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Fugitives and Forfeiture--Flouting the System or Fundamental Right?

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NOTES

Fugitives and Forfeiture – Flouting the System or Fundamental Right?

INTRODUCTION

Is a fugitive claimant in a civil forfeiture action defending his due process rights or "flouting the system"?[1] Until recently, the answer was clear. However, the recent decision of the Seventh Circuit Court of Appeals, *United States v. $40,877.59*,[2] creates a split in authority regarding the right of one who is a "fugitive from justice" to defend seized property.[3] The Seventh Circuit is the first court to take the approach that defending property in such an action is based on the fundamental due process right to a fair hearing;[4] other courts consider a fugitive to be "flouting" the system by defending in this manner.[5] The

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[1] This phrase has been used to define the situation where a defendant could "accept the benefits from a favorable adjudication . . . but could choose to avoid the consequences of an adverse adjudication." United States v. $40,877.59, 32 F.3d 1151, 1152 (7th Cir. 1994) (citing Smith v. United States, 94 U.S. 97, 97 (1876)).

[2] *Id.*

[3] For a discussion of the varying definitions of "fugitive from justice," see *infra* notes 38-48 and accompanying text.

[4] *$40,877.59*, 32 F.3d at 1153. The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. Several Supreme Court cases have noted that this provision includes the right to a hearing in order to answer charges and present evidence and defenses. *See, e.g.*, Hovey v. Elliott, 167 U.S. 409, 413-14 (1897) (finding that striking out an answer and rendering a decree pro confesso as punishment for contempt constituted a denial of due process).

[5] The Supreme Court in Ortega-Rodriguez v. United States, 113 S. Ct. 1199, 1206 (1993), explained the fugitive disentitlement doctrine as follows: "The fugitive from justice has demonstrated such disrespect for the legal processes that he has no right to call upon the court to adjudicate his claim." *See also* United States v. Timbers Preserve, 999 F.2d 452, 453 (10th Cir. 1993) (upholding an entry of default in a forfeiture proceeding

Seventh Circuit's approach is more in touch with the Supreme Court's changing attitude towards forfeiture. Recent cases suggest that the Court endeavors to make forfeiture a fairer and more limited doctrine than in the past.[6]

Part I of this Note examines the origins of civil forfeiture and its uses from the Middle Ages to the 1970s to more recent times.[7] Part II gives an historical perspective on the fugitive disentitlement doctrine, including its use to deny standing in a civil forfeiture action.[8] Part III describes the Seventh Circuit's holding and rationale in *$40,877.59*.[9] Part IV analyzes the holding and rationale of *$40,877.59*.[10] The Note concludes that the Seventh Circuit's holding is consistent with due process and that a person's fugitive status should not be a bar to defending property seized by the government.[11] At a minimum, a bipartisan hearing should be held for all claimants, regardless of status, to ensure the fairness of the seizure and the action as a whole.

I. CIVIL FORFEITURE

A. Historical Background

Civil forfeiture is an action by the government against property suspected of being used in or purchased with the profits from certain illegal transactions.[12] The action is in rem, which means that the property itself, not the owner, is the defendant. The property in this context is considered, by its very nature, to be a "wrongdoer."[13] In order to prevent the government from keeping the seized property, all persons

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under the fugitive disentitlement theory); United States v. $129,374, 769 F.2d 583, 586-87 (9th Cir. 1985) (using disentitlement doctrine to bar conservator's intervention in forfeiture proceeding), *cert. denied sub nom.* Geiger v. United States, 474 U.S. 1086 (1986); Conforte v. Commissioner, 692 F.2d 587, 589 (9th Cir. 1982) (holding that a taxpayer who was a fugitive from justice was not entitled to prosecute an appeal).

[6] *See infra* notes 31-37 and accompanying text.

[7] *See infra* notes 12-37 and accompanying text.

[8] *See infra* notes 38-75 and accompanying text.

[9] *See infra* notes 76-115 and accompanying text.

[10] *See infra* notes 116-51 and accompanying text.

[11] *See* pp. 650-51.

[12] Congress determines the scope of the action. *See infra* notes 19-22 and accompanying text.

[13] *See* United States v. United States Coin & Currency, 401 U.S. 715, 719 (1971) (noting that in forfeiture proceedings, inanimate objects themselves are considered guilty of wrongdoing); Tamara R. Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L. REV. 911, 927 (1991).

with a claim to it must appear at a hearing and prove by a preponderance of the evidence that the property was not used in or purchased with the proceeds of the crime in question.[14]

Civil forfeiture has existed in some form since the Middle Ages, when any property causing the death of a person was forfeited to the English Crown.[15] Forfeitures were later used in America to enforce violations of maritime or admiralty law.[16] The colonies used similar concepts to rationalize the seizure of hostile ships and other vessels in wartime.[17] The United States government also used this concept to justify confiscation of Confederate property at the end of the Civil War.[18] Civil forfeiture today is used to enforce customs duties and other administrative regulations.[19]

However, the effect of civil forfeiture was not realized fully until Congress established both civil and criminal forfeiture as tools in the war on drugs and crime in the early 1970s.[20] Forfeiture also has been approved for use in money laundering and financial institution fraud,[21] and it is now a penalty for violations of several crimes and regulations.[22]

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[14] *E.g.*, United States v. $40,877.59, 32 F.3d 1151, 1156 (7th Cir. 1994); Arthur W. Leach & John G. Malcolm, *Criminal Forfeiture: An Appropriate Solution to the Civil Forfeiture Debate*, 10 GA. ST. U. L. REV. 241, 254-55 (1994). Compare the civil forfeiture proceeding with the criminal forfeiture proceeding. *See infra* note 26.

[15] This doctrine was known as "deodand." *See* Piety, *supra* note 13, at 928-29; Leach & Malcolm, *supra* note 14, at 247. Piety notes that, in many cases, only the value of the offending objects was forfeited. Piety, *supra* note 13, at 928-29. *See generally id.*; Leach & Malcolm, *supra* note 14 (providing an excellent history of civil forfeiture and its uses).

[16] Piety, *supra* note 13, at 935; Leach & Malcolm, *supra* note 14, at 248.

[17] Leach & Malcolm, *supra* note 14, at 248.

[18] *Id.* at 249.

[19] *E.g.*, 19 U.S.C. § 1607 (1988 & Supp. IV 1992) (customs regulation); 26 U.S.C. § 7325 (1988) (administrative forfeiture under the Internal Revenue Code).

