THE DEFENSE OF FORFEITURE CASES IN MARYLAND STATE COURTS

What the State does not want you to know.

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Summary

There is every reason to believe that a knowledgeable practitioner can win any forfeiture case brought by the State in the Maryland courts. The statutes, case law and constitution provide a host of procedural and substantive issues. If you know the law, you will always be in a position to fight and win.

I. INTRODUCTION – The Statute: Maryland Criminal Procedure Code, Titles 12 (CDS) and 13 (Gambling, Guns, Explosives, Mortgage Fraud) – Exhibit 1

II. NEGOTIATIONS – a.k.a. "The Forfeiture Extortions"

A. Contact Cop

B. States Attorney – Pre-litigation

1. Negotiations and Settlement Agreements

- Contents (N.B. towing and storage)

- Form

2. §12-208 – Obtaining possession of seized property during Forfeiture litigation – Getting your client's car back!

III. STATE FORFEITURE LITIGATION

A. Time Limits §12-304

1. Currency – Window = 90 days after the final disposition of the criminal proceeding. However, must petition for return before 1 year "<u>The Pocket Forfeiture</u>"
(§12-304(d))

2. **Vehicles – 45 days from seizure (§12-304(b))**

3. **Real Property – requires a felony conviction of all owners of the property**

4. **Others property – within 90 days of seizure or 1 year following final disposition of a criminal case (§12-304(a))**

B. The Petition for Forfeiture – The State must file this and it must follow a specific format

C. The Defense Response

1. **Motion for Bond (§12-307) – Exhibit 2**

2. **Answer – Exhibit 3**

3. **Petition for Return of Seized Property – Exhibit 4 (Used where time limits are missed)**

D. Discovery

1. **Civil Rules of Discovery Apply**

   a. **Interrogatories – Exhibit 5**

   b. **Request for Production of Documents – Exhibit 6**

   c. **Admissions**

   d. **Depositions**

2. **Defendant's Fifth Amendment Rights – Exhibits 7 & 8**

   Does Fifth Amendment apply at all after <u>1995 Corvette</u>?

D. Trial Issues

1. **What must be proven by "clear and convincing evidence"? Proceeds §12-101 (l) (Definition of "proceeds) and 12-312(a) (3 elements necessary to be prove by Clear and Convincing Evidence to Forfeit as proceeds)**

2. **Burden of Proof (that property was connected to CDS violations)? – Exhibit 9**

3. **4th Amendment – Exhibit 10 & 11**

4. **Excessive Fines: The 8th Amendment – Exhibits 12 & 13**

5. **Innocent owner defenses §12-103, §12-205 – Exhibit 14**

6. **Trace Analysis – The Dog Sniff of Currency- Close Proximity not good enough anymore! – Exhibit 15**

7. **What does §12-401 mean?**

ATTACHMENTS

Ex. 1 **Md. Crim Pro Code Ann., §12-100 *et seq***

Ex. 2 **Motion to Set Bond**

Ex. 3 **Answer**

Ex. 4 **Petition for Return of Seized Property**

Ex. 5 **Interrogatories**

Ex. 6 **Request for Production of Documents**

Ex. 7 **Motion to Stay**

Ex. 8 **Attorney Grievance Commission v. Unnamed Attorney, 298 Md. 36, 467 A.2d 517 (1983)**

Ex. 9 **1986 Mercedes Benz 560 CE v. State, 334 Md. 264, 368 A.2d 1164 (1994)**

Ex. 10 **1995 Corvette v. Mayor and City of Baltimore, 353 Md. 114, 724 A.2d 680 (1999)**

Ex. 11 **Florida v. White, 526 U.S. 559 (1999)(98-223)**

Ex. 12 **Austin v. United States, 509 U.S. 602 (1993)**

Ex. 13 **United States v. Bajakajian, 524 U.S. 321 (1998)**

Ex. 14 **One 1998 Jeep Cherokee v. City of Salisbury, 98 Md. App. 676, 635 A.2d 21 (1994)**

Ex. 15 **United States v. $506,231, 125 F. 3d 442 (7th Cir., 1997)**

EXHIBIT 1

Md. Criminal Procedure Code Annotated
Title 12. Forfeiture – Controlled Dangerous Substance Violations
Current through 2018 Regular Session and legislation effective January 1, 2019

§ 12-101. Definitions

(a) In general. – In this title the following words have the meanings indicated.

(b) Chief executive officer. – "Chief executive officer" means:
- **(1)** for Baltimore City, the Mayor;
- **(2)** for a charter county, the county executive or, if there is no county executive, the county council;
- **(3)** for a code county, the county commissioners or county council;
- **(4)** for a county commissioner county, the county commissioners; or
- **(5)** for a municipal corporation, the legislative body established by municipal charter.

(c) Controlled Dangerous Substances law. – "Controlled Dangerous Substances law" means Title 5 of the Criminal Law Article.

(d) Convicted. – "Convicted" means found guilty.

(e) Final disposition. – "Final disposition" means a dismissal, entry of a nolle prosequi, the marking of a criminal charge "stet" on the docket, entry of a not guilty verdict, the pronouncement of sentence, or imposition of probation under § 6-220 of this article.

(f) Forfeiting authority. – "Forfeiting authority" means:
- **(1)** the nit or person designated by agreement between the State's Attorney for a county and the chief executive officer of the governing body having jurisdiction over assets subject to forfeiture to act on behalf of the governing body regarding those assets; or
- **(2)** if the seizing authority is a unit of the State, a unit or person that the Attorney General or the Attorney General's designee designates by agreement with a State's Attorney, county attorney, or municipal attorney to act on behalf of the State regarding assets subject to forfeiture by the State.

(g) Governing body. – "Governing body" includes:
- **(1)** the State, if the seizing authority is a unit of the State;
- **(2)** a county, if the seizing authority is a unit of a county;
- **(3)** a municipal corporation, if the seizing authority is a unit of a municipality; and
- **(4)** Baltimore City, if the seizing authority is the Police Department of Baltimore City.

(h) Lien. – "Lien" includes a mortgage, deed of trust, pledge, security interest, encumbrance, or right of setoff.

(i) Lienholder. – "Lienholder" means a person who has a lien or a secured interest on property created before the seizure.

(j) Local financial authority. – "Local financial authority" means:
- **(1)** if the seizing authority is a unit of a county, the treasurer or director of finance of the county; or
- **(2)** if the seizing authority is a unit of a municipal corporation, the treasurer or director of finance of that municipal corporation.

(k) Owner. –
- **(1)** "Owner" means a person having a legal, equitable, or possessory interest in property.
- **(2)** "Owner" includes:
  - **(i)** a co-owner;
  - **(ii)** a life tenant;
  - **(iii)** a remainderman to a life tenancy in real property;
  - **(iv)** a holder of an inchoate interest in real property; and
  - **(v)** a bona fide purchaser for value.

(l) Proceeds. – "Proceeds" includes property derived directly or indirectly in connection with or as a result of a crime under the Controlled Dangerous Substances law.

(m) Property. –
- **(1)** "Property" includes:
  - **(i)** real property and anything growing on or attached to real property;
  - **(ii)** tangible and intangible personal property, including:
    - **1.** securities;
    - **2.** negotiable and nonnegotiable instruments;
    - **3.** vehicles and conveyances of any type;
    - **4.** privileges;
    - **5.** interests;
    - **6.** claims; and
    - **7.** rights;

(iii) an item, object, tool, substance, device, or weapon used in connection with a crime under the Controlled Dangerous Substances law; and

(iv) money.

(2) "Property" does not include:

(i) an item unlawfully in the possession of a person other than the owner when used in connection with a crime under the Controlled Dangerous Substances law; or

(ii) a lessor's interest in property subject to a bona fide lease, unless the forfeiting authority can show that the lessor participated in a crime under the Controlled Dangerous Substances law or that the property was the proceeds of a crime under the Controlled Dangerous Substances law.

(n) Real property. –

(1) "Real property" means land or an improvement to land.

(2) "Real property" includes:

(i) a leasehold or other limited interest in real property;

(ii) an easement; and

(iii) a reversionary interest in a 99-year ground lease renewable forever.

(o) Seizing authority. – "Seizing authority" means a law enforcement unit in the State that is authorized to investigate violations of the Controlled Dangerous Substances law and that has seized property under this title.

History

An. Code 1957, art. 27, § 297(a)(1)-(13); 2001, ch. 10, § 2; 2002, ch. 213, § 6.

Annotations: Notes

EFFECT OF AMENDMENTS. –

Section 6, ch. 213, Acts 2002, effective Oct. 1, 2002, substituted "Title 5 of the Criminal Law Article" for "the Health - Controlled Dangerous Substances Subheading of Article 27 of the Code" in (c).

EDITOR'S NOTE. –

Some of the cases appearing in the notes to this article were decided under the former statutes in effect prior to the 2001 revision. These earlier cases have been moved to pertinent sections of the revised material where they may be used in interpreting the current statutes. Internal references have also been updated.

Section 7, ch. 10, Acts 2001, provides that "the Revisor's Notes, Special Revisor's Notes, General Revisor's Notes, captions, and catchlines contained in this Act are not law and may not be considered to have been enacted as a part of this Act."

Section 8, ch. 10, Acts 2001, provides that "nothing in this Act affects the term of office of an appointed or elected member of any commission, office, department, agency, or other unit. An individual who is a member of a unit on the effective date of this Act [October 1, 2001] shall remain a member for the balance of the term to which appointed or elected, unless the member sooner dies, resigns, or is removed under provisions of law."

Section 9, ch. 10, Acts 2001, provides that "except as expressly provided to the contrary in this Act, any transaction or employment status affected by or flowing from any change of nomenclature or any statute amended, repealed, or transferred by this Act and validly entered into or existing before the effective date of this Act [October 1, 2001] and every right, duty, or interest flowing from a statute amended, repealed, or transferred by this Act remains valid after the effective date of this Act [October 1, 2001] and may be terminated, completed, consummated or enforced as required or allowed by any statute amended, repealed, or transferred by this Act as though the repeal, amendment, or transfer had not occurred. If a change in nomenclature involves a change in name or designation of any State unit, the successor unit shall be considered in all respects as having the powers and obligations granted the former unit."

Section 10, ch. 10, Acts 2001, provides that "the continuity of every commission, office, department, agency or other unit is retained. The personnel, records, files, furniture, fixtures, and other properties and all appropriations, credits, assets, liabilities, and obligations of each retained unit are continued as the personnel, records, files, furniture, fixtures, properties, appropriations, credits, assets, liabilities, and obligations of the unit under the laws enacted by this Act."

Section 11, ch. 10, Acts 2001, provides that "except as expressly provided to the contrary in this Act, any person licensed, registered, certified, or issued a permit or certificate by any commission, office, department, agency, or other unit established or continued by any statute amended, repealed, or transferred by this Act is considered for all purposes to be licensed, registered, certified, or issued a permit or certificate by the appropriate unit continued under this Act for the duration of the term for which the license, registration, certification, or permit was issued, and may renew that authorization in accordance with the appropriate renewal provisions of this Act."

Section 13, ch. 10, Acts 2001, provides that "this Act does not rescind, supersede, change, or modify any rule adopted by the Court of Appeals that is or was in effect on the effective date of this Act [October 1, 2001] concerning the practice and procedure in and the administration of the appellate courts and the other courts of this State."

Section 14, ch. 10, Acts 2001, provides that "the creation in this Act of separate definitions for the terms 'victim' and 'victim's representative' from broad definitions of 'victim' in the former law is intended for stylistic purposes only and does not narrow the meaning of the word 'victim' as used in Article 47 of the Constitution of Maryland [Declaration of Rights]."

Annotations: Case Notes

MARYLAND LAW REVIEW. – For article, "Survey of Developments in Maryland Law, 1983-84," see 44 Md. L. Rev. 511 (1985).

For article, "Survey of Developments in Maryland Law, 1987-88," see 48 Md. L. Rev. 551 (1989).

UNIVERSITY OF BALTIMORE LAW REVIEW. – For article, "Forfeitures in Narcotics Cases: The Constitution and Recent Amendments to Maryland's Forfeiture Statute," see 14 U. Balt. L. Rev. 79 (1984).

CONDITIONAL VENDOR AS OWNER. – Conditional vendor is included within the meaning of "owner" and is entitled to contend that a motor vehicle was unlawfully in the possession of another at the time the act occurred which subjected it to forfeiture. Lumar Sales, Inc. v. State, 268 Md. 355, 301 A.2d 495 (1973).

PRESUMPTION OF VEHICLE OWNERSHIP. – In a forfeiture context, when a vehicle's ownership is at issue, whether the presumption of its ownership has been rebutted is a question for the trier of the facts to decide, and its decision will not be disturbed on appeal unless it is clearly erroneous. One Ford Motor Vehicle v. State, 104 Md. App. 744, 657 A.2d 825 (1995).

FINAL DISPOSITION. – For the purpose of former Art. 27, § 297(a)(4) (now (e) of this section), a "final disposition" under former Art. 27, § 641 (now § 6-220 of this article) occurs either upon the entry of judgment following the finding of a violation of probation, or upon the discharge of the defendant from probation. Director, Office of Fin. v. Lapenotiere, 77 Md. App. 372, 550 A.2d 433 (1988).

CONSTITUTIONALITY. – The due process clause of the 14th Amendment to the U.S. Constitution is not violated by the provisions of former Art. 27, § 297(a)(6) (now (g) of this section). Ewachiw v. Director of Fin., 70 Md. App. 58, 519 A.2d 1327 (1987).

CONSTRUCTION OF SECTION. – The various subsections of former Art. 27, § 297 (now this title) must be interpreted with reference to one another, and harmonized to the extent reasonably possible. State ex rel. Frederick City Police Dep't v. One 1988 Toyota Pick-up Truck, 334 Md. 359, 639 A.2d 641 (1994).

COMPARISON WITH FEDERAL STATUTE. – The former Maryland forfeiture statute, Art. 27, § 297 (now this title), mirrored the federal forfeiture statute and was adopted largely from it; therefore, the Supreme Court's analysis of cases under the federal statute may have been used as guidance in cases under the State statute. One 1984 Ford Truck v. Baltimore County, 111 Md. App. 194, 681 A.2d 527 (1996).

HISTORY OF FORMER ART. 27, § 297. – See Prince George's County v. One 1969 Opel, 267 Md. 491, 298 A.2d 168 (1973).

PROVISIONS NOT RETROACTIVE. – Acts 1970, ch. 403, which rewrote former Art. 27, §§ 276-302 (now Title 5 of the Criminal Law Article and this title), by its own terms was not applicable retroactively. Montgomery County v. Sum of $103,428.23, 264 Md. 208, 285 A.2d 663 (1972).

Former Art. 27, § 297(a)(6) (now (g) of this section) could not be retroactively applied so as to authorize forfeiture of money initially seized before July 1, 1970. Montgomery County v. Sum of $103,428.23, 264 Md. 208, 285 A.2d 663 (1972).

Former Art. 27, § 297 (now this title) was, and was intended to be, a harsh law. Prince George's County v. Vieira, 340 Md. 651, 667 A.2d 898 (1995).

PURPOSE OF FORMER DRUG FORFEITURE LAWS. – The former Maryland drug forfeiture law was, and was intended to be, a harsh law. The purpose of the statutory scheme was to impede the drug trade by depriving drug dealers of the instrumentalities that facilitate the sale and use of illegal drugs. Boyd v. Hickman, 114 Md. App. 108, 689 A.2d 106 (1997), cert. denied, 346 Md. 26, 694 A.2d 949 (1997).

PROCEDURES TO BE FOLLOWED UNDER (H). – All the procedures that must be followed under pre-existing law as required by due process and the Fourth Amendment must be followed under this section to accomplish a forfeiture of drug paraphernalia as provided by former Art. 27, § 297(a)(7) (now (h) of this section). Mid-Atlantic Accessories Trade Ass'n v. Maryland, 500 F. Supp. 834 (D. Md. 1980).

DUTY AND POWER OF COURT. – See Prince George's County v. One 1969 Opel, 267 Md. 491, 298 A.2d 168 (1973).

APPLICATION TO MONEY IN BANK ACCOUNT. – Funds in a bank account constitute money for purposes of the forfeiture statute under Md. Code Ann., Criminal Procedure § 12-101(m)(1)(iv), and correspondingly for purposes of the filing deadline contained in Md. Code Ann., Criminal Procedure § 12-304(c)(1). Bottini v. Dep't of Fin., 450 Md. 177, 147 A.3d 371 (2016).

Judgment forfeiting money contained in a bank account was affirmed under Md. Code Ann., Criminal Procedure § 12-101(m)(1)(iv) since the funds were not a type of tangible or intangible personal property and, in accordance with Md. Code Ann., Criminal Procedure § 12-304(c)(1), the forfeiting authority timely filed the complaint for forfeiture within 90 days after the final disposition of the criminal proceedings, the deadline applicable to the filing of a complaint for forfeiture of money. Bottini v. Dep't of Fin., 450 Md. 177, 147 A.3d 371 (2016).

APPLIED IN WFS Fin., Inc. v. Mayor of Baltimore, 402 Md. 1, 935 A.2d 385 (2007).

§ 12-102 Property subject to forfeiture

(a) In general. – The following are subject to forfeiture:

(1) controlled dangerous substances manufactured, distributed, dispensed, acquired, or possessed in violation of the Controlled Dangerous Substances law;

(2) raw materials, products, and equipment used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting a controlled dangerous substance in violation of the Controlled Dangerous Substances law;

(3) property used or intended for use as a container for property described in item (1) or (2) of this subsection;

(4) except as provided in § 12-103 of this subtitle, conveyances, including aircraft, vehicles, or vessels used or intended to be used to transport, or facilitate the transportation, sale, receipt, possession, or concealment of property described in item (1) or (2) of this subsection;

(5) books, records, and research, including formulas, microfilm, tapes, and data used or intended for use in violation of the Controlled Dangerous Substances law;

(6) subject to subsection (b) of this section, weapons used or intended to be used in connection with the unlawful manufacture, distribution, or dispensing of a controlled dangerous substance or controlled paraphernalia;

(7) subject to subsection (b) of this section, any amount of money that is used or intended to be used in connection with the unlawful manufacture, distribution, or dispensing of a controlled dangerous substance;

(8) drug paraphernalia under § 5-619 of the Criminal Law Article;

(9) controlled paraphernalia under § 5-620 of the Criminal Law Article;

(10) except as provided in § 12-103 of this subtitle, the remaining balance of the proceeds of a sale by a holder of an installment sale agreement under § 12-626 of the Commercial Law Article of goods seized under this subtitle;

(11) except as provided in § 12-103 of this subtitle, real property; and

(12) everything of value furnished, or intended to be furnished, in exchange for a controlled dangerous substance in violation of the Controlled Dangerous Substances law, all proceeds traceable to the exchange, and all negotiable instruments and securities used, or intended to be used, to facilitate any violation of the Controlled Dangerous Substances law.

(b) Money or weapons. –

(1) All rights in, title to, and interest in the money or weapons immediately shall vest in:

(i) the State, if the seizing authority was a State unit;

(ii) the county in which the money or weapons were seized, if the seizing authority was a county law enforcement unit, including a sheriff's office; or

(iii) the municipal corporation in which the money or weapons were seized, if the seizing authority was a law enforcement unit of a municipal corporation.

(2) The money or weapons may be returned to the claimant only as this title provides.

History

An. Code 1957, art. 27, § 297(b)(1)-(10); 2001, ch. 10, § 2; 2002, ch. 213, § 6; 2016, chs. 5, 619, 658.

Annotations: Notes

EFFECT OF AMENDMENTS. –

Section 6, ch. 213, Acts 2002, effective Oct. 1, 2002, substituted "§ 5-619 of the Criminal Law Article" for "Article 27, § 287A of the Code" in (a)(7); and substituted "§ 5-620 of the Criminal Law Article" for "Article 27, § 287 of the Code" in (a)(8).

Chapter 5, Acts 2016, effective February 20, 2016, enacted pursuant to Art. II, § 17(d) of the Maryland Constitution by overriding the 2015 Governor's veto, in (a)(6) added "of more than $300"; and added (a)(7), deleted (b)(1), and redesignated accordingly.

Chapter 619, Acts 2016, and ch. 658, Acts 2016, enacted pursuant to Art. II, § 17(c) of the Maryland Constitution without the Governor's signature, effective October 1, 2016, made identical amendments. Each deleted "money of more than $300" after "section" and "or possession" after "dispensing" in (a)(6) and made a related change; and rewrote (a)(7).

EDITOR'S NOTE. –

Ch. 5, Acts 2016, was enacted pursuant to Article II, § 17(d) of the Maryland Constitution without the Governor's signature, to become effective 30 days after the Governor's veto was overridden, superseding the effective date as drafted in the bill.

Chapters 5, 619, and 658, Acts 2016, amended (a). None of the chapters referred to the others, and effect was given to all. The changes to (a)(6) by ch. 5, Acts 2016, were deemed to be superseded after October 1, 2016, by the amendments by chs. 619 and 658, Acts 2016; and chs. 619 and 658, Acts 2016, made identical amendments to (a)(7), as enacted by ch. 5, Acts 2016.

Annotations: Case Notes

MARYLAND LAW REVIEW. – For article, "Survey of Developments in Maryland Law, 1983-84," see 44 Md. L. Rev. 511 (1985).

For article, "Survey of Developments in Maryland Law, 1987-88," see 48 Md. L. Rev. 551 (1989).

UNIVERSITY OF BALTIMORE LAW REVIEW. – For article, "Forfeitures in Narcotics Cases: The Constitution and Recent Amendments to Maryland's Forfeiture Statute," see 14 U. Balt. L. Rev. 79 (1984).

EXCESSIVE FINES PROVISIONS APPLICABLE TO THIS TITLE. – The excessive fines provision of Article 25 of the Maryland Declaration of Rights applies to a forfeiture under former Art. 27, § 297 (now this title). Aravanis v. Somerset County, 339 Md. 644, 664 A.2d 888 (1995), cert. denied, 516 U.S. 1115, 116 S. Ct. 916, 133 L. Ed. 2d 846 (1996).

Resolution of a claim that a forfeiture of property violates the constitutional prohibition against imposition of excessive fines necessarily requires consideration of not only those factors involved in an "instrumentality" test, but also factors of proportionality that compare the gravity of the offense or offenses involving the property and the extent of involvement of the owner with the enormity of the loss to the owner occasioned by the forfeiture. Aravanis v. Somerset County, 339 Md. 644, 664 A.2d 888 (1995), cert. denied, 516 U.S. 1115, 116 S. Ct. 916, 133 L. Ed. 2d 846 (1996).

CONSTITUTIONALITY. – Former Art. 27, § 297 (now this title), providing for forfeiture of money found in close proximity to controlled dangerous substance incident to execution of valid search warrant, was not unconstitutional on grounds of deprivation of property without due process and denial of equal protection. Gatewood v. State, 268 Md. 349, 301 A.2d 498 (1973).

TERMS NOT IMPERMISSIBLY VAGUE. – The terms "intended for use" and "designed for use," as those terms are employed in Chapter 874, Acts 1980, are not impermissibly vague. 65 Op. Att'y Gen. 92 (1980).

DESIRABILITY OF FORFEITURE PROVISION DETERMINED BY GENERAL ASSEMBLY. – It is within the General Assembly's power to decide whether a forfeiture provision such as former Art. 27, § 297 (now this title) is desirable. Prince George's County v. Blue Bird Cab Co., 263 Md. 655, 284 A.2d 203 (1971).

PURPOSE OF FORMER ART. 27, § 297(D)(2). – The General Assembly, in former Art. 27, § 297(d)(2) (now §§ 12-202 and Subtitle 3 of this title) clearly intended to impose a fixed limitation upon the filing of applications for forfeiture if a trial has taken place and a final disposition of criminal proceedings has resulted. Bozman v. Office of Fin., 296 Md. 492, 463 A.2d 832 (1983).

FORFEITURE OF ACTUAL CONTRABAND. – The forfeiture of a controlled dangerous substance, which is forfeitable by its inherently illegal nature, does not implicate the excessive fines clause of article 25 of the Declaration of Rights, and unlike derivative contraband, therefore, requires no proceeding for forfeiture. Thompson v. Grindle, 113 Md. App. 477, 688 A.2d 466 (1997).

FORFEITURE GROUNDED IN A LEGAL FICTION. – Forfeiture is grounded in the legal fiction that an inanimate object can be guilty of a crime. Prince George's County v. Blue Bird Cab Co., 263 Md. 655, 284 A.2d 203 (1971).

It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient. In a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted and punished. The forfeiture is no part of the punishment for the criminal offense. Prince George's County v. Blue Bird Cab Co., 263 Md. 655, 284 A.2d 203 (1971).

A forfeiture is not viewed to be a future or additional punishment of the individual whose property is so confiscated. Instead, the law looks upon the property as a living being and thus subject to punishment by way of forfeiture. It is as if the property were a living codefendant. Bozman v. Office of Fin., 52 Md. App. 1, 445 A.2d 1073 (1982), aff'd, 296 Md. 492, 463 A.2d 832 (1983).

CLOSE RELATIONSHIP BETWEEN OBJECT AND OFFENSE REQUIRED. – As forfeiture is based upon the legal fiction that an inanimate object can be guilty of a crime, the proper inquiry as to the relationship between the item that is the subject of the forfeiture action and the offense is whether they are close enough to render the property, under traditional standards, "guilty" and hence forfeitable. Thompson v. Grindle, 113 Md. App. 477, 688 A.2d 466 (1997).

SECTION PROTECTS AGAINST ARBITRARY ACTION. – Provisions of former Art. 27, § 297(b) (now this section), that forfeitable property may be seized on judicial process incident to an arrest, or where there is probable cause to believe that the property is dangerous or was used to violate the drug laws, are adequate protection against arbitrary action. Mid-Atlantic Accessories Trade Ass'n v. Maryland, 500 F. Supp. 834 (D. Md. 1980).

CONSTRUCTION. – Subsections (b)(4) and (b)(10) of former Art. 27, § 297 (now (4) and (11) of this section) defined categories of property subject to forfeiture: the former focused on the use of the property, the latter on its source. 1986 Mercedes Benz v. State, 334 Md. 264, 638 A.2d 1164 (1994).

MOTOR VEHICLE IS "CONVEYANCE." – Former Art. 27, § 297 (now this title) subjected motor vehicles to seizure and forfeiture for simple possession of controlled substances. State ex rel. Frederick City Police Dep't v. One 1988 Toyota Pick-up Truck, 334 Md. 359, 639 A.2d 641 (1994).

"IN CHARGE OF." – Where cab driver failed to pay daily rent on a cab for two or three days in violation of a lease agreement on the cab, and the cab company simply tried to recover the unpaid rent rather than get the cab back or void the lease, the cab driver was in charge of the vehicle within the meaning of former Art. 27, § 297(b)(4)(i) (now § 12-103(b)(1) of this article). Prince George's County v. Blue Bird Cab Co., 263 Md. 655, 284 A.2d 203 (1971).

DERIVATION OF MONEY. – Money must be derived from criminal activity in order to have been subject to forfeiture under former Art. 27, § 297(b)(6) (now (b)(1)(i) of this section). Bozman v. Office of Fin., 52 Md. App. 1, 445 A.2d 1073 (1982), aff'd, 296 Md. 492, 463 A.2d 832 (1983).

Forfeiture provided by former Art. 27, § 297(b)(6) (now (b)(1)(i) of this section) is directed at money that either was or is intended to be a part of an illicit controlled dangerous substance, or paraphernalia dealing. Bozman v. Office of Fin., 52 Md. App. 1, 445 A.2d 1073 (1982), aff'd, 296 Md. 492, 463 A.2d 832 (1983).

APPLICATION TO MONEY IN BANK ACCOUNT. – Funds in a bank account constitute money for purposes of the forfeiture statute under Md. Code Ann., Criminal Procedure § 12-101(m)(1)(iv), and correspondingly for purposes of the filing deadline contained in Md. Code Ann., Criminal Procedure § 12-304(c)(1). Bottini v. Dep't of Fin., 450 Md. 177, 147 A.3d 371 (2016).

