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Quick Release

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Good Violation / Post and Walk

- **Eleventh Circuit, *en banc*, holds that the proper remedy for a *Good* violation is return of rents to the property owner, not dismissal of the forfeiture action.**

- **An arrest warrant *in rem* that authorizes the Government "to arrest and take into custody" the defendant property violates due process, even though the Government merely posts the property and makes no effort to assert physical control.**

- ***En banc* court suggests, but does not rule, that *in rem* jurisdiction may be obtained by posting an arrest warrant that omits any language authorizing the Government to take the real property into custody, thus avoiding a *Good* violation.**

The Government commenced a civil forfeiture case against real property and obtained a *seizure warrant* based upon a magistrate's *ex parte* finding of probable cause for forfeiture. Upon the filing of the complaint for forfeiture *in rem* two weeks later, the clerk of the court issued a *warrant of arrest in rem* directing the marshal "to arrest and take into custody" the defendant property. Both warrants were executed by posting them on the property, and a notice of *lis pendens* was filed in the local land records.

The Government made no effort to assert physical control over the premises, nor did it post warning signs or change the locks to buildings on the property. Claimant nevertheless moved to dismiss the forfeiture action for failure to afford him "pre-seizure" notice and opportunity for a hearing under *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), retroactively applied to this case. The district court denied this motion and granted summary judgment to the Government. A panel of the Eleventh Circuit reversed, *United States v. 408 Peyton Road*, 112 F.3d 1106 (11th Cir. 1997), concluding that the posting of the property with a copy of the warrant violated due process under *Good* and required dismissal of the case. The **Eleventh Circuit** granted the Government's Petition for Rehearing and Suggestion for Rehearing *En Banc*.

The *en banc* court noted that some of the language used by the Supreme Court in *Good* suggested that execution of a warrant of arrest *in rem* does not implicate the same due process concerns as does execution of a seizure warrant. In fact, the Supreme Court cited *United States v. TWP 17 R 4*, 970 F.2d 984 (1st Cir. 1992), with approval. In that case, the First Circuit permitted the posting of a warrant of arrest *in rem* on real property as a means of perfecting *in rem* jurisdiction without triggering the due process requirement of affording owners prior notice and opportunity for a hearing.

The *en banc* court found it unnecessary to definitively resolve the issue of whether execution of an arrest warrant implicates the same due process concerns as execution of a seizure warrant, however, because in this case, as in *Good*, both forms of warrants had been used and executed. It also noted, without deciding, that the title of the warrant may not be as determinative of whether there has been a due process violation as may be *the extent of the authority that the warrant purports to grant.*

The *en banc* court asserted that the Government was asking it to create an exception to *Good* where the Government, in fact, obtains and executes an arrest warrant and a seizure warrant authorizing it to exert physical control and dominion over the property, but then of its own free will chooses not to execute such authority. It noted that the majority in *Good* never defined the term "seizure" nor indicated that exercising physical control over the property should be regarded as the *sine qua non* of a constitutionally cognizable seizure. It accordingly turned to a determination of whether some lesser procedural protections than those required by *Good* are permissible under the three-factor test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), to what it termed to be deprivations occasioned by "nonphysical seizures of real property."

Pertaining to the first factor (the private interest at stake), the court found that the nonphysical seizure of a real property pursuant to a seizure warrant impairs the owner's right to maintain control over his property free of governmental interference. Physical seizure is not of paramount importance in the due process determination. Pertaining to the second factor (risk of erroneous deprivation), the court merely reiterated the conclusion in *Good* that *ex parte* issuance of seizure warrants creates an unacceptable risk of error. In doing so, however, it focused largely on protection for claimants under statutory "innocent owner" defenses. Pertaining to the third factor (which it defined as the Government's "specific interest in conducting nonphysical seizures of real property"), the court noted that this interest could be served by filing a notice of *lis pendens* in the local land records and, quoting *Good*, "by posting notice on the property and leaving a copy of the process with the occupant." Finally, the panel noted that the Government had neither established nor alleged the existence of "exigent circumstances" so as to justify dispensing with due process protections under *Good*. It concluded that the "nonphysical seizure" of the property violated the claimant's due process rights.

The *en banc* court then turned to the proper remedy for a *Good* violation. Quite significantly, it rejected the remedy of dismissal previously approved by a panel of the Eleventh Circuit in *United States v. 2751 Peyton Woods Trail*, 66 F.3d 1164 (11th Cir. 1995). The *en banc* court held that the proper remedy is the return of any rents received or other proceeds realized from the property during the period of illegal seizure. The panel found no need to further define the contours of this remedy because no rents were lost in this case. It also found no need to address if suppression of evidence is an appropriate remedy for a due process violation. —*HSH*

United States v. 408 Peyton Road, ___ F.3d ___, No. 95-8330, 1998 WL 846854 (11th Cir. Dec. 8, 1998) (*en banc*). Contact: AUSA Al Kemp (N.D. Ga.), CRM00.WTGATE.akemp2.