[20] *See* Comprehensive Drug Abuse Prevention and Control (Controlled Substances) Act of 1970, Pub. L. No. 91-513, § 511, 84 Stat. 1242, 1276 (1970) (codified at 21 U.S.C. § 881 (1988 & Supp. V 1993)); *see also* Marc B. Stahl, *Asset Forfeiture, Burdens of Proof and the War on Drugs*, 83 J. CRIM. L. & CRIMINOLOGY 274, 275 & nn.6-18 (1992) (discussing how forfeiture proceeds are used to pay more police and prosecutors).

[21] *See* 18 U.S.C. § 981 (1988 & Supp. V 1993). Criminal forfeiture, *see infra* note 26, has been established mainly to deter organized criminal activity. *See, e.g.*, Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1988 & Supp. IV 1992); Continuing Criminal Enterprise Act, 21 U.S.C. §§ 848, 853 (1988).

[22] *E.g.*, Omnibus Diplomatic Security and Antiterrorism Act of 1986, 18 U.S.C. §§ 793(h), 794(d) (1988 & Supp. V 1993); Child Protection Act of 1984, 18 U.S.C. §§ 2253-2254, 1.3(b)(1) progressive order (1988 & Supp. V 1993) (amended by civil and criminal forfeiture provisions by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7522(c), 102 Stat. 4181, 4494-4501 (1988)); Controlled Substances Act, 21 U.S.C.

B. Recent Cases Limiting Civil Forfeiture

Almost from the beginning, scholars labeled civil forfeiture actions as unfair, prejudicial, and even unconstitutional.[23] Unlike traditional civil suits where the plaintiff bears the burden of proof, in civil forfeiture actions the claimant to the defendant property must prove that the property was *not* used or gained illegally.[24] Courts have repeatedly rejected the argument that this approach amounts to a presumption of "guilty until proven innocent" because the action is not "criminal" enough in nature to trigger the Due Process Clause prohibition on this kind of burden-shifting.[25]

Further, unlike the situation of criminal forfeiture where a conviction gives rise to the forfeiture,[26] in a civil forfeiture action the government only has to show a "substantial connection" of the property to a suspected crime in order to seize it.[27] This low standard of proof has been criticized for its effect on innocent owners of the seized property, who either have a joint interest in the property with the suspected criminal or receive the property without knowledge of its tainted character.[28] Courts have acknowledged the chance for governmental abuse in the amount or type of property seized, the limited amount of evidence establishing that a crime has been committed, and the effect on innocent owners,[29] but they have generally sustained the doctrine by relying on the duty and necessity for authorities to prevent and punish crime.[30]

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§ 853(p) (1988 & Supp. V 1993); Currency and Foreign Transactions Reporting Act, 31 U.S.C. § 5311 (1970).

[23] *See* Leach & Malcolm, *supra* note 14, at 253-56.

[24] *E.g.*, United States v. $40,877.59, 32 F.3d 1151, 1156 (7th Cir. 1994).

[25] *See* Leach & Malcolm, *supra* note 14, at 256 (citing United States v. $2,500, 689 F.2d 10, 12 (2d Cir. 1982), *cert. denied*, 466 U.S. 1099 (1984)). *But see* Piety, *supra* note 13, at 920-21 (noting that civil forfeiture under tariff laws fell under Fourth Amendment because "the information, though technically a civil proceeding, is in substance and effect a criminal one" (citing Boyd v. United States, 116 U.S. 616, 634 (1886))).

[26] *See* Leach & Malcolm, *supra* note 14, at 264-65. The criminal forfeiture is an in personam action, which focuses on the person convicted of the crime. All assets used in the commission of the crime and/or all profits from the crime must affirmatively be connected with the crime beyond a reasonable doubt in order to be forfeited. *Id.*

[27] *E.g.*, United States v. $4,255,000, 762 F.2d 895, 903 (11th Cir. 1985) (noting that the "substantial connection" test is the appropriate standard), *cert. denied*, 474 U.S. 1056 (1986).

[28] *See $40,877.59*, 32 F.3d at 1155; Leach & Malcolm, *supra* note 14, at 255-57.

[29] *See* Leach & Malcolm, *supra* note 14, at 254-60.

[30] *See* Piety, *supra* note 13, at 946-47 (noting where the courts have justified the use of forfeiture as "remedial").

In the past five or six years, however, the Supreme Court and some circuit courts of appeal have begun limiting the application of civil forfeiture. The Court in *Alexander v. United States*[31] and *Austin v. United States*[32] stressed that the amount of the forfeiture should be proportional to the crime in question. Considering criminal and civil forfeiture to be "punishment," the Court noted that the forfeited amounts are subject to the Excessive Fines Clause of the Eighth Amendment.[33]

In addition, the Court rejected application of the "relation back" doctrine to the ownership of the seized property.[34] After *92 Buena Vista Avenue*, the title to the seized property does not vest in the government until it has been *adjudicated* as seizeable by a court; thus, the defense of innocent ownership is available to all making a claim.[35] The Court also has mandated that the requirements of the Fifth and Fourteenth Amendments relating to notice of the seizure and a proper hearing of any defenses be met in forfeiture actions.[36] Most recently, the Ninth Circuit

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[31] 113 S. Ct. 2766, 2776 (1993) (involving criminal forfeiture). For a brief discussion of the procedure for a criminal forfeiture action, see *supra* note 26.

[32] 113 S. Ct. 2801, 2812 (1993) (involving civil forfeiture). Decided on the same day, *Austin* and *Alexander* each discussed the need for proportionality under the Eighth Amendment.

[33] *Austin*, 113 S. Ct. at 2812; *Alexander*, 113 S. Ct. at 2776. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Court specifically noted in *Austin* that a forfeiture such as the one in question was at least partially punitive in nature and therefore should be considered a "fine." *Austin*, 113 S. Ct. at 2808-09.

The Court in *Austin*, however, refused to set a standard by which lower courts could establish what was excessive. *Id.* at 2812. The failure to do so has created a wide variety of subsequent decisions on the matter. *See* United States v. 835 Seventh St., 832 F. Supp. 43, 48 (N.D.N.Y. 1993) (noting that the *Austin* Court left the matter of fashioning an appropriate standard to the district courts); Ellen S. Zimiles et al., *Proportionality in Forfeiture Cases in Light of* Austin *and* Alexander, *in* WHITE COLLAR CRIME 1994, at G-51-52.