Judgment forfeiting money contained in a bank account was affirmed under Md. Code Ann., Criminal Procedure § 12-101(m)(1)(iv) since the funds were not a type of tangible or intangible personal property and, in accordance with Md. Code Ann., Criminal Procedure § 12-304(c)(1), the forfeiting authority timely filed the complaint for forfeiture within 90 days after the final disposition of the criminal proceedings, the deadline applicable to the filing of a complaint for forfeiture of money. Bottini v. Dep't of Fin., 450 Md. 177, 147 A.3d 371 (2016).

PROPERTY AS "PROCEEDS." – Should the State proceed pursuant to former Art. 27, § 297(b)(10) (now (a)(11) of this section) and adduce evidence to prove that the property constitutes proceeds, it need neither establish the property owner's involvement in drug transactions, nor negate other likely sources of that property. 1986 Mercedes Benz v. State, 334 Md. 264, 638 A.2d 1164 (1994).

As relates to proceeds, former Art. 27, § 297(b)(10) (now (a)(11) of this section) requires only that the property be traceable to an exchange for a controlled dangerous substance. 1986 Mercedes Benz v. State, 334 Md. 264, 638 A.2d 1164 (1994).

FAILURE TO OBSERVE TERMS OF LEASE NOT VIOLATION OF CRIMINAL LAW. – Use of cab in contravention of terms of a lease did not, in and of itself, violate the criminal laws of this State in terms of former Art. 27, § 297(b)(4)(ii) (now § 12-103(b)(2) of this article). Prince George's County v. Blue Bird Cab Co., 263 Md. 655, 284 A.2d 203 (1971).

CONCEPT OF PROXIMITY NOT NEGATED. – Where the cash, the heroin and the marijuana were in the same brown paper bag, the fact that cash happened to be in a bank money sack which was also in the paper bag did not negate the concept of proximity. Gatewood v. State, 268 Md. 349, 301 A.2d 498 (1973).

"CLOSE PROXIMITY" DETERMINED ON CASE-BY-CASE BASIS. – The courts shall determine the "close proximity" of former Art. 27, § 297(b)(6) (now (b)(1)(i) of this section) on a case-by-case basis. Bozman v. Office of Fin., 52 Md. App. 1, 445 A.2d 1073 (1982), aff'd, 296 Md. 492, 463 A.2d 832 (1983); Ewachiw v. Director of Fin., 70 Md. App. 58, 519 A.2d 1327, cert. denied, 309 Md. 605, 525 A.2d 1075 (1987).

CIRCUMSTANCES INDICATING "CLOSE PROXIMITY." – Absent the slightest explanation, the presence of multiple proscribed drugs and large sums of money within a single bedroom fell within the meaning of "close proximity" in former Art. 27, § 297(b)(6) (now (b)(1)(i) of this section). Bozman v. Office of Fin., 296 Md. 492, 463 A.2d 832 (1983).

INITIAL BURDEN UPON STATE. – The State had the initial burden of showing that subject money was found in close proximity to contraband controlled dangerous substances; once the State had met its burden, the money was presumed to be derivative contraband forfeitable under former Art. 27, § 297(b)(6) (now (b) of this section). Thompson v. Grindle, 113 Md. App. 477, 688 A.2d 466 (1997).

USE OF VEHICLE FOR POSSESSION OF DRUGS. – The use of a vehicle for the possession of drugs is enough to justify a conviction under this section. State v. One Motor Vehicle to Wit: 1982 Plymouth, Serial No. JP3BE4439CU404899, 67 Md. App. 310, 507 A.2d 633 (1986).

In the case of former Art. 27, § 297(b)(4) (now (a)(4) of this section), an automobile or other conveyance may be forfeited if the State is able to prove that it was used, or intended for use, in connection with, or to facilitate, drug activities; on the other hand, pursuant to former Art. 27, § 297(b)(10) (now (a)(11) of this section), forfeiture of property may be ordered if the State proves that it constitutes proceeds of drug activity. In neither case is there a requirement that the property's owner also be implicated. 1986 Mercedes Benz v. State, 334 Md. 264, 638 A.2d 1164 (1994).

There was no provision in former Art. 27, § 297 creating a presumption of use or intended use of the property referenced pursuant to former Art. 27, § 297(b)(4) (now (a)(4) of this section); hence, the proof of its use or intended use affirmatively had to be proven; however, when the issue involved proof of proceeds, the State was given the option either affirmatively to prove that the subject property had been derived directly or indirectly in connection with or as a result of an offense or offenses under former Art. 27, § 297(a)(10) (now § 12-101(l) of this article), pursuant to former Art. 27, § 297(b)(10) (now (a)(11) of this section) or, when certain enumerated offenses are involved, of relying on the presumption prescribed by this subsection. 1986 Mercedes Benz v. State, 334 Md. 264, 638 A.2d 1164 (1994).

EVIDENCE INSUFFICIENT TO OVERCOME PRESUMPTION OF "CLOSE PROXIMITY." – Forfeiture held to be warranted where drugs, drug paraphernalia, and manufacturing devices were found in basement, drug paraphernalia and manufacturing aids were found on the first floor, and the money forfeited was found in the second floor bedroom with chemistry books, catalogues, and other items which could be used for or in the manufacture of drugs. Ewachiw v. Director of Fin., 70 Md. App. 58, 519 A.2d 1327, cert. denied, 309 Md. 605, 525 A.2d 1075 (1987).

EVIDENCE SUFFICIENT TO OVERCOME PRESUMPTION OF "CLOSE PROXIMITY." – Evidence that claimant cashed Social Security checks, and kept the proceeds in her purse, was sufficient to overcome presumption that all money in purse, found by police in close proximity to cocaine, was intended for use in connection with illegal activities, and supported lower court's decision to return all cash in purse except for $1,000 to claimant. $3,417.46 United States Money v. Kinnamon, 326 Md. 141, 604 A.2d 64 (1992).

EVIDENCE OF CHEMICAL ANALYSIS NOT PREREQUISITE TO FORFEITURE. – Before forfeiture of a motor vehicle under former Art. 27, § 297 (now this title), § 10-1001 of the Courts Article does not require evidence of a chemical analysis to prove that particular substances found in the subject vehicle were controlled dangerous substances. One 1979 Cadillac Seville Serial No. 6S69899473348 v. State, 68 Md. App. 467, 513 A.2d 927 (1986).

EVIDENCE OF CONTROLLED SUBSTANCE NOT REQUIRED. – An intention to possess controlled substance, believing it to be controlled substance, even though it is not, is within the scope of former Art. 27, § 297 (now this title). State ex rel. Frederick City Police Dep't v. One 1988 Toyota Pick-up Truck, 334 Md. 359, 639 A.2d 641 (1994).

CITED IN Dixon v. Balt. City Police Dep't, 345 F. Supp. 2d 512 (D. Md. 2003).

§ 12-103. Conditions excluding property from forfeiture

(a) No knowledge of violation. – Property or an interest in property described in § 12-102(a)(4), (11), and (12) of this subtitle may not be forfeited unless the State establishes by a preponderance of the evidence that the violation of the Controlled Dangerous Substances law was committed with the owner's actual knowledge.

(b) No consent or privity to violation. –

(1) A conveyance used as a common carrier or vehicle for hire in the transaction of business as a common carrier or vehicle for hire may not be seized or forfeited under this title unless it appears that the owner or other person in charge of the conveyance was a consenting party or privy to a violation of the Controlled Dangerous Substances law.

(2) A conveyance may not be forfeited under this title for an act or omission that the owner shows was committed or omitted by a person other than the owner while the person other than the owner possessed the conveyance in criminal violation of federal law or the law of any state.

(c) No forfeiture of real property for drug or drug paraphernalia violation. – An owner's interest in real property may not be forfeited for a violation of § 5-601, § 5-619, or § 5-620 of the Criminal Law Article.

(d) Principal family residence – In general. –

(1) Except as provided in paragraph (2) of this subsection, real property used as the principal family residence may not be forfeited under this subtitle unless one of the owners of the real property was convicted of a violation of §§ 5-602 through 5-609, §§ 5-612 through 5-614, § 5-617, § 5-618, or § 5-628 of the Criminal Law Article or of an attempt or conspiracy to violate Title 5 of the Criminal Law Article.

(2) Without a conviction, a court may order a forfeiture of real property used as the principal family residence if the owner of the family residence:

(i) fails to appear for a required court appearance; and

(ii) fails to surrender to the jurisdiction of the court within 180 days after the required court appearance.

(e) Principal family residence – Use by spouses. – Real property used as the principal family residence by a husband and wife and held by the husband and wife as tenants by the entirety may not be forfeited unless:

(1) the property was used in connection with a violation of §§ 5-602 through 5-609, §§ 5-612 through 5-614, § 5-617, § 5-618, or § 5-628 of the Criminal Law Article or with an attempt or conspiracy to violate Title 5 of the Criminal Law Article; and

(2) both the husband and wife are convicted of a violation of §§ 5-602 through 5-609, §§ 5-612 through 5-614, § 5-617, § 5-618, or § 5-628 of the Criminal Law Article or of an attempt or conspiracy to violate Title 5 of the Criminal Law Article.

History

An. Code 1957, art. 27, § 297(b)(4), (c), (l)(1), (2), (m)(1)(ii), (2), (n)(2); 2001, ch. 10, § 2; 2002, ch. 213, § 6; 2008, ch. 36, § 6; 2016, ch. 5.

Annotations: Notes

EFFECT OF AMENDMENTS. –

Section 6, ch. 213, Acts 2002, effective Oct. 1, 2002, updated the references from Article 27 to the Criminal Law Article throughout (c) through (e).

Chapter 5, Acts 2016, effective February 20, 2016, enacted pursuant to Art. II, § 17(d) of the Maryland Constitution by overriding the 2015 Governor's veto, in (a) substituted "§ 12-102(a)(4), (11), and (12)" for "§ 12-102(a)(4), (10), and (11)," "unless the State" for "if the owner," and "committed with" for "committed without."

EDITOR'S NOTE. –

Pursuant to § 6, ch. 36, Acts 2008, "state" was substituted for "State" in (b)(2).

Chapter 5, Acts 2016, was enacted pursuant to Article II, § 17(d) of the Maryland Constitution without the Governor's signature, to become effective 30 days after the Governor's veto was overridden, superseding the effective date as drafted in the bill.

Annotations: Case Notes

MARYLAND LAW REVIEW. – For article, "Survey of Developments in Maryland Law, 1983-84," see 44 Md. L. Rev. 511 (1985).

For article, "Survey of Developments in Maryland Law, 1987-88," see 48 Md. L. Rev. 551 (1989).

UNIVERSITY OF BALTIMORE LAW REVIEW. – For article, "Forfeitures in Narcotics Cases: The Constitution and Recent Amendments to Maryland's Forfeiture Statute," see 14 U. Balt. L. Rev. 79 (1984).

EXCESSIVE FINES PROVISIONS APPLICABLE TO FORFEITURE PROVISIONS. – The excessive fines provision of Article 25 of the Maryland Declaration of Rights applies to a forfeiture under former Art. 27, § 297 (now this title). Aravanis v. Somerset County, 339 Md. 644, 664 A.2d 888 (1995), cert. denied, 516 U.S. 1115, 116 S. Ct. 916, 133 L. Ed. 2d 846 (1996).

Resolution of a claim that a forfeiture of property violates the constitutional prohibition against imposition of excessive fines necessarily requires consideration of not only those factors involved in an "instrumentality" test, but also factors of proportionality that compare the gravity of the offense or offenses involving the property and the extent of involvement of the owner with the enormity of the loss to the owner occasioned by the forfeiture. Aravanis v. Somerset County, 339 Md. 644, 664 A.2d 888 (1995), cert. denied, 516 U.S. 1115, 116 S. Ct. 916, 133 L. Ed. 2d 846 (1996).

PURPOSE OF (A). – By enacting former Art. 27, § 297(c) (now (a) of this section), the General Assembly intended to provide additional protection for the interests of innocent owners. One 1988 Jeep Cherokee VIN 1JCMT7898JT159481 v. City of Salisbury, 98 Md. App. 676, 635 A.2d 21 (1994).

MOTOR VEHICLE IS A "CONVEYANCE." – Former Art. 27, § 297 (now this title) subjected motor vehicles to seizure and forfeiture for simple possession of controlled substances. State ex rel. Frederick City Police Dep't v. One 1988 Toyota Pick-up Truck, 334 Md. 359, 639 A.2d 641 (1994).

STANDARD OF "KNOWLEDGE." – "Actual knowledge" is a subjective standard, requiring specific awareness; because the owner has the burden of proof, it follows that proving lack of "actual" knowledge is a less burdensome task than proving that the owner "neither knew or should have known." One 1988 Jeep Cherokee VIN 1JCMT7898JT159481 v. City of Salisbury, 98 Md. App. 676, 635 A.2d 21 (1994).

"IN CHARGE OF." – Where cab driver failed to pay daily rent on a cab for two or three days in violation of a lease agreement on the cab, and the cab company simply tried to recover the unpaid rent rather than get the cab back or void the lease, the cab driver was in charge of the vehicle within the meaning of former Art. 27, § 297(b)(4)(i) (now § 12-103(b)(1) of this article). Prince George's County v. Blue Bird Cab Co., 263 Md. 655, 284 A.2d 203 (1971).

FAILURE TO OBSERVE TERMS OF LEASE NOT VIOLATION OF CRIMINAL LAW. – Use of cab in contravention of terms of a lease did not, in and of itself, violate the criminal laws of this State in terms of former Art. 27, § 297(b)(4)(ii) (now § 12-103(b)(2) of this article). Prince George's County v. Blue Bird Cab Co., 263 Md. 655, 284 A.2d 203 (1971).

APPLICABILITY OF (D)(1). – Former Art. 27, § 297(l)(1) (now (d)(1)) refers to five controlled dangerous substances statutes which are a prerequisite to its application. 1986 Mercedes Benz v. State, 334 Md. 264, 638 A.2d 1164 (1994).

BURDEN OF PROOF. – In order to avoid forfeiture, under former Art. 27, § 297(c) (now (a) of this section), the owner must establish by a preponderance of the evidence that what occurred was done without owner's actual knowledge. One 1988 Jeep Cherokee VIN 1JCMT7898JT159481 v. City of Salisbury, 98 Md. App. 676, 635 A.2d 21 (1994).

FORFEITURE HELD TO BE NOT WARRANTED. – Forfeiture held to be not warranted where the owner of the vehicle testified that owner kept in the vehicle various drugs and instruments associated with owner's profession and that owner was unaware that owner's son was using the vehicle to transport controlled dangerous substances, the vehicle was improperly confiscated. One 1988 Jeep Cherokee VIN 1JCMT7898JT159481 v. City of Salisbury, 98 Md. App. 676, 635 A.2d 21 (1994).

INNOCENT TENANT BY ENTIRETY. – Wife can avoid forfeiture of automobile held as tenants by the entirety upon proof that she had no knowledge of her husband's criminal activities. State v. One 1984 Toyota Truck, 69 Md. App. 235, 517 A.2d 103 (1986), aff'd, 311 Md. 171, 533 A.2d 659 (1987).

A conveyance owned by husband and wife as tenants by the entirety is not subject to forfeiture under former Art. 27, § 297 (now this title) where innocent spouse was not aware that the vehicle was used to transport and to distribute controlled dangerous substances and related paraphernalia; former Art. 27, § 297(c) (now (a) of this section) protects the innocent spouse (or his or her interest in the vehicle) in these circumstances. State v. One 1984 Toyota Truck, 311 Md. 171, 533 A.2d 659 (1987).

INNOCENT OWNERS EXCLUDED FROM FORFEITURE. – If an innocent owner can satisfy the court that he or she has an interest in the subject property, it should not be forfeited; although the purpose of forfeiture is to discourage the use, production and trafficking of drugs, the General Assembly has seen fit to exclude innocent owners from this harsh remedy. One Ford Motor Vehicle v. State, 104 Md. App. 744, 657 A.2d 825 (1995).

CITED IN Dixon v. Balt. City Police Dep't, 345 F. Supp. 2d 512 (D. Md. 2003).

§ 12-104. Receipt; written notification of seizure of property

(a) Receipt required at time of seizure; contents. – At the time of seizure, the seizing authority shall provide a receipt to the person from whom the property was seized, that includes:

- **(1)** a detailed description of the property;
- **(2)** a case number, property inventory number, or any other reference number used by the seizing authority to connect the property to the circumstances of the seizure;
- **(3)** the name and contact information of an individual or office within the seizing authority that can provide information concerning the seized property;
- **(4)** notice that the owner of the property may make a written request for return of the seized property; and
- **(5)** notice that within 60 days after receipt of a written request for return of the seized property, the seizing authority will decide whether to return the property and notify the owner of the decision.

(b) In general. – If the person who received a receipt under subsection (a) of this section is not the owner of the property, within 15 days after the seizure of property by a seizing authority, the seizing authority shall send by first-class mail written information to the owner of the seized property, if known, providing:

- **(1)** the location and description of the seized property; and
- **(2)** the name and contact information of an individual or office within the seizing authority that can provide further information concerning the seized property, including information on how the property may be returned to the owner.

(c) Required statement. – The written information distributed by a seizing authority as required under this section shall state: "Seizure and forfeiture of property is a legal matter. Nothing in this document may be construed as legal advice. You may wish to consult an attorney concerning this matter.".

History

2016, chs. 5, 619, 658.

Annotations: Notes

EFFECT OF AMENDMENTS. –

Chapter 619, Acts 2016, and ch. 658, Acts 2016, enacted pursuant to Art. II, § 17(c) of the Maryland Constitution without the Governor's signature, effective October 1, 2016, made identical amendments. Each added (a) and redesignated accordingly; in the introductory language of (b) substituted "If the person who received a receipt under subsection (a) of this section is not the owner of the property, within 15" for "Within 30"; and in (c) added "distributed by a seizing authority as."

EDITOR'S NOTE. –

Ch. 5, Acts 2016, was enacted pursuant to Article II, § 17(d) of the Maryland Constitution without the Governor's signature, to become effective 30 days after the Governor's 2015 veto was overridden, superseding the effective date as drafted in the bill, and became effective February 20, 2016.

§ 12-201. Seizure and summary forfeiture of contraband

(a) Schedule I substances – Possession, transference, and sale. – A Schedule I substance listed in § 5-402 of the Criminal Law Article shall be seized and summarily forfeited to the State if the substance is:

(1) possessed, transferred, sold, or offered for sale in violation of the Controlled Dangerous Substances law; or

(2) possessed by the State and its owner is not known.

(b) Schedule I or II substances – Planting or cultivation. – A plant may be seized and summarily forfeited to the State if the plant:

(1) is one from which a Schedule I or Schedule II substance listed in § 5-402 or § 5-403 of the Criminal Law Article may be derived; and

(2)

(i) has been planted or cultivated in violation of the Controlled Dangerous Substances law;

(ii) has an unknown owner or cultivator; or

(iii) is a wild growth.

(c) Failure to provide registration or proof of identity. – The Maryland Department of Health may seize and subject a plant to forfeiture if the person that occupies or controls the place where the plant is growing or being stored fails, on demand from the Maryland Department of Health, to produce an appropriate registration or proof that the person is the holder of a registration.

History

An. Code 1957, art. 27, § 297(g); 2001, ch. 10, § 2; 2002, ch. 213, § 6; 2017, ch. 214, § 7.

Annotations: Notes

EFFECT OF AMENDMENTS. –

Section 6, ch. 213, Acts 2002, effective Oct. 1, 2002, substituted "§ 5-402 of the Criminal Law Article" for "Article 27, § 279 of the Code" in the introductory language of (a); and substituted "§ 5-402 or § 5-403 of the Criminal Law Article" for "Article 27, § 279 of the Code" in (b)(1).

EDITOR'S NOTE. –

Pursuant to § 7, ch. 214, Acts 2017, "Maryland Department of Health" was substituted for "Department of Health and Mental Hygiene" twice in (c).

EDITOR'S NOTE. –

Some of the cases appearing in the notes to this article were decided under the former statutes in effect prior to the 2001 revision. These earlier cases have been moved to pertinent sections of the revised material where they may be used in interpreting the current statutes. Internal references have also been updated.

Section 7, ch. 10, Acts 2001, provides that "the Revisor's Notes, Special Revisor's Notes, General Revisor's Notes, captions, and catchlines contained in this Act are not law and may not be considered to have been enacted as a part of this Act."

Section 8, ch. 10, Acts 2001, provides that "nothing in this Act affects the term of office of an appointed or elected member of any commission, office, department, agency, or other unit. An individual who is a member of a unit on the effective date of this Act [October 1, 2001] shall remain a member for the balance of the term to which appointed or elected, unless the member sooner dies, resigns, or is removed under provisions of law."

Section 9, ch. 10, Acts 2001, provides that "except as expressly provided to the contrary in this Act, any transaction or employment status affected by or flowing from any change of nomenclature or any statute amended, repealed, or transferred by this Act and validly entered into or existing before the effective date of this Act [October 1, 2001] and every right, duty, or interest flowing from a statute amended, repealed, or transferred by this Act remains valid after the effective date of this Act [October 1, 2001] and may be terminated, completed, consummated or enforced as required or allowed by any statute amended, repealed, or transferred by this Act as though the repeal, amendment, or transfer had not occurred. If a change in nomenclature involves a change in name or designation of any State unit, the successor unit shall be considered in all respects as having the powers and obligations granted the former unit."

Section 10, ch. 10, Acts 2001, provides that "the continuity of every commission, office, department, agency or other unit is retained. The personnel, records, files, furniture, fixtures, and other properties and all appropriations, credits, assets, liabilities, and obligations of each retained unit are continued as the personnel, records, files, furniture, fixtures, properties, appropriations, credits, assets, liabilities, and obligations of the unit under the laws enacted by this Act."

Section 11, ch. 10, Acts 2001, provides that "except as expressly provided to the contrary in this Act, any person licensed, registered, certified, or issued a permit or certificate by any commission, office, department, agency, or other unit established or continued by any statute amended, repealed, or transferred by this Act is considered for all purposes to be licensed, registered, certified, or issued a permit or certificate by the appropriate unit continued under this Act for the duration of the term for which the license, registration, certification, or permit was issued, and may renew that authorization in accordance with the appropriate renewal provisions of this Act."

Section 13, ch. 10, Acts 2001, provides that "this Act does not rescind, supersede, change, or modify any rule adopted by the Court of Appeals that is or was in effect on the effective date of this Act [October 1, 2001] concerning the practice and procedure in and the administration of the appellate courts and the other courts of this State."

Section 14, ch. 10, Acts 2001, provides that "the creation in this Act of separate definitions for the terms 'victim' and 'victim's representative' from broad definitions of 'victim' in the former law is intended for stylistic purposes only and does not narrow the meaning of the word 'victim' as used in Article 47 of the Constitution of Maryland [Declaration of Rights]."

Annotations: Case Notes

MARYLAND LAW REVIEW. – For article, "Survey of Developments in Maryland Law, 1983-84," see 44 Md. L. Rev. 511 (1985).

For article, "Survey of Developments in Maryland Law, 1987-88," see 48 Md. L. Rev. 551 (1989).

UNIVERSITY OF BALTIMORE LAW REVIEW. – For article, "Forfeitures in Narcotics Cases: The Constitution and Recent Amendments to Maryland's Forfeiture Statute," see 14 U. Balt. L. Rev. 79 (1984).

FOURTH AMENDMENT. – This section is not violative of the Fourth Amendment. Mid-Atlantic Accessories Trade Ass'n v. Maryland, 500 F. Supp. 834 (D. Md. 1980).

EFFECT OF FOURTH AMENDMENT. – The Fourth Amendment's Exclusionary Rule applies to cases brought under former Art. 27, § 297 (now this title). One 1995 Corvette VIN #1G1YY22P585103433 v. Mayor & City Council, 353 Md. 114, 724 A.2d 680 (1999), cert. denied, 528 U.S. 927, 120 S. Ct. 321, 145 L. Ed. 2d 250 (1999).

STALENESS. – Fourth Amendment concept of staleness not applicable to the seizure of property under Maryland's forfeiture laws. Jones v. State, 56 Md. App. 101, 466 A.2d 895 (1983).

COMPARISON WITH FEDERAL STATUTE. – The former Maryland forfeiture statute, Art. 27, § 297 (now this title), mirrored the federal forfeiture statute and was adopted largely from it; therefore, the Supreme Court's analysis of cases under the federal statute may have been used as guidance in cases under the State statute. One 1984 Ford Truck v. Baltimore County, 111 Md. App. 194, 681 A.2d 527 (1996).

Former Art. 27, § 297 (now this title) was, and was intended to be, a harsh law. Prince George's County v. Vieira, 340 Md. 651, 667 A.2d 898 (1995).

PURPOSE OF SECTION. – The former Maryland drug forfeiture law was, and was intended to be, a harsh law. The purpose of the statutory scheme was to impede the drug trade by depriving drug dealers of the instrumentalities that facilitate the sale and use of illegal drugs. Boyd v. Hickman, 114 Md. App. 108, 689 A.2d 106 (1997), cert. denied, 346 Md. 26, 694 A.2d 949 (1997).

DUTY AND POWER OF COURT. – See Prince George's County v. One 1969 Opel, 267 Md. 491, 298 A.2d 168 (1973).

ACTUAL TAKING ISOLATED IN TIME. – State of seizure is continuous, but there is only one act of seizing. The property may be under seizure for an indefinite period, but the actual taking of something into custody is isolated in time. Money seized prior to July 1, 1970, cannot be viewed as reseized subsequent to that date. Montgomery County v. Sum of $103,428.23, 264 Md. 208, 285 A.2d 663 (1972).

PURPOSE OF ESTABLISHMENT OF STANDARDS, GUIDELINES AND METHODS OF PROCEDURE. – Purpose of establishment of standards, guidelines and methods of procedure is to provide, after due notice has been given to the owner, a forum in which it can be established whether the vehicle seized was used to facilitate the transportation, sale and possession of

controlled dangerous substances, that no statutory exceptions to the implementation of the forfeiture statute are applicable, and to ensure adherence to due process requirements. State v. One 1979 Pontiac Firebird, 55 Md. App. 394, 462 A.2d 73 (1983).

QUOTED IN Robinson v. State, 451 Md. 94, 152 A.3d 661 (2017).

§ 12-202. Seizure of property subject to forfeiture

(a) Seizure with or without warrant. – Property subject to forfeiture under this title may be seized:

(1) on a warrant issued by a court that has jurisdiction over the property; and

(2) without a warrant when:

(i) the seizure is incident to an arrest or a search under a search warrant;

(ii) the seizure is incident to an inspection under an administrative inspection warrant;

(iii) the property subject to seizure has been the subject of a prior judgment in favor of the State in a criminal injunction or forfeiture proceeding under this title;

(iv) there is probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(v) there is probable cause to believe that the property has been used or is intended to be used in violation of the Controlled Dangerous Substances law or this title.

(b) Photographing of contraband money. – The seizing authority that seizes money that is contraband shall immediately:

(1) photograph the contraband money and record the quantity of each denomination of coin or currency seized; and

(2) deposit the money to the account of the appropriate local financial authority.

(c) Photographs as evidence. – A photograph taken under subsection (b) of this section may be substituted for money as evidence in a criminal or forfeiture proceeding.

History

An. Code 1957, art. 27, §§ 297(d)(1), 297A; 2001, ch. 10, § 2.

Annotations: Case Notes

SEIZURE OF PROPERTY PERMITTED. – State law permits the seizure of property when there is probable cause to believe that the property was or will be used to violate the controlled dangerous substances laws. 96 Op. Att'y Gen. 31 (May 2, 2011).

FEDERAL ADOPTION OF CURRENCY SEIZED. – When the Maryland State Police seized currency as proceeds of illegal drug transactions and asked the Drug Enforcement Administration to "adopt" the currency, under 21 U.S.C.S. § 873 and file forfeiture proceedings under 21 U.S.C.S. § 881, the State Police could not completely circumvent State law because their authority to seize and detain the currency emanated from State law, specifically this section, and not federal authority, so § 12-203 of this subtitle applied to the seizure. DeSantis v. State, 384 Md. 656, 866 A.2d 143 (2005).

SEARCH INCIDENT TO CUSTODIAL ARREST FOR TRAFFIC INFRACTION PERMISSIBLE. – Police are entitled to make a search incident to a custodial arrest for a traffic infraction just as surely as they are as an incident to an arrest for any other crime. Jones v. State, 56 Md. App. 101, 466 A.2d 895 (1983).