Comment: The decision of the *en banc* court, while a vast improvement over the panel opinion, is still quite peculiar and unclear. First, it recites that "[o]ur resolution of this case turns in large part on the fact that it is virtually identical to

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Good in that the [G]overnment here, as in *Good*, obtained and executed both a [warrant of arrest in rem] and a seizure warrant." It later states in a footnote, however, that "the title of the warrant may not be as determinative of whether there has been a due process violation as may be the extent of the authority that the warrant grants." Second, the court frames the issue as involving the permissibility of a "nonphysical seizure" of real property without affording owners prior notice and opportunity for a hearing, but never squarely decides that the mere act of *posting of a warrant* to secure *in rem* jurisdiction over real property constitutes a sufficient intrusion to trigger the due process protections. Indeed, the court cites, with evident approval and without qualification, the statement in *Good* that "the *res* may be brought within the [jurisdiction] of the court simply by posting notice on the property and leaving a copy of the process with the occupant." 510 U.S. at 58.

The unanswered question (and one the court expressly declined to resolve) is *what exactly* should be posted for the purpose of securing *in rem* jurisdiction over real property without triggering due process protections. The "answer," at least in the mind of the *en banc* court, appears to focus on *the language used* in the "warrant" or "notice." This "answer" derives from two critical footnotes in the majority opinion. In footnote 8, the majority noted that the Supreme Court in *Good* cited with approval the holding of the First Circuit decision in *TWP 17 R 4*, 970 F.2d at 984, that execution of a warrant by posting does not violate due process. The *en banc* court distinguished this decision as follows: "Although the arrest warrant in *TWP 17 R 4* directed the United States [m]arshal to "arrest the property . . . and detain the same in your custody until further order of the [c]ourt," *it did not direct the United States [m]arshal to actually seize the property* and the United States [m]arshal did not do so" (emphasis added) (citation omitted). In footnote 9, the court noted, without deciding, "that the title of the warrant may not be as determinative of whether there has been a due process violation as may be *the extent of the authority that the warrant purports to grant*" (emphasis added).

Thus, while much remains unresolved, it is clear that the problematic language of the warrants used in *408 Peyton Road*—directing the U.S. marshal "to arrest and take into custody" the defendant property—must clearly be avoided in all "notices" or "warrants" used to effectuate *in rem* jurisdiction over real property in the Eleventh Circuit. The question remains of whether anything must be posted at all. The *en banc* court states near the end of its opinion that "the [G]overnment can protect its legitimate interests by filing of notice of *lis pendens* or taking other steps short of seizure." This *might* be read as making the posting of a "notice" or "warrant" unnecessary. However, the *only* lawful procedure for perfecting a court's *in rem* jurisdiction over property as to which "the taking of actual possession is impracticable" (which includes all real property cases) is for "the [m]arshal . . . executing the process [(defined in Rule C(3) of the Supplemental Rules for Certain Admiralty and Maritime Claims as the complaint, supporting papers and warrant of arrest *in rem*)] [to] affix a copy thereof to the property in a conspicuous place and leave a copy of the complaint and process with the person having possession or the person's agent." Rule E(4)(b) of the Supplemental Rules. Thus, one must presume that the posting of a "notice" or "warrant" is still required in cases involving real property; the sole "wrinkle" imposed by *408 Peyton Road* is that the language used to be limited only in terms of affording notice to the world that the property is subject to the *in rem* jurisdiction of the district court.

The court's focus on statutory "innocent owner" defenses in evaluating "the risk of erroneous deprivation" under the *Mathews* standard is troublesome. The singular issue in a pre-seizure hearing under *Good* should be *the Government's authority* to seize the property and commence its civil forfeiture case. In other words, the hearing should focus exclusively on whether there are reasonable grounds to believe that the Government will be able to establish probable cause for forfeiture of the property at trial or on summary judgment. The statutory defenses are *affirmative defenses* to be raised and established by claimants at trial or on summary judgment. Such defenses have no place in a *pre-seizure Good* hearing. A regime under which an owner could contest "innocence" prior to seizure would, in essence, require a mini-trial on the merits prior to the filing of responsive pleadings or opportunity for meaningful

discovery. Indeed, the Government would be placed in the untenable position of having to rebut the affirmative "innocent owner" defense without benefit of any discovery whatsoever.

The Government should strongly oppose any and all efforts to extrapolate from the court's expression of concern a legal requirement that the "innocence" of the owner(s) may be placed at issue and contested in a *Good* hearing. *See, e.g., United States v. One Parcel of Property Located at 194 Quaker Farms Road*, 85 F.3d 985, 989 (2d Cir. 1996) ("The process generally proceeds as follows: Absent exigent circumstances, a hearing, with notice to record owners, is held before seizure.) *United States v. James Daniel Good Real Property*, 510 U.S. 43, ___, ___, ___, 114 S. Ct. 492, 498, 500-04 (1993). At this hearing, the Government must show probable cause that the property has been used for narcotics trafficking. *United States v. Milbrand*, 58 F.3d 841, 844 (2d Cir. 1995); *see generally Good*, 510 U.S. 43 ("[i]f the [G]overnment meets this burden, a warrant *in rem* issues, and the property is seized").