[34] Prior to United States v. 92 Buena Vista Avenue, 113 S. Ct. 1126, 1135-37 (1993), the "relation back" doctrine was the seemingly accepted idea that

> the government's right to forfeited property . . . vested at the time of its illegal use, rather than at the time a forfeiture judgment was obtained or when the property was seized. . . . From this, it had been argued that the government had superior title to anyone acquiring an interest in the property after the illegal act.

Leach & Malcolm, *supra* note 14, at 262 (footnote omitted).

[35] *92 Buena Vista Ave.*, 113 S. Ct. at 1137. "The Government cannot profit from the common-law doctrine of relation back until it has obtained a judgment of forfeiture. And it cannot profit from the statutory version of that doctrine . . . until respondent has had the chance to invoke and offer evidence to support the innocent owner defense." *Id.*

[36] United States v. James Daniel Good Real Property, 114 S. Ct. 492, 500-02 (1993). "The *ex parte* preseizure proceeding affords little or no protection to the innocent

has held that the government's initiation of both criminal and civil forfeiture actions resulting from the same crime amounts to double jeopardy in violation of the Fifth Amendment.[37] These recent cases indicate that the courts are backing away from their previous dispositions which concentrated on the importance of the "remedial" measures in stopping crime and which sought to conform this interest to the constitutional rights afforded to all citizens.

II. FUGITIVE DISENTITLEMENT

A. Historical Background

The fugitive disentitlement doctrine as used in civil forfeiture cases actually is based on the constitutional right to appeal. The Supreme Court held in early cases that a convicted criminal who flees captivity is a "fugitive from justice" and thus has no right or standing to pursue an appeal of that conviction.[38] Originally, the Court rejected such appeals due to the fact that the proceedings would have no valid effect on fugitives.[39] However, the Court in *Molinaro v. New Jersey* determined that the fugitive waived his rights under the justice system and thus was "disentitled" from his normal rights.[40] Allowing a fugitive to appeal in these situations, courts reasoned, would be "flouting" the justice system.[41]

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owner. . . . The Government is not required to offer any evidence on the question of innocent ownership or other potential defenses a claimant might have." *Id.* at 502.

The Court established a three-part balancing test to determine if "exigent circumstances" exist to seize the property without notice or hearing. That test balances "the private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and the Government's interest, including the administrative burden that additional procedural requirements would impose." *Id.* at 501.

[37] United States v. $405,089.23, 33 F.3d 1210, 1215-16 (9th Cir. 1994). It must be noted that this particular decision has created a flurry of discussion concerning the future of forfeiture among criminal law academicians and enforcers alike. Interview with Sarah Welling, Professor of Law, University of Kentucky College of Law, in Lexington, Ky. (Nov. 18, 1994).

[38] Bonahan v. Nebraska, 125 U.S. 692, 692 (1887); Smith v. United States, 94 U.S. 97, 97-98 (1876).

[39] *See* Ortega-Rodriguez v. United States, 113 S. Ct. 1199, 1203-04 (1993) (regarding the post-conviction flight and subsequent pre-appeal recapture of defendant).

[40] 396 U.S. 365, 366 (1970) (upholding the dismissal of an appeal brought by a defendant who failed to surrender himself).

[41] *E.g., Ortega-Rodriguez*, 113 S. Ct. at 1206; United States v. Persico, 853 F.2d 134,

Over the years, "fugitive disentitlement" spread beyond its original meaning. In addition to referring to an escapee from conviction, the term "fugitive" has been defined as one who has not been convicted or even arrested but who leaves the jurisdiction for the purpose of avoiding arrest, prosecution, or extradition to answer for the alleged crime.[42] Courts have also held fugitive status to be a "state of mind."[43] The person does not even have to possess physical control over the failure to return to the jurisdiction; if he *leaves* voluntarily, he is considered a fugitive.[44]

Courts have applied the fugitive disentitlement doctrine to bar actions in other types of situations as well. For example, the appellant does not have to be a fugitive from the particular sovereign hearing the appeal; fleeing from any sovereign bars the right to appeal.[45] The doctrine also spread to bar a criminal fugitive from bringing a related civil action[46]

137-38 (2d Cir. 1988) (declining to reach the merits of an appeal by a defendant who fled overseas after conviction and remained at large for seven years).

[42] *See* United States v. Timbers Preserve, 999 F.2d 452, 454-55 (10th Cir. 1993) (involving an individual who had been imprisoned while in Laos); United States v. Marshall, 856 F.2d 896, 900 (7th Cir. 1988) (involving a defendant who had left the state); United States v. $45,940, 739 F.2d 792, 796 (2d Cir. 1984) (involving involuntary deportation). This intent to evade justice, in most cases, must be proven by a preponderance of the evidence, *see Marshall*, 856 F.2d at 900, although some courts do not require proof of intent, *see* McGowen v. United States, 105 F.2d 791, 792 (D.C. Cir.) (explaining that a fugitive from justice is one who simply has left the jurisdiction), *cert. denied*, 308 U.S. 552 (1939).

[43] United States v. Catino, 735 F.2d 718, 722 (2d Cir.) (involving an individual who had been imprisoned in France), *cert. denied*, 469 U.S. 855 (1984); *see* United States v. Eng, 951 F.2d 461, 464 (2d Cir. 1991) ("Fleeing from justice does not . . . mean a person [is] 'on the run.' One may flee though confined in prison in another jurisdiction. Fleeing from justice is not always a physical act.").

[44] Courts have held voluntary absence from the jurisdiction in which an action is proceeding to be sufficient to establish fugitive status. *Catino*, 735 F.2d at 722; *see Timbers Preserve*, 999 F.2d at 454 (noting that the defendant was imprisoned in Laos when the forfeiture action was commenced); *Eng*, 951 F.2d at 465 (finding that the overseas defendant had not done "all within his power" to return to country).

[45] *E.g.*, Broadway v. City of Montgomery, 530 F.2d 657, 659 (5th Cir. 1976) (finding that a defendant who was a fugitive from justice was barred from calling upon the resources of an appellate court for a determination of his case).