CASE-BY-CASE DETERMINATION AS TO PROPRIETY OF LENGTH OF DELAY BETWEEN FIRST KNOWLEDGE OF PROBABLE CAUSE AND SEIZURE. – Determinations as to how long a governmental agency can wait after it has probable cause to believe that property has been used in violation of the controlled dangerous substances laws before seizing the property ought to be made on a case-by-case basis. Jones v. State, 56 Md. App. 101, 466 A.2d 895 (1983).

THREE-MONTH DELAY BEFORE SEIZURE NOT EXCESSIVE DURING ONGOING INVESTIGATION. – Three-month delay between State's first knowledge of probable cause and seizure of property not excessive where seizure was product of an ongoing investigation of defendant's illegal activity. Jones v. State, 56 Md. App. 101, 466 A.2d 895 (1983).

FOURTH AMENDMENT. – This section is not violative of the Fourth Amendment. Mid-Atlantic Accessories Trade Ass'n v. Maryland, 500 F. Supp. 834 (D. Md. 1980).

EFFECT OF FOURTH AMENDMENT. – The Fourth Amendment's Exclusionary Rule applies to cases brought under former Art. 27, § 297 (now this title). One 1995 Corvette VIN #1G1YY22P585103433 v. Mayor & City Council, 353 Md. 114, 724 A.2d 680 (1999), cert. denied, 528 U.S. 927, 120 S. Ct. 321, 145 L. Ed. 2d 250 (1999).

STALENESS. – Fourth Amendment concept of staleness not applicable to the seizure of property under Maryland's forfeiture laws. Jones v. State, 56 Md. App. 101, 466 A.2d 895 (1983).

TERMS NOT IMPERMISSIBLY VAGUE. – The terms "intended for use" and "designed for use," as those terms are employed in Chapter 874, Acts 1980, are not impermissibly vague. 65 Op. Att'y Gen. 92 (1980).

§ 12-203. Custody of seized property; sequestering and removing seized property; request for return of property

(a) Custody of property. – Property seized under this title is in the custody of the seizing authority, and, unless returned to the owner as provided in subsection (c) of this section or § 12-207 of this subtitle, is subject only to the orders, judgments, and decrees of the court or the official having jurisdiction over the property.

(b) Sequestering and removing property. – A seizing authority may place seized property under seal and remove the property to a place designated by the court.

(c) Request for return of property. –

(1) The owner of seized property may make a written request to the seizing authority for the return of the seized property.

(2) Within 60 days after receipt of a written request under paragraph (1) of this subsection, the seizing authority shall make a decision as to the disposition of the seized property and shall notify the owner that:

(i) the seizing authority does not have custody of the property and shall provide contact information for the law enforcement agency that does have custody of the property;

(ii) the seizing authority does have custody of the property and will file a complaint for forfeiture;

(iii) the seizing authority does have custody of the property and will retain it for evidentiary purposes until after the conclusion of a criminal case; or

(iv) the seizing authority does have custody of the property and will promptly return the property to the owner.

History

An. Code 1957, art. 27, § 297(e); 2001, ch. 10, § 2; 2016, chs. 619, 658. –

Annotations: Notes

EFFECT OF AMENDMENTS. –

Chapter 619, Acts 2016, and ch. 658, Acts 2016, enacted pursuant to Art. II, § 17(c) of the Maryland Constitution without the Governor's signature, effective October 1, 2016, made identical amendments. Each deleted (a)(1) and the (a)(2) designation; in (a) added "and, unless returned to the owner as provided in subsection (c) of this section or § 12-207 of this subtitle, is"; added (c); and made a related change.

Annotations: Case Notes

FEDERAL ADOPTION. – When the Maryland Attorney General asked the Drug Enforcement Administration (DEA) to "adopt" certain currency seized by the Maryland State Police and initiate forfeiture proceedings regarding it, pursuant to 21 U.S.C.S. § 881, and the DEA agreed to do so, the State Police did not have to obtain the order of a Maryland court before turning over the seized currency to the DEA, as this section allowed the Attorney General to exercise this authority without judicial involvement. DeSantis v. State, 384 Md. 656, 866 A.2d 143 (2005).

When the Maryland State Police seized currency as proceeds of illegal drug transactions and asked the Drug Enforcement Administration to "adopt" the currency, under 21 U.S.C.S. § 873 and file forfeiture proceedings under 21 U.S.C.S. § 881, the State Police could not completely circumvent State law because their authority to seize and detain the currency emanated from State law, specifically § 12-202 of this subtitle, and not federal authority, so this section applied to the seizure. DeSantis v. State, 384 Md. 656, 866 A.2d 143 (2005).

LIMITATIONS ON STATE OFFICERS INAPPLICABLE TO OTHER OFFICIALS. – While this section limits the options of a law enforcement agency for disposal of forfeited property it seizes, other officials with authority over the property, who are not solely judges of Maryland courts, are not so limited by the statute, as, pursuant to §§ 12-207 and 12-304 of this article, such an official may return property wrongly seized without judicial involvement. DeSantis v. State, 384 Md. 656, 866 A.2d 143 (2005).

JURISDICTION OVER PROPERTY – City's argument that the lienholder could not obtain a vehicle in a forfeiture proceeding once a complaint for forfeiture had been filed was without merit, as it was based on the faulty premise that the trial court exercised continuing jurisdiction over that property; its argument, directed at the lienholder's claim that the lienholder should be able to sell the vehicle first without having to pay costs to have it released, ignored this section, which stated that the seized property was in the custody of the seizing authority subject only to orders of the court having jurisdiction over the property. WFS Fin., Inc. v. Mayor of Baltimore, 402 Md. 1, 935 A.2d 385 (2007).

§ 12-204. Seizure of motor vehicles – In general

(a) Seizing authority to apply standards. – In exercising the authority to seize motor vehicles under this title, a seizing authority shall apply the standards listed in subsection (b) of this section.

(b) Applicable standards. – A motor vehicle used in violation of the Controlled Dangerous Substances law or this title shall be seized and forfeiture shall be recommended to the forfeiting authority if:

(1) any quantity of a controlled dangerous substance is sold or attempted to be sold in violation of the Controlled Dangerous Substances law or this title;

(2) an amount of the controlled dangerous substance or paraphernalia is found that reasonably shows that the violator intended to sell the controlled dangerous substance in violation of the Controlled Dangerous Substances law; or

(3) the total circumstances of the case as listed in subsection (c) of this section dictate that seizure and forfeiture are justified.

(c) Circumstances of case. – Circumstances to be considered in deciding whether seizure and forfeiture are justified include:

(1) the possession of controlled dangerous substances;

(2) an extensive criminal record of the violator;

(3) a previous conviction of the violator for a controlled dangerous substances crime;

(4) evidence that the motor vehicle was acquired by use of proceeds from a transaction involving a controlled dangerous substance;

(5) circumstances of the arrest; and

(6) the way in which the motor vehicle was used.

History

An. Code 1957, art. 27, § 297(i)(1); 2001, ch. 10, § 2.

Annotations: Case Notes

UNIVERSITY OF BALTIMORE LAW REVIEW. – For note, "Due Process in Automobile Forfeiture Proceedings," see 3 U. Balt. L. Rev. 270 (1974).

FOURTH AMENDMENT. – This section is not violative of the Fourth Amendment. Mid-Atlantic Accessories Trade Ass'n v. Maryland, 500 F. Supp. 834 (D. Md. 1980).

EFFECT OF FOURTH AMENDMENT. – The Fourth Amendment's Exclusionary Rule applies to cases brought under former Art. 27, § 297 (now this title). One 1995 Corvette VIN #1G1YY22P585103433 v. Mayor & City Council, 353 Md. 114, 724 A.2d 680 (1999), cert. denied, 528 U.S. 927, 120 S. Ct. 321, 145 L. Ed. 2d 250 (1999).

STALENESS. – Fourth Amendment concept of staleness not applicable to the seizure of property under Maryland's forfeiture laws. Jones v. State, 56 Md. App. 101, 466 A.2d 895 (1983).

CONDITIONAL VENDORS. – Former Art. 27, § 297 (now this title) did not deny a conditional vendor due process of law contrary to article 23 of the Maryland Declaration of Rights or to the Fourteenth Amendment of the U.S. Constitution. Lumar Sales, Inc. v. State, 268 Md. 355, 301 A.2d 495 (1973).

PURPOSE. – The General Assembly did not intend by the enactment of former Art. 27, § 297(i) (now §§ 12-204, 12-204, 12-206 of this title) to supplant any of the provisions of former Art. 27, § 297(b) (now § 12-102(a) of this article), including former Art. 27, § 297(b)(4) (now § 12-102(a)(4) of this article), as they applied to the seizure and forfeiture of motor vehicles. State ex rel. Frederick City Police Dep't v. One 1988 Toyota Pick-up Truck, 334 Md. 359, 639 A.2d 641 (1994).

Former Art. 27, § 297(i) (now §§ 12-204, 12-205, 12-206 of this title) was intended to vest in the seizing authority a measure of discretion, guided by the factors specified in the subsection, in making the determination whether a motor vehicle, which had become subject to forfeiture under former Art. 27, § 297(b)(4) (now § 12-102(a)(4) of this article), should be recommended for forfeiture. State ex rel. Frederick City Police Dep't v. One 1988 Toyota Pick-up Truck, 334 Md. 359, 639 A.2d 641 (1994).

PROCEDURE SPELLED OUT BY ENACTMENT OF CH. 659, ACTS 1972. – The General Assembly, by the enactment of ch. 659, Acts 1972, has spelled out in some detail standards, guidelines and methods of procedure to be applied and followed by the authorities in respect of the forfeiture of motor vehicles under former Art. 27, § 297 (now this title). Prince George's County v. One 1969 Opel, 267 Md. 491, 298 A.2d 168 (1973); State v. One 1979 Pontiac Firebird, 55 Md. App. 394, 462 A.2d 73 (1983).

LACK OF JUDICIAL DISCRETION. – The mandate of former Art. 27, § 297 (now this title) must be obeyed for it is not a penalty imposed as part of the criminal punishment that can be invoked at the discretion of the trial judge. State v. One 1967 Ford Mustang, 266 Md. 275, 292 A.2d 64 (1972).

If the General Assembly had desired to make this forfeiture discretionary it could have so provided. State v. One 1967 Ford Mustang, 266 Md. 275, 292 A.2d 64 (1972).

REMEDY IS PRESCRIBED BY LAW. – Once the basis of forfeiture under former Art. 27, § 297 (now this title) is established by a preponderance of the evidence, the remedy is prescribed by law – loss of the seized vehicle, and it is no more permissible to deny forfeiture under these circumstances than it would be to order a debtor to repay a reduced amount than is lawfully due because extenuating circumstances indicate that requiring the full sum to be paid would create great hardship. State v. One 1967 Ford Mustang, 266 Md. 275, 292 A.2d 64 (1972).

FEDERAL FORFEITURE PROCEEDING MAY BE SELECTED. – A State or local police officer who seizes a motor vehicle under the authority of former Art. 27, § 297 (now this title), may, instead of proceeding with a forfeiture action under this section, defer to a federal forfeiture proceeding under 21 U.S.C. § 881. Cavaliere v. Town of N. Beach, 101 Md. App. 319, 646 A.2d 1058 (1994).

CONDITIONAL VENDOR AS OWNER. – Conditional vendor is included within the meaning of "owner" and is entitled to contend that a motor vehicle was unlawfully in the possession of another at the time the act occurred which subjected it to forfeiture. Lumar Sales, Inc. v. State, 268 Md. 355, 301 A.2d 495 (1973).

PURPOSE OF ESTABLISHMENT OF STANDARDS, GUIDELINES AND METHODS OF PROCEDURE. – Purpose of establishment of standards, guidelines and methods of procedure is to provide, after due notice has been given to the owner, a forum in which it can be established whether the vehicle seized was used to facilitate the transportation, sale and possession of controlled dangerous substances, that no statutory exceptions to the implementation of the forfeiture statute are applicable, and to ensure adherence to due process requirements. State v. One 1979 Pontiac Firebird, 55 Md. App. 394, 462 A.2d 73 (1983).

COUNTY AS NECESSARY PARTY TO ACTION SEEKING RELEASE. – Where county police seized a car, according to former Art. 27, § 297 (now this title) the county, not the State, had custody of the vehicle and authority to control its disposition, and was the only necessary party to an action seeking release of the car. State v. Greer, 263 Md. 692, 284 A.2d 233 (1971).

GUIDELINES TO POLICE. – Former Art. 27, § 297(i) (now §§ 12-204, 12-205, 12-206 of this title) was a set of guidelines to the police to assist them in deciding when to seize a vehicle and to recommend forfeiture to the State's Attorney. State v. One Motor Vehicle to Wit: 1982 Plymouth, Serial No. JP3BE4439CU404899, 67 Md. App. 310, 507 A.2d 633 (1986).

DECISIONS DEEMED NONJUDICIAL. – Under former Art. 27, § 297(i) (now §§ 12-204, 12-205, 12-206 of this title), the decision to seize and the decision to recommend forfeiture to the State's Attorney are not judicial decisions either in the first instance or by way of de novo determination. State v. One Motor Vehicle to Wit: 1982 Plymouth, Serial No. JP3BE4439CU404899, 67 Md. App. 310, 507 A.2d 633 (1986).

AUTOMOBILE NOT REQUIRED TO BE COMMON NUISANCE. – Former Art. 27, § 297 (now this title) did not require that automobile constitute common nuisance on day seized. Jones v. State, 56 Md. App. 101, 466 A.2d 895 (1983).

STANDARD OF REVIEW. – The trial court did not err in imposing a "de novo" or "independent" determination regarding the sufficiency of the decision by the police commissioner to recommend forfeiture instead of reviewing that decision on a "clearly erroneous" or "abuse of discretion" standard. State v. One 1976 Dodge Motor Vehicle, 65 Md. App. 482, 501 A.2d 103 (1985), cert. denied, 305 Md. 599, 505 A.2d 856 (1986).

APPLIED IN WFS Fin., Inc. v. Mayor of Baltimore, 402 Md. 1, 935 A.2d 385 (2007).

§ 12-205. Seizure of motor vehicles – Exceptions

A motor vehicle used in violation of this title may not be seized and forfeiture may not be recommended to the forfeiting authority if:

(1) the motor vehicle falls within § 12-103(b) of this title;

(2)

(i) an innocent registered owner lends the motor vehicle to another person; and

(ii) that person, or someone invited into the motor vehicle by that person, brings a controlled dangerous substance or paraphernalia into the motor vehicle without the registered owner's knowledge; or

(3)

(i) a member of the family other than the registered owner uses the motor vehicle, and a controlled dangerous substance or paraphernalia is in the motor vehicle in an amount insufficient to suggest a sale is contemplated;

(ii) a sale was not made or attempted; and

(iii) the registered owner did not know that the controlled dangerous substance or paraphernalia was in the motor vehicle.

History

An. Code 1957, art. 27, § 297(i)(2); 2001, ch. 10, § 2.

Annotations: Case Notes

FORFEITURE NOT WARRANTED. – Forfeiture held to be not warranted where the owner of the vehicle testified that owner kept in the vehicle various drugs and instruments associated with owner's profession and that owner was unaware that owner's son was using the vehicle to transport controlled dangerous substances, the vehicle was improperly confiscated. One 1988 Jeep Cherokee VIN 1JCMT7898JT159481 v. City of Salisbury, 98 Md. App. 676, 635 A.2d 21 (1994).

Where there was no evidence that appellant employed a vehicle to distribute or attempt to distribute any controlled dangerous substances, and where the vehicle did not play an extensive or pervasive role in the possession of confiscated cocaine or marijuana, the forfeiture of that vehicle constituted an excessive fine in violation of the Eighth Amendment and article 25 of the Maryland Declaration of Rights. Thompson v. Grindle, 113 Md. App. 477, 688 A.2d 466 (1997).

INNOCENT TENANT BY ENTIRETY. – Wife can avoid forfeiture of automobile held as tenants by the entirety upon proof that she had no knowledge of her husband's criminal activities. State v. One 1984 Toyota Truck, 69 Md. App. 235, 517 A.2d 103 (1986), aff'd, 311 Md. 171, 533 A.2d 659 (1987).

A conveyance owned by husband and wife as tenants by the entirety is not subject to forfeiture under former Art. 27, § 297 (now this title) where innocent spouse was not aware that the vehicle was used to transport and to distribute controlled dangerous

substances and related paraphernalia; former Art. 27, § 297(c) (now § 12-103(a) of this article) protects the innocent spouse (or his or her interest in the vehicle) in these circumstances. State v. One 1984 Toyota Truck, 311 Md. 171, 533 A.2d 659 (1987).

GUIDELINES TO POLICE. – Former Art. 27, § 297(i) (now §§ 12-204, 12-205, 12-206 of this title) was a set of guidelines to the police to assist them in deciding when to seize a vehicle and to recommend forfeiture to the State's Attorney. State v. One Motor Vehicle to Wit: 1982 Plymouth, Serial No. JP3BE4439CU404899, 67 Md. App. 310, 507 A.2d 633 (1986).

DECISIONS DEEMED NONJUDICIAL. – Former Art. 27, § 297(i) (now §§ 12-204, 12-205, 12-206 of this title), the decision to seize and the decision to recommend forfeiture to the State's Attorney are not judicial decisions either in the first instance or by way of de novo determination. State v. One Motor Vehicle to Wit: 1982 Plymouth, Serial No. JP3BE4439CU404899, 67 Md. App. 310, 507 A.2d 633 (1986).

STANDARD OF REVIEW. – The trial court did not err in imposing a "de novo" or "independent" determination regarding the sufficiency of the decision by the police commissioner to recommend forfeiture instead of reviewing that decision on a "clearly erroneous" or "abuse of discretion" standard. State v. One 1976 Dodge Motor Vehicle, 65 Md. App. 482, 501 A.2d 103 (1985), cert. denied, 305 Md. 599, 505 A.2d 856 (1986).

PURPOSE. – The General Assembly did not intend by the enactment of former Art. 27, § 297(i) (now §§ 12-204, 12-205, 12-206 of this title) to supplant any of the provisions of former Art. 27, § 297(b) (now § 12-102 of this article), including former Art. 27, § 297(b)(4) (now § 12-102(a)(4) of this article), as they applied to the seizure and forfeiture of motor vehicles. State ex rel. Frederick City Police Dep't v. One 1988 Toyota Pick-up Truck, 334 Md. 359, 639 A.2d 641 (1994).

Former Art. 27, § 297(i) (now §§ 12-204, 12-205, 12-206 of this title) was intended to vest in the seizing authority a measure of discretion, guided by the factors specified in the subsection, in making the determination whether a motor vehicle, which had become subject to forfeiture under former Art. 27, § 297(b)(4) (now § 12-104(a)(4) of this title), should be recommended for forfeiture. State ex rel. Frederick City Police Dep't v. One 1988 Toyota Pick-up Truck, 334 Md. 359, 639 A.2d 641 (1994).

§ 12-206. Recommendation of forfeiture by seizing authority

(a) Requirements for recommendation. – The chief law enforcement officer of the seizing authority that seizes a motor vehicle used in violation of this title shall recommend to the appropriate forfeiting authority in writing that the motor vehicle be forfeited only if the officer:

(1) determines from the records of the Motor Vehicle Administration the names and addresses of all registered owners and secured parties as defined in the Code;

(2) personally reviews the facts and circumstances of the seizure; and

(3) personally determines, according to the standards listed in § 12-204(b) of this subtitle, and represents in writing that forfeiture is warranted.

(b) Chief law enforcement officer. –

(1) A sworn affidavit by the chief law enforcement officer that the officer followed the requirements of this paragraph is admissible in evidence in a proceeding under this section.

(2) The chief law enforcement officer may not be subpoenaed or compelled to appear and testify if another law enforcement officer with personal knowledge of the facts and circumstances surrounding the seizure and the recommendation of forfeiture appears and testifies at the proceeding.

History

An. Code 1957, art. 27, § 297(i)(3); 2001, ch. 10, § 2.

Annotations: Case Notes

PURPOSE OF SECTION. – The General Assembly did not intend by the enactment of former Art. 27, § 297(i) (now §§ 12-204, 12-205, 12-206 of this title) to supplant any of the provisions of former Art. 27, § 297(b) (now § 12-102 of this article), including former Art. 27, § 297(b)(4) (now § 12-102(a)(4) of this article), as they applied to the seizure and forfeiture of motor vehicles. State ex rel. Frederick City Police Dep't v. One 1988 Toyota Pick-up Truck, 334 Md. 359, 639 A.2d 641 (1994).

Former Art. 27, § 297(i) (now §§ 12-204, 12-205, 12-206 of this title) was intended to vest in the seizing authority a measure of discretion, guided by the factors specified in the subsection, in making the determination whether a motor vehicle, which had become subject to forfeiture under former Art. 27, § 297(b)(4) (now § 12-102(a)(4) of this article), should be recommended for forfeiture. State ex rel. Frederick City Police Dep't v. One 1988 Toyota Pick-up Truck, 334 Md. 359, 639 A.2d 641 (1994).

GUIDELINES TO POLICE. – Former Art. 27, § 297(i) (now §§ 12-204, 12-205, 12-206 of this title) was a set of guidelines to the police to assist them in deciding when to seize a vehicle and to recommend forfeiture to the State's Attorney. State v. One Motor Vehicle to Wit: 1982 Plymouth, Serial No. JP3BE4439CU404899, 67 Md. App. 310, 507 A.2d 633 (1986).

Former Art. 27, § 297(i)(3) (now this section) provided guidelines to the seizing authority in determining whether to "recommend" forfeiture to the State's Attorney. State ex rel. Frederick City Police Dep't v. One 1988 Toyota Pick-up Truck, 334 Md. 359, 639 A.2d 641 (1994).

DECISIONS DEEMED NONJUDICIAL. – Former Art. 27, § 297(i) (now §§ 12-204, 12-205, 12-206 of this title), the decision to seize and the decision to recommend forfeiture to the State's Attorney are not judicial decisions either in the first instance or by way of de novo determination. State v. One Motor Vehicle to Wit: 1982 Plymouth, Serial No. JP3BE4439CU404899, 67 Md. App. 310, 507 A.2d 633 (1986).

§ 12-207. Return of vehicle to owner after seizure

(a) Surrender of motor vehicle to owner. – The forfeiting authority shall surrender the motor vehicle on request to the owner if the forfeiting authority determines, independent of the decision of the seizing authority, that:
- **(1)** the motor vehicle falls within the purview of § 12-205 of this subtitle; or
- **(2)** the standards listed under § 12-204(b) of this subtitle were not met.

(b) Court review. – In a proceeding under this title, the court may determine, based on the standards listed in § 12-204(b) of this subtitle, whether the seizing authority or forfeiting authority abused its discretion or was clearly erroneous:
- **(1)** in recommending the forfeiture of a motor vehicle; or
- **(2)** in not surrendering on request a motor vehicle to an owner.

History

An. Code 1957, art. 27, § 297(j), (k)(1); 2001, ch. 10, § 2.

Annotations: Case Notes

NOTICE. – Without notice upon which a challenge could have been made to a petition for release of an automobile seized under former Art. 27, § 297 (now this title), an order releasing the automobile, issued on the basis of that petition, violated not only the Fourteenth Amendment of the United States Constitution but also article 23, Maryland Declaration of Rights, and was therefore invalid. State v. Greer, 263 Md. 692, 284 A.2d 233 (1971).

PURPOSE OF FORMER ART. 27, § 297(J). – The legislative purpose in enacting former Art. 27, § 297(j) (now subsection (a)), providing for an innocent secured party to sell the forfeited vehicle in a commercially reasonable manner, was to protect the interests of the secured party. One 1983 Chevrolet Van Serial No. IGCCG15D8D104615 v. State, 67 Md. App. 485, 508 A.2d 503 (1986), aff'd, 309 Md. 327, 524 A.2d 51 (1987).

§ 12-208. Owner obtaining possession of seized property

(a) Notice required. –
- **(1)** Except as provided in §§ 12-209 and 12-210 of this subtitle, an owner of seized property who wishes to obtain possession of the property, to convey an interest in real property, or to remove a building or fixture from real property shall notify the clerk of the proper court.
- **(2)** If forfeiture proceedings have begun, the proper court is the court where the proceedings have begun.
- **(3)** If criminal proceedings have begun but forfeiture proceedings have not begun, the proper court is the court where the criminal proceedings have begun.
- **(4)** If neither forfeiture nor criminal proceedings have begun, the proper court is the circuit court for the county where the property was seized.

(b) Appraisal for motor vehicle. –
- **(1)** Unless the forfeiting authority and the owner agree to a bond in another amount, if a motor vehicle is not needed for evidentiary purposes in a judicial proceeding:
  - **(i)** the court shall appraise the value of the motor vehicle on the basis of the average value of the motor vehicle set forth in the National Automobile Dealer's Association official used car guide; or
  - **(ii)** if the owner shows that a lien is on the motor vehicle and the owner agrees to make the required payments to the lienholder, the court shall require a bond in an amount of the average value of the motor vehicle set forth in the National Automobile Dealer's Association official used car guide, less the amount owed on the lien.
- **(2)** For a motor vehicle, the court shall appraise the value in the manner provided in this subsection and provide the appraisal in writing to the clerk of the court.

(c) Appraisal for property other than motor vehicle. –
- **(1)** If property other than a motor vehicle is not needed for evidentiary purposes in a judicial proceeding, the clerk shall obtain an independent appraisal of the value of the property.
- **(2)** The sheriff or other person responsible for an appraisal under this subsection shall promptly:
  - **(i)** inspect and appraise the value of the property; and
  - **(ii)** return the appraisal in writing under oath to the clerk of the court.

(d) Notice to lienholders. – Notice of the appraisal shall be sent to all lienholders shown in the records required by law for notice or the perfection of the lien.

(e) Bonds. –

(1) On the filing of an appraisal, the owner may give bond payable to the clerk of the court in an amount equal to the greater of:
  (i) the appraised value of the property plus any accrued costs; or
  (ii) the aggregate amount of the liens on the property that are shown in the records required by law for the notice or perfection of liens.

(2) A person may give a bond under this section by cash, through a surety, through a lien on real property, or by other means that the clerk approves.

(3) A bond authorized under this section:
  (i) shall be conditioned for performance on final judgment by the court;
  (ii) shall be filed in the District Court or circuit court where the criminal action that gave rise to the seizure is pending; and
  (iii) unless a complaint for forfeiture has been filed, shall be part of the same criminal proceeding.

(4) If a criminal action is not pending or a forfeiture complaint has not been filed, the bond shall be filed in the circuit court or District Court where the property was seized.

(f) Judgment to be entered against obligors. –

(1) If the court orders that property or an interest or equity in the property or proceeds be forfeited under this title, the court shall enter judgment in the amount of the bond against the obligors on the bond without further proceedings.

(2) Payment of the amount of the bond shall be applied as provided under § 12-402(d)(2) of this title.

History

An. Code 1957, art. 27, § 297(o); 2001, ch. 10, § 2.

§ 12-209. Seizure of real property

Seizure of real property occurs on the earlier of the filing:

(1) of a complaint for forfeiture under this title; or

(2) of a notice of pending litigation in the circuit court of the county where the real property is located.

History

An. Code 1957, art. 27, § 297(m)(4); 2001, ch. 10, § 2.

Annotations: Case Notes

FOURTH AMENDMENT. – This section is not violative of the Fourth Amendment. Mid-Atlantic Accessories Trade Ass'n v. Maryland, 500 F. Supp. 834 (D. Md. 1980).

EFFECT OF FOURTH AMENDMENT. – The Fourth Amendment's Exclusionary Rule applies to cases brought under former Art. 27, § 297 (now this title). One 1995 Corvette VIN #1G1YY22P585103433 v. Mayor & City Council, 353 Md. 114, 724 A.2d 680 (1999), cert. denied, 528 U.S. 927, 120 S. Ct. 321, 145 L. Ed. 2d 250 (1999).

STALENESS. – Fourth Amendment concept of staleness not applicable to the seizure of property under Maryland's forfeiture laws. Jones v. State, 56 Md. App. 101, 466 A.2d 895 (1983).

§ 12-210. Possession of seized real property by owners or tenants

(a) Right to possess until forfeiture. – Subject to the rights of a lienholder to sell the real property, an owner or owner's tenant may remain in possession of seized real property until forfeiture is ordered.

