purchased one-way tickets with cash shortly before departure, carried little or no luggage, and were traveling to or from a drug source city. They were also traveling under