The *en banc* court's ruling that dismissal of the complaint is *not* an appropriate remedy for a *Good* violation is, of course, a very positive development. The Eleventh Circuit now rejoins the majority view on this issue. *See United States v. Marsh*, 105 F.3d 927 (4th Cir. 1997) (forfeiture case need not be dismissed, but the Government must account for the "profits it denied the claimant" for the period between the illegal seizure and the first adversarial hearing at which claimant was heard); *United States v. Real Property . . . 20832 Big Rock Drive*, 51 F.3d 1402 (9th Cir. 1995) (*Good* violation requires suppression of evidence illegally seized, but does not require dismissal of complaint); *United States v. One Parcel Property . . . Lot 85*, 100 F.3d 740 (10th Cir. 1996) (*Good* violation does not require dismissal of forfeiture action as long as "impermissibly obtained evidence is not used in the forfeiture proceeding"); *United States v. All Assets and Equipment of West Side Building Corp.*, 58 F.3d 1181 (7th Cir. 1995) (no dismissal of complaint for *Good* violation, but the Government owes claimant damages for lost profits). —*HSH*

Lis Pendens / Pretrial Restraint / Right to Counsel

- ***Lis pendens* does not constitute a seizure or restraint of property because the owner still can sell or encumber property subject to a *lis pendens*.**
- ***Lis pendens* does not adversely affect right to counsel because it does not affect a defendant's financial ability to retain counsel.**
- **A defendant whose assets are subject to forfeiture has a right to competent and effective legal representation, not to the counsel of his choice.**

The district court placed pretrial notices of *lis pendens* on two of Defendant's real properties as substitute assets for criminal forfeiture, and Defendant moved for their cancellation on the grounds that they constituted improper pretrial restraints of substitute assets and violated his right to counsel. The court disagreed and denied Defendant's motion.

The court pointed out that a notice of *lis pendens* may decrease the interest of potential buyers in purchasing disputed land, but that during the imposition of a notice of *lis pendens*, the disputed land is not effectively frozen and still may be sold or encumbered before the pending lawsuit involving it has been resolved. *See United States v. St. Pierre*, 950 F. Supp. 334, 337 (M.D. Fla. 1996). The court also pointed out that the filing of a *lis pendens* is "less intrusive" than a seizure. The court concluded that a *lis pendens* is not a restraint or seizure, but merely serves the purpose of notifying potential purchasers of the pending lawsuit concerning the property. The court stated that Defendant/owner still could sell or encumber his property by providing potential buyers or lenders with guarantees or other special contractual provisions designed to deal with a potential adverse judgement in the pending forfeiture action. Given its ruling that a *lis pendens* is not a seizure or restraint of property, the court found it unnecessary to consider

whether substitute assets may be restrained pretrial.

Based upon its ruling that Defendant could sell or borrow against the property subject to the *lis pendens*, the court also found that Defendant's right to counsel argument was "wholly without merit" because the *lis pendens* did not affect his financial ability to retain defense counsel. *See United States v. St. Pierre*, 950 F. Supp. at 338-39. Moreover, even if the notices of *lis pendens* did affect Defendant's finances and, therefore, his ability to choose counsel, the notices would not affect Defendant's Sixth Amendment rights because the right to counsel only guarantees a defendant competent and effective counsel and does not guarantee defendant the counsel of his choice.

—*JHP*

United States v. Kouri-Perez, No. 97-091 (JAF) (D.P.R. Dec. 14, 1998) (unpublished). Contact: AUSA Jacqueline D. Novas, CRM00.WTGATE.jnovas.

Comment: The court's ruling that a *lis pendens* is not a seizure, for purposes of forfeiture law, is consistent with the following cases: *United States v. James Daniel Good Real Property*, 510 U.S. 43, 58 (1993) (filing of a *lis pendens* is "less intrusive" than a seizure); *United States v. TWP 17 R 4, Certain Real Property in Maine*, 970 F.2d 984 (1st Cir. 1992) (posting of process for forfeiture action and notice of *lis pendens* is not a seizure under the Fifth Amendment); *Aronson v. City of Akron*, 116 F.3d 804 (6th Cir. 1997) (filing *lis pendens* is not a taking).

Concerning the right-to-counsel issue, the court relied on *Caplin & Drysdale Chartered v. United States*, 491 U.S. 617, 631 (1989), and *United States v. Bissell*, 866 F.2d 1343, 1353 (11th Cir. 1989) (pretrial restraint of all of the defendant's assets did not violate right to counsel).

—*JHP*

Plea Agreements

- **A plea agreement that provides that it constitutes the "full and complete agreement" between the parties concerning the defendant's guilty plea, but makes no mention of civil forfeiture, does not preclude the Government from pursuing civil forfeiture of the defendant's property once the criminal case is over.**

Defendant pled guilty to narcotics violations and was sentenced. The district court then awarded the United States partial summary judgment as to its civil forfeiture of certain property involved in the criminal case, including real property and currency. Defendant then filed an action seeking the return of forfeited property on the ground that the forfeiture violated his plea agreement in his criminal case, as well as the Excessive Fines, Double Jeopardy, and Due Process Clauses of the Constitution. The district court dismissed the civil action, and Defendant appealed. The **Sixth Circuit** affirmed the dismissal.

Defendant did not address his double jeopardy and due process claims in his initial brief; therefore, the Sixth Circuit ruled that he abandoned those claims for purposes of appellate review. The Sixth Circuit did address whether the following section of Defendant's plea agreement precluded forfeiture of his property:

> The parties further agree that this plea agreement constitutes the full and complete agreement and understanding between the parties concerning the defendant's guilty plea(s) to the above-referenced charge(s), and that there are no other agreements, promises, undertakings, or understandings between the defendant and the United States.

The panel held that the district court properly rejected Defendant's challenge to the civil forfeiture because there was nothing in the plea agreement that expressly precluded such forfeiture of Defendant's property. Additionally, the forfeiture proceedings were brought against the property itself and thus could not be construed as an "undertaking" between Defendant and the United States.

With regard to the remaining constitutional claim, the court held that, because civil forfeiture may be subject to the limitations of the Eighth Amendment's Excessive Fines Clause, a remand was necessary to allow the district court an opportunity to analyze the relevant facts.