(b) Appointment of receiver allowed. – The forfeiting authority may apply to the court for the appointment of a receiver to apply income from income-producing property.

(c) Surrender of property. – If a person who is an owner or owner's tenant remains in possession of the real property and the person's interest in the real property is forfeited, the person shall immediately surrender the real property to the seizing authority in substantially the same condition as when seized.

History

An. Code 1957, art. 27, § 297(p); 2001, ch. 10, § 2; 2009, ch. 60.

Annotations: Notes

EFFECT OF AMENDMENTS. –

Chapter 60, Acts 2009, enacted April 14, 2009, and effective from date of enactment, deleted "and" following "tenant" in (c).

§ 12-211. Prohibited acts

(a) Scope. – This section does not apply if:
- **(1)** an act is agreed to by a forfeiting authority or is ordered by the court; or
- **(2)** an owner posts a bond under § 12-208 of this subtitle.

(b) In general. – Subject to subsection (a) of this section, until the court enters judgment in favor of the owner, an owner may not attempt:
- **(1)** to convey or encumber an interest in seized real property; or
- **(2)** to remove a building or fixture on seized real property.

History

An. Code 1957, art. 27, § 297(m)(5); 2001, ch. 10, § 2.

§ 12-212. Transfer to federal authority prohibited; exceptions.

A seizing authority or prosecuting authority may not directly or indirectly transfer seized property to a federal law enforcement authority or agency unless:

(1) a criminal case related to the seizure is prosecuted in the federal court system under federal law;

(2) the owner of the property consents to the forfeiture;

(3) the property is cash of at least $ 50,000; or

(4) the seizing authority transfers the property to a federal authority under a federal seizure warrant issued to take custody of assets originally seized under State law.

History

2016, chs. 5, 619, 658.

Annotations: Notes

EFFECT OF AMENDMENTS. –

Chapter 619, Acts 2016, and ch. 658, Acts 2016, enacted pursuant to Art. II, § 17(c) of the Maryland Constitution without the Governor's signature, effective October 1, 2016, made identical amendments. Each added (3) and (4).

EDITOR'S NOTE. –

Ch. 5, Acts 2016, was enacted pursuant to Article II, § 17(d) of the Maryland Constitution without the Governor's signature, to become effective 30 days after the Governor's 2015 veto was overridden, superseding the effective date as drafted in the bill, and became effective February 20, 2016.

§ 12-301. In general

Except as provided in § 12-304(d) of this subtitle, if property is seized under § 12-202(a)(2)(iv) and (v) of this title because there is probable cause to believe that the property is directly or indirectly dangerous to health or safety and that the property was or will be used to violate this title, forfeiture proceedings under this subtitle shall be filed promptly.

History

An. Code 1957, art. 27, § 297(d)(2)(i); 2001, ch. 10, § 2; 2016, ch. 8, § 5.

Annotations: Notes

EDITOR'S NOTE. –

Pursuant to § 5, ch. 8, Acts 2016, "§ 12-304(d)" was substituted for "§ 12-304(c)," following the amendment by chs. 619 and 658, Acts 2016.

EDITOR'S NOTE. –

Some of the cases appearing in the notes to this article were decided under the former statutes in effect prior to the 2001 revision. These earlier cases have been moved to pertinent sections of the revised material where they may be used in interpreting the current statutes. Internal references have also been updated.

Section 7, ch. 10, Acts 2001, provides that "the Revisor's Notes, Special Revisor's Notes, General Revisor's Notes, captions, and catchlines contained in this Act are not law and may not be considered to have been enacted as a part of this Act."

Section 8, ch. 10, Acts 2001, provides that "nothing in this Act affects the term of office of an appointed or elected member of any commission, office, department, agency, or other unit. An individual who is a member of a unit on the effective date of this Act [October 1, 2001] shall remain a member for the balance of the term to which appointed or elected, unless the member sooner dies, resigns, or is removed under provisions of law."

Section 9, ch. 10, Acts 2001, provides that "except as expressly provided to the contrary in this Act, any transaction or employment status affected by or flowing from any change of nomenclature or any statute amended, repealed, or transferred by this Act and validly entered into or existing before the effective date of this Act [October 1, 2001] and every right, duty, or interest flowing from a statute amended, repealed, or transferred by this Act remains valid after the effective date of this Act [October 1, 2001] and may be terminated, completed, consummated or enforced as required or allowed by any statute amended, repealed, or transferred by this Act as though the repeal, amendment, or transfer had not occurred. If a change in nomenclature involves a change in name or designation of any State unit, the successor unit shall be considered in all respects as having the powers and obligations granted the former unit."

Section 10, ch. 10, Acts 2001, provides that "the continuity of every commission, office, department, agency or other unit is retained. The personnel, records, files, furniture, fixtures, and other properties and all appropriations, credits, assets, liabilities, and obligations of each retained unit are continued as the personnel, records, files, furniture, fixtures, properties, appropriations, credits, assets, liabilities, and obligations of the unit under the laws enacted by this Act."

Section 11, ch. 10, Acts 2001, provides that "except as expressly provided to the contrary in this Act, any person licensed, registered, certified, or issued a permit or certificate by any commission, office, department, agency, or other unit established or continued by any statute amended, repealed, or transferred by this Act is considered for all purposes to be licensed, registered, certified, or issued a permit or certificate by the appropriate unit continued under this Act for the duration of the term for which the license, registration, certification, or permit was issued, and may renew that authorization in accordance with the appropriate renewal provisions of this Act."

Section 13, ch. 10, Acts 2001, provides that "this Act does not rescind, supersede, change, or modify any rule adopted by the Court of Appeals that is or was in effect on the effective date of this Act [October 1, 2001] concerning the practice and procedure in and the administration of the appellate courts and the other courts of this State."

Section 14, ch. 10, Acts 2001, provides that "the creation in this Act of separate definitions for the terms 'victim' and 'victim's representative' from broad definitions of 'victim' in the former law is intended for stylistic purposes only and does not narrow the meaning of the word 'victim' as used in Article 47 of the Constitution of Maryland [Declaration of Rights]."

Annotations: Case Notes

MARYLAND LAW REVIEW. – For article, "Survey of Developments in Maryland Law, 1983-84," see 44 Md. L. Rev. 511 (1985).

For article, "Survey of Developments in Maryland Law, 1987-88," see 48 Md. L. Rev. 551 (1989).

UNIVERSITY OF BALTIMORE LAW REVIEW. – For article, "Forfeitures in Narcotics Cases: The Constitution and Recent Amendments to Maryland's Forfeiture Statute," see 14 U. Balt. L. Rev. 79 (1984).

FORFEITURE PROCEEDINGS ARE CIVIL. – Forfeiture proceedings under former Art. 27, § 297 (now this title) were intended by the Maryland General Assembly to be civil rather than criminal, and they are not so punitive in form and effect so as to render them criminal, which would require criminal constitutional protections. One 1984 Ford Truck v. Baltimore County, 111 Md. App. 194, 681 A.2d 527 (1996).

The Maryland General Assembly intended the forfeiture proceedings under former Art. 27, § 297 (now this title) to be civil, and those proceedings are not so punitive in fact that they may not legitimately be regarded as civil, despite the legislature's intent. Jones v. State, 111 Md. App. 456, 681 A.2d 1190 (1996).

IN REM PROCEEDINGS. – Forfeiture proceedings under former Art. 27, § 297 (now this title) are civil in rem proceedings. Mayor of Baltimore v. One 1995 Corvette VIN No. 1G1YY22P585103433, 119 Md. App. 691, 706 A.2d 43 (1998), rev'd on other grounds, 353 Md. 114, 724 A.2d 680 (1999).

DOUBLE JEOPARDY. – A forfeiture proceeding is a civil action and when brought prior or subsequent to a criminal proceeding does not involve the double jeopardy clause of the Fifth Amendment nor the Maryland common law double jeopardy prohibition. Allen v. State, 91 Md. App. 775, 605 A.2d 994 (1992), cert. denied, State v. Threatt, 328 Md. 92, 612 A.2d 1315 (1992), overruled on other grounds, 107 Md. App. 420, 668 A.2d 948 (1995).

Civil forfeiture does not constitute punishment for double jeopardy purposes (readopting position taken in Allen v. State, 91 Md. App. 775, 605 A.2d 994, cert. denied, 328 Md. 92, 612 A.2d 1315 (1992)). One 1984 Ford Truck v. Baltimore County, 111 Md. App. 194, 681 A.2d 527 (1996).

DISTINCTION DRAWN BETWEEN FORFEITURES. – The General Assembly drew a sharp distinction between forfeitures in gambling cases under former Art. 27, § 264 (now § 13-101 et seq. of this article) and forfeitures in controlled dangerous substances matters under former Art. 27, § 297 (now this title). Bozman v. Office of Fin., 52 Md. App. 1, 445 A.2d 1073 (1982), aff'd, 296 Md. 492, 463 A.2d 832 (1983).

COMPARISON WITH FEDERAL STATUTE. – The former Maryland forfeiture statute, Art. 27, § 297 (now this title), mirrored the federal forfeiture statute and was adopted largely from it; therefore, the Supreme Court's analysis of cases under the federal statute may have been used as guidance in cases under the State statute. One 1984 Ford Truck v. Baltimore County, 111 Md. App. 194, 681 A.2d 527 (1996).

Former Art. 27, § 297 (now this title) was, and was intended to be, a harsh law. Prince George's County v. Vieira, 340 Md. 651, 667 A.2d 898 (1995).

PURPOSE OF THE FORFEITURE PROVISION. – The purpose of the forfeiture provision in former Art. 27, § 297 (now this title) was to attempt not only to curtail drug traffic in this State, but to discourage such a blight from continuing in the future. Prince George's County v. Blue Bird Cab Co., 263 Md. 655, 284 A.2d 203 (1971); State v. One 1967 Ford Mustang, 266 Md. 275, 292 A.2d 64 (1972); Ewachiw v. Director of Fin., 70 Md. App. 58, 519 A.2d 1327, cert. denied, 309 Md. 605, 525 A.2d 1075 (1987).

The former Maryland drug forfeiture law was, and was intended to be, a harsh law. The purpose of the statutory scheme was to impede the drug trade by depriving drug dealers of the instrumentalities that facilitate the sale and use of illegal drugs. Boyd v. Hickman, 114 Md. App. 108, 689 A.2d 106 (1997), cert. denied, 346 Md. 26, 694 A.2d 949 (1997).

PUNITIVE NATURE OF FORFEITURE PROVISIONS. – Former Art. 27, § 297 (now this title) was a punitive statute, the purpose of which was to require direct payment to a sovereign as punishment for some offense. Aravanis v. Somerset County, 339 Md. 644, 664 A.2d 888 (1995), cert. denied, 516 U.S. 1115, 116 S. Ct. 916, 133 L. Ed. 2d 846 (1996).

JURISDICTION. – The circuit court, sitting as a criminal court, had no jurisdiction to hear defendant's petition for return of money. Such a petition, authorized by former Art. 27, § 297 (now this title), a forfeiture statute, must be filed in a civil proceeding separate and distinct from any criminal proceedings. State v. Walls, 90 Md. App. 300, 600 A.2d 1165 (1992).

DUTY AND POWER OF COURT. – See Prince George's County v. One 1969 Opel, 267 Md. 491, 298 A.2d 168 (1973).

Once the seizing authority decides to seek forfeiture, the court's only responsibilities are to require proof that the vehicle seized was used, or intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of controlled dangerous substances; determine that no statutory exceptions are applicable; and insure the adherence to due process requirements. State v. One 1967 Ford Mustang, 266 Md. 275, 292 A.2d 64 (1972).

APPLICATION OF THREE-PART INSTRUMENTALITY TEST. – In forfeiture cases, a court must apply a three-part instrumentality test that considers (1) the nexus between the offense and the property and the extent of the property's role in the offense, (2) the role and culpability of the owner, and (3) the possibility of separating offending property that can readily be separated from the remainder. One Ford Motor Vehicle v. State, 104 Md. App. 744, 657 A.2d 825 (1995).

NATURE OF FORFEITURE ACTION. – Forfeiture is a civil in rem action unless otherwise specifically provided by statute. Prince George's County v. Blue Bird Cab Co., 263 Md. 655, 284 A.2d 203 (1971).

Forfeiture, unless specifically provided otherwise by statute, is a civil in rem proceeding, separate from any criminal action and it is of little significance whether there is a criminal conviction. State v. Greer, 263 Md. 692, 284 A.2d 233 (1971).

Forfeiture is treated as action in rem, prosecuted against the property because of its connection with a crime. Bozman v. Office of Fin., 52 Md. App. 1, 445 A.2d 1073 (1982),aff'd, 296 Md. 492, 463 A.2d 832 (1983).

A proceeding under former Art. 27, § 297 (now this title) is a civil in rem action. The action is not in personam against the defendant, it is in rem against the alleged contraband per se. Ewachiw v. Director of Fin., 70 Md. App. 58, 519 A.2d 1327, cert. denied, 309 Md. 605, 525 A.2d 1075 (1987).

CONDITION PRECEDENT. – Right to institute proceeding for forfeiture of seized contraband has a condition precedent that the petition be filed within the 90-day period set out in former Art. 27, § 297 (now this title). Office of Fin. v. Jones, 46 Md. App. 419, 417 A.2d 470, cert. denied, 288 Md. 740 (1980).

FORFEITURE PROCEEDING NOT INSTITUTED PROMPTLY. – With no explanation or attempted justification by the State for the eight-month delay, it cannot be held that the forfeiture proceedings were instituted promptly. Geppi v. State, 270 Md. 239, 310 A.2d 768 (1973).

PARTY AUTHORIZED TO FILE FORFEITURE PETITION. – Under former Art. 27, § 297(d) (now § 12-301 et seq. of this article), the political subdivision that seized property is the only party authorized to file a forfeiture petition. Montgomery County v. Sum of $103,428.23, 264 Md. 208, 285 A.2d 663 (1972).

BURDEN OF PROOF. – Former Art. 27, § 297 (now this title) was a civil statute, and the standard of proof necessary to sustain a forfeiture action by the State was that of a mere preponderance of the evidence rather than the criminal standard of proof beyond a reasonable doubt. Allen v. State, 91 Md. App. 775, 605 A.2d 994 (1992), cert. denied, State v. Threatt, 328 Md. 92, 612 A.2d 1315 (1992), overruled on other grounds, 107 Md. App. 420, 668 A.2d 948 (1995).

REPOSSESSION BY OWNER. – There was nothing in former Art. 27, § 297 (now this title) to indicate that the forfeiture proceeding "forever" precludes eventual repossession by the owner of the vehicle. One 1983 Chevrolet Van Serial No. IGCCG15D8D104615 v. State, 67 Md. App. 485, 508 A.2d 503 (1986), aff'd, 309 Md. 327, 524 A.2d 51 (1987).

§ 12-302. Forfeiture of money

(a) Forfeiture application. – To apply for the forfeiture of money, the appropriate local financial authority or the Attorney General shall file a complaint and affidavit in the District Court or the circuit court for the county in which the money was seized.

(b) Service of complaint and affidavit. – The complaint and affidavit shall be served in accordance with the Maryland Rules of Procedure.

History

An. Code 1957, art. 27, § 297(d)(2)(ii), (iii); 2001, ch. 10, § 2.

Annotations: Case Notes

CONSTITUTIONALITY. – Former Art. 27, § 297 (now this title), providing for forfeiture of money found in close proximity to controlled dangerous substance incident to execution of valid search warrant, was not unconstitutional on grounds of deprivation of property without due process and denial of equal protection. Gatewood v. State, 268 Md. 349, 301 A.2d 498 (1973).

JURISDICTION. – The circuit court, sitting as a criminal court, had no jurisdiction to hear defendant's petition for return of money. Such a petition, authorized by former Art. 27, § 297 (now this title), a forfeiture statute, must be filed in a civil proceeding separate and distinct from any criminal proceedings. State v. Walls, 90 Md. App. 300, 600 A.2d 1165 (1992).

ATTORNEY GENERAL'S AUTHORITY. – Under this section, the Attorney General has the authority to initiate forfeiture proceedings against property seized by the State Police in the form of money, and this authority includes the discretion not to institute forfeiture proceedings and to request federal adoption; none of this authority is circumscribed by the restrictions of § 12-203 of this title regarding the custodial placement of the property, which apply only to the seizing agency. DeSantis v. State, 384 Md. 656, 866 A.2d 143 (2005).

§ 12-303. Proceedings filed by forfeiting authority

Except as provided in § 12-302 of this subtitle and § 4-401(9) of the Courts Article, the appropriate forfeiting authority shall file proceedings under this title in the circuit court.

History

An. Code 1957, art. 27, § 297(h)(1); 2001, ch. 10, § 2; 2002, ch. 19, § 1.

Annotations: Notes

EFFECT OF AMENDMENTS. –

Section 1, ch. 19, Acts 2002, approved Apr. 9, 2002, and effective from date of enactment, reenacted the section without change to validate a previously made technical correction.

Annotations: Case Notes

CONSTRUCTION. – Although the petitioner's assertion that former Art. 27 § 297 (now this title) was to be liberally interpreted and construed was correct, the forfeiting authority was still required to follow the procedures prescribed, and these procedures should have been strictly imposed to provide post seizure due process protection to the defendant. Prince George's County v. Vieira, 340 Md. 651, 667 A.2d 898 (1995).

PURPOSE OF SUBTITLE. – The purpose of the establishment of the standards, guidelines and methods of procedure under former Art. 27, § 297(h) (now this subtitle) was to provide, after due notice had been given to the owner, a forum in which it could be established whether the vehicle seized was used to facilitate the transportation, sale and possession of controlled dangerous substances. Boyd v. Hickman, 114 Md. App. 108, 689 A.2d 106 (1997), cert. denied, 346 Md. 26, 694 A.2d 949 (1997).

"SHALL" IN PRIOR, SIMILAR SECTION WAS MANDATORY. – The use of "shall" in the context of the prior, similar section should be regarded as a direction from the General Assembly that certain conduct was required. State v. One 1979 Pontiac Firebird, 55 Md. App. 394, 462 A.2d 73 (1983).

§ 12-304. Deadlines for filing complaint seeking forfeiture

(a) In general. – Except as provided under subsections (b), (c), and (d) of this section, a complaint seeking forfeiture shall be filed within the earlier of:

(1) 90 days after the seizure; or

(2) 1 year after the final disposition of the criminal charge for the violation giving rise to the forfeiture.

(b) Forfeiture of motor vehicle. – A complaint for the forfeiture of a motor vehicle shall be filed within 45 days after the motor vehicle is seized.

(c) Release of property on failure to file for forfeiture. – If the State or a political subdivision does not file a timely complaint seeking forfeiture under subsection (a) or (b) of this section, the property shall be promptly released to the owner, if known.

(d) Proceedings about money. –

(1) A proceeding about money shall be filed within 90 days after the final disposition of criminal proceedings that arise out of the Controlled Dangerous Substances law.

(2) If the State or a political subdivision does not file proceedings about money within the 90-day period, the money seized under this title shall be returned to the owner on request by the owner.

(3) If the owner fails to ask the return of the money within 1 year after the final disposition of criminal proceedings, as provided under § 12-403 of this title, the money shall revert to:

(i) the political subdivision in which the money was seized; or

(ii) the State, if the money was seized by State authorities.

History

An. Code 1957, art. 27, § 297(d)(2)(i), (ii), (3), (h)(2)(i); 2001, ch. 10, § 2; 2016, chs. 619,658.

Annotations: Notes

EFFECT OF AMENDMENTS. –

Chapter 619, Acts 2016, and ch. 658, Acts 2016, enacted pursuant to Art. II, § 17(c) of the Maryland Constitution without the Governor's signature, effective October 1, 2016, substituted "subsections (b), (c), and (d)" for "subsections (b) and (c)" in the introductory language of (a), rewrote (c), and redesignated accordingly.

Annotations: Case Notes

FORFEITURE ACTION NOT CONTINGENT ON FILING CRIMINAL PROCEEDING. – A forfeiture action is not contingent upon the filing of a criminal proceeding. 96 Op. Att'y Gen. 31 (May 2, 2011).

PURPOSE OF SECTION. – The General Assembly, in the prior, similar section clearly intended to impose a fixed limitation upon the filing of applications for forfeiture if a trial has taken place and a final disposition of criminal proceedings has resulted. Bozman v. Office of Fin., 296 Md. 492, 463 A.2d 832 (1983).

PETITION FOR RELEASE CANNOT BE FILED AS ADJUNCT TO CRIMINAL CASE. – A petition for release of an automobile seized under the prior, similar section could not be filed and granted as an adjunct to a criminal case. State v. Greer, 263 Md. 692, 284 A.2d 233 (1971).

COUNTY AS NECESSARY PARTY TO ACTION SEEKING RELEASE. – Where county police seized a car, according to the prior, similar section the county, not the State, had custody of the vehicle and authority to control its disposition, and was the only necessary party to an action seeking release of the car. State v. Greer, 263 Md. 692, 284 A.2d 233 (1971).

SUBSECTION (D) PERIOD MUST BE SPECIALLY PLEADED AND DEMONSTRATED. – Former Art. 27, § 297(d)(2)(i) (now (d) of this section) does not require that the governmental agency affirmatively prove as part of its case that it commenced proceedings within 90 days of final disposition. On the contrary, the 90-day period must be specially pleaded and demonstrated. Bozman v. Office of Fin., 52 Md. App. 1, 445 A.2d 1073 (1982), aff'd, 296 Md. 492, 463 A.2d 832 (1983); Ewachiw v. Director of Fin., 70 Md. App. 58, 519 A.2d 1327, cert. denied, 309 Md. 605, 525 A.2d 1075 (1987).

FINAL DISPOSITION OF RELATED CRIMINAL PROCEEDINGS NOT CONDITION PRECEDENT TO FORFEITURE PROCEEDING. – Former Art. 27, § 297(d)(2)(i) (now (d) of this section) does not impose the final disposition of related criminal proceedings as a condition precedent to the institution of a forfeiture proceeding. Bozman v. Office of Fin., 296 Md. 492, 463 A.2d 832 (1983).

"SHALL" IN PRIOR, SIMILAR SECTION WAS MANDATORY. – The use of "shall" in the context of the prior, similar section should be regarded as a direction from the General Assembly that certain conduct was required. State v. One 1979 Pontiac Firebird, 55 Md. App. 394, 462 A.2d 73 (1983).

RETURN OF MONEY, AND INTEREST EARNED THEREON, TO PERSON FROM WHOM SEIZED. – Where seized money has been held in an interest bearing account and is ordered returned for failure to make a timely filing of a petition for forfeiture, as required by the prior, similar section, the interest as well as the money must be returned to the person from whom it was seized. Jones v. Office of Fin., 294 Md. 601, 451 A.2d 926 (1982).

PETITION FOR RETURN OF MONEY. – Defendant's petition for return of money was timely where defendant filed petition within one year after successfully completing probation. Director, Office of Fin. v. Lapenotiere, 77 Md. App. 372, 550 A.2d 433 (1988).

Where a complaint and affidavit for forfeiture of money or currency is filed pursuant to the prior, similar section within ninety days after the date of final disposition of the underlying criminal proceeding, but a show-cause order is not filed until after the running of the ninety-day period, the court, upon timely petition by the defendant, must order the return of the money or currency to the defendant. Vieira v. Prince George's County, 101 Md. App. 220, 645 A.2d 639 (1994), aff'd, 340 Md. 651, 667 A.2d 898 (1995).

APPLICATION TO MONEY IN BANK ACCOUNT. – Funds in a bank account constitute money for purposes of the forfeiture statute under Md. Code Ann., Criminal Procedure § 12-101(m)(1)(iv), and correspondingly for purposes of the filing deadline contained in Md. Code Ann., Criminal Procedure § 12-304(c)(1). Bottini v. Dep't of Fin., 450 Md. 177, 147 A.3d 371 (2016).

Judgment forfeiting money contained in a bank account was affirmed under Md. Code Ann., Criminal Procedure § 12-101(m)(1)(iv) since the funds were not a type of tangible or intangible personal property and, in accordance with Md. Code Ann., Criminal Procedure § 12-304(c)(1), the forfeiting authority timely filed the complaint for forfeiture within 90 days after the final disposition of the criminal proceedings, the deadline applicable to the filing of a complaint for forfeiture of money. Bottini v. Dep't of Fin., 450 Md. 177, 147 A.3d 371 (2016).

CONDITION PRECEDENT. – Right to institute proceeding for forfeiture of seized contraband has a condition precedent that the petition be filed within the 90-day period set out in the prior, similar section. Office of Fin. v. Jones, 46 Md. App. 419, 417 A.2d 470, cert. denied, 288 Md. 740 (1980).

Baltimore City Police Department employees were entitled to summary judgment in a State inmate's 42 U.S.C.S. § 1983 action seeking the return of funds seized from the inmate arrested because the inmate failed to properly petition for the return of the money as required by this section where inmate did not complete a forfeiture information sheet as the Department had requested. The fact that the inmate chose not to comply with administrative procedures for the return of the money simply did not state a due process claim. Dixon v. Balt. City Police Dep't, 345 F. Supp. 2d 512 (D. Md. 2003).

FORFEITURE PROCEEDING NOT INSTITUTED PROMPTLY. – With no explanation or attempted justification by the State for the eight-month delay, it cannot be held that the forfeiture proceedings were instituted promptly. Geppi v. State, 270 Md. 239, 310 A.2d 768 (1973).

§ 12-305. Contents and distribution of complaint

(a) Contents. – A complaint seeking forfeiture shall contain:
- **(1)** a description of the property seized;
- **(2)** the date and place of the seizure;
- **(3)** the name of the owner, if known;
- **(4)** the name of the person in possession, if known;
- **(5)** the name of each lienholder, if known or reasonably subject to discovery;
- **(6)** an allegation that the property is subject to forfeiture;
- **(7)** if the forfeiting authority seeks to forfeit a lienholder's interest in property, an allegation that the lien was created with actual knowledge that the property was being or was to be used in violation of the Controlled Dangerous Substances law;
- **(8)** a statement of the facts and circumstances surrounding the seizure;
- **(9)** a statement setting forth the specific grounds for forfeiture; and
- **(10)** an oath or affirmation by the forfeiting authority that the contents of the complaint are true to the best of the forfeiting authority's knowledge, information, and belief.

(b) Service. – Within 20 days after the filing of the complaint, copies of the summons and complaint shall be sent by certified mail requesting "restricted delivery – show to whom, date, address of delivery" and first-class mail to all known owners and lienholders whose identities are reasonably subject to discovery, including all real property owners and lienholders shown in the records required by law for notice or perfection of the lien.

History

An. Code 1957, art. 27, § 297(h)(3), (4)(i); 2001, ch. 10, § 2; 2008, ch. 36, § 6.

Annotations: Notes

EDITOR'S NOTE. –

Pursuant to § 6, ch. 36, Acts 2008, "first-class mail" was substituted for "first class mail" in (b).

Annotations: Case Notes

"SHALL" IN PRIOR, SIMILAR SECTION WAS MANDATORY. – The use of "shall" in the context of the prior, similar section should be regarded as a direction from the General Assembly that certain conduct was required. State v. One 1979 Pontiac Firebird, 55 Md. App. 394, 462 A.2d 73 (1983).

NONCOMPLIANCE WITH NOTICE REQUIREMENTS NOT EXCUSED BY ALLEGED ACTUAL NOTICE THROUGH FORFEITURE PETITION. – Failure to comply with the notice requirements of predecessor of this section was not excused by the alleged actual notice furnished by the State in its petition of forfeiture. State v. One 1979 Pontiac Firebird, 55 Md. App. 394, 462 A.2d 73 (1983).

STANDARD OF "KNOWLEDGE." – "Actual knowledge" is a subjective standard, requiring specific awareness; because the owner has the burden of proof, it follows that proving lack of "actual" knowledge is a less burdensome task than proving that the owner "neither knew or should have known." One 1988 Jeep Cherokee VIN 1JCMT7898JT159481 v. City of Salisbury, 98 Md. App. 676, 635 A.2d 21 (1994).

APPLIED IN WFS Fin., Inc. v. Mayor of Baltimore, 402 Md. 1, 935 A.2d 385 (2007).