[46] *See* Schuster v. United States, 765 F.2d 1047, 1049-50 (11th Cir. 1985) (involving a civil tax suit related to criminal money laundering suspicion); Doyle v. United States Dep't of Justice, 668 F.2d 1365, 1365 (D.C. Cir. 1981) (per curiam) (claiming that Freedom of Information Act, 5 U.S.C. §§ 551-559 (1976), request had not been fulfilled), *cert. denied*, 455 U.S. 1002 (1982); *see also* Conforte v. Commissioner, 692 F.2d 587, 589-91 (9th Cir. 1982) (denying standing in a civil appeal regarding penalties imposed to a fugitive from criminal tax evasion claims).

and even later to apply in an in rem civil proceeding.[47] Some courts also hold that, regardless of who initiated the proceedings in civil court, the person's fugitive status bars his or her participation in that action.[48]

B. As Traditionally Applied in Civil Forfeiture

The Sixth Circuit first addressed the issue of a fugitive in a civil forfeiture action in *United States v. $83,320.*[49] That court refused to extend to the civil forfeiture context[50] the Supreme Court's reasoning in *Molinaro v. New Jersey*, which held that an appeal could not be made of a criminal conviction when the defendant had fled custody.[51] The court reasoned that "the individual accused of the related criminal violation is not necessarily the only individual with a direct, litigable interest in the outcome of the forfeiture action."[52] The court continued that the "escape of the criminal defendant should not be raised as a bar to those who may have a legitimate, innocent interest in exonerating the defendant property from its wrongdoing," such as creditors and employees of the business involved in the narcotics scheme in question.[53]

However, later courts distinguished *$83,320* and found *Molinaro* and other fugitive cases sufficient to bar claims in forfeiture actions. The court in *United States v. $45,940,* for example, relied on the fact that the only person in that case with a claim to the property in question was the fugitive.[54] Thus, the court reasoned, the basis for allowing the appeal in *$83,320* (the existence of potentially innocent claimants) was not present, and the denial of access to a civil forfeiture suit was consistent with other cases which denied access to civil suits based on fugitive status.[55]

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[47] *See infra* notes 49-75 and accompanying text (regarding those courts which applied fugitive disentitlement to civil forfeiture).

[48] *Eng*, 951 F.2d at 466 (holding that status as a fugitive bars defense); United States v. 7707 South West 74th Lane, 868 F.2d 1214, 1216-17 (11th Cir. 1989) (holding that a fugitive from justice waives due process rights in a civil forfeiture proceeding).

[49] 682 F.2d 573 (6th Cir. 1982) (holding that claimant's fugitive status did not preclude his appeal from the decision ordering forfeiture).

[50] *Id.* at 576.

[51] 396 U.S. 365 (1970).

[52] *$83,320*, 682 F.2d at 576.

[53] *Id.*

[54] 739 F.2d 792, 797-98 (2d Cir. 1984).

[55] *Id.* (citing Doyle v. United States Dep't of Justice, 668 F.2d 1365, 1365-66 (D.C. Cir. 1981) (per curiam) (noting that a defendant who evades federal authority is precluded from demanding that a federal court address his complaint), *cert. denied*, 455 U.S. 1002 (1982), and Broadway v. City of Montgomery, 530 F.2d 657, 659 (5th Cir. 1976) (finding that fugitive status bars a defendant from seeking appellate review)).

The Ninth Circuit, in *United States v. $129,374*, also rejected the Sixth Circuit's concerns of third-party claims, stating that "[i]nnocent creditors and beneficiaries, if any, would benefit only secondarily" to the fugitive, so his right was foremost in question.[56] The court reemphasized the expansion of the fugitive disentitlement doctrine to include completely unrelated civil actions.[57]

The First Circuit declined to apply the disentitlement doctrine to fugitive status in *United States v. Pole No. 3172*.[58] That court ruled that the fugitive's status was not "closely related" to the civil forfeiture in question.[59] More importantly, the court said that the claimant in *Pole No. 3172* did not "invoke the processes of the court," as he was merely protesting a government action.[60] The court continued: "One of the main considerations in the fugitive from justice cases is the fact that the fugitive is trying . . . to reap the benefit of the judicial process without subjecting himself to an adverse determination."[61] The court found the fact that the claimant was merely responding to the government's action to be sufficiently distinguishable.[62]

The next year, the Eleventh Circuit took the opposite stance in *United States v. 7707 South West 74th Lane*.[63] The court stated that the justification in *$83,320* did not apply, as no claims were made against the property except by the fugitive.[64] The court then held that the in rem nature of the forfeiture action did not differ from other civil suits applying disentitlement.[65] Following *Molinaro*, the court opined, "By his own actions as a fugitive . . . the appellant has disentitled himself from raising objections . . . ."[66] to the validity of the seizure. The court referred to it as "essentially an uncontested action."[67]

The court in *United States v. Eng* likewise distinguished *$83,320* on lack of a third-party claim.[68] The Second Circuit also explained that it makes no

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[56] 769 F.2d 583, 589 (9th Cir. 1985), *cert. denied sub nom.* Geiger v. United States, 474 U.S. 1086 (1986). In addition, the existence of such parties was only speculative. *Id.*

[57] *Id.* at 586.

[58] 852 F.2d 636 (1st Cir. 1988).

[59] *Id.* at 643-44.

[60] *Id.* at 643.

[61] *Id.*

[62] *Id.*

[63] 868 F.2d 1214, 1217 (11th Cir. 1989).

[64] *Id.*

[65] *Id.* at 1216.

[66] *Id.* at 1217.

[67] *Id.* (citing United States v. $3,817.49, 826 F.2d 785 (8th Cir. 1987), and United States v. Beechcraft Queen Airplane, 789 F.2d 627 (8th Cir. 1986)).

[68] 951 F.2d 461, 465 (2d Cir. 1991).

difference who initiates the proceedings in question; fugitive status is a bar to defending.[69] "The doctrine operates as a waiver . . . of [the fugitive's] due process rights in related civil forfeiture proceedings."[70] The court read the previous holding of *Pole No. 3172* very narrowly, finding that it only stood for the proposition that fugitive status *without substantial relation* to the forfeiture action does not justify application of fugitive disentitlement.[71]

Finally, in *United States v. Timbers Preserve*,[72] the Tenth Circuit became the fifth court to apply the fugitive disentitlement doctrine to civil forfeiture. Finding that the claimant had voluntarily avoided prosecution and that the seized property was directly related to the crime, the court affirmed the denial of the claim to the seized property and entered a default judgment.[73]

Against this background, the Seventh Circuit heard the case of *United States v. $40,877.59*.[74] Note that the courts rely heavily on each other's decisions in applying the disentitlement doctrine. After the first two courts applied the *Molinaro* standard, the others simply followed suit, without regard for constitutional issues such as whether due process requires a bipartisan hearing.[75]

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[69] *Id.* at 466.