—*MML*

Nichols v. United States, No. 96-6703, 1998 WL 792049 (6th Cir. Nov. 2, 1998) (Table) (unpublished). Contact: AUSA Robert Simpson (D. Tenn.), CRM00.WTGATE.rsimpson3.

Double Jeopardy / Probable Cause / Circumstantial Evidence

- **District court rejects a claimant's contention that allowing the Government to proceed on its civil forfeiture complaint violates the Double Jeopardy Clause.**

- **Probable cause to believe that seized currency was derived from drug trafficking may be based on the totality of the circumstances, including quantity of currency seized, proximity of currency to drug paraphernalia, and a claimant's arrest and conviction on drug charges.**

The Government filed a civil forfeiture complaint against currency seized from Defendant at the time of his arrest on drug charges. Also seized were: a revolver, 23 rounds of ammunition, a triple-beam balance scale, and a zip-lock bag containing 5 ounces of cocaine.

After he was found guilty of conspiracy to possess cocaine and possession of cocaine, Claimant filed two motions to dismiss the Government's civil forfeiture complaint. The first motion alleged that allowing the Government to proceed would violate the Double Jeopardy Clause. The second motion alleged that the complaint was not supported by probable cause. The district court denied both motions.

In his first motion, Claimant contended that the Supreme Court's holding in *United States v. Ursery*, 518 U.S. 267 (1996), did not address "circumstances where proceedings are so punitive, in fact, that they may not legitimately be viewed as civil in nature," and claimed that his case fell outside the scope of the *Ursery* decision. The district court rejected the argument and dismissed the double jeopardy claim, stating that Claimant misinterpreted *Ursery*.

In his second motion on lack of probable cause, Claimant contended that neither the complaint nor the accompanying affidavit established that the money sought to be forfeited was related to illegal drug activity. The court rejected this contention as well, stating that the alleged facts substantially connected the currency to cocaine-related activity. The court stated that probable cause may be established by circumstantial evidence that such property constitutes the proceeds of narcotics activity, and that "common experience considerations" should be applied. The court noted that the search warrant had been issued after a controlled purchase of cocaine from Claimant, and that execution of the warrant resulted in the discovery of additional narcotics and paraphernalia. Claimant was convicted on drug-related charges. Moreover, the amount of cash discovered in Claimant's residence was not an amount commonly kept in residences by law-abiding wage earners and consisted of small bills, indicating their use in narcotics transactions. Given the totality of the circumstances, the court concluded that there was sufficient reliable information to establish probable cause that Defendant currency was connected to illegal drug activity. —*JRP*

United States of One Lot of $17,220.00 in United States Currency, ___F.R.D. __, No. CIV-A-98-139ML, 1998 WL 796009 (D.R.I. Nov. 9, 1998). Contact: AUSA Michael P. Iannotti, CRM00.WTGATE.miannott.

Ancillary Proceeding / Adverse Inference

- **Third parties may not challenge the factual basis for the forfeiture in the ancillary proceeding in a criminal case. The only issue a third party may raise under section 853(n) is**

his superior ownership interest in the property subject to forfeiture.

- **Section 853(n)(3) requires a third party to state his interest in the forfeited property with particularity. A petition that merely tracks the language of section 853(n)(6) and gives no details regarding the third party's alleged legal interest is inadequate.**

- **Third parties may not rely on a Fifth Amendment claim against self-incrimination as an excuse for failing to allege the details of their legal interest in forfeited property.**

Defendant pled guilty to a money laundering conspiracy under 18 U.S.C. § 1956(h) and agreed to the forfeiture of certain property, including $46 million that Defendant agreed to repatriate from overseas and surrender to the United States and the proceeds of the future liquidation of certain real property in Florida. Upon acceptance of the plea agreement, the district court entered a preliminary order of forfeiture for the $46 million and proceeds from the future sale of the real property.

The Government then commenced an ancillary proceeding pursuant to section 853(n). Defendant's brother filed a claim challenging the adequacy of the evidence supporting the forfeiture of the property and asserting that he, not the defendant, was the true owner of the property. The Government objected to Claimant's attempt to challenge the forfeitability of the property and moved to dismiss the claim for failure to comply with the pleading requirements of section 853(n)(3). The district court granted the motion to dismiss.

The court disposed first of Claimant's challenge to the forfeitability of the property. Criminal forfeitures, the court noted, are *in personam* sanctions in which only the defendant's interest in the property involved in the criminal offense may be forfeited. An attempt to forfeit a third party's property in a criminal case may be voided if the third party establishes in the ancillary proceeding that the property belongs to him, not to the defendant. Because the only issue in the ancillary proceeding is the ownership of the property, the court explained, "a third party's right to challenge the forfeiture against a convicted defendant is limited to the right to assert the third party's own legal right, title[,] or interest in the forfeited property."

The court continued:

> The third party cannot attack the underlying theory of forfeiture, for that truly is not the third party's concern. A third party who is the true owner of the forfeited property will prevail on the § 853(n) petition whether or not the court's early finding regarding the forfeitability of the property was correct, and a petitioner who is not the true owner of the property will fail on the § 853(n) petition whether or not the court's earlier finding was correct. In either case, the basis for the forfeiture, and the adequacy of the evidence in support of it, are irrelevant to the third party.