§ 12-306. Notice

(a) Contents of notice. – A notice shall be signed by the clerk and shall:
- **(1)** include the caption of the case;
- **(2)** describe the substance of the complaint and the relief sought;

(3) state the latest date on which a response may be filed;
(4) state that the property shall be forfeited if a response is not filed on time;
(5) state that the owner of the property may have possession of the property pending forfeiture by posting a bond as provided in § 12-208 of this title; and
(6) tell where to file a response and whom to contact for more information concerning the forfeiture.

(b) Posting and publishing of notice. – Within 20 days after the filing of the complaint, the notice shall be:
(1) posted by the sheriff on the door of the courthouse where the action is pending or on a bulletin board within the immediate vicinity of the door;
(2) posted by the sheriff in a conspicuous place on the land, if forfeiture of real property is sought; and
(3) published at least once a week in each of 3 successive weeks in a newspaper of general circulation published in the county in which the action is pending, unless the property is a boat or motor vehicle.

History

An. Code 1957, art. 27, § 297(h)(4)(ii); 2001, ch. 10, § 2.

Annotations: Case Notes

"SHALL" IN PRIOR, SIMILAR SECTION WAS MANDATORY. – The use of "shall" in the context of the prior, similar section should be regarded as a direction from the General Assembly that certain conduct was required. State v. One 1979 Pontiac Firebird, 55 Md. App. 394, 462 A.2d 73 (1983).

NONCOMPLIANCE WITH NOTICE REQUIREMENTS NOT EXCUSED BY ALLEGED ACTUAL NOTICE THROUGH FORFEITURE PETITION. – Failure to comply with the notice requirements of the predecessor of this section was not excused by the alleged actual notice furnished by the State in its petition of forfeiture. State v. One 1979 Pontiac Firebird, 55 Md. App. 394, 462 A.2d 73 (1983).

§ 12-307. Answer to complaint

The answer to a complaint shall:
(1) comply with the Maryland Rules;
(2) state the nature and extent of the person's right in, title to, or interest in the property;
(3) state how and when the person acquired a right in, title to, or interest in the property; and
(4) contain a request for relief and a request for a prompt hearing.

History

An. Code 1957, art. 27, § 297(h)(5); 2001, ch. 10, § 2.

Annotations: Case Notes

"SHALL" IN PRIOR, SIMILAR SECTION WAS MANDATORY. – The use of "shall" in the context of prior, similar section should be regarded as a direction from the General Assembly that certain conduct was required. State v. One 1979 Pontiac Firebird, 55 Md. App. 394, 462 A.2d 73 (1983).

§ 12-308. Hearing on forfeiture claim

(a) Hearing to be set by court. – If an answer has been filed on time, the court shall set a hearing on the forfeiture claim within 60 days after the later of:
(1) posting of notice under § 12-306(b)(1) or (2) of this subtitle; or
(2) final publication of notice under § 12-306(b)(3) of this subtitle.

(b) Forfeiture without hearing. – Without a hearing, the court may order forfeiture of the property interest of a person who fails to timely file an answer.

History

An. Code 1957, art. 27, § 297(h)(6); 2001, ch. 10, § 2.

Annotations: Case Notes

BURDEN OF PROOF. – Burden of proof necessary to sustain a forfeiture is a mere preponderance of the evidence and not proof beyond a reasonable doubt. Prince George's County v. Blue Bird Cab Co., 263 Md. 655, 284 A.2d 203 (1971).

Former Art. 27, § 297 (now this title) was a civil statute, and the standard of proof necessary to sustain a forfeiture action by the State was that of a mere preponderance of the evidence rather than the criminal standard of proof beyond a reasonable doubt. Allen v. State, 91 Md. App. 775, 605 A.2d 994 (1992), cert. denied, State v. Threatt, 328 Md. 92, 612 A.2d 1315 (1992), overruled on other grounds, 107 Md. App. 420, 668 A.2d 948 (1995).

"SHALL" IN PRIOR, SIMILAR SECTION WAS MANDATORY. – The use of "shall" in the context of prior, similar section should be regarded as a direction from the General Assembly that certain conduct was required. State v. One 1979 Pontiac Firebird, 55 Md. App. 394, 462 A.2d 73 (1983).

SEIZURE HEARING NOT REQUIRED. – Former Art. 27, § 297 (now this title) did not contemplate, nor does due process require, that a hearing must precede a seizure; rather, it required only that notice and a hearing be afforded prior to the forfeiture of the property. Boyd v. Hickman, 114 Md. App. 108, 689 A.2d 106 (1997), cert. denied, 346 Md. 26, 694 A.2d 949 (1997).

UNDER PRIOR, SIMILAR SECTION, ONCE SCHEDULED, HEARING DATE MAY BE LATER THAN 30-DAY REQUIREMENT. – Former Art. 27, § 297(n) (now §§ 12-103(d)(2), 12-311 of this article) required that a hearing date must be scheduled within 30 days of conviction, but the scheduled date could be later than 30 days after conviction. State v. One 1980 Harley Davidson Motorcycle, 303 Md. 154, 492 A.2d 896 (1985).

§ 12-309. Forfeiture of interest in real property

Except as provided in § 12-103(e) of this title and § 12-312 of this subtitle, an owner's interest in real property may be forfeited if the real property was used in connection with a violation of §§ 5-602 through 5-609, §§ 5-612 through 5-614, § 5-617, § 5-618, or § 5-628 of the Criminal Law Article or is convicted of an attempt or conspiracy to violate Title 5 of the Criminal Law Article.

History

An. Code 1957, art. 27, § 297(m)(1)(i); 2001, ch. 10, § 2; 2002, ch. 213, § 6; 2018, ch. 12, § 6.

Annotations: Notes

EFFECT OF AMENDMENTS. –

Section 6, ch. 213, Acts 2002, effective Oct. 1, 2002, substituted "§§ 5-602 through 5-609, §§ 5-612 through 5-614, § 5-617, § 5-618, or § 5-628 of the Criminal Law Articleor is convicted of an attempt or conspiracy to violate Title 5 of the Criminal Law Article" for "§ 286, § 286A, § 286B, § 286C, or § 290 of Article 27 of the Code."

EDITOR'S NOTE. –

Pursuant to § 6, ch. 12, Acts 2018, "§ 12-103(e) of this title and § 12-312 of this subtitle" was substituted for "§§ 12-103(e) and 12-312 of this title."

§ 12-310. Forfeiture proceedings for real property

(a) Venue of proceedings. – Forfeiture proceedings for real property may be brought in the jurisdiction where:

- **(1)** the criminal charges are pending;
- **(2)** the owner resides; or
- **(3)** the real property is located.

(b) Notice of pending litigation. –

- **(1)** If forfeiture proceedings for real property are brought in a jurisdiction other than where the real property is located, a notice of pending litigation shall be filed in the jurisdiction where the property is located.
- **(2)** A notice of pending litigation required under this subsection shall include at least:
  - **(i)** the name and address of the owner of the real property;
  - **(ii)** a description of the real property; and
  - **(iii)** a description of the reasons for the filing of the forfeiture proceedings and notice of pending litigation.

History

An. Code 1957, art. 27, § 297(m)(3); 2001, ch. 10, § 2.

§ 12-311. Stay of forfeiture of principal family residence

If an owner of real property used as the principal family residence is convicted under §§ 5-602 through 5-609, §§ 5-612 through 5-614, § 5-617, § 5-618, or § 5-628 of the Criminal Law Article or is convicted of an attempt or conspiracy to violate Title 5 of the Criminal Law Article and the owner files an appeal of the conviction, the court shall stay forfeiture proceedings under § 12-103(e) of this title or § 12-312(b) of this subtitle against the real property during the pendency of the appeal.

History

An. Code 1957, art. 27, § 297(n)(1); 2001, ch. 10, § 2; 2002, ch. 213, § 6; 2018, ch. 12, § 6.

Annotations: Notes

EFFECT OF AMENDMENTS. –

Section 6, ch. 213, Acts 2002, effective Oct. 1, 2002, substituted "§§ 5-602 through 5-609, §§ 5-612 through 5-614, § 5-617, § 5-618, or § 5-628 of the Criminal Law Articleor is convicted of an attempt or conspiracy to violate Title 5 of the Criminal Law Article" for "§ 286, § 286A, § 286B, § 286C, or § 290 of Article 27 of the Code."

EDITOR'S NOTE. –

Pursuant to § 6, ch. 12, Acts 2018, "§ 12-103(e) of this title or § 12-312(b) of this subtitle" was substituted for "§§ 12-103(e) or 12-312 of this title."

§ 12-312. Forfeiture of ownership interest in property

(a) In general. – Except as provided in subsection (b) of this section, property or part of a property in which a person has an ownership interest is subject to forfeiture as proceeds, if the State establishes by clear and convincing evidence that:

(1) the person has violated §§ 5-602 through 5-609, §§ 5-612 through 5-614, § 5-617, § 5-618, or § 5-628 of the Criminal Law Article or has attempted or conspired to violate Title 5 of the Criminal Law Article;

(2) the property was acquired by the person during the violation or within a reasonable time after the violation; and

(3) there was no other likely source for the property.

(b) Real property used as principal family residence. – Real property used as the principal family residence may not be forfeited under this section unless:

(1) an owner of the real property was convicted of a crime described under subsection (a) of this section; or

(2) the real property is covered by § 12-103(d)(2) of this title.

History

An. Code 1957, art. 27, § 297(l); 2001, ch. 10, § 2; 2002, ch. 213, § 6; 2016, ch. 5; ch. 8, § 5; chs. 619, 658.

Annotations: Notes

EFFECT OF AMENDMENTS. –

Section 6, ch. 213, Acts 2002, effective Oct. 1, 2002, substituted "§§ 5-602 through 5-609, §§ 5-612 through 5-614, § 5-617, § 5-618, or § 5-628 of the Criminal Law Articleor has attempted or conspired to violate Title 5 of the Criminal Law Article" for "§ 286, § 286A, § 286B, § 286C, or § 290 of Article 27 of the Code" in (a)(1)(i).

Chapter 5, Acts 2016, effective February 20, 2016, enacted pursuant to Art. II, § 17(d) of the Maryland Constitution by overriding the 2015 Governor's veto, deleted (a)(2) and redesignated accordingly; and in the introductory language of (a) deleted "there is a rebuttable presumption that" before "property or part of a property."

Chapter 619, Acts 2016, and ch. 658, Acts 2016, enacted pursuant to Art. II, § 17(c) of the Maryland Constitution without the Governor's signature, effective October 1, 2016, made identical amendments. Each reenacted the section without change.

EDITOR'S NOTE. –

Chapter 5, Acts 2016, was enacted pursuant to Article II, § 17(d) of the Maryland Constitution without the Governor's signature, to become effective 30 days after the Governor's veto was overridden, superseding the effective date as drafted in the bill.

Pursuant to § 5, ch. 8, Acts 2016, "subsection (a)" was substituted for "subsection (a)(1)" in (c)(1), following the amendment by ch. 5, Acts 2016.

Annotations: Case Notes

"DRUG ACTIVITY." – The "drug activity" referred to in former Art. 27, § 297(l) (now this section) was precisely defined. 1986 Mercedes Benz v. State, 334 Md. 264, 638 A.2d 1164 (1994).

PROPERTY REQUIRED TO BE PURCHASED CONTEMPORANEOUSLY. – Former Art. 27, § 297(l) (now this section) requires that the property which is the subject of the forfeiture proceedings be purchased during the time of the criminal involvement or shortly thereafter. 1986 Mercedes Benz v. State, 334 Md. 264, 638 A.2d 1164 (1994).

PRESUMPTION OF PROOF IN (A). – The presumption of former Art. 27, § 297(l)(1) (now (a) of this section) relates to the forfeitability of the property as proceeds; it does not address the property's ownership. 1986 Mercedes Benz v. State, 334 Md. 264, 638 A.2d 1164 (1994).

The presumption of former Art. 27, § 297(l)(1) (now (a) of this section) has no relevance to establishing ownership of the property. 1986 Mercedes Benz v. State, 334 Md. 264, 638 A.2d 1164 (1994).

BURDEN OF PROOF. – Unlike in the ordinary forfeiture case, former Art. 27, § 297(l) (now this section) requires that the prerequisites for the presumption of forfeiture be met and, if not rebutted, be established by clear and convincing evidence. 1986 Mercedes Benz v. State, 334 Md. 264, 638 A.2d 1164 (1994).

Former Art. 27, § 297(l) (now this section) addresses the situation in which the connection between the property and the drug activity is attenuated, i.e., where the property is not directly traceable to drug activity, but there is proof of the owner's involvement in certain kinds of drug activity, by creating a presumption that the property constitutes proceeds and, thus, is forfeitable; the proof as to those elements prerequisite to the establishment of the presumption must be shown by clear and convincing evidence. 1986 Mercedes Benz v. State, 334 Md. 264, 638 A.2d 1164 (1994).

The provisions of former Art. 27, § 297(l)(1) (now (a) of this section) are clear and unambiguous: it is rebuttably presumed that property which a person owns or in which he or she has an ownership interest constitutes proceeds and, hence, is subject to forfeiture, whenever the State, by clear and convincing evidence proves that: (1) the person has committed one or more of several enumerated controlled dangerous substances offenses; (2) the person acquired the property during the period in which, or within a reasonable time after, the violation or violations occurred; and (3) the violation was the only likely source of the property. 1986 Mercedes Benz v. State, 334 Md. 264, 638 A.2d 1164 (1994).

The State is required to prove a negative: that there is no other likely source of the property; that burden is affirmative, not passive, and as such, the State's burden is to produce evidence that there is no other likely source for the property. 1986 Mercedes Benz v. State, 334 Md. 264, 638 A.2d 1164 (1994).

A forfeiture proceeding is a civil action in rem; as such, the burden of proof necessary to sustain a forfeiture is by a preponderance of the evidence. 1986 Mercedes Benz v. State, 334 Md. 264, 638 A.2d 1164 (1994).

§ 12-313. Statement inadmissible in related criminal prosecution.

Except for purposes of impeachment, a statement made by a person regarding ownership of seized property during the course of a forfeiture proceeding is not admissible in a related criminal prosecution.

History

2016, chs. 619, 658.

Annotations: Notes

EDITOR'S NOTE. –

Section 2, ch. 619, Acts 2016, and ch. 658, Acts 2016, enacted pursuant to Art. II, § 17(c) of the Maryland Constitution without the Governor's signature, effective October 1, 2016, provides that the acts shall take effect October 1, 2016.

§ 12-401. Powers of court

In a proceeding under this title, a court:

(1) may grant requests for mitigation or remission of forfeiture or take other action that protects the rights of innocent persons, is consistent with this title, and is in the interest of justice;

(2) may resolve claims arising under this title; and

(3) may take appropriate measures to safeguard and maintain property forfeited under this title pending the disposition of the property.

History

An. Code 1957, art. 27, § 297(s); 2001, ch. 10, § 2.

Annotations: Notes

EDITOR'S NOTE. –

Some of the cases appearing in the notes to this article were decided under the former statutes in effect prior to the 2001 revision. These earlier cases have been moved to pertinent sections of the revised material where they may be used in interpreting the current statutes. Internal references have also been updated.

Section 7, ch. 10, Acts 2001, provides that "the Revisor's Notes, Special Revisor's Notes, General Revisor's Notes, captions, and catchlines contained in this Act are not law and may not be considered to have been enacted as a part of this Act."

Section 8, ch. 10, Acts 2001, provides that "nothing in this Act affects the term of office of an appointed or elected member of any commission, office, department, agency, or other unit. An individual who is a member of a unit on the effective date of this Act [October 1, 2001] shall remain a member for the balance of the term to which appointed or elected, unless the member sooner dies, resigns, or is removed under provisions of law."

Section 9, ch. 10, Acts 2001, provides that "except as expressly provided to the contrary in this Act, any transaction or employment status affected by or flowing from any change of nomenclature or any statute amended, repealed, or transferred by this Act and validly entered into or existing before the effective date of this Act [October 1, 2001] and every right, duty, or interest flowing from a statute amended, repealed, or transferred by this Act remains valid after the effective date of this Act [October 1, 2001] and may be terminated, completed, consummated or enforced as required or allowed by any statute amended, repealed, or transferred by this Act as though the repeal, amendment, or transfer had not occurred. If a change in nomenclature involves a change in name or designation of any State unit, the successor unit shall be considered in all respects as having the powers and obligations granted the former unit."

Section 10, ch. 10, Acts 2001, provides that "the continuity of every commission, office, department, agency or other unit is retained. The personnel, records, files, furniture, fixtures, and other properties and all appropriations, credits, assets, liabilities, and obligations of each retained unit are continued as the personnel, records, files, furniture, fixtures, properties, appropriations, credits, assets, liabilities, and obligations of the unit under the laws enacted by this Act."

Section 11, ch. 10, Acts 2001, provides that "except as expressly provided to the contrary in this Act, any person licensed, registered, certified, or issued a permit or certificate by any commission, office, department, agency, or other unit established or continued by any statute amended, repealed, or transferred by this Act is considered for all purposes to be licensed, registered, certified, or issued a permit or certificate by the appropriate unit continued under this Act for the duration of the term for which the license, registration, certification, or permit was issued, and may renew that authorization in accordance with the appropriate renewal provisions of this Act."

Section 13, ch. 10, Acts 2001, provides that "this Act does not rescind, supersede, change, or modify any rule adopted by the Court of Appeals that is or was in effect on the effective date of this Act [October 1, 2001] concerning the practice and procedure in and the administration of the appellate courts and the other courts of this State."

Section 14, ch. 10, Acts 2001, provides that "the creation in this Act of separate definitions for the terms 'victim' and 'victim's representative' from broad definitions of 'victim' in the former law is intended for stylistic purposes only and does not narrow the meaning of the word 'victim' as used in Article 47 of the Constitution of Maryland [Declaration of Rights]."

Annotations: Case Notes

MARYLAND LAW REVIEW. – For article, "Survey of Developments in Maryland Law, 1983-84," see 44 Md. L. Rev. 511 (1985).

For article, "Survey of Developments in Maryland Law, 1987-88," see 48 Md. L. Rev. 551 (1989).

UNIVERSITY OF BALTIMORE LAW REVIEW. – For article, "Forfeitures in Narcotics Cases: The Constitution and Recent Amendments to Maryland's Forfeiture Statute," see 14 U. Balt. L. Rev. 79 (1984).

COMPARISON WITH FEDERAL STATUTE. – The former Maryland forfeiture statute, Art. 27, § 297 (now this title), mirrored the federal forfeiture statute and was adopted largely from it; therefore, the Supreme Court's analysis of cases under the federal statute may have been used as guidance in cases under the State statute. One 1984 Ford Truck v. Baltimore County, 111 Md. App. 194, 681 A.2d 527 (1996).

Former Art. 27, § 297 (now this title) was, and was intended to be, a harsh law. Prince George's County v. Vieira, 340 Md. 651, 667 A.2d 898 (1995).

PURPOSE OF SECTION. – The former Maryland drug forfeiture law was, and was intended to be, a harsh law. The purpose of the statutory scheme was to impede the drug trade by depriving drug dealers of the instrumentalities that facilitate the sale and use of illegal drugs. Boyd v. Hickman, 114 Md. App. 108, 689 A.2d 106 (1997), cert. denied, 346 Md. 26, 694 A.2d 949 (1997).

JURISDICTION. – The circuit court, sitting as a criminal court, had no jurisdiction to hear defendant's petition for return of money. Such a petition, authorized by former Art. 27, § 297 (now this title), a forfeiture statute, must be filed in a civil proceeding separate and distinct from any criminal proceedings. State v. Walls, 90 Md. App. 300, 600 A.2d 1165 (1992).

DUTY AND POWER OF COURT. – See Prince George's County v. One 1969 Opel, 267 Md. 491, 298 A.2d 168 (1973).

Under the Controlled Dangerous Substances Act, the duties and powers of the courts are narrowly limited in forfeiture proceedings. State v. One 1967 Ford Mustang, 266 Md. 275, 292 A.2d 64 (1972).

Once the seizing authority decides to seek forfeiture, the court's only responsibilities are to require proof that the vehicle seized was used, or intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of controlled dangerous substances; determine that no statutory exceptions are applicable; and insure the adherence to due process requirements. State v. One 1967 Ford Mustang, 266 Md. 275, 292 A.2d 64 (1972).

Lienholder was not required to pay towing and storage costs as a condition precedent to the release of the vehicle that the city seized before the lienholder could sell the vehicle and recover the balance due to it; not only did the relevant statute, § 12-501 of this title, not contain language indicating such a condition precedent, but other statutes dealing with the forfeiture of property either expressly stated how costs were to be dealt with, such as § 12-402 of this subtitle, or left out instructions about costs in stating the duties and powers of the court regarding forfeiture proceedings, such as this section. WFS Fin., Inc. v. Mayor of Baltimore, 402 Md. 1, 935 A.2d 385 (2007).

APPLICATION OF THREE-PART INSTRUMENTALITY TEST. – In forfeiture cases, a court must apply a three-part instrumentality test that considers (1) the nexus between the offense and the property and the extent of the property's role in the offense, (2) the role and culpability of the owner, and (3) the possibility of separating offending property that can readily be separated from the remainder. One Ford Motor Vehicle v. State, 104 Md. App. 744, 657 A.2d 825 (1995).

TRIAL COURT LACKS DISCRETION. – A trial court lacks discretion to deny a petition for forfeiture after it has been determined that a motor vehicle was used by its owner to transport or to facilitate the transport of controlled dangerous substances. State v. One 1989 Harley-Davidson Motorcycle VIN 1HD1BKL15KY029303, 90 Md. App. 445, 601 A.2d 1119 (1992).

EVIDENCE OF OWNERSHIP. – While former Art. 27, § 297(s)(3) (now (3) of this section) permitted the court to resolve claims arising under this section, and the ownership of property under certain circumstances, neither former Art. 27, § 297(b)(4) (now § 12-102(a)(4) of this article) nor former Art. 27, § 297(a)(9) (now § 12-101(k) of this article) provided for a presumption of ownership in lieu of affirmative proof of that issue. 1986 Mercedes Benz v. State, 334 Md. 264, 638 A.2d 1164 (1994).

DISCRETION TO DISMISS FORFEITURE PROCEEDINGS. – The General Assembly intended forfeiture to be harsh and where the driver is convicted of possession the court does not have discretion to dismiss a forfeiture petition. State v. One 1985 Ford, 72 Md. App. 144, 527 A.2d 1311 (1987).

STATED IN Jones v. State, 403 Md. 267, 941 A.2d 1082 (2008).

§ 12-402. Posthearing orders

(a) Order for release. – After a full hearing, if the court determines that the property should not be forfeited, the court shall order that the property be released.

(b) Order for forfeiture. – Subject to § 12-403(b) of this subtitle, if the court determines that the property should be forfeited, the court shall order that the property be forfeited to the appropriate governing body.

(c) Property subject to lien. – If the court determines that the forfeited property is subject to a valid lien created without actual knowledge of the lienholder that the property was being or was to be used in violation of the Controlled Dangerous Substances law, the court shall order that the property be released within 5 days to the first priority lienholder.

(d) Application of proceeds from sale. –

(1) The lienholder shall sell the property in a commercially reasonable manner.

(2) The proceeds of the sale shall be applied as follows:

(i) to the court costs of the forfeiture proceeding;

(ii) to the balance due the lienholder, including all reasonable costs incident to the sale;

(iii) to payment of all other expenses of the proceedings for forfeiture, including expenses of seizure or maintenance of custody; and

(iv) except as provided in § 12-403(b) of this subtitle, to the General Fund of the State or of the political subdivision that seized the property.

History

An. Code 1957, art. 27, § 297(k)(2), (3)(i), (ii), (iii), (iv), (r)(4)(ii); 2001, ch. 10, § 2.

Annotations: Case Notes

NOTICE. – Without notice upon which a challenge could have been made to a petition for release of an automobile seized under former Art. 27, § 297 (now this title), an order releasing the automobile, issued on the basis of that petition, violated not only the Fourteenth Amendment of the United States Constitution but also article 23, Maryland Declaration of Rights, and was therefore invalid. State v. Greer, 263 Md. 692, 284 A.2d 233 (1971).

OPERATION OF TERM "COMMERCIALLY REASONABLE". – The term "commercially reasonable" sale does not operate to proscribe the sale of the goods to the defaulting party. One 1983 Chevrolet Van Serial No. IGCCG15D8D104615 v. State, 67 Md. App. 485, 508 A.2d 503 (1986), aff'd, 309 Md. 327, 524 A.2d 51 (1987).

The requirement that the sale of a forfeited vehicle be in a commercially reasonable manner does not proscribe a sale to the former owner. State v. One 1983 Chevrolet Van, 309 Md. 327, 524 A.2d 51 (1987).

The statutory scheme of former Art. 27, § 297 (now this title) does not preclude auto owners from reacquiring their forfeited vehicles through a buy-back program. Boyd v. Hickman, 114 Md. App. 108, 689 A.2d 106 (1997), cert. denied, 346 Md. 26, 694 A.2d 949 (1997).

STANDARD OF "KNOWLEDGE." – "Actual knowledge" is a subjective standard, requiring specific awareness; because the owner has the burden of proof, it follows that proving lack of "actual" knowledge is a less burdensome task than proving that the owner "neither knew or should have known." One 1988 Jeep Cherokee VIN 1JCMT7898JT159481 v. City of Salisbury, 98 Md. App. 676, 635 A.2d 21 (1994).

COSTS – Lienholder was not required to pay towing and storage costs as a condition precedent to the release of the vehicle that the city seized before the lienholder could sell the vehicle and recover the balance due to it; not only did the relevant statute, § 12-501 of this title, not contain language indicating such a condition precedent, but other statutes dealing with the forfeiture of property either expressly stated how costs were to be dealt with, such as this section, or did not state at all how such costs were to be dealt with, such as § 12-401 of this subtitle. WFS Fin., Inc. v. Mayor of Baltimore, 402 Md. 1, 935 A.2d 385 (2007).

§ 12-403. Disposition of forfeited property

(a) Options for governing body. –

(1) Whenever property is forfeited under this title, the governing body where the property was seized may:

(i) keep the property for official use;

(ii) require an appropriate unit to take custody of the property and destroy or otherwise dispose of it; or

(iii) sell the property if:

1. the law does not require the property to be destroyed; and

2. the property is not harmful to the public.

(2) The proceeds of a sale under this subsection shall first be used to pay all proper expenses of the proceedings for forfeiture and sale, including expenses of seizure, maintenance of custody, advertising, and court costs.

(b) Property seized by State law enforcement unit. – If the seizing authority was a State law enforcement unit:

(1) under § 12-402(b) of this subtitle, the court shall order the property to be forfeited to the State law enforcement unit; or

(2) under § 12-402(d)(2)(iv) of this subtitle, the proceeds of the sale shall be paid to the State law enforcement unit.

(c) Duty of State law enforcement unit. – Except as provided in subsection (d) of this section, the State law enforcement unit that receives forfeited property or proceeds from a sale of forfeited property under this section shall:

(1) dispose of the forfeited property as provided in subsection (a) of this section; and

(2) pay to the General Fund of the State any proceeds of the sale of the forfeited property.

(d) Sharing of proceeds between law enforcement units. – Except as otherwise provided under federal law, a law enforcement unit other than a State law enforcement unit that participated with a State law enforcement unit in seizing property forfeited under this section:

(1) shall be paid by the State law enforcement unit the share of the proceeds from the sale of the forfeited property as agreed by the law enforcement units; or

(2) may ask the Governor's Office of Crime Control and Prevention to determine its share.

(e) Proceeds to be deposited into general fund of appropriate political subdivision. – Proceeds that a law enforcement unit other than a State law enforcement unit receives under subsection (d) of this section shall be deposited in the general fund of the political subdivision of that law enforcement unit.

History

An. Code 1957, art. 27, § 297(f), (k)(3)(v), (vi), (vii), (viii); 2001, ch. 10, § 2.

§ 12-404. Terms of sale of forfeited property

A sale of property ordered under this title shall be made for cash and gives the purchaser clear and absolute title.

History

An. Code 1957, art. 27, § 297(q); 2001, ch. 10, § 2.

§ 12-405. Appropriation of percentage of proceeds for drug treatment and education programs.