[70] *Id.*

[71] *Id.* at 466-67. The court noted that in *7707 South West 74th Lane* the defendant was considered a fugitive because proper notice of the pending action was given to him; thus, his failure to appear at that hearing gave him the status of "fugitive." *Id.* at 466.

Additionally, the *Eng* court clarified the gray edges around the rights of a fugitive by holding that "[a]ppellant is entitled to all of his due process rights once he returns to stand trial. None of his constitutional rights are given up by waiving extradition. His remedy as a fugitive is to forego that status and promptly avail himself of his right to a speedy and public trial . . . ." *Id.* at 467.

[72] 999 F.2d 452 (10th Cir. 1993).

[73] *Id.* at 454.

[74] 32 F.3d 1151 (7th Cir. 1994).

[75] Oddly, the courts have merely followed precedent without discussion of the constitutional consequences.

The court in United States v. $45,940, 739 F.2d 792, 797 (2d Cir. 1984), noted that other circuits had extended the *Molinaro* decision to civil cases, citing Conforte v. Commissioner, 692 F.2d 587 (9th Cir. 1982) (holding that a taxpayer who was a fugitive from justice was not entitled to prosecute appeal), Doyle v. United States Department of Justice, 668 F.2d 1365 (D.C. Cir. 1981) (per curiam) (finding that the evasion of federal authority bars a defendant from demanding that a federal court hear his complaint), *cert. denied*, 455 U.S. 1002 (1982), and Broadway v. City of Montgomery, 530 F.2d 657 (5th Cir. 1976) (barring a fugitive from calling upon the resources of an appellate court for a determination of his case). The Second Circuit adopted *Molinaro* without explaining any of the other courts' decisions to extend it to civil cases and without any explanation of its

III. *UNITED STATES V. $40,877.59*

A. Facts

Iraqi businessman Anas Malik Dohan and two other individuals were indicted for "allegedly shipping, or conspiring to ship," technological equipment to Iraq from the United States in violation of executive orders issued during the Persian Gulf War.[76] One defendant was acquitted; charges were dropped against another.[77] Dohan remained in Jordan throughout the war and did not appear to defend the charge.[78] The government seized all funds in Dohan's Indiana bank account, alleging that they had been used in furtherance of the illegal transactions.[79] Dohan filed a claim to the funds, but the federal district court in Indiana rejected this claim on the basis that Dohan's fugitive status disentitled him from defending against the action.[80] The court subsequently entered a default judgment without a hearing.[81]

B. Holding and Rationale

In refusing to permit the application of fugitive disentitlement to civil forfeiture, the Seventh Circuit based its opinion on the principle that "notwithstanding an individual's status, where he is vulnerable to being sued, he has the right to defend himself in the action brought against him."[82] The court relied on two older Supreme Court cases involving the

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own decision to do so.

Likewise, the Ninth Circuit in United States v. $129,374, 769 F.2d 583, 587 (9th Cir. 1985), *cert. denied sub nom.* Geiger v. United States, 474 U.S. 1086 (1986), followed the Second Circuit's lead by citing all previously mentioned cases and adding a discussion of the holding in *$45,940.*

Other courts have applied the same rationale for extending the doctrine: the precedent of *Molinaro* and its extension by later cases. *See, e.g.*, Conforte v. Commissioner, 692 F.2d 587 (9th Cir. 1982); Doyle v. United States Dep't of Justice, 668 F.2d 1365 (D.C. Cir. 1981) (per curiam), *cert. denied*, 455 U.S. 1002 (1982); Broadway v. City of Montgomery, 530 F.2d 657 (5th Cir. 1976). Not once is the issue of due process discussed in the context of fugitives and forfeiture.

[76] United States v. $40,877.59, 32 F.3d 1151, 1152 (7th Cir. 1994). The violation was brought under 18 U.S.C. § 981 (1988 & Supp. V 1993). *$40,877.59*, 32 F.3d at 1151.

[77] *$40,877.59*, 32 F.3d at 1152.

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.* at 1153 (citing McVeigh v. United States, 78 U.S. 259, 267 (1870)).

right to defend in situations in which status to do so was unclear. The Court in *McVeigh v. United States* held that an "alien enemy" (a Confederate office holder) was entitled to defend against a forfeiture action brought against him in Virginia, despite his lack of "locus standi."[83] The Court said that, although McVeigh had a questionable right to sue in Virginia, it was uncontroverted that he *could be sued* in that state.[84] In allowing McVeigh to defend, the Court held that the right to defend is fundamental, as "[t]he liability and the right are inseparable."[85] Likewise, in *Hovey v. Elliott,* the Court found it a violation of due process to punish someone with a default judgment merely because the defendant was in contempt of court.[86] The Court reasoned:

> The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatsoever is . . . to convert the court exercising such an authority into a instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.[87]

The Seventh Circuit compared the situations of contempt of court (as in *Hovey*) to fugitive status and found them similar. The court noted that the fugitive civil forfeiture claimant was "in a position similar to a party in contempt of court"[88] because both contempt of court and fugitive status may work to bar a potential suit. Therefore, by analogy, the court suggested that the *Hovey* rationale would find the denial of the fugitive's right to defend equally as offensive to due process as the denial of that right to one in contempt of court.[89] Further, the court stated that, since *Hovey* found no distinction in contempt of court in criminal and civil proceedings, the right to answer a seizure of property is analogous to the right to answer charges as granted by due process in criminal cases.[90]

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[83] 78 U.S. at 267.

[84] *Id.*

[85] *Id.*

[86] 167 U.S. 409, 413-14 (1897).

[87] *Id.* at 413-14. The Court reviewed English common law and chancery decisions as well as early American decisions which supported the idea that contempt of court is not a bar to defending a subsequent claim. *Id.* at 414-44.

[88] United States v. $40,877.59, 32 F.3d 1151, 1154 (7th Cir. 1994).

[89] *Id.* at 1154-55.