Next, the court addressed the adequacy of the claims set forth in the petition. Section 853(n)(3) requires a claimant to set forth the "nature and extent" of his right, title or interest in the property, and the circumstances of his acquisition of that interest. Claimant's petition, however, merely tracked the language of section 853(n)(6) and alleged, in general terms, that he had the requisite interest in the forfeited property. Pertaining to the $46 million, Claimant asserted that he could not be any more specific as to his interest, because the preliminary order of forfeiture lacked details regarding the bank accounts through which the money had passed before it was surrendered to the Internal Revenue Service. Pertaining to the real property, Claimant asserted only that his brother, the defendant, was a nominee who acquired the property on Claimant's behalf.

The court found these allegations wholly inadequate. Claimant must know what his interest in the $46 million is, the court said, "and undoubtedly could describe it in detail if he wished." Concerning future proceeds from the sale of the real property, Claimant was required to allege facts supporting his claim of ownership of the real property, "such as when the property was acquired, where it was acquired, how it was acquired, . . . when his brother became a nominee, [and] the details of the alleged arrangement."

Claimant asserted that he could not provide any additional details in his petition without waiving his Fifth Amendment right against self-incrimination. He suggested that, if such details were required, the court

should stay the ancillary proceeding until Claimant no longer had any exposure to criminal prosecution. The court rejected this argument.

The assertion of the Fifth Amendment cannot be used as a substitute for the factual allegations required by section 853(n)(3), the court held. "The salient point is that the petition is inadequate, and case law indicates that a petitioner cannot employ the Fifth Amendment as an excuse for failing to satisfy the requirements of section 853(n)(3)." Accordingly, the request for a stay was denied, and the petition was dismissed. —*SDC*

United States v. Pegg, Crim. No. 97-CR-30 (HL) (M.D. Ga. Dec. 9, 1998) (unpublished) Contact: Deputy Chief G. Allen Carver, Jr., AFMLS, Criminal Division, CRM20(acarver).

Comment: A number of courts have now held that a third party has no right to challenge the factual basis for the forfeiture in a criminal case. In each case, the court recognized that, in a criminal case, a third party's property is never at risk of forfeiture. As long as the third party establishes that he is the true owner of the property, he will prevail in the ancillary proceeding. Therefore, there is no cause for the third party to challenge the factual basis for the forfeiture. (Compare this to a civil forfeiture case in which *all* interests in the property are subject to forfeiture, and accordingly any party with a legal interest is entitled to challenge the factual basis for forfeiture before a jury.)

Unfortunately, all of these cases, like the latest one, are unpublished. *See United States v. Sokolow*, 1996 WL 32113 (E.D. Pa. Jan 26, 1996) (third party may not relitigate propriety of the special verdict form, legality of a forfeiture count, or whether court properly ordered forfeiture of substitute assets); *United States v. Duboc (Petition of F. Lee Bailey)*, No. GCR-94-01009-MMP (N.D. Fla. May 9, 1996) (unpublished) (third party cannot dispute a defendant's admission that property was purchased with drug proceeds); *United States v. Ken International Co., Ltd.*, 113 F.3d 1243 (9th Cir. 1997) (Table) (unpublished) (third party cannot object that court failed to find factual basis for forfeiture under Rule 11(f)).

There are a few published cases regarding the particularity in the third-party petition required by section 853(n)(3) or its RICO counterpart, section 1963(l)(3). All of them hold that the district court has the discretion to dismiss without a hearing any petition that fails to set forth adequately the nature and extent of the petitioner's alleged interest in the forfeited property. *See United States v. BCCI Holdings (Luxembourg) S.A. (Fifth Round Petition of Liquidation Comm'n for BCCI (Overseas) Macau)*, 980 F. Supp. 1 (D.D.C. 1997) (petition that is not signed under penalty of perjury and fails to identify asset in which a claimant is asserting an interest and nature of that interest does not comply with section 1963(l)(3)); *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of BCCI Campaign Committee)*, 980 F. Supp. 16 (D.D.C. 1997) (petition dismissed because not signed under penalty of perjury); *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Richard Eline)*, 916 F. Supp. 276 (D.D.C. 1996) (claim that simply listed random legal phrases dismissed for failure to set forth nature and extent of legal interest in the forfeited property as required by section 1963(l)(3)); *United States v. BCCI Holdings (Luxembourg) S.A. (Fourth Round Petitions of General Creditors)*, 956 F. Supp. 1 (D.D.C. 1996) (petition stating only that "the property belongs to me" was insufficient); *but see United States v. Toma*, 1997 WL 467280 (N.D. Ill. Aug. 6, 1997) (petition signed "under oath" is the equivalent of "under penalty of perjury"; petition reciting dates and circumstances when claimant acquired title to vehicle is sufficient; not necessary to attach title documents). —*SDC*

Ancillary Proceeding / Substitute Assets / Attorneys' Fees

- **Defense attorneys may not challenge forfeiture of substitute assets in the ancillary proceeding on the ground that such assets are needed to pay their fees.**

- **Unless they take steps under state law to levy against defendants' assets, defense attorneys are merely creditors without any legal interest in the substitute property.**

Defendant was convicted and ordered to forfeit substantial property as substitute assets. In the ancillary proceeding, two sets of defense attorneys objected to the forfeiture on the ground that they had a legal interest in the substitute assets, because that money was needed to pay their fees. The district court denied both petitions.