Notwithstanding any other provision of law, the Governor shall appropriate 20% of the proceeds deposited in the General Fund of the State under this subtitle to the Maryland Department of Health for the purpose of funding drug treatment and education programs.

History

2016, chs. 619, 658; 2017, ch. 214, § 7.

Annotations: Notes

EDITOR'S NOTE. –

Section 2, ch. 619, Acts 2016, and ch. 658, Acts 2016, enacted pursuant to Art. II, § 17(c) of the Maryland Constitution without the Governor's signature, effective October 1, 2016, provides that the acts shall take effect October 1, 2016.

Pursuant to § 7, ch. 214, Acts 2017, "Maryland Department of Health" was substituted for "Department of Health and Mental Hygiene."

§ 12-501. Lienholder sale of seized property

(a) Notice required. – Before exercising the right to sell property that has been seized under this title, a lienholder shall give to the forfeiting authority:

(1) written notice of the intention to sell;
(2) copies of documents giving rise to the lien;
(3) an affidavit under oath by the lienholder:
(i) stating that the underlying obligation is in default; and
(ii) stating the reasons for the default.

(b) Release of property on request. – On request of the lienholder, the forfeiting authority shall release the property to the lienholder.

History

An. Code 1957, art. 27, § 297(r)(2); 2001, ch. 10, § 2.

Annotations: Notes

EDITOR'S NOTE. –

Some of the cases appearing in the notes to this article were decided under the former statutes in effect prior to the 2001 revision. These earlier cases have been moved to pertinent sections of the revised material where they may be used in interpreting the current statutes. Internal references have also been updated.

Section 7, ch. 10, Acts 2001, provides that "the Revisor's Notes, Special Revisor's Notes, General Revisor's Notes, captions, and catchlines contained in this Act are not law and may not be considered to have been enacted as a part of this Act."

Section 8, ch. 10, Acts 2001, provides that "nothing in this Act affects the term of office of an appointed or elected member of any commission, office, department, agency, or other unit. An individual who is a member of a unit on the effective date of this Act [October 1, 2001] shall remain a member for the balance of the term to which appointed or elected, unless the member sooner dies, resigns, or is removed under provisions of law."

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COMPARISON WITH FEDERAL STATUTE. – The former Maryland forfeiture statute, Art. 27, § 297 (now this title), mirrored the federal forfeiture statute and was adopted largely from it; therefore, the Supreme Court's analysis of cases under the federal statute may have been used as guidance in cases under the State statute. One 1984 Ford Truck v. Baltimore County, 111 Md. App. 194, 681 A.2d 527 (1996).

Former Art. 27, § 297 (now this title) was, and was intended to be, a harsh law. Prince George's County v. Vieira, 340 Md. 651, 667 A.2d 898 (1995).

PURPOSE OF SECTION. – The former Maryland drug forfeiture law was, and was intended to be, a harsh law. The purpose of the statutory scheme was to impede the drug trade by depriving drug dealers of the instrumentalities that facilitate the sale and use of illegal drugs. Boyd v. Hickman, 114 Md. App. 108, 689 A.2d 106 (1997), cert. denied, 346 Md. 26, 694 A.2d 949 (1997).

SEIZURE ACTION AGAINST PROCEEDS WHERE INNOCENT LIENHOLDER SELLS PROPERTY. – When an innocent lienholder exercises its statutory right to sell a seized motor vehicle, and the sale is made to someone other than the owner of the vehicle, the subsequent seizure action is against the net proceeds of the sale and not against the vehicle. Ed Rogers, Inc. v. Mayor of Baltimore, 324 Md. 659, 598 A.2d 467 (1991).

DUTY AND POWER OF COURT. – See Prince George's County v. One 1969 Opel, 267 Md. 491, 298 A.2d 168 (1973).

COSTS – Lienholder was not required to pay towing and storage costs as a condition precedent to the release of the vehicle that the city seized before the lienholder could sell the vehicle and recover the balance due to it; not only did the relevant statute, this section, not contain language indicating such a condition precedent, but other statutes dealing with the forfeiture of property either expressly stated how costs were to be dealt with, such as § 12-402 of this title, or did not state at all how such costs were to be dealt with, such as § 12-401 of this title. WFS Fin., Inc. v. Mayor of Baltimore, 402 Md. 1, 935 A.2d 385 (2007).

§ 12-502. Governing law

(a) Default sales law to apply. – Except as provided in subsection (b) of this section, the law governing the sale of collateral securing an obligation in default governs a lienholder's repossession and sale of property that has been seized under this title.

(b) Possession before sale not required. – A lienholder may not be required to take possession of the property before the sale of the property.

History

An. Code 1957, art. 27, § 297(r)(3), (4)(i); 2001, ch. 10, § 2.

§ 12-503. Proceeds of sale

(a) Seizing authority to be paid owner's proceeds. – Any part of the proceeds from a sale of property that has been seized under this title that would be paid to an owner of the property under the applicable law relating to distribution of proceeds:

(1) shall be paid to the seizing authority; and

(2) shall be property subject to forfeiture.

(b) Return of proceeds to owner. – If an order of forfeiture is not entered, the State shall return to the owner that part of the proceeds and any costs of the forfeiture proceedings paid from the proceeds of the sale.

History

An. Code 1957, art. 27, § 297(r)(4)(iii); 2001, ch. 10, § 2.

Annotations: Case Notes

SEIZURE ACTION AGAINST PROCEEDS WHERE INNOCENT LIENHOLDER SELLS PROPERTY. – When an innocent lienholder exercises its statutory right to sell a seized motor vehicle, and the sale is made to someone other than the owner of the vehicle, the subsequent seizure action is against the net proceeds of the sale and not against the vehicle. Ed Rogers, Inc. v. Mayor of Baltimore, 324 Md. 659, 598 A.2d 467 (1991).

§ 12-504. Redemption of interest or repossession of property

(a) Notice of redemption. – If the interest of the owner in property that has been seized under this title is redeemed, the lienholder shall mail a notice of the redemption to the forfeiting authority within 10 days after the redemption.

(b) Property returned to seizing authority before forfeiture. –

(1) If property that has been seized under this title has been repossessed or otherwise lawfully taken by the lienholder, the lienholder shall return the property to the seizing authority within 21 days after the redemption.

(2) The seizing authority and the forfeiting authority may then proceed with the forfeiture of the property or the proceeds from the sale of the property.

(c) Time limitations. – Time limitations required under this title for notice and filing of the complaint for forfeiture run from the date of redemption or purchase of the property that has been seized under this title.

History

An. Code 1957, art. 27, § 297(r)(5); 2001, ch. 10, § 2.

§ 12-505. Effect of title

This title does not prohibit a lienholder from exercising rights under applicable law, including the right to sell property that has been seized under this title, if a default occurs in the obligation giving rise to the lien.

History

An. Code 1957, art. 27, § 297(r)(1); 2001, ch. 10, § 2.

§ 12-601. Definitions

(a) In general. – In this subtitle the following words have the meanings indicated.
(b) GOCCP. – "GOCCP" means the Governor's Office of Crime Control and Prevention.
(c) MSAC. – "MSAC" means the Maryland Statistical Analysis Center of GOCCP.

History

2016, chs. 619, 658.

Annotations: Notes

EDITOR'S NOTE. –

Section 2, ch. 619, Acts 2016, and ch. 658, Acts 2016, enacted pursuant to Art. II, § 17(c) of the Maryland Constitution without the Governor's signature, effective October 1, 2016, provides that the acts shall take effect October 1, 2016.

EDITOR'S NOTE. –

Some of the cases appearing in the notes to this article were decided under the former statutes in effect prior to the 2001 revision. These earlier cases have been moved to pertinent sections of the revised material where they may be used in interpreting the current statutes. Internal references have also been updated.

Section 7, ch. 10, Acts 2001, provides that "the Revisor's Notes, Special Revisor's Notes, General Revisor's Notes, captions, and catchlines contained in this Act are not law and may not be considered to have been enacted as a part of this Act."

Section 8, ch. 10, Acts 2001, provides that "nothing in this Act affects the term of office of an appointed or elected member of any commission, office, department, agency, or other unit. An individual who is a member of a unit on the effective date of this Act [October 1, 2001] shall remain a member for the balance of the term to which appointed or elected, unless the member sooner dies, resigns, or is removed under provisions of law."

Section 9, ch. 10, Acts 2001, provides that "except as expressly provided to the contrary in this Act, any transaction or employment status affected by or flowing from any change of nomenclature or any statute amended, repealed, or transferred by this Act and validly entered into or existing before the effective date of this Act [October 1, 2001] and every right, duty, or interest flowing from a statute amended, repealed, or transferred by this Act remains valid after the effective date of this Act [October 1, 2001] and may be terminated, completed, consummated or enforced as required or allowed by any statute amended, repealed, or transferred by this Act as though the repeal, amendment, or transfer had not occurred. If a change in nomenclature involves a change in name or designation of any State unit, the successor unit shall be considered in all respects as having the powers and obligations granted the former unit."

Section 10, ch. 10, Acts 2001, provides that "the continuity of every commission, office, department, agency or other unit is retained. The personnel, records, files, furniture, fixtures, and other properties and all appropriations, credits, assets, liabilities, and obligations of each retained unit are continued as the personnel, records, files, furniture, fixtures, properties, appropriations, credits, assets, liabilities, and obligations of the unit under the laws enacted by this Act."

Section 11, ch. 10, Acts 2001, provides that "except as expressly provided to the contrary in this Act, any person licensed, registered, certified, or issued a permit or certificate by any commission, office, department, agency, or other unit established or continued by any statute amended, repealed, or transferred by this Act is considered for all purposes to be licensed, registered, certified, or issued a permit or certificate by the appropriate unit continued under this Act for the duration of the term for which the license, registration, certification, or permit was issued, and may renew that authorization in accordance with the appropriate renewal provisions of this Act."

Section 13, ch. 10, Acts 2001, provides that "this Act does not rescind, supersede, change, or modify any rule adopted by the Court of Appeals that is or was in effect on the effective date of this Act [October 1, 2001] concerning the practice and procedure in and the administration of the appellate courts and the other courts of this State."

Section 14, ch. 10, Acts 2001, provides that "the creation in this Act of separate definitions for the terms 'victim' and 'victim's representative' from broad definitions of 'victim' in the former law is intended for stylistic purposes only and does not narrow the meaning of the word 'victim' as used in Article 47 of the Constitution of Maryland [Declaration of Rights]."

§ 12-602. Reporting expenditure of forfeited funds.

(a) In general. – On an annual basis, each seizing authority in consultation with the corresponding forfeiting authority shall report how any funds appropriated to the authority as a result of forfeiture were spent in the preceding fiscal year and the following information about each individual seizure and forfeiture completed by the agency under this title:

(1) the date that currency, vehicles, houses, or other types of property were seized;

(2) the type of property seized, including year, make, and model, as applicable;

(3) the outcome of related criminal action, including whether charges were brought, a plea bargain was reached, a conviction was obtained, or an acquittal was issued;

(4) whether a unit of federal government took custody of the seized property, and the name of the unit;

(5) for property other than money, the market value of the property seized;

(6) if money was seized, the amount of money;

(7) the amount the seizing authority received in the prior year from the federal government as part of an equitable sharing agreement;

(8) the race and gender of the person or persons from whom the property was seized, if known; and

(9) whether the property was returned to the owner.

(b) Additional information. – MSAC may require a seizing authority to provide relevant information not specified in subsection (a) of this section.

(c) Report required; null report. –

(1) Each seizing authority shall file with MSAC the report required under subsection (a) of this section for the seizing authority and the corresponding forfeiting authority.

(2) A null report shall be filed by a seizing authority that did not engage in seizures or forfeitures under this title during the reporting period.

(d) Standard form, process, and deadlines; aggregate report by MSAC. –

(1) MSAC shall develop a standard form, a process, and deadlines for electronic data entry for annual submission of forfeiture data by seizing authorities.

(2) MSAC shall compile the submissions and issue an aggregate report of all forfeitures under this title in the State.

(e) Posting of reports; reports to Governor and General Assembly. –

(1) By March 1 of each year, MSAC shall make available on its website the reports submitted by seizing authorities and the aggregate report of MSAC.

(2) GOCCP shall submit the aggregate report to the Governor, the General Assembly, as provided in § 2-1246 of the State Government Article, and each seizing authority before September 1 of each year.

(f) Recommendations. – GOCCP may include, with the aggregate report of MSAC, recommendations to the legislature to improve forfeiture statutes to better ensure that forfeiture proceedings are reported and handled in a manner that is fair to crime victims, innocent property owners, secured interest holders, citizens, and taxpayers.

(g) Effect of failure to comply. –

(1) If a seizing authority fails to comply with the reporting provisions of this section:

(i) GOCCP shall report the noncompliance to the Police Training and Standards Commission; and

(ii) the Police Training and Standards Commission shall contact the seizing authority and request that the agency comply with the required reporting provisions.

(2) If the seizing authority fails to comply with the required reporting provisions within 30 days after being contacted by the Police Training and Standards Commission, GOCCP and the Police Training and Standards Commission jointly shall report the noncompliance to the Governor and the Legislative Policy Committee of the General Assembly.

(h) Fees; use of forfeiture proceeds. –

(1) MSAC may recoup its costs by charging a fee to each seizing authority that engages in seizures or forfeitures during the reporting period.

(2) A seizing authority may use forfeiture proceeds to pay the cost of compiling and reporting data under this subtitle, including any fee imposed by MSAC.

History

2016, ch. 8, § 5; chs. 619, 658; 2018, ch. 12, § 6.

Annotations: Notes

EDITOR'S NOTE. –

Pursuant to § 5, ch. 8, Acts 2016, "Police Training and Standards Commission" was substituted for "Police Training Commission" throughout (g).

Section 2, ch. 619, Acts 2016, and ch. 658, Acts 2016, enacted pursuant to Art. II, § 17(c) of the Maryland Constitution without the Governor's signature, effective October 1, 2016, provides that the acts shall take effect October 1, 2016.

Pursuant to § 6, ch. 12, Acts 2018, "website" was substituted for "Web site" in (e)(1).

EXHIBIT 2

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

PRINCE GEORGE'S COUNTY, MARYLAND	:	
Plaintiff	:	
vs.	:	Case No. CAE 98-00000
1990 FORD BRONCO VIN: XXXXXXXXXXXXX TAG: ABC123 (DC)	:	
	:	
REGISTERED OWNER John Doe 1000 A Street, N.E. Washington, D.C. 20002	:	
and/or	:	
5000 Maple Drive, Apt. 101 New Carrollton, Maryland 20784	:	
	:	
LIENHOLDER: None	:	
Defendants		

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MOTION TO SET BOND FOR POSSESSION OF VEHICLE

Comes now the Defendant/Registered Owner, John, by and through counsel, Richard A. Finci and the Law Offices of Houlon, Berman, Bergman, Finci, Levenstein & Skok, and respectfully states as follows:

1. On June 27, 2012, members of the Prince George's County Police Department seized Defendant's vehicle advising him that they intended to hold same for forfeiture procedures.

2. In fact, the States Attorney for Prince George's County initiated forfeiture proceedings in this matter on July 31, 2012

3. Pursuant to Md. Crim. Pro. Code Ann. §12-208(b)(1)(i) the "Court shall appraise the value of the motor vehicle on the basis of the average value of the motor vehicle set forth in the National Automobile Dealer's Association Official Used Car Guide." Upon setting a bond amount, pursuant to Md. Crim. Pro. Code Ann. §12-208(e)(2) the Defendant may then set the bond "by cash, through a surety, through a lien on real property, or by other means that the clerk approves."

4. Defendant respectfully requests that the Court set a bond for the return of his vehicle in this case pending the outcome of the forfeiture action pursuant to the provisions of Md. Crim. Pro. Code Ann. Title 12.

WHEREFORE, Defendant respectfully requests the following relief:

1. That this Honorable Court set a bond in accordance with Md. Crim. Pro. Code Ann. §12-208(b)(1)(i)

2. Such further and additional relief as justice may require under the circumstances.

Respectfully submitted,

Richard A. Finci
Houlon, Berman, Finci & Levenstein, LLC
7850 Walker Drive, Suite 160
Greenbelt, MD 20770

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

PRINCE GEORGE'S COUNTY, MARYLAND	:	
Plaintiff	:	
vs.	:	Case No. CAE 98-00000
1990 FORD BRONCO VIN: XXXXXXXXXXXXX TAG: ABC123 (DC)	:	
	:	
REGISTERED OWNER John Doe	:	
1000 A Street, N.E. Washington, D.C. 20002	:	
and/or 5000 Maple Drive, Apt. 101 New Carrollton, Maryland 20784	:	
	:	
LIENHOLDER: None	:	
Defendants		

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ORDER

Upon consideration of Defendant's Motion to Set Bond for Possession of Vehicle, it is this _____ day of _____, 1998,

ORDERED, that the Clerk of the Court shall appraise Defendant's vehicle in accordance with the provisions of Md. Crim. Pro. Code Ann. §12-208(b)(1)(i), and it is further,

ORDERED, that the Clerk shall certify the appraisal and file same in the Court file.

_____
JUDGE

EXHIBIT 3

IN THE CIRCUIT COURT FOR CALVERT COUNTY, MARYLAND

STATE OF MARYLAND, et. al. c/o Robert B. Riddle State's Attorney for Calvert County, Maryland	:	
Plaintiffs	:	
vs.	:	Case No.: C-98-000
JOHN DOE, et al. 200 Maple Road Huntingtown, Maryland 20639	:	
Defendants	:	

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ANSWER TO COMPLAINT FOR FORFEITURE PURSUANT TO CRIMINAL PROCEDURE ARTICLE §12-301

Comes now the Defendant, John Doe, by and through counsel, Richard A. Finci and the Law Offices of Houlon & Berman, and in response to the Complaint for Forfeiture of Real Estate, respectfully states as follows:

FIRST DEFENSE

1. Defendant admits the allegations of paragraphs 1-3.

2. Paragraph 4 is a statement of a legal description of the subject property and does not require an admission or denial.

3. Defendant admits the allegations of Paragraph 5.

4. Defendant denies the allegations of Paragraph 6-16.

5. Defendant is without sufficient information to admit or deny Paragraph 17.

6. Defendant denies the allegations of Paragraphs 18 and 19.

7. Pursuant to Md. Crim. Pro. Code Ann. §12-307(2), Defendant alleges that he has title to the property through the purchase of the property at public auction for $15,000.00.

SECOND DEFENSE

8. Defendant pleads Statute of Limitations.

THIRD DEFENSE

9. Defendant pleads Latches.

FOURTH DEFENSE

10. Plaintiff has failed to comply with the procedural requirements of the Forfeiture Statute.

FIFTH DEFENSE

11. Plaintiff is not a proper "forfeiting authority" pursuant to Md. Crim. Pro. Code Ann. §12-101(f) and (g).

SIXTH DEFENSE

12. Forfeiture in this case would amount to an excessive fine prohibited by the 8th Amendment to the United States Constitution and Article 25 of the Maryland Declaration of Rights.

SEVENTH DEFENSE

13. The Court should exercise its power to mitigate or remit this forfeiture pursuant to Md. Crim. Pro. Code Ann. §12-401.

EIGHTH DEFENSE

That Plaintiff's efforts to seek forfeiture of the subject vehicle violates his right to due process and equal protection of the law pursuant to the United States Constitution and Maryland Declaration of Rights due to Plaintiff's selective enforcement of the forfeiture laws.

NINTH DEFENSE

Forfeiture of this vehicle would violate the owner's federal and state constitutional right to be free from being placed in jeopardy twice for the same act.

TENTH DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

WHEREFORE, Defendant respectfully requests the following relief:

1. That the State's Petition for Forfeiture be denied.

2. That this Honorable Court order the return of said vehicle to Defendant and a prompt hearing.

3. Such further and additional relief as justice may require under the circumstances.

Respectfully submitted,

Richard A. Finci
Houlon, Berman, Bergman, Finci, Levenstein, & Skok
7850 Walker Drive, Suite 160
Greenbelt, MD 20770
(301) 459-8200

EXHIBIT 4

IN THE DISTRICT COURT OF MARYLAND FOR MONTGOMERY COUNTY

JOHN DOE	**:**	
Plaintiff	**:**	
v.	**:**	**Case No.**
	:	
Defendants	**:**	

PETITION FOR RETURN OF SEIZED CURRENCY

COMES NOW, the Plaintiff, John Doe and pursuant to Md. Crim. Pro. Code Ann. §12-101, et seq., petitions this Honorable Court for the return of monies, and in support thereof, states as follows:

1. That on or about April 2, 2007, Plaintiff, John Doe, was stopped by members of the Prince George's County Police Department while parked in the Foreman Mills Parking in the 1200 Block of Maryland Avenue, Rockville, Maryland.

2. That a search was performed on the Plaintiff by a member of the Montgomery County Police Department, pursuant to which the sum of One Thousand Four Hundred Seventeen Dollars ($1,417.00) was seized from the Plaintiff.

3. That the currency was then and there seized as allegedly being associated with illegal drugs in some manner.

4. That the Plaintiff was never charged with any offense in connection with this matter.

5. Pursuant to Md. Crim. Pro. Code Ann. §12-304(c), the State is required to file a complaint seeking forfeiture of any monies seized from Plaintiff within ninety (90) days following the seizure.

6. That no complaint seeking forfeiture was filed within the ninety (90) days following the seizure and/or no complaint seeking forfeiture of the monies seized has been served upon Plaintiff.

7. Pursuant to Md. Crim. Pro. Code Ann. §12-304(c)(2)-(3), all seized currency shall be returned upon petition of the owner if no complaint for forfeiture is filed as long as the petition for return of currency.

8. In spite of his demand for return of the currency through undersigned counsel, Defendant has failed and refused to return the currency.

WHEREFORE, Plaintiff prays:

1. That she be returned the One Thousand Four Hundred Seventeen Dollars ($1,417.00) that was seized from her.

2. And for such further and additional relief as justice may require.

Respectfully submitted,

Richard A. Finci
Houlon, Berman, Bergman, Finci, Levenstein, & Skok
7850 Walker Drive, Suite 160
Greenbelt, MD 20770
(301) 459-8200

EXHIBIT 5

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

PRINCE GEORGE'S COUNTY, MARYLAND :

Plaintiff :

vs. : Case No.

:

Defendants

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INTERROGATORIES

TO: **PRINCE GEORGE'S COUNTY, MARYLAND**

FROM: **DEFENDANT**

You are required to answer the following Interrogatories within thirty (30) days, pursuant to the provisions of Maryland Rules of Procedure, Rules 2-421 and 2-422:

a. These Interrogatories are continuing in character so as to require you to file supplementary answers if you obtain further or different information for trial.

b. Where the name or identity of a person is requested, please state the full name, home address, and also business address, if known.

c. Unless otherwise indicated, these Interrogatories refer to the time, place, and circumstances of the occurrence mentioned or complained of in the pleading.

d. Where knowledge or information in possession of a party is requested, such request includes knowledge of the party's agents, representatives and unless

privileged, his attorneys. When answer is made by a corporate defendant, state the name, address and title of the persons supplying the information and making affidavit, and the source of this information.

e. The pronoun "you" refers to the party to whom these Interrogatories are addressed, and persons mentioned in clause (d).

f. You are required to file full, complete and truthful answers to these Interrogatories and to send a copy to the undersigned Attorney.

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1. State the full name, present address and business address, date of birth, marital status and social security number of the person answering these Interrogatories.

2. Identify all persons with personal knowledge of any facts pertaining to this matter.

3. State in detail the reasons for the seizure of the VEHICLE which is the subject matter of this Complaint for Forfeiture.

4. State the precise date, time and place of each and every search of the subject vehicle and/or its contents and the results of each search.

5. State the precise date, time and place of each search of the person of the Defendant or any persons found in or near the vehicle and describe the results of each such search.

6. Describe each and every item of physical evidence which was seized from the Defendant prior to or at any time after his arrest.

7. Describe all facts upon which you base your contention that the subject vehicle was used, or intended for use in the manufacturing, compounding, processing, delivering, importing or exporting of controlled dangerous substance.

8. Please state all facts upon which you base your contention, if any, that the subject vehicle was purchased with proceeds traceable to the exchange of controlled dangerous substances.

9. Describe all facts upon which you base your contention that the subject motor vehicle was utilized to facilitate the transportation, sale, receipt, possession or concealment of controlled dangerous substance or raw materials, products and equipment used or intended for use in the manufacturing, compounding, processing, delivering, importing or exporting of controlled dangerous substance.

10. Identify all documents which were seized from the Defendant or from the interior of the vehicle. Please attach copies of any documents.

11. Describe all facts upon which you base your contention that the subject vehicle was owned by Defendant.

12. If you contend that Defendant had knowledge or reason to know that the subject vehicle was being used to transport controlled dangerous substance describe all facts upon which you base your contention.

13. If you contend that Defendant is not an innocent owner of the subject vehicle as described by Md. Crim. Pro. Code Ann. §12-205, describe all facts upon which you base your contention.

14. Describe all statements, oral, written or recorded, made by Defendant.

15. Describe which of the criteria set forth in Md. Crim. Pro. Code Ann. §12-204 were considered to be applicable by the executive branch when it recommended that forfeiture of the vehicle be sought.

16. If you contend that forfeiture of this vehicle would not be an excessive fine pursuant to the Eighth Amendment and Article 25 of the Md. Dec. of Rights, give all facts upon which you base your contention.

17. If you contend that some person other than the Defendant was the equitable owner of the subject vehicle, give all facts upon which you base your contention.

18. Attach to your answers copies of all written reports made to you by any experts whom you propose to call as witnesses.

Respectfully submitted,

RICHARD A. FINCI
HOULON, BERMAN, BERGMAN,
FINCI, LEVENSTEIN & SKOK, LLC
7850 Walker Drive, Suite 160
Greenbelt, Maryland 20770

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

PRINCE GEORGE'S COUNTY, MARYLAND	:	
and	:	
Deputy Director of Finance P.G. County, Maryland County Administration Building Upper Marlboro, Maryland 20772	:	
Plaintiff	:	
vs.	:	Case No. CAE 97-00000
U.S CURRENCY IN THE AMOUNT OF $6,520.99	:	
and	:	
JOHN DOE 1000 Maple Drive Forest Heights, Maryland 20745	:	
Defendants	:	

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INTERROGATORIES

TO: **PRINCE GEORGE'S COUNTY, MARYLAND**

FROM: **DEFENDANT**

You are required to answer the following Interrogatories within thirty (30) days, pursuant to the provisions of Revised Maryland Rules of Procedure, Rules 2-421 and 2-422:

a. These Interrogatories are continuing in character so as to require you to file supplementary answers if you obtain further or different information for trial.

b. Where the name or identity of a person is requested, please state the full name, home address, and also business address, if known.

c. Unless otherwise indicated, these Interrogatories refer to the time, place, and circumstances of the occurrence mentioned or complained of in the pleading.

d. Where knowledge or information in possession of a party is requested, such request includes knowledge of the party's agents, representatives and unless privileged, his attorneys. When answer is made by a corporate defendant, state the name, address and title of the persons supplying the information and making affidavit, and the source of this information.

e. The pronoun "you" refers to the party to whom these Interrogatories are addressed, and persons mentioned in clause (d).

f. You are required to file full, complete and truthful answers to these Interrogatories and to send a copy to the undersigned Attorney.

- - - - - - - -

1. State the full name, present address and business address, date of birth, marital status and social security number of the person answering these Interrogatories.

2. Identify all persons with personal knowledge of any facts pertaining to this matter.

3. State in detail the reasons for the seizure of the currency which is the subject matter of this Complaint for Forfeiture.

4. State the precise date, time and place of each and every search of the subject property where the currency was seized and the results of each search.

5. State the precise date, time and place of each search of the person of the Defendant or any persons found in or near the subject property and describe the results of each such search.

6. Describe each and every item of physical evidence which was seized from the Defendant prior to or at any time after his arrest.

7. Please state all facts upon which you base your contention, if any, that the subject currency represents proceeds traceable to the exchange of controlled dangerous substances.

8. Identify all documents which were seized from the Defendant or from the interior of the subject property. Please attach copies of any documents.

9. Describe all statements, oral, written or recorded, made by Defendant.

10. If you contend that forfeiture of this currency would not be an excessive fine pursuant to the Eighth Amendment and Article 25 of the Md. Dec. of Rights, give all facts upon which you base your contention.