[90] *Id.*

The court also cited a recent Supreme Court case, *United States v. Sharpe*, which rejected the application of the fugitive disentitlement doctrine "in those very different circumstances where the government, and not the fugitive, initiates the action."[91] Here, the court noted, although Dohan was the appellant, he was "clearly in a defensive position,"[92] and it was the government who had seized his property. Thus, the court opined, Dohan fell within the Supreme Court's precedent in *Sharpe*.[93]

The court next pointed out some of the imbalance and unfairness in the civil forfeiture proceeding.[94] According to the court, the fact that the government could seize the property in question on a "mere allegation" constituted the "real injustice" in forfeiture actions.[95] Such an allegation, the court suggested, is an "insufficient basis on which to justify a forfeiture."[96] The court also stated that the government's allegations of a connection between the property and the suspected crime should be questioned.[97] In addition, the court observed that those courts allowing fugitive disentitlement in forfeiture cases place heavy reliance on the relationship of the property to the crime in question.[98] However, the Seventh Circuit noted that the prime purpose of the forfeiture hearing is to *determine* whether a connection exists between the property to be seized and the suspected crime; hence, the requirement of only an allegation by the government is subject to abuse and "artful pleading."[99]

Likewise, the court stated that the claimant's "fugitive" status is not always fully established before the forfeiture action commences, and thus this area is open to abuse by the government's bare allegation as well.[100] Citing Supreme Court precedent, the court observed that, in order to be a "fugitive," one must "intentionally take a material step towards

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[91] *Id.* at 1154 (citing United States v. Sharpe, 470 U.S. 675, 681-82 (1985), which held that since the Supreme Court's grant of certiorari caused respondent's fugitive status, the status did not result in dismissal of the case). The defendant became a fugitive after his conviction was reversed by the Fourth Circuit and after the Supreme Court granted certiorari; the Court decided to review the case "on the merits." *Sharpe*, 470 U.S. at 681-82 n.2.

[92] *$40,877.59*, 32 F.3d at 1154.

[93] *Id.*

[94] *Id.* at 1155.

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.* at 1156.

commission of the crime while in the state and then absent himself from that state. If the crime is then completed while he is outside the state, he would become a fugitive."[101] Further, to be a fugitive, "a defendant must flee the state with the intent to avoid prosecution."[102] Without hearing his case, the circuit court said that Dohan's status was uncertain at best and that the forfeiture action was used solely to "bar Dohan from asserting a claim to his property."[103]

The recent Supreme Court case of *United States v. James Daniel Good Real Property* rejected the previously common practice of an ex parte pre-seizure hearing regarding temporary seizure of the property pending a full forfeiture hearing.[104] In that case, the Court held that such a hearing did nothing to preserve the rights of the unrepresented party who was in jeopardy of losing his property because the government was not required to present evidence or possible defenses of innocent ownership.[105] The Seventh Circuit, by analogy, noted that "[i]f a probable cause warrant, issued ex parte, is not sufficient to temporarily deprive an owner of the use of his property . . . , then clearly it is an insufficient basis on which to justify a permanent loss by forfeiture."[106]

The court also found support in the recent Supreme Court decision of *United States v. Ortega-Rodriguez*.[107] There, a convicted fugitive, sentenced in absentia, appealed his re-sentencing upon recapture and indictment for contempt of court.[108] The Supreme Court held that the court of appeals could not punish the fugitive for disrespect of the judicial system by dismissing his case.[109] The Court found that the fugitive's misconduct (fleeing) had "no connection to the course of appellate proceedings."[110] In the Court's opinion, allowing flight to bar

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[101] *Id.* (citing Strassheim v. Daily, 221 U.S. 280, 285 (1911)).

[102] *Id.* (citing United States v. Marshall, 856 F.2d 896, 899-900 (7th Cir. 1988), which held that fugitive tolling statutes apply when the government shows defendant's intent to flee justice by a preponderance of evidence).

[103] *Id.* at 1156-57.

[104] *Id.* at 1155 (citing United States v. James Daniel Good Real Property, 114 S. Ct. 492, 502 (1993)). In such a hearing, the magistrate must decide if there is probable cause that a connection between the property and the suspected crime exists. If it exists, a warrant is issued for the seizure of the property, pending adjudication of its lack of connection. *James Daniel Good*, 114 S. Ct. at 502.

[105] *James Daniel Good*, 114 S. Ct. at 502.

[106] *$40,877.59*, 32 F.3d at 1155.

[107] *Id.* at 1156 (citing 113 S. Ct. 1199, 1207 (1993)).

[108] *Ortega-Rodriguez*, 113 S. Ct. at 1202-03.

[109] *Id.* at 1207.

[110] *Id.*

appellate proceedings gave the courts too much discretion in sanctioning minor offenders with dismissal of their cases.[111]

The Seventh Circuit observed that this rationale extends to civil forfeiture. "[T]he claimant's fugitive status does not threaten the integrity of the forfeiture proceeding," and thus, the forfeiture action should not be dismissed.[112]

The court concluded by recognizing the fundamental importance of due process and the opportunity to be heard in the American justice system. "The courts have a duty to render just decisions that are in accordance with the law, and without a fair hearing, that cannot be done."[113] The government has a valid right to deter crime, the court noted, and "when properly enforced," the civil forfeiture system "serves the public good."[114] But, the court warned of certain limits:

> [P]roperty that is not illegally obtained or used should not be forfeited, and cannot be forfeited under the civil forfeiture act, even if the owner of that property is a fugitive. If the fugitive cannot prove the innocent ownership of the property, he will lose that property. . . . The only way to make a just determination of whether that property is forfeitable is to afford the claimant an opportunity to be heard.[115]

Thus, while forfeiture may be legitimate, courts should not be overzealous in applying this doctrine.

IV. ANALYSIS

The Seventh Circuit's opinion illuminates the issue of a person's right to defend a civil forfeiture action. The courts which have adopted fugitive disentitlement of forfeiture claims have done so based on the Second Circuit's decision to follow the criminal appeal doctrine of *Molinaro v. New Jersey*.[116] None have taken into account the due process right to a fair hearing,[117] nor have they even mentioned the long-standing rule

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[111] *Id.*

[112] *$40,877.59*, 32 F.3d at 1156.

[113] *Id.* at 1157.

[114] *Id.*

[115] *Id.*

[116] 396 U.S. 365 (1970). It appears that one court after the other simply jumped on the bandwagon of United States v. $45,940, 739 F.2d 792 (2d Cir. 1984) (following *Molinaro*), without questioning the decision or looking for problems within it. *See supra* notes 49-75 and accompanying text.