First, the court recognized, but sidestepped, a threshold issue. Under section 1963(l)(6)(A), a third party may recover forfeited property if he had a superior interest in the property "at the time of the commission of the acts which gave rise to the forfeiture." This provision embodies the relation back doctrine, which provides that the Government's interest in forfeited property vests at the time of the commission of the underlying offense. What is unclear is how the relation back doctrine applies to substitute assets.

Claimants argued that notwithstanding the language in section 1963(l)(6)(A), the Government's interest in substitute assets does not vest until the property is included in an order of forfeiture. Thus, they argued, their only burden is to show that their interest was vested at that time, and not, as the statute seems to require, at the time of the commission of the criminal offense.

The court, however, found it unnecessary to resolve this issue. Claimants, the court held, were merely creditors of Defendant. They may have earned attorneys' fees by performing legal services, but they never took any of the steps required under state law to levy against any of Defendant's property. Accordingly, that had claims against Defendant personally, but held no legal interest in the particular assets forfeited as substitute property. Thus, they had no right to recover under section 1963(l)(6)(A), regardless of whether the Government's interest in the property vested at the time it was included in the order of forfeiture or at some earlier time. —*SDC*

United States v. Stewart, No. 96-583 (E.D. Pa. Dec. 11, 1998) (unpublished). Contact: AUSA Maryanne Donaghy, CRM00.WTGATE.mdonaghy.

Comment: When the Government's interest vests in substitute assets is entirely unclear. In most cases, claimants—like the attorneys in this case—argue that it does not vest until the last possible moment, i.e., when the property is included in an order of forfeiture. The Government, on the other hand, generally argues that it vests at some earlier point. Most often, the Government suggests that it vests when the property is first listed in an indictment, bill of particulars, or motion to forfeit substitute assets. But some prosecutors contend that under the plain language of the statute, the Government's interest relates back to the date of the underlying criminal offense, even though the substitute property was unrelated to, and untainted by, that offense.

These issues are discussed in Rena Johnson's article, "When Does the Government's Interest in Substitute Assets Vest?," published in the *Asset Forfeiture News*, May/June 1995, at 9-12. The Department of Justice has proposed legislation amending the criminal forfeiture statutes to address this problem by making it clear that the Government's interest in substitute assets vests when the property is first identified by the Government as being subject to forfeiture in the course of the criminal case. —*SDC*

Indictment / Bill of Particulars

- **A pretrial discovery request is not the appropriate medium through which a defendant may elicit proof from the Government regarding forfeiture allegations in the indictment.**

- **Forfeiture allegations in an indictment serve as "notice pleading." The Government is not required to itemize its proof in support of the forfeiture either in the**

indictment or in response to a discovery request.

- **The Government may be required, through a Bill of Particulars, to specify the subsections of the forfeiture statute on which the forfeiture allegations are based.**

In a criminal forfeiture case, Defendant moved for a Bill of Particulars and, alternatively, for return of seized property, contending that the Government had no legal basis to justify the forfeiture of $54,822. (He argued that only $7,350 of the $62,172 seized for forfeiture was directly related to drug sales.) Defendant relied upon *United States v. Garcia-Guizar*, ___ F.3d ___, 1998 WL 736357 (9th Cir. Oct. 23, 1998), which held that criminal forfeiture under 21 U.S.C. § 853(a)(1) is limited to the portion of the defendant's property that the Government proved by a preponderance of the evidence was the proceeds obtained as a result of the activities for which he was convicted.

Defendant apparently confused information elicited through evidence produced by the Government during its case-in-chief at trial to meet the burden of proof, with information that is discoverable prior to commencement of the trial. The court found *Garcia-Guizar* distinguishable as it did not involve pretrial discovery. Noting that the Government properly tracked the statutory language in the allegations of the superseding indictment, the court determined that the Government was not required to "itemize" the basis for forfeiture of property named in the forfeiture count of the indictment. Further, as the indictment merely serves as notice to the defendant of the nature of the allegations brought, the Government was not required to provide any proof supporting the allegations until trial.

The court decided that Defendant was entitled to a Bill of Particulars only to the extent that the Government must identify the specific subsections of section 853 on which it would rely as the basis for forfeiture. Accordingly, the court ordered the Government to clarify whether it would rely solely upon section 853(a)(1) (forfeiture of drug proceeds), or whether it would rely on section 853(a)(2) (facilitating property) as well. —*WJS*

United States v. Kahn, No. A98-0148-CR (JKS) (D. Alaska Dec. 17, 1998) (unpublished). Contact: AUSA Betsy O'Leary, CRM00.WTGATE.bo'leary4.

Innocent Owner / Standing / Summary Judgment / Constructive Trust

- **A person who gives money to another who uses it to buy drugs has standing to contest the forfeiture of the money.**

- **A claimant in such a case is no longer the owner of the money because he voluntarily transferred it to another; but he may be the beneficiary of a constructive trust if he alleges that he had no idea his money was going to be used for an unlawful purpose, and that it was taken from him by fraud.**

- **Government's motion for summary judgment on an innocent owner defense must be denied where the claimant's knowledge regarding the use of his property is in dispute.**

Claimant gave Defendant $50,000, allegedly to pay for a custom-built airplane. Defendant, however, used the money to buy drugs from an undercover agent. When the Government filed a civil forfeiture action against the $50,000 under section 881(a)(6), Claimant asserted that the $50,000 still belonged to him and that he was an innocent owner because he had no idea Defendant would use the $50,000 for an illegal purpose. The Government moved to strike the claim for lack of standing and for summary judgment.