11. Attach to your answers copies of all written reports made to you by any experts whom you propose to call as witnesses.

12. State all facts upon which you base your contention as contained in paragraph 10 of the Complaint that the subject currency “was in close proximity to contraband controlled dangerous substances”.

13. State all facts upon which you base your contention as contained in paragraph 11 of the Complaint that “said currency was in close proximity to contraband controlled paraphernalia”.

14. State all facts upon which you base you contention that said currency “had been used or intended to be used in connection with the illegal manufacture, distribution, dispensing, or possession of controlled dangerous substances or controlled paraphernalia”.

15. State the factual basis for your contention as set forth in paragraph 13 of your Complaint that said currency “was a proceed from the sale or exchange of Controlled Dangerous Substance or a proceed traceable to such a sale or exchange”.

16. Give a full description of where all alleged contraband was seized from the subject property at the time of Defendant’s arrest and the seizure of these funds.

17. Give the precise location of the place where the U.S. Currency which is the subject of this matter was recovered.

Respectfully submitted,

Richard A. Finci
Houlon, Berman, Bergman, Finci, Levenstein, & Skok
7850 Walker Drive, Suite 160
Greenbelt, MD 20770
(301) 459-8200

EXHIBIT 6

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

PRINCE GEORGE'S COUNTY, MARYLAND	:	
Plaintiff	:	
vs.	:	Case No. CAE 96-0000
1992 LEXUS SC300 Owner: Jane Doe	:	
Defendants	:	

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REQUEST FOR DOCUMENTS

TO: **PRINCE GEORGE'S COUNTY, MARYLAND**

FROM: **DEFENDANT**

Comes now the Defendant, Jane Doe, by and through counsel, Richard A. Finci and the Law Offices of Houlon & Berman, and pursuant to Maryland Rule 2-422, respectfully requests copies of the following documents to be produced at the Law Offices of undersigned counsel within 30 days:

1. The complete police investigative file relating to all police investigations, searches and seizures, statements obtained and/or any other evidence which resulted in the seizure of the subject vehicle.

2. Copies of all documentary evidence seized from Defendant and any occupants of the vehicle.

3. Copies of all documentary evidence seized from the vehicle.

4. Verbatim copies of all written or recorded statements from any parties or witnesses to the events which led to the forfeiture of the vehicle.

5. Notes of any oral statement from any parties or witnesses to the events which led to the forfeiture of the vehicle.

6. Copies of all documentary evidence showing that anyone other than the Defendant was the equitable owner of the subject vehicle.

Respectfully submitted,

Richard A. Finci
Houlon, Berman, Bergman, Finci, Levenstein, & Skok
7850 Walker Drive, Suite 160
Greenbelt, MD 20770
(301) 459-8200

EXHIBIT 7

IN THE DISTRICT COURT OF MARYLAND FOR PRINCE GEORGE'S COUNTY

PRINCE GEORGE'S COUNTY, MARYLAND	**:**	
	:	
vs.	**:**	**Case No. SP 5-2- 0000-97**
U.S. CURRENCY IN THE AMOUNT OF $2,393.00	**:**	
	:	
and		
	:	
JOHN DOE **1000 Maple Grove Road** **Bowie, Maryland 20720**	**:**	
	:	
Defendant		

MOTION TO STAY FORFEITURE ACTION OR IN THE ALTERNATIVE TO CONTINUE

Comes now the Defendant, John Doe, by and through counsel, Richard A. Finci and the law office of Houlon & Berman, and respectfully states as follows:

1. On January 24, 2012, Defendant was arrested and charged with a violation of the Maryland Controlled Dangerous Substance Laws after the execution of a search warrant at his home.

2. Along with numerous other allegedly incriminating items, the sum of $2,393.00 was seized from Defendant's home.

3. The Plaintiff, Prince George's County, Maryland has filed for Forfeiture of these funds pursuant to Md. Crim. Pro. Code Ann., Title 12. A Complaint and Show Cause Order has been served upon the Defendant.

4. Defendant wishes to contest the Forfeiture of these funds but also wishes to maintain his Fifth Amendment right to remain silent. In order to contest

this Forfeiture, he would have to testify and thus waive his right to remain silent. Under the circumstances, it is respectfully submitted that it is unfair to require the Defendant to choose between his right to contest the Forfeiture and his Constitutional right to remain silent.

5. Undersigned counsel has reviewed this issue with counsel for the Plaintiff, Bridgett A. Greer, Associate County Attorney and she has consented to the relief requested herein.

WHEREFORE, Defendant respectfully requests the following relief:

1. That this Honorable Court stay this Forfeiture action until conclusion of the criminal case.

2. As an alternative method to make sure that the case is properly scheduled, that this Honorable Court continue this Forfeiture action for a period of minimum of six months.

3. Such further and additional relief as justice may require.

Respectfully submitted,

Richard A. Finci
Houlon, Berman, Bergman, Finci,
Levenstein, & Skok
7850 Walker Drive, Suite 160
Greenbelt, MD 20770
(301) 459-8200

IN THE DISTRICT COURT OF MARYLAND FOR PRINCE GEORGE'S COUNTY

PRINCE GEORGE'S COUNTY, MARYLAND	:	
	:	
vs.	:	**Case No. SP 5-2- 0000-97**
U.S. CURRENCY IN THE AMOUNT OF $2,393.00	:	
and	:	
JOHN DOE **1000 Maple Grove Road** **Bowie, Maryland 20720**	:	
Defendant	:	

ORDER

Upon consideration of Defendant's Motion to Stay Forfeiture Action or In The Alternative To Continue Trial, as well as the Plaintiff's consent thereto, it is this day of

_____, 2013,

ORDERED, that the above captioned matter be and is hereby continued for a minimum period of six months to be reset for Trial on or after six months from the date of this Order.

_____
JUDGE

EXHIBIT 8

ATTORNEY GRIEVANCE COMMISSION OF MARYLAND v. UNNAMED ATTORNEY

No. 51, September Term, 1983

Court of Appeals of Maryland

298 Md. 36; 467 A.2d 517; 1983 Md. LEXIS 323

November 7, 1983

SUBSEQUENT HISTORY: **[***1]**

Opinion December 1, 1983.

PRIOR HISTORY: Appeal from the Circuit Court for Baltimore City pursuant to certiorari to the Court of Special Appeals. Marshall A. Levin, JUDGE

CORE TERMS: self-incrimination, disciplinary, injunction, compelled, silence, constitutional right, unnamed, Fifth Amendment, right to remain silent, prisoner, misconduct, chairman, vacated, Maryland Rule, criminal case, enjoined, constitutional protection, constitutional rights, evidentiary, asserting, disbarred, relieved, seizure, inmates, inform, warns, subsequent criminal proceeding, disciplinary proceeding, criminal conviction, public interest

COUNSEL: Melvin Hirshman, Bar Counsel, Annapolis (Kendall R. Calhoun and Glenn M. Grossman, Assistant Bar Counsels, Annapolis, on the brief), Maryland for appellant.

Sheldon H. Braiterman and Andre R. Weitzman, Baltimore (Mary Morton Kramer, Baltimore, on the brief), Maryland for appellee.

JUDGES: Murphy, C.J., and Smith, Eldridge, Cole, Davidson, Rodowsky and Couch, JJ.

OPINIONBY: PER CURIAM; MURPHY

OPINION: **[*39]** **[**518]** ORDER

It is this 7th day of November, 1983

ORDERED, by the Court of Appeals of Maryland, a majority of the Court concurring, that for reasons to be set forth in an opinion later to be filed, the decree of the Circuit Court for Baltimore City dated April 5, 1983, enjoining the Attorney Grievance Commission from proceeding with attorney disciplinary actions against the respondent unnamed attorney until final termination of a pending criminal appeal filed by respondent be, and it is hereby, vacated.

Costs to be paid by the respondent unnamed attorney. Mandate to issue forthwith.

MURPHY, Chief Judge.

The **[***2]** primary issue before us is whether, in the circumstances of this case, § 5-301(g) of Title 5 of the Administrative and Procedural Guidelines of the Attorney Grievance Commission of Maryland, promulgated pursuant to Maryland Rule BV3 b(i), violates the appellee unnamed attorney's constitutional right against compelled self-incrimination. The challenged rule governs attorney disciplinary proceedings before Inquiry Panels empowered by Maryland Rule BV6 to conduct hearings respecting claimed violations of the Code of Professional Responsibility, Maryland Code (1977 Repl.Vol.), Vol. 9C, Appendix F. In pertinent part, the Commission's guideline requires the Inquiry Panel chairman, at the outset of the hearing, to

"(g) Inform the Respondent of his privilege against incriminating himself of a crime by stating that (i) he has a right to remain silent by asserting that his testimony **[*40]** may tend to incriminate him of a crime; (ii) anything Respondent does say may be used against him in a subsequent criminal proceeding; and (iii) other evidence may be admitted in the Proceedings tending to prove the allegations of the Complaint, and such evidence may be accepted as true in the absence **[***3]** of Respondent's testimony or other evidence controverting such evidence."

I

The attorney in this case was charged by information in the United States District Court for the District of Maryland with filing a false federal income tax return for the year 1975 in violation of 26 U.S.C. § 7206(1). On February 25, 1980, he entered into a "Stipulation" with the United States Attorney by which he agreed to the

entry of a judgment of conviction if the federal district court found that a challenged search and seizure of evidence from his law offices, conducted by the government during the investigation, was lawful. The district court later ruled that the search and seizure was conducted pursuant to an invalid general warrant and was therefore unlawful. The United States Court of Appeals for the Fourth Circuit reversed the district court and remanded for further proceedings. Subsequently, on January 27, 1982, the district court entered a judgment of conviction against the attorney pursuant to the stipulation. The attorney appealed to the Fourth Circuit.

On March 10, 1982, the Attorney Grievance Commission, pursuant to Maryland Rule BV16, filed a petition with us to suspend the attorney **[***4]** from practicing law in this State. We denied the petition in an **[**519]** order dated May 13, 1982. Subsequently, the Commission informed the attorney that his misconduct, as evidenced by his conviction, had been referred to an Inquiry Panel for disciplinary proceedings under Rule BV6. On November 5, 1982, the attorney requested the Commission to continue the disciplinary proceedings until appellate review of his criminal conviction was completed. The request was denied on November 19, 1982.

[*41] On November 26, 1982, the attorney filed a petition in the Circuit Court of Baltimore City to enjoin all disciplinary proceedings against him pending completion of appellate review of his conviction in the federal courts. He contended that § 5-301(g) violated his constitutional right not to be compelled to be a witness against himself. He asserted that § 5-301(g) exacted a penalty for invoking his privilege against self-incrimination in that, unless the Inquiry Panel proceedings were enjoined, he would "suffer irreparable harm . . . [by being] forced to choose between a real and substantial danger of self-incrimination or having the allegations in the stipulation deemed **[***5]** to be true without an opportunity to testify on his own behalf." In other words, the attorney maintained that if compelled to appear before an Inquiry Panel while his appeal was pending, his testimony might be used against him in the event his conviction was reversed and a new trial ordered. On the other hand, the attorney claimed that if he refused to testify, the allegations against him could be accepted as true under the explicit provisions of § 5-301(g).

The Commission moved to dismiss the petition on the ground that the circuit court lacked subject matter jurisdiction; it contended that original and exclusive jurisdiction in attorney disciplinary proceedings is vested in the Court of Appeals of Maryland. On February 8, 1983, the court (Levin, J.) denied the Commission's jurisdictional motion and enjoined further disciplinary proceedings against the attorney "until final termination of the criminal case." After finding that the Inquiry Panel proceedings concerned the same subject matter as the conduct which resulted in the attorney's criminal conviction, the court said:

"The Court finds that if the Inquiry Panel proceedings are held, Petitioner will be expected to testify, **[***6]** he having been summoned to that proceeding. The Administrative and Procedural Guidelines for Inquiry Panel proceedings provide that in the absence of testimony from the Petitioner, evidence presented against him may be accepted as true, putting Petitioner in a dilemma concerning his testimony **[*42]** necessary to defend himself and the possibility that if he testifies before the Inquiry Panel, and his appeal to the Fourth Circuit is successful, that testimony can be used against him in the federal proceedings.

"The Court finds that because Respondent intends to proceed with disciplinary proceedings, regardless of the outcome of the appeal, the public interest is satisfied. However, the interests of Petitioner in protecting his rights are more significant.

"The Court finds that there will be irreparable injury to the Petitioner if this injunction is denied. The public interest will only be delayed.

"The Court finds that the balance of convenience is weighed in favor of the Petitioner in that the possible harm to him is greater than any inconvenience of the Respondent.

. . . .

"The Court therefore concludes as a matter of law that the Petitioner is entitled to an injunction. **[***7]** The Court further notes that the Court of Appeals denied a temporary suspension of Petitioner previously, which indicates Petitioner is not such an immediate danger to the public as to require such a drastic action. The Court also notes the American Bar Association's policy to delay grievance procedures pending a criminal case, which represents a consensus of legal thinking, but does not have the force of precedent."

[520]** The Commission appealed and we granted certiorari prior to decision by the Court of Special Appeals. By order dated November 7, 1983, we vacated Judge Levin's decree granting the injunction for reasons to be set forth in an opinion later to be filed. We now give our reasons for so acting.

II

The Commission argues, as it did below, that (1) the lower court was without jurisdiction to issue the injunction, and (2) that because the challenged provisions of § 5-301(g) are not **[*43]** violative of the attorney's constitutional right against self-incrimination, the injunction was improperly issued. While we entertain some doubt that the lower court had jurisdiction to grant the injunction, we need not here consider that issue, for assuming arguendo **[***8]** that it did, the injunction should not have been granted in the circumstances of this case.

The Fifth Amendment to the federal constitution provides in pertinent part:

"No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

The constitutional provision is applied to the states through the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). Article 22 of the Maryland Declaration of Rights also protects individuals from compelled self-incrimination. n1

n1 Article 22 is in pari materia with the Fifth Amendment. Richardson v. State, 285 Md. 261, 265, 401 A.2d 1021 (1979).

> It is settled law that a state may not impose a substantial penalty on an individual who elects to exercise his constitutional right against compelled self-incrimination. Testimony given under the threat of a severe sanction is thus compelled testimony obtained in violation of the constitutional guarantee. Lefkowitz v. Cunningham, 431 **[***9]** U.S. 801, 805, 97 S.Ct. 2132, 2135, 53 L.Ed.2d 1 (1977). Therefore, the prosecution in a criminal case is not permitted to comment on the fact that the accused did not testify. Griffin v. California, 380 U.S. 609, 614-15, 85 S.Ct. 1229, 1232-33, 14 L.Ed.2d 106 (1965). Penalties which amount to compulsion within the contemplation of the constitutional prohibition are not limited to fines or jail sentences. Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967). Automatic deprivation of a significant economic benefit upon assertion of the privilege is also prohibited; consequently, an attorney may not be automatically disbarred because he asserts his self-incrimination privilege and refuses to testify before a **[*44]** judicial inquiry into his alleged misconduct. Spevack, supra. Nor may government employees be discharged automatically for refusing to waive their Fifth Amendment privilege. Sanitation Men v. Sanitation Comm'r, 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968); Gardner v. Broderick, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968); Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967). Similarly, officers **[***10]** of political parties may not be removed from office solely for asserting the privilege. Lefkowitz v. Cunningham, 431 U.S. 801, 97 S.Ct. 2132, 53 L.Ed.2d 1 (1977). And contractors may not be made ineligible to contract with the government on the ground that they refused to waive their privilege against self-incrimination. Lefkowitz v. Turley, 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973).

Not every adverse consequence of invoking the self-incrimination privilege constitutes compulsion, however. Unlike the laws struck down in the cited Supreme Court cases, § 5-301(g) does not impose a sanction upon the assertion of the constitutional protection against self-incrimination. As earlier observed, § 5-301 prescribes the procedure to be followed by the Inquiry Panel chairman at the commencement of each hearing. He is required to advise the attorney of the governing procedural rules so as to ensure fairness by informing the attorney of his rights. Subsection (g) requires the chairman to advise the attorney **[**521]** of his right to invoke the privilege against self-incrimination. Subsection (g)(i) requires that the attorney be told that he has the right to remain silent. **[***11]** Subsection (g)(ii) warns him of the consequences of his decision to testify. He is told that anything he says may tend to incriminate him and may be used against him in a subsequent criminal proceeding. Subsection (g)(iii) informs the attorney of the potential consequences of his silence. It states that if evidence against the attorney is presented, and the attorney puts on no evidence in his own defense, the Inquiry Panel may accept the evidence against the attorney as true. Simply put, it warns the attorney that the Inquiry Panel may believe evidence which the attorney does not contest. As such, the provision is **[*45]** merely a description of how proof may be viewed by the finder of fact in the absence of evidence to the contrary. No adverse inference may be drawn from the attorney's refusal to testify in a disciplinary proceeding against him. Nor does § 5-301(g) impose any sanction upon the attorney's invocation of the constitutional protection. Unlike the attorney in Spevack, supra, the appellee will not be disbarred for refusing to testify before the Inquiry Panel. Rule BV10 d requires that "clear and convincing" evidence of punishable misconduct be shown before **[***12]** any disciplinary sanction is imposed. The unnamed attorney in this case may not be disciplined on the basis of his silence. It is therefore plain that § 5-301(g) does not violate the appellee attorney's constitutional right against compelled self-incrimination.

Our conclusion is consistent with state and federal cases. For example, in Baxter v. Palmigiano, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976), a prisoner was charged with a violation of prison disciplinary rules. At the hearing before the Disciplinary Board, he was informed that he might be prosecuted criminally for the activities giving rise to the alleged disciplinary infraction and was advised to retain an attorney. He was also told of his right to remain silent and warned that his silence could be held against him. The prisoner thereafter filed an action under 42 U.S.C. § 1983 for damages and injunctive relief, claiming a violation of his constitutional rights. In rejecting his argument, the Supreme Court ruled that holding the inmate's silence against him in a prison disciplinary proceeding did not constitute a penalty imposed on the exercise of the Fifth Amendment privilege against self-incrimination. **[***13]** The Court noted that the prisoner's silence by itself was insufficient to support imposition of a sanction by the Disciplinary Board. While the regulation in the instant case does not sanction the use of silence against an attorney, nevertheless what the Court said in Baxter in explaining differences between that case and its Garrity and Lefkowitz line of decisions is pertinent here (425 U.S. at 318, 96 S.Ct. at 1558):

[*46] "There, failure to respond to interrogation was treated as a final admission of guilt. Here, [the prisoner] remained silent at the hearing in the face of evidence that incriminated him; and, as far as this record reveals, his silence was given no more evidentiary value than was warranted by the facts surrounding his case. This does not smack of an invalid attempt by the State to compel testimony without granting immunity or to penalize the exercise of the privilege. The advice given inmates by the decision-makers is merely a realistic reflection of the evidentiary significance of the choice to remain silent." (Emphasis added.)

Appellee attorney in the present case, in support of the lower court's issuance of the injunction, **[***14]** asserts that to be forced to choose between remaining silent and testifying before the Inquiry Panel violated his constitutional rights against self-incrimination. But, as the Supreme Court said in McGautha v. California, 402 U.S. 183, 213, 91 S.Ct. 1454, 1470, 28 L.Ed.2d 711 (1971):

"The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. [citation omitted] Although a defendant **[**522]** may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose."

Manifestly, difficult choices confront an individual who is the subject of simultaneous criminal and civil or administrative proceedings. It is well accepted that such an individual has no constitutional right to be relieved of the choice whether or not to testify, and civil proceedings will not be enjoined pending the disposition of the criminal charges. See Hoover v. Knight, 678 F.2d 578 (5th Cir.1982); Arthurs v. Stern, 560 F.2d 477 (1st Cir.1977), cert. denied, 434 U.S. 1034, 98 S.Ct. 768, **[***15]** 54 L.Ed.2d 782 (1978); De Vita v. Sills, 422 F.2d 1172 (3d Cir.1970); Sternberg v. State Bar of Michigan, 384 Mich. 588, 185 N.W.2d 395 (1971). De Vita is virtually identical to the case at bar. There, a judge, **[*47]** accused of accepting bribes, was suspended from office. He sought an injunction to stay state disciplinary proceedings pending the conclusion of his criminal trial. The Third Circuit rejected the claim that the disciplinary proceedings violated the judge's Fifth Amendment privilege; it held that he had no constitutional right to be relieved of the burden of choosing whether to exercise his right to remain silent. The analysis set forth in De Vita has been applied to attorneys in the conduct of disciplinary proceedings. Sternberg, supra. In that case, the Michigan Supreme Court vacated an injunction staying disciplinary proceedings against an attorney pending the outcome of his trial on criminal charges related to the allegations of professional misconduct.

Section 5-301(g) not being violative of the attorney's constitutional right against self-incrimination, there was no basis in this case for the lower court to enjoin the Inquiry Panel **[***16]** proceedings until completion of the process of appellate review of the attorney's criminal conviction. n2

n2 The Fourth Circuit affirmed the unnamed attorney's conviction in an unreported per curiam decision filed on September 30, 1983. A petition for certiorari is now pending in the Supreme Court.

EXHIBIT 9

Burden of Proof to prove property connected to CDS violations.

1986 MERCEDES BENZ 560 CE VIN: WDBCA45DGA211147 REGISTERED OWNER: TROY BOWERS V. STATE OF MARYLAND

No. 57, SEPTEMBER TERM, 1993

COURT OF APPEALS OF MARYLAND

334 Md. 264; 638 A.2d 1164; 1994 Md. LEXIS 47

March 28, 1994, Filed

PRIOR HISTORY: **[***1]** Certiorari to the Court of Special Appeals (Circuit Court for Prince George's County). Graydon S. McKee, III, JUDGE

DISPOSITION: JUDGMENT REVERSED. COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.

CORE TERMS: claimant, forfeiture, cocaine, drug activity, involvement, ownership, informant, convincing evidence, sub judice, manufacture, paraphernalia, rebutted, concealment, subheading, apartment, blue, prerequisite, surveillance, forfeited, common nuisance, traceable, detailing, residue, driving, rebut, confidential informant, subject to forfeiture, transportation, preponderance, transport

COUNSEL: ARGUED BY Stanley E. Baritz (Mark W. Oakley) both on brief, both from Rockville, MD, FOR PETITIONER.

ARGUED BY David S. Whitacre, Assistant State's Attorney for Prince George's County, MD, from Upper Marlboro, MD, FOR RESPONDENT.

JUDGES: ARGUED BEFORE Murphy, C.J.; Eldridge, Rodowsky, McAuliffe, * Chasanow, Karwacki, and Bell, JJ.

* McAuliffe, J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and adoption of this opinion.

OPINIONBY: BELL

OPINION: **[*266]**

[1164]** OPINION BY Bell, J.

This case requires us to construe and then apply Maryland Code (1957, 1992 Repl. Vol.) **[**1165]** Art. 27, § 297(l). n1 Specifically, we must decide whether, in this case, the State is entitled to the benefit of the presumption that the motor vehicle, which is the subject of the forfeiture proceedings, is forfeitable as proceeds n2 of drug activity. n3 If we determine that it is - that the State has established **[***2]** the necessary prerequisites by the prescribed level of proof - then we must decide whether the claimant of the property, in this case, the registered owner, Troy Bowers ("Bowers" or "the claimant"), has rebutted the presumption. The trial court held that the State properly forfeited the motor vehicle, the claimant not having rebutted the presumption that it was subject to forfeiture as proceeds. In an unreported opinion, the Court of Special Appeals, affirmed. **[*267]** 95 Md.App. 737. We granted certiorari upon the claimant's petition to consider the important issue presented. We shall reverse.

n1 The subject seizure was made in August, 1990; hence, the applicable version of section 297 was that codified in Maryland Code (1957, 1982 Repl. Vol., 1990 Cum. Supp.), the relevant subsections of which are identical to those in present section 297.

n2 Maryland Code (1957, 1992 Repl. Vol.) Art. 27, § 297(a)(10) defines "proceeds" as including "property derived directly or indirectly in connection with or as a result of an offense or offenses under this subheading." The subheading of which § 297 is a part is captioned, "Health - Controlled Dangerous Substances," and encompasses §§ 276-304, inclusive.

[*3]**

n3 The drug activity section 297(l) references is precise: Art. 27, § 286, "Unlawful manufacture, distribution, etc.; counterfeiting, etc.; manufacture, possession, etc., of certain equipment for illegal use; keeping common nuisance," § 286A, "Bringing into State in excess of certain amounts," § 286B, "Distribution of noncontrolled substance as controlled

dangerous substances," § 286C, "Using minors for manufacture, delivery or distribution of controlled dangerous substance," and § 290, "Attempts, endeavors and conspiracies."

I.

The State filed a "Complaint For Forfeiture of Vehicle Pursuant To Article 27, Section 297," the subject of which was a 1986 Mercedes Benz 560CE, Tag: ITA-719 (Virginia), serial VIN WDBCA45D9GA211147. As amended, the complaint alleged, inter alia, that

the aforementioned vehicle was used or intended for use, to transport or facilitate the transportation, sale, receipt, possession or concealment of the controlled dangerous substances as listed in the schedules found in Article 27, Section 279, or the raw materials, products and equipment which were used or intended for **[***4]** use in the manufacturing, compounding, processing and delivering of such controlled dangerous substances or constitutes proceeds traceable to the exchange of controlled dangerous substances.

* * *

In this case, the motor vehicle [as] utilized constitutes proceeds traceable to the exchange of controlled dangerous substances.

With respect to Bowers, the statement of facts attached to the complaint stated:

The State alleges that the registered owner was merely a nominee in regards to this subject vehicle and that the actual owner of the subject vehicle was the alleged owner [i.e. Estate of Keith Delante Joiner].

The State also alleges that the subject vehicle was purchased by the alleged owner with proceeds derived from the sale of CDS.

[*268] The claimant and Joiner's estate n4 answered the complaint and moved to dismiss. Their answer admitted "that said vehicle was registered to Troy F. Bowers and owned by the Estate of Keith Joiner."

n4 Joiner's estate is not a party to these proceedings. Its answer to the forfeiture petition was ordered stricken by the trial court and its interest in the Mercedes Benz ordered forfeited without a hearing. It did not note an appeal from that judgment. Only the claimant appealed the forfeiture and petitioned this Court for writ of certiorari.

[*5]**

The evidence on the basis of which the trial court ordered forfeiture largely is not in dispute. Corporal Michael Leadbeter of the Prince George's County Police Department, Narcotics Enforcement Division, testified that he initiated an investigation into Joiner's alleged involvement in the distribution of cocaine **[**1166]** in the Washington, D.C. metropolitan area in June, 1990, after receiving information to that effect from a confidential informant. Before he testified, the claimant objected, arguing that the testimony as to what the informant said was hearsay. The claimant's objection on hearsay grounds was overruled; however, the trial court ruled that the information received from the informant was admitted "only to explain the subsequent actions of this witness. It is not necessarily being admitted for the truth but to say what his state of mind was as to why he did things. It could not be and would not be used to prove drug activity." Corporal Leadbeter further testified that the informant also stated that Joiner drove "a blue two-door Mercedes Benz with blue BBS rims," although he or she did not specify the year.

Corporal Leadbeter testified that he "checked the County Police department's **[***6]** intelligence files both to verify or [corroborate] Mr. Joiner's involvement in controlled dangerous substance activity, along with corroborating the fact that he [was] driving the blue Mercedes Benz." Surveillance was established at Joiner's residence, "the address where [Joiner] was involved in that action [distribution of controlled dangerous substance]," according to the informant, "along with other places." He stated that he saw the Mercedes Benz at Joiner's **[*269]** residence on occasions and at other places and, on one occasion, Joiner was in the car when it was stopped. n5

n5 It was not clear whether Joiner was driving or was simply a passenger. Furthermore, Corporal Leadbeter did not disclose in detail what his check of the County Police department's intelligence files turned up. Nor did he specify the other locations from which the informant alleged Joiner distributed controlled dangerous substances or at which the Mercedes Benz was seen.