[117] *See supra* notes 113-15 and accompanying text (discussing fair hearing).

in *Hovey v. Elliott*[118] that a person's status does not bar him or her from defending a subsequent action.[119]

The fact that the Supreme Court has established that status makes no difference in defending a case is of utmost importance to this issue.[120] The right of one without normal standing in a civil case to answer a lawsuit against him is *exactly* the situation presented in *$40,877.59*.[121] The fact that courts have not recognized and addressed the analogy before now is puzzling. Perhaps the courts' eagerness to use civil forfeiture as a weapon in the war on crime and drugs explains this situation.[122] Placing limitations on this action may create problems for the efficient pursuit of justice, and thus courts may hesitate to do so.[123]

Another reason that the courts' reliance on precedent without discussion appears suspicious is that the facts in *Molinaro* and other such cases are distinguishable from civil forfeiture situations. First, in the area of criminal appeals, the fugitive has already been convicted of a crime and has fled confinement.[124] By contrast, in most civil forfeiture actions barring the fugitive's right to defend, the "fugitive" has not been convicted of, nor even arrested for, any crime at all.[125] Furthermore, the criminal appellant fugitive is trying to take advantage of the system by appealing his conviction while at the same time resisting punishment for the conviction under the *same case*.[126] In civil forfeiture, the claimant's fugitive activities often stem from a different action or suspected crime altogether.[127] In any event, the forfeiture proceeding itself is not the

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[118] 167 U.S. 409 (1897).

[119] *See supra* notes 86-90 and accompanying text (discussing *Hovey*).

[120] *See supra* notes 82-93 and accompanying text.

[121] *See supra* notes 88-90 and accompanying text.

[122] *See* Piety, *supra* note 13, at 946-47 ("The most commonly cited rationale [for upholding civil forfeiture] is that [it] is a 'remedial' measure, and thus subject to less constitutional scrutiny.").

[123] *Id.*

[124] *See* Molinaro v. New Jersey, 396 U.S. 365, 365 (1970) (holding that a convicted criminal who fled the jurisdiction cannot use the court's resources to decide his claim); Smith v. United States, 94 U.S. 97, 97 (1876) (holding that the Supreme Court will not hear a criminal case unless the defendant is located somewhere where he can be held accountable for the judgment).

[125] *See, e.g.*, United States v. $40,877.59, 32 F.3d 1151 (7th Cir. 1994).

[126] *See, e.g.*, Ortega-Rodriguez v. United States, 113 S. Ct. 1199 (1993) (upholding the dismissal of an appeal by a defendant who refused to surrender); *Molinaro*, 396 U.S. at 365; *Smith*, 94 U.S. at 97.

[127] *See* United States v. Pole No. 3172, 852 F.2d 636, 638 (1st Cir. 1988). In fact, it is often the case that the owner of the property has no connection at all with the property's involvement in crime. *See* Leach & Malcolm, *supra* note 14, at 257 ("[A]

same as the one from which the claimant is a fugitive, and thus a court should not be able to punish someone for "unconnected" disrespect for the courts.[128]

Second, those situations in which the courts have extended fugitive disentitlement to civil cases are also distinguishable from civil forfeiture – the primary difference being that the *government*, not the fugitive, brings the forfeiture action.[129] Despite the Supreme Court's clear position in *United States v. Sharpe* that the fugitive disentitlement doctrine does not apply when the government brings the action,[130] the Second Circuit in *United States v. Eng* held that this distinction was "irrelevant."[131] The court in *Eng* ruled this way in the face of contrary precedent without even mentioning *Sharpe* in its opinion. Such a position seems to be another product of the previously mentioned drive to continue the prominence of forfeiture as an effective tool in crime prevention.[132]

Moreover, the decision in *$40,877.59* reflects the current trend under recent Supreme Court cases to make the civil forfeiture proceeding more fair and equitable as a whole to the claimants of the seized property.[133] The Court has narrowed the scope of the government's ownership of the seized property from the time that the crime was committed via the "relation back" doctrine,[134] to the time that the property is adjudicated as forfeited after a proper hearing.[135] The Court, recognizing the validity of a claimant's right to defend, kept the government from effectively barring such defenses by disallowing immediate, strict-liability forfeiture.[136]

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defense of *owner* innocence, as opposed to property innocence, is not deemed to be a valid defense."). *But see* United States v. Timbers Preserve, 999 F.2d 452, 453 (10th Cir. 1993) (involving an action which stemmed from the same illegal act from which the claimant was a fugitive); Conforte v. Commissioner, 692 F.2d 587, 588-89 (9th Cir. 1982) (involving an action which stemmed from the same illegal act from which the claimant was a fugitive).

[128] *See $40,877.59*, 32 F.3d at 1157 (citing *Ortega-Rodriguez*, 113 S. Ct. at 1207).

[129] This distinction remains even though the claimant bears a burden of proof much like that of plaintiff in a civil case. *See supra* note 91 and accompanying text.

[130] 470 U.S. 675, 681-82 (1985); *see supra* notes 91-93 and accompanying text.

[131] 951 F.2d 461, 466 (2d Cir. 1991) (holding that a convicted defendant who resists extradition to the United States is a fugitive and cannot challenge civil forfeiture of his property).

[132] *See Sharpe*, 470 U.S. at 681-82; *supra* note 30 and accompanying text.

[133] *See supra* notes 34-37 and accompanying text.

[134] United States v. 92 Buena Vista Ave., 113 S. Ct. 1126, 1135-37 (1993); *see supra* notes 34-35 and accompanying text.

[135] *92 Buena Vista Ave.*, 113 S. Ct. at 1135-37.

[136] *See id.* at 1135 ("[T]he Government's [position in favor of relation back] would effectively eliminate the innocent owner defense in almost every imaginable case in which

The Court again emphasized the need for allowing the presentation of defenses through a bipartisan hearing by requiring notice of the seizure action under the Fifth and Fourteenth Amendments.[137] Among other determinations, the Court noted that "[t]he practice of *ex parte* seizure . . . creates an unacceptable risk of error. Although Congress designed the drug forfeiture statute to be a powerful instrument . . . it did not intend to deprive innocent owners of their property."[138] Finally, the concerns over the excessiveness of the seizures in relation to the crime committed[139] enforce the idea that the Court intends to take a more equitable approach to forfeiture.