The district court had no trouble finding that the Government had established probable cause to believe that the $50,000 was forfeitable as property intended to

be exchanged for a controlled substance, and it granted the Government's motion for summary judgment on that issue. The court was troubled, however, by the innocent owner claim.

First, the court found that Claimant, who voluntarily transferred his $50,000 to Defendant, was no longer the owner of the money as a matter of state law. Thus, the court appeared poised to grant the motion to strike the claim for lack of standing. But the court then held that Claimant had standing because—if the facts asserted by Claimant were true—the $50,000 was taken from him by fraud, and he was therefore the beneficiary of a constructive trust. Having found standing, the court the denied the motion for summary judgment on the innocent ownership issue because the facts regarding Claimant's state of mind were in dispute. —*SDC*

United States v. One 1987 Velocity Aircraft, No. 97-CV-1906 BTM (S.D. Cal. Dec. 2, 1998) (unpublished). Contact: AUSA Mary Lundberg, CRM00.WTGATE.mlundber.

Comment: The district court's denial of the Government's motion for summary judgment on the innocent owner claim is understandable. Such motions are rarely granted where the claimant's state of mind is in issue, and there is a dispute as to what the claimant knew concerning the use of his property. *See United States v. Real Property 874 Gartel Drive*, 79 F.3d 918 (9th Cir. 1996) (where wife disclaims knowledge of the illegal transactions [structuring], there is material issue of fact); *United States v. Dollar Bank Money Market Account*, 980 F.2d 233 (3d Cir. 1992) (no summary judgment where affirmative defense is that underlying crime did not occur because of absence of requisite *mens rea* element, and claimant offers "reasonable and legitimate" explanation for events that would permit jury to find that perpetrator lacked requisite intent); *United States v. Leak*, 123 F.3d 787 (4th Cir. 1997) (same). For the same reason, however, the court may have erred in imposing a constructive trust to allow Claimant to establish standing. A constructive trust is an equitable remedy that may be imposed only if the claimant/beneficiary has "clean hands." *See United States v. $3,000 in Cash*, 906 F. Supp. 1061 (E.D. Va. 1995) (constructive trust not imposed, even though claimant could trace assets, because claimant did not have clean hands). In this case, the Government alleged that Claimant was complicit in the drug deal and knew full well that his $50,000 would be used for that purpose. Thus, it was probably wrong for the court to reject the Government's motion to dismiss for lack of standing. Instead of assuming Claimant's assertion was true for the purposes of standing and thus finding a way to impose a constructive trust, the court might have withheld ruling on the standing issue until Claimant's knowledge was determined at trial—for both standing and innocent owner purposes. In that way, the court could have achieved the same result without creating a precedent for improperly imposing a constructive trust on behalf of a coconspirator in a drug deal in order to allow the coconspirator to have standing to challenge the forfeiture of the money he supplied for the drug purchase. —*SDC*

Notice / Laches / Administrative Forfeiture

- **Actual notice to a prisoner/claimant is not required to satisfy due process.**
- **Laches bars motion for return of property if claimant waits five years to file claim and offers no reasonable excuse for the delay.**

The Government indicted Defendant on drug charges in 1990 and immediately filed a civil forfeiture complaint against certain real and personal property belonging to him. Notice of the forfeiture proceeding mailed to Defendant's home was returned undelivered. Notice mailed to the place of Defendant's incarceration was accepted by a prison employee, but there was no record as to whether Defendant actually received the notice. However, at a hearing concerning Defendant's ability to afford counsel held nine days

after the filing of the forfeiture complaint, the court discussed the property involved in the forfeiture action with Defendant and the Assistant U.S. Attorney.

In March 1991, the Government moved for a default judgment of forfeiture and mailed notice to Defendant's prison, where it was accepted by a prison employee. Again there was no record of Defendant's actual receipt of the notice. However, prison records indicated that Defendant was incarcerated there at the time this notice was received. Notice of the default motion was served also on the attorney representing Defendant in the criminal case, and the forfeiture proceedings were again discussed in Defendant's presence at a hearing in April 1991.

Also, in March 1991, the Drug Enforcement Administration (DEA) seized two rings belonging to Defendant from his fiancee. The notices of administrative forfeiture proceedings that were sent to Defendant's home address and to his fiancee's address were both returned undelivered. DEA also sent notice of the administrative forfeiture proceedings against the two rings to Defendant's prison address where it was accepted by a prison employee. Prison records again indicated that the defendant was a prisoner at that prison when the administrative forfeiture notice arrived there.

In July 1991, the court entered a default forfeiture judgment against the real and personal property included in the forfeiture complaint, DEA declared the two rings administratively forfeited, and Defendant was convicted in the criminal case. In 1992, the defendant contacted the U.S. Attorney's Office (USAO) seeking return of the two rings and stating that he had just learned from a local newspaper that his real property had been forfeited. The USAO informed the defendant that he should contact DEA concerning the rings. Defendant asked his counsel to contact DEA, but his counsel failed to do so. Three years later, in 1995, Defendant himself contacted DEA concerning the rings, and DEA advised him that they had been forfeited.

In March 1998, Defendant moved for the return of all of his forfeited property relying on the holding in *Weng v. United States*, 137 F.3d 709 (2d Cir. 1998) (summarized in the *Quick Release*, April 1998, at 12-13), that due process requires actual notice to a federal claimant in federal custody. The court ruled that "*Weng* does not represent the law of the First Circuit," and that, instead, due process only requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *United States v. Giraldo*, 45 F.3d 509, 511 (1st Cir. 1995) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)); *see also United States v. One Parcel ... 13 Maplewood Dr.*, 1997 WL 567945 (D. Mass. Sept. 4, 1997) (holding that service by certified mail on attorney and on claimant in state prison where claimant was incarcerated was sufficient).

The court pointed out that other circuits also have held that due process does not require actual notice to potential claimants who are incarcerated. *See, e.g.*, *United States v. Real Property Known as the Lido Motel*, 135 F.3d 1312, 1315 (9th Cir. 1998) (summarized in the *Quick Release*, March 1998, at 13-14); *United States v. Clark*, 84 F.3d 378, 381 (10th Cir. 1996). The court ruled that under the circumstances, including the fact that Defendant was in custody, due process required that the Government send him notice at the prison where he was incarcerated. The court found that the record in this case indicated that the Government had done so in both the administrative forfeiture of the rings and the judicial forfeiture of Defendant's real and other personal property. Consequently, the court concluded, due process had been satisfied.

As a separate and independent basis for the denial of Defendant's motion, the court also ruled that the doctrine of laches should apply to bar recovery of forfeited property. The court found that the circumstances of this case satisfied the elements of the test for laches, unreasonable delay and prejudice to the opposing party. The rings were seized in 1991, yet Defendant waited until 1996 to seek judicial redress, and the court found that the excuse that his lawyer failed to contact DEA was unreasonable and unacceptable given Defendant's ability to do so himself. In addition, because the prison had moved in 1994, the court found that the delay had prejudiced the Government's ability to produce prison records to prove actual delivery of the notices.

In addition, the court found that the transcripts of the December 1990 and April 1991 hearings in the criminal case proved that Defendant had notice, in fact, of the judicial forfeiture proceedings well in advance of the default judgment. The court stated that, when a

person has notice in fact, his claim based on the asserted failure of the Government, after good faith efforts, to provide him with written notice ordinarily lacks merit. —*JHP*

Whiting v. United States, ___ F. Supp. 2d ___, No. CIV-A-98-11907-REK, 1998 WL 847933 (D. Mass. Nov. 30, 1998). Contact: AUSA Richard Hoffman, CRM00.WTGATE.rhoffman3.

Comment: As this decision points out, courts are split concerning whether notice of forfeiture sent to a claimant's prison is adequate to satisfy due process absent actual delivery of the notice to the prisoner. Most of the decisions, like *Whiting*, hold that actual notice is not required. *See United States v. Clark*, 84 F.3d 378 (10th Cir. 1996) (mailing notice to inmate's place of incarceration is sufficient; personal service not necessary); *United States v. Real Property (Lido Motel)*, 135 F.3d 1312 (9th Cir. 1998) (same); *United States v. Real Property (Tree Top)*, 129 F.3d 1266 (6th Cir. 1997) (Table) (same); *Scott v. United States*, 950 F. Supp. 381 (D.D.C. 1996) (publication and sending notice to prison where defendant incarcerated is adequate whether defendant actually receives the notice or not); and *United States v. One Parcel ... 13 Maplewood Dr.*, 1997 WL 567945 (D. Mass. 1997) (same) (noting that mailing notice to the prison address is mandatory); *but see Weng v. United States*, 137 F.3d 709 (2d Cir. 1998) (actual delivery of notice to prisoner required; proof that prisoner was located in the facility at the time notice was sent there, and that facility signed for the notice, is not sufficient proof that the prisoner actually received the notice); *Aguilar v. United States*, 8 F. Supp. 2d 175 (D. Conn. 1998) (Rule 60(b) motion granted; the Government required to prove prisoner received actual notice); *United States v. Woodall*, 12 F.3d 791, 794-95 (8th Cir. 1993) (if the Government is incarcerating or prosecuting the property owner, fundamental fairness requires that either the defendant or his counsel receive actual notice of the institution of a forfeiture proceeding); and *United States v. Cupples*, 112 F.3d 318 (8th Cir. 1997) (following *Woodall*). However, the courts are unanimous in holding that the Government must attempt to serve prisoners at their place of incarceration, and cannot rely on publication or mailing to the last known address. *See Small v. United States*, 136 F.3d 1334 (D.C. Cir. 1998) (notice sent to prisoner's place of incarceration is not adequate if notice is returned undelivered to seizing agency before administrative forfeiture is complete and agency could have taken steps to locate prisoner); *United States v. Giraldo*, 45 F.3d 509, 511 (1st Cir. 1995) (seizing agencies must take steps to locate the prisoner and send him notice in jail).

The *Whiting* decision also adds to the split among the courts concerning the applicability of laches to bar claims for forfeited property. Other courts have held that laches does not bar such claims. *See Ikelionwu v. United States*, 150 F.3d 233 (2d Cir. 1998) (laches does not bar suit to recover forfeited property where claimant did not have notice of right to contest forfeiture; knowledge of the seizure does not equate with knowledge of the right to challenge the forfeiture action); *United States v. Marolf*, 973 F. Supp. 1139 (C.D. Cal. 1997) (where claimant waits to assert due process rights until after statute of limitations has run, doctrine of laches does not require dismissal of Rule 41(e) motion or tolling of limitations period; claimant has no duty to save the Government from the results of its own carelessness); *but see United States v. Mulligan*, 178 F.R.D. 164 (E.D. Mich. 1998) (defendant who waits until after statute of limitations bars civil forfeiture action is barred by laches from filing Rule 41(e) motion). —*JHP*

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