Perhaps one reason for the Court's growing concern over the fairness of forfeiture proceedings lies in the fact that, procedurally, the government already has a substantial advantage over claimants.[140] The government must show merely that the property in question is related to the suspected crime by a "reasonable connection;"[141] then for the claimant to win, he or she must prove by a preponderance of the evidence that the property is *not* connected.[142] Adding further to the imbalance, courts applying fugitive disentitlement allow the government to establish that the claimant is a fugitive without a hearing to prove the necessary absence and intent to avoid prosecution.[143] Clearly, with the given trend toward preserving more rights of claimants, providing hearing to all claimants, regardless of status, is a logical step in the courts' quest to ensure fairness in civil forfeiture actions.

One may argue that allowing all claimants, including "fugitives," to have a hearing on the validity of the seizure will encourage potential defendants to flee. Since they may then make a claim to the seizure anyway, the argument goes, they have nothing to lose by fleeing. In fact,

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proceeds could be forfeited. It seems unlikely that Congress would create a meaningless defense.").

[137] United States v. James Daniel Good Real Property, 114 S. Ct. 492, 500-02 (1993); *see supra* note 36 and accompanying text.

[138] *James Daniel Good*, 114 S. Ct. at 501.

[139] Austin v. United States, 113 S. Ct. 2801, 2812 (1993); Alexander v. United States, 113 S. Ct. 2766, 2776 (1993); *see supra* notes 31-33 and accompanying text.

[140] United States v. $40,877.59, 32 F.3d 1151, 1156 (7th Cir. 1994); *see* Leach & Malcolm, *supra* note 14, at 254-55.

[141] *$40,877.59*, 32 F.3d at 1156.

[142] *Id.* The Seventh Circuit has also noted that as the purpose of a hearing in forfeiture is to actually determine the connectedness of the property to the crime, the initial determination is a fiction. *See supra* notes 95-99 and accompanying text.

[143] *$40,877.59*, 32 F.3d at 1156-57; *see supra* notes 95-103 and accompanying text.

one may argue that this approach legitimizes the "flouting" that courts have tried to avoid.

This argument, however, misses the point of the Seventh Circuit's holding – fairness to *all* parties, both claimants and the government.[144] When the bipartisan hearing is held on the validity of the seizure, only that property which is proved by a preponderance of the evidence to not have been illegally obtained or used will be omitted from the seizure. Therefore, the government will get that which it deserves (all property illegally obtained or used), while the claimants' opportunity to defend against the possibly unfair seizure will still be preserved.

As to the claim that more suspects will flee due to this approach, it simply does not follow that guaranteeing a defendant his due process rights will encourage his flight. As previously noted, the suspected crime involving the property in question and the crime from which the defendant is allegedly fleeing are often completely different,[145] and deprivation of rights for a separate offense has been held to be invalid.[146] Further, the fact that the government will receive the property in forfeiture if the claimant is guilty of the suspected crime may be as much of a deterrent of crime as imprisonment.[147] "The [Supreme] Court claims that the purpose of seizing assets is to take the incentive out of drug dealing by preventing the criminals from enjoying the profits of their illegal activities."[148] The Seventh Circuit's ruling goes much further to protect the rights of *all* individuals than it does to increase the number of potential "fugitives."

A significant purpose of civil forfeiture, deterring crime, is a completely legitimate pursuit. However, the pursuit of criminals does not justify infringing upon the rights of the innocent.[149] As the Eleventh Circuit stated in *United States v. $38,000*: "[W]e must not forget . . . that at the core of [the criminal justice] system lies the Constitution, with its guarantees of individuals' rights. We cannot permit these rights to become

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[144] *$40,877.59*, 32 F.3d at 1157.

[145] *See supra* note 127 and accompanying text.

[146] *See supra* notes 86-90 and accompanying text (noting the situation where a defendant is in contempt of court for a separate offense).

[147] Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 630 (1989) (rejecting the proposition that a criminal defendant has a constitutional right to use proceeds of a crime to pay for his defense). The deterrence goal is also one of the purposes behind the forfeiture penalty in drug trafficking and other federal crimes. *See* Paul Finkleman, *The Second Casualty: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1436-37 (1993).

[148] Finkleman, *supra* note 147, at 1436-37.

[149] *See* Piety, *supra* note 13, at 977-78.

fatalities of the government's war on drugs."[150] Civil forfeiture, as it has been applied specifically against a "fugitive," is unfair in that it violates the fundamental right of due process to a bipartisan hearing. The system is not being "flouted" in these cases; the government will lose no property to which it is entitled merely by holding such a hearing before seizure occurs.[151] Thus the purpose of due process – to ensure fairness and completeness to all individuals – will never be fully accomplished if one is not allowed to contest the validity of a proceeding against his property because of his status.

CONCLUSION

The Seventh Circuit's decision in *$40,877.59* brings to light the true question in civil forfeiture actions: Does the right to due process via a hearing to defend property outweigh the governmental interest of deterring crime? The court correctly answered the question in the affirmative. By overlooking the existence of this right, or at least its application in the fugitive scenario, prior court decisions have allowed the government to seize unknown amounts of "suspected property" without contest because of the person's alleged fugitive status.

Previous courts have applied the "fugitive" doctrine blindly to forfeiture actions, without any consideration for due process. The striking differences between civil forfeiture actions and other actions where the fugitive disentitlement doctrine has been applied correctly are enough to distinguish forfeiture and thus prevent status from being a factor in the defense of such actions.

The Seventh Circuit pointed out what the other courts have overlooked – status is not a ban to *defending* an action. The government has almost carte blanche in determining who is a fugitive and what property is "reasonably connected" to the crime. A bipartisan hearing is a fundamental instrument of due process and should be utilized in all forums.

In addition, this rationale is consistent with recent Supreme Court cases limiting the scope of civil forfeiture as well as making more fair the procedures and seizures of civil forfeiture actions. With the already clear

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[150] 816 F.2d 1538, 1549 (11th Cir. 1987) (holding that the government must establish that currency was linked to exchange of controlled substance in order to maintain a forfeiture action).

[151] *See* United States v. $40,877.59, 32 F.3d 1151, 1157 (7th Cir. 1994) ("If the fugitive cannot prove the innocent ownership of the property, he will lose that property. If he can prove innocent ownership, the property should not be forfeited in any event.").

advantage given the government in these actions, the Seventh Circuit has now put a check on the validity of the seizure.

The government has a legitimate interest in deterring crime and preventing profit from crime; however, this interest may still be completely served without the traditional use of civil forfeiture against fugitives, as such is an abuse of the system. Due to the split of authority, the Supreme Court should address this issue and affirm the constitutional due process right.

N. Brock Collins