Joiner was killed in an automobile accident in the early morning of August 5, **[***7]** 1990. Later that morning, his apartment was searched pursuant to a search and seizure warrant, issued on August 3, 1990, for narcotics, narcotics paraphernalia, and guns. Recovered from a weightlifting bench in the dining room area of the apartment were a hand rolled cigarette containing marijuana and PCP and 0.4 grams of PCP. A white box, containing an acculab electronic scale, three kitchen measuring spoons, a pill bottle containing a single-edge razor blade, and three "zip-loc" style plastic sandwich bags, was

seized from the kitchen. On the paraphernalia and in the white box in which they were contained was a white "powdery residue" which was field tested and determined to be cocaine. Having qualified as an expert in methods of distribution and the significance of the items found in the distribution of controlled dangerous substances, Corporal Leadbeter opined, based on the items seized, that Joiner was a distributor of controlled dangerous substances.

With respect to the Mercedes Benz, n6 Corporal Leadbeter testified that he recovered, in Joiner's bedroom, a sales receipt for it from Mark Cook's Euro-Classics Auto Dealership in Midlothian, Virginia. The receipt listed Troy Bowers, **[***8]** rather than Joiner, as the purchaser. Believing it to be Joiner's property, Corporal Leadbeter obtained a seizure warrant for the Mercedes Benz. It was subsequently located in a District of Columbia police impound lot, returned to Maryland, and searched. Relevant to the case sub judice, recovered in the **[*270]** search of that car was "a price list kind of thing with some business cards on it that had Keith Joiner's name on it." Following up on that lead, Corporal Leadbeter learned that the business, Hollywood Car Care, "was some kind of auto detailing business," which was located next to Joiner's apartment. He testified, without objection, that he "called the business and asked if Keith Joiner worked there. And they said that he did not work there."

n6 Documents pertaining to various automobiles were recovered during the search. Corporal Leadbeter testified that more than one confidential informant told him that Joiner owned several motor vehicles.

The State's only other witness, Detective William T. Whigham of the Prince **[***9]** George's County State's Attorney's Office, testified concerning his conversation with the claimant. According to Detective Whigham, Bowers contacted him to claim the Mercedes Benz. Notwithstanding that he had no documentation **[**1167]** to that effect, he indicated that he had "sold" the Mercedes Benz to Joiner approximately four months earlier. To date, he said, he had received only $4400.00, consisting of a $3,000.00 downpayment and two installments of $700.00 each. Bowers claimed that Joiner was in default of their agreement. Shortly before his death, he reported, Joiner purchased another car, also titled in Bowers' name, for $28,000.00 cash and, thereafter, had ceased making installments on the Mercedes Benz.

The trial court denied Bowers' motion to dismiss, ruling: "There is sufficient evidence to give rise to the statutory presumption, which may be rebutted." As will become obvious from the court's final ruling, see infra, the presumption to which the court referred was that Joiner, and not Bowers, owned the Mercedes Benz. Bowers then presented his case. Testifying in his own behalf, he confirmed that he sold the Mercedes Benz to Joiner, but denied that Joiner owned it at the time **[***10]** of Joiner's death. His explanation was consistent with what he had related to Detective Whigham, that Joiner was in default of their agreement as a result of not having made the agreed $700.00 installment payments. Bowers also testified that the Joiner deal was not the only one of its kind that he had engaged in. He explained that he had purchased a number of cars in his name, but had either lent, given, or leased them to others, including his sisters. The source of the funds he used for these purchases, he asserted, was either his savings or loans from various relatives. **[*271]**

The trial court ordered forfeiture of the Mercedes Benz. It reasoned (emphasis added):

Court has already ruled that the evidence that was put on by the moving party gave rise to the presumption of ownership. Now, the issue before the Court is whether or not that additional evidence placed before the Court [by the] person claiming the property has been sufficient to rebut the presumption. The Court has reviewed the evidence presented, applying its own common sense and everyday experiences, but also taking into consideration the manner in which the witness has testified, the recollection of the witness, ability **[***11]** to remember. These are all the standards in which the trier of the fact is required to apply; whether or not the witness had an interest in the outcome [of] the case, whether or not the witness' testimony is supported or contradicted by other evidence that the court believes.

And applying all of these and the other standards of which the trier of the fact is required to apply in the State of Maryland, the Court finds that the defense or the claiming party's evidence does not rise to that level that would rebut the presumption.

The claimant's timely appeal to the Court of Special Appeals was unsuccessful. While, in affirming the judgment of the trial court, that court acknowledged "the interplay between § 297(b), n7 on the one hand, and § 297(l) n8 on the other," it **[*272]** held that "there is ... **[**1168]** no necessity for the State [to seek to forfeit certain property] under § 297(l) .... That section - § 297(l) - exists only to provide the State with a mechanism for achieving the forfeiture of the property whose link to CDS otherwise is rather attenuated." This is true, the court opined, even when, in fact, the State attempted to prove the elements of § 297(l). All that is

required, the **[***12]** intermediate appellate court asserted, is that the State have adduced evidence tending to prove that the subject property fell within the definition of § 297(b)(4), i.e. that it was "used [or intended to be used] to facilitate ... drug distribution activities." Subsection (b) is, after all, it observed, "the sieve through which all forfeited property must pass." (citing State v. 1982 Plymouth, 67 Md. App. 310, 314, 507 A.2d 633, 635 (1986)).

n7 As relevant to the case sub judice, § 297(b), in pertinent part, provides:

> (4) All conveyances including aircraft, vehicles or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2) [controlled dangerous substances or the raw materials, products and equipment used in its manufacture, etc.] of this subsection....
>
> * * *
>
> (10) Everything of value furnished, or intended to be furnished, in exchange for a controlled dangerous substance in violation of this subheading, all proceeds traceable to such an exchange, and all negotiable instruments and securities used, or intended to be used, to facilitate any violation of this subheading.
>
> **[***13]**

n8 Section 297(1) provides:

> Presumption of ownership of property. - (1) Except as provided in paragraph (2) of this subsection, when the State establishes by clear and convincing evidence that a person has committed a violation of Article 27, § 286, § 286A, § 286B, or § 286C of the Code, or Article 27, § 290 of the Code in relation to these offenses, there is a rebuttable presumption that any property or any portion thereof in which that person has an ownership interest is subject to forfeiture as proceeds if the State establishes by clear and convincing evidence that:
>
> (i) The property was acquired by such person during the period in which such person had committed violations of Article 27, § 286, § 286A, § 286B, or § 286C of the Code, or Article 27, § 290 of the Code in relation to these offenses, or within a reasonable time after such period; and
>
> (ii) There was no likely source for such property other than the violation of Article 27, § 286, § 286A, § 286B, or § 286C of the Code, or Article 27, § 290 of the Code in relation to these offenses.
>
> (2) Except as provided in subsection (n)(2) of this section, real property used as the principal family residence may not be forfeited under this subsection unless it is shown that one of the owners of the real property was convicted of one or more of the offenses described under paragraph (1) of this subsection.
>
> (3) The burden of proof is on a claimant of the property to rebut the presumption in paragraph (1) of this subsection.
>
> **[***14]**

Turning to the case sub judice, applying § 297(b)(4), the Court of Special Appeals held that Corporal Leadbeter's testimony **[*273]** detailing the information he received from his informant "was clearly sufficient to indicate (1) that Joiner was engaged in the 'sale, receipt, possession, or concealment,' of controlled dangerous substances, and (2) that the Mercedes was 'used, or intended for use, to transport, or in [some] manner to facilitate the transportation' of said substances." n9 Although the court did not specify what level of proof was required, presumably it tested the sufficiency of the evidence by the preponderance standard. Similarly, the court found that the trial court was not clearly erroneous in determining that, despite being the registered owner, the claimant did not own the Mercedes, having previously sold it to Joiner.

n9 The specific testimony upon which the intermediate appellate court relied was the following:

> By Counsel for the State:
>
> Q And what ... vehicles were you identifying - did you identify in fact this '86 Mercedes?
>
> A Yes.
>
> Q And how did you come to identify that as a [possible] vehicle owned by Mr. Joiner?
>
> A In June of 1990, when the case was initially investigated, I spoke with - I received a call from a confidential informant who related that he was

involved in the distribution of controlled dangerous substances. The person provided the address where he was involved in that action, provided information as to what he was driving. The vehicle that the caller advised he [was] driving was - I don't think they specifically stated it was a 1987, but it was a blue two door Mercedes Benz with blue BBS rims.

I checked the intelligence files of the County police department both to verify or [corroborate] Mr. Joiner's involvement in controlled dangerous substance activity, along with corroborating that he [was] driving this blue Mercedes Benz. Surveillance was established. This is prior to the search warrant.

Surveillance was established at the residence of 3703 Silver Park Drive, along with other places. And the vehicle had been observed at that address on occasions and other places.

[*15]**

II.

A forfeiture proceeding is a civil action in rem. State v. Greer, 263 Md. 692, 694, 284 A.2d 233, 235 (1971); Prince George's County v. Blue Bird Cab Company, 263 Md. 655, 659, 284 A.2d 203, 205 (1971); Bozman v. Office of Finance, 52 Md. App. 1, 6, 445 A.2d 1073, 1076 (1982), aff'd, 296 Md. 492, 463 A.2d 832 **[*274]** (1983). As such, the burden of proof necessary to sustain a forfeiture is by a preponderance of the evidence. Blue Bird Cab Company, 263 Md. at 659, 284 A.2d at 205.

As the Court of Special Appeals recognized, there are three subsections of section 297 that potentially have relevance to the case sub judice: subsections (b)(4) and (b)(10) and subsection (l). Subsections (b)(4) and (b)(10) define categories of property subject to forfeiture. The former focuses on the use of the property, the latter on its source. Thus, in the case of subsection (b)(4), an automobile or other conveyance may be forfeited if the State is able to prove that it **[***16]** was **[**1169]** used, or intended for use, in connection with, or to facilitate, drug activities. On the other hand, pursuant to subsection (b)(10), forfeiture of property may be ordered if the State proves that it constitutes proceeds of drug activity. In neither case is there a requirement that the property's owner also be implicated. See Greer, 263 Md. at 694, 284 A.2d at 235; Blue Bird Cab Co., 263 Md. at 659, 284 A.2d at 205.

Subsection (l) provides an alternate method of proving the category of property, i.e., proceeds, addressed by subsection (b)(10). There is no provision in § 297 creating a presumption of use or intended use of the property referenced pursuant to subsection (b)(4); hence, the proof of its use or intended use affirmatively must be proven. The situation is quite different when the issue involves proof of proceeds. In contrast to subsection (b)(4) the State is given the option either affirmatively to prove that the subject property is "derived directly or indirectly in connection with or as a result of an offense or offenses under this subheading," § 297(a)(10), pursuant to subsection **[***17]** (b)(10) or, when certain enumerated offenses are involved, of relying on the presumption prescribed by subsection (l). Should the State proceed pursuant to § 297(b)(10) and adduce evidence to prove that the property constitutes proceeds, it need neither establish the property owner's involvement in drug transactions, nor negate other likely sources of that property. As relates to proceeds, section 297(b)(10) requires only that the property be traceable to an exchange for a controlled dangerous substance. Section **[*275]** 297(l), on the other hand, addresses the situation in which the connection between the property and the drug activity is attenuated - where the property is not directly traceable to drug activity, but there is proof of the owner's involvement in certain kinds of drug activity - by creating a presumption that the property constitutes proceeds and, thus, is forfeitable. In the former situation, proof by a preponderance of the evidence, as in other civil cases, is all that is required; in the latter, by the express terms of section 297(l), the proof as to those elements prerequisite to the establishment of the presumption must be shown by clear and convincing evidence.

III.

Rule **[***18]** 8-131(a), pertaining to the scope of appellate review, provides:

(a) Generally. - The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

Although it recognized, at least implicitly, that section 297(l) could apply to the facts sub judice, the Court of Special Appeals did not undertake to apply it in this case. Rather, construing that section only cursorily, the intermediate appellate court decided that another section, § 297(b)(4), was the applicable section and that the State's proof of its elements was sufficient.

The applicability of section 297(b)(4), and the sufficiency of the evidence with respect thereto, was not decided by the trial court, however. In denying the claimant's motion to dismiss **[***19]** for failure of the State to carry its burden of proof, made at the end of the State's case, the trial court found the State's **[*276]** evidence to be sufficient to raise the statutory presumption. At the close of all the evidence, the trial court again ruled that it had already found that the State's evidence "gave rise to the presumption of [Joiner's] ownership [of the Mercedes Benz]," and that the only issue it had to resolve was whether the claimant had rebutted the presumption. Only section 297(l) explicitly prescribes a presumption; hence, notwithstanding that the presumption relates to what property is subject to forfeiture as proceeds, rather than to the ownership of the property, as the trial court stated, it necessarily was to section 297(l) to which the trial court referred. While section 297(s)(3) permits the court to resolve claims arising under section 297 and the ownership of property under certain circumstances **[**1170]** may be, and in this case is, such a claim, neither section 297(b)(4) nor section 297(a)(9) n10 provides for a presumption of ownership in lieu of affirmative proof of that issue.

n10 Section 297(a)(9) provides:

(i) "Owner" means a person having a legitimate legal, equitable, or possessory interest in property.

(ii) "Owner" includes:

1. A coowner;
2. A life tenant;
3. A remainderman to a life tenancy in real property;
4. A holder of an inchoate interest in real property; and
5. A bona fide purchaser for value.

[*20]**

Moreover, it is far from clear that the section 297(b)(4) issue was even presented to, or raised in, the trial court. Not only does the State concede that it did not seek forfeiture pursuant to section 297(b)(4), n11 but the record reflects that, at the end of the State's case, having been invited by the trial court to expand upon its contention that the State had not met its burden of proof, the claimant referenced section 297(l)(1). The court then acknowledged that, "there is a presumption, and it has to be rebutted...." Furthermore, the State's approach was the same as the claimant's. Its argument was that it had established that: (1) distribution of controlled **[*277]** dangerous substances had occurred on Joiner's premises; (2) Joiner had no legitimate source of income, and (3) the Mercedes Benz was owned by Joiner, it having been sold to him about four months earlier by Bowers, the title owner. Implicit in its last point is that Joiner acquired the automobile during the time when he was distributing cocaine. Summing up, the State argued:

As I indicated, we showed that [Joiner] was in fact involved with the distribution of cocaine. We showed that at the very least he came up with three **[***21]** thousand seven hundred dollars. Rational inference is that in fact that those are the proceeds of his drug activity he was involved in. And, therefore, our complaint is based upon the fact that this vehicle constitutes proceeds. And therefore I think we have in fact made our prima facie case regarding that issue.

At the close of all the evidence, the claimant again referred to section 297(l), urging the trial court "not to impose this rebuttable presumption." He argued that the presumption did not apply "because under the Code Section that I've cited, we have sufficient information to show he's the owner." While not referring to section 297(l) explicitly, the prosecutor, in rebuttal, acknowledged that "the only question is whether or not this vehicle constitutes the proceeds of drug activity and that drug being cocaine." Clearly, therefore, neither party addressed the use of the Mercedes Benz as section 297(b)(4) would have required.

n11 This relieves us of the obligation of addressing the sufficiency of the evidence the State adduced to prove that proposition.

[*22]**

The Court of Special Appeals held that Corporal Leadbeter's testimony detailing the information he received from his confidential informant, his surveillance of Joiner's residence and other places, and his verification or corroboration of the information the informant provided was sufficient evidence of Joiner's involvement in the "sale, receipt, possession, or concealment of controlled dangerous substances," and that the Mercedes Benz was "'used or intended for use, to transport, or in [some] manner to facilitate the transportation' of said substance." It found, in addition, that the trial court believed that testimony and that the claimant did not challenge its admissibility on appeal. These holdings are belied by the **[*278]** record. First, as we have seen, the trial court's ruling was based on section 297(l)(1), not section 297(b)(4). Furthermore, the record reflects that when Corporal Leadbeter first gave an indication that he would refer to information received from confidential informants, the claimant objected, arguing:

But it's not first [hand] information, and to get it second hand from the officer, he has no first hand knowledge of what use either the vehicle has or whether **[***23]** Mr. - what Mr. Joiner's involvement is. And if it's coming directly from unnamed sources, we have a right to know who they are and actually they should be here to testify first hand.

[1171]** As we have also seen, the trial court agreed and admitted the testimony to explain the witness' subsequent actions, not to prove Joiner's drug activity. Later, after the testimony relied upon by the Court of Special Appeals had been given, the claimant reminded the trial court of its prior ruling that the information from confidential sources was not admitted as substantive evidence. Neither the court nor the State challenged those remarks. See Mejia v. State, 328 Md. 522, 537, 616 A.2d 356, 363 (1993); Henry v. State, 324 Md. 204, 240-242, 596 A.2d 1024, 1042-43 (1991) (A party tacitly admits a fact when "(1) the party heard and understood the other person's statement; (2) at the time, the party had an opportunity to respond; (3) under the circumstances, a reasonable person in the party's presence, who disagreed with the statement would have voiced that disagreement."). Accordingly, it is clear that the evidence **[***24]** upon which the Court of Special Appeals placed such heavy reliance was neither offered to prove Joiner's involvement in drug activity, nor accepted by the trial court for that purpose.

IV.

We turn now to the construction of section 297(l)(1) and its application to the facts sub judice. The provisions of that section are clear and unambiguous: It is rebuttably presumed that property which a person owns or in which he or she has an ownership interest constitutes proceeds and, hence, is subject to forfeiture, whenever the State, by clear and **[*279]** convincing evidence proves that: (1) the person has committed one or more of several enumerated controlled dangerous substances offenses; (2) the person acquired the property during the period in which, or within a reasonable time after, the violation or violations occurred; and (3) the violation was the only likely source of the property. The section 297(l)(1) presumption relates to the forfeitability of the property as proceeds; it does not address the property's ownership. In other words, the section 297(l)(1) presumption has no relevance to establishing ownership of the property. Who owns the property is an issue the resolution of which is **[***25]** dependent upon the adequacy of the evidence that each party adduces on that issue. No presumption of ownership derives from proof of criminal involvement; on the other hand, a presumption of forfeitability arises from proof that the property constitutes proceeds. State v. One 1984 Toyota Truck, 311 311 Md. 184, 533 A.2d 659, 665 (1987). Once the presumption is raised, the burden shifts to the claimant to the property to rebut it. Because it is not otherwise specified, that burden, consistent with the burden in civil cases, is preponderance of the evidence. Blue Bird Cab Company, Inc., 263 Md. at 659, 284 A.2d at 205.

Responding to the claimant's argument that it had not met its burden of proof, the State argued:

I think I have shown, Your Honor, that Mr. Joiner's apartment was searched pursuant to a search warrant. At the time the police seized from that apartment scales, razor blades, plastic bags, measuring spoons, all with traces of cocaine.

I provided the report of analysis which shows that in fact the traces were in fact the substance cocaine. That obviously - and based upon **[***26]** - also when you add to that the expert testimony provided by Detective Leadbeter that these are items which are used in distribution and not personal use, I believe I've established at that point in time distribution was in fact occurring on those premises and those were the premises of Mr. Keith Joiner.

[*280]

Section 297(l)(1) references five controlled dangerous substances statutes, §§ 286, 286A, 286B, 286C and 290, which are a prerequisite to its application. Of those, four have no conceivable relevance to the case sub judice. n12 For § 286 to apply, the State's evidence **[**1172]** must have established a violation of either subsection (a)(1) or (5).

n12 Because there is neither an allegation, nor proof, that Joiner brought any controlled dangerous substances into the State, section 286A does not apply. Similarly, the complaint did not allege, and the State did not even attempt to prove, distribution of noncontrolled substances. Accordingly, section 286B cannot apply. Section 286C applies only when minors are used in the drug activities. There was neither an allegation, nor proof that Joiner used minors in the distribution of cocaine. And, because these offenses are not implicated, patently, § 290, which proscribes attempts, endeavors and conspiracies pertaining to the foregoing offenses, cannot apply either.

[*27]**

Section 286, as relevant, makes it unlawful:

(1) to manufacture, distribute, or dispense, or to possess a controlled dangerous substance in sufficient quantity to reasonably indicate under all circumstances an intent to manufacture, distribute, or dispense, a controlled dangerous substance;

* * *

(5) to keep or maintain any common nuisance which means any dwelling house, apartment, building, vehicle, vessel, aircraft, or any place whatever which is resorted to by drug abusers for purposes of illegally administering controlled dangerous substances or which is used for the illegal manufacture, distribution, dispensing, storage or concealment of controlled dangerous substances or controlled paraphernalia, as defined in § 287(d) of this subheading.

* * *

As we have already seen, the search of Joiner's residence uncovered a small amount of marijuana and PCP, paraphernalia, and cocaine residue. Corporal Leadbeter, qualified as an expert, opined that possession of the latter two items n13 was **[*281]** consistent with the distribution of cocaine. He was not asked and, therefore, did not state explicitly the significance of the small amount of marijuana and PCP. Whatever may be the significance **[***28]** of evidence of cocaine residue on controlled paraphernalia, the possession of which, based on expert testimony, is consistent with the distribution of cocaine, to the proof of section 286(a)(1), i.e., that Joiner distributed or possessed with intent to distribute, cocaine, that evidence may be consistent with the maintenance of a common nuisance. McMillian v. State, 325 Md. 272, 296, 600 A.2d 430, 441 (1992). The expert opinion of Corporal Leadbeter, the cocaine residue and the controlled paraphernalia may suffice to establish that Joiner's residence was a place used for the illegal distribution and/or storage or concealment of cocaine and controlled paraphernalia. No additional evidence is required to establish the recurring nature of the offense, an essential element of the offense. See McMillian, 325 Md. at 294-96, 600 A.2d at 441-42.

n13 While Corporal Leadbeter did not specifically mention the cocaine residue when he expressed his opinion, it is fair to assume that its presence was relevant to, and, indeed, colored, that opinion, especially with respect to what substance was being distributed.

[*29]**

The second prerequisite for that presumption is that the Mercedes Benz was purchased during the time that Joiner was engaged in the maintenance of a common nuisance or shortly thereafter. Aside from Corporal Leadbeter's testimony, the evidence to establish it consisted of a sales receipt, in the claimant's name, found in Joiner's bedroom and the testimony of Detective Whigham and the claimant, concerning the nature, and timing, of the transaction involving the Mercedes Benz, between Joiner and the claimant. According to Corporal Leadbeter, an informant told him that Joiner used a described Mercedes Benz, which he observed at Joiner's residence and other places, and in which he observed Joiner, on one occasion. Both Whigham and the claimant testified that possession of the Mercedes Benz was delivered to Joiner, a matter never in dispute. They also agreed that, consistent with the sales receipt, that transfer would have occurred sometime in May, 1990. The investigation into Joiner's drug **[*282]** activities began in June 1990, a fact which the claimant finds most significant. n14

n14 The claimant argues, of course, that, if the requirement is that the purchase be made during the time of the drug activity, or shortly thereafter, evidence that shows that the property was purchased prior to the start of the investigation is insufficient. In other words, unlike the State, the claimant takes the position that, to be clear and convincing evidence of a purchase during the period, the evidence be must "strong, positive and free from doubt," Berkey v. Delia, 287 Md. 302, 318, 413 A.2d 170, 178 (1980), quoting Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 330 N.E.2d 161, 175 (Mass. 1975), both with respect to the fact of purchase and the timing of the purchase.

[*30]**

As to the proof of the third factor - that the drug activity is the only source of the property - the only evidence adduced was Corporal Leadbeter's testimony that when he **[**1173]** called Hollywood Car Care he was told that Joiner did not work there. n15

n15 It is unclear whether, as the State contends, Corporal Leadbeter testified that, in his opinion, based on his firsthand knowledge, Joiner was not engaged in any legitimate business activities. On direct examination, the prosecutor asked: "As part of your investigation of Mr. Keith Joiner from your firsthand knowledge only, were you able to establish whether, as the State contends, or not Mr. Joiner engaged in any legitimate business activities?" After the claimant's objection had been overruled, the witness answered, "No." It is clear that, on cross-examination, he acknowledged that he did not keep Joiner under surveillance for 24 hours and, thus, did not know for a fact what legitimate activity Joiner might have been involved in.

Unlike in the ordinary forfeiture case, **[***31]** section 297(l) requires that the prerequisites for the presumption of forfeiture and, if not rebutted, for forfeiture, be established by clear and convincing evidence. Although we have not heretofore had the occasion to apply this standard of proof in a forfeiture case, this Court has applied it in a variety of other contexts. See e.g., Owens-Illinois v. Zenobia, 325 Md. 420, 601 A.2d 633 (1992) (proof of punitive damages); Everett v. Baltimore Gas & Electric, 307 Md. 286, 301-04, 513 A.2d 882, 889-90 (1986) (fraud); Washington County Department of Social Services v. Clark, 296 Md. 190, 192-99, 461 A.2d 1077, 1078-81 (1983) (termination of parental rights); Coard v. State, 288 Md. 523, 525, 419 A.2d 383, 383-84 (1980) (commitment hearings). See Mack v. Mack, 329 Md. 188, 207-09, 618 A.2d 744, 753-755 **[*283]** (1993) (withdrawal or withholding of life-sustaining medical treatment); Attorney Grievance Commission v. Powell, 328 Md. 276, 287, 614 A.2d 102, 108 (1992) **[***32]** (attorney discipline); Wentzel v. Montgomery Gen. Hosp., Inc., 293 Md. 685, 703, 447 A.2d 1244, 1253-54 (1982), cert. denied, 459 U.S. 1147, 103 S.Ct. 790, 74 L.Ed.2d 995 (1983) (sterilization of incompetent ward); Delia, 287 Md. at 318-19, 413 A.2d at 178 (libel and slander). This "heightened standard," Zenobia, 325 Md. at 469, 601 A.2d at 657, requires "a degree of belief greater than the usually imposed burden of proof by a fair preponderance of the evidence, but less than the burden of proof beyond a reasonable doubt imposed in criminal cases." Delia, 287 Md. at 318, 413 A.2d at 177. That level of proof has been characterized as "strong, positive and free from doubt." Id., quoting Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 330 N.E.2d 161, 175 (Mass. 1975). We have also said that, to be clear and convincing, "the proof must be 'clear and satisfactory' and be of such a character **[***33]** as to appeal strongly to the conscience of the court." First National Bank v. U.S.F.& G. Co., 275 Md. 400, 411, 340 A.2d 275, 283 (1975).

We adopt the definition of clear and convincing evidence applied in other contexts, for application in forfeiture cases. Reviewing the evidence adduced by the State to prove the requisite elements for the presumption of forfeiture, and ultimately, for forfeiture, in light of a clear and convincing evidence standard produces a clear result: the State failed to prove at least two of the elements. n16

n16 The evidence of Joiner's criminal activity is arguably sufficient. Indeed, had Joiner been charged with maintaining and keeping a common nuisance, the evidence might have been sufficient to find him guilty of that offense beyond a reasonable doubt. See McMillian, 325 Md. at 294-96, 600 A.2d at 441-42.

Section 297(l) requires that the property, which is the subject of the forfeiture proceedings, **[***34]** be purchased during the time of the criminal involvement or shortly thereafter. The evidence adduced, however, tended to prove that the property was purchased prior to the initiation of the investigation **[*284]** hence, prior to the criminal activity proven. While the evidence of criminal activity may have been sufficient, proof of the transfer of the automobile came before, not after, nor even during the criminal involvement. We agree with the claimant, to be clear and convincing, the evidence of that element necessarily must be precise as to when the purchase occurred.

The evidence as to the source of the property is even more glaringly deficient. The State was required to prove a negative: that there was no other likely source of the property. That burden is affirmative, not passive. As such, it is not met by failing to adduce evidence on the issue, when the record reflects only a lack of any proof on the **[**1174]** issue. In other words, the State's burden is to produce evidence that there is no other likely source for the property; it simply cannot rely on the absence of evidence. In this case, a search of the Mercedes Benz uncovered business cards, with Joiner's name on them, for a car detailing **[***35]** establishment. The natural inference to be drawn from these cards is that Joiner was connected with that company in some way. The only evidence the State offered to rebut that inference was Corporal Leadbeter's testimony, given without objection, that he called the establishment and was told that Joiner did not work there. That testimony was far from detailed. The State did not elicit to whom Corporal Leadbeter spoke or exactly what questions he asked. Because the Mercedes Benz was seized after Joiner's death, so too was the call to the car detailing company. Thus, it was certainly true that Joiner did not work there at that time. On the other hand, that answer did not shed any light on whether he ever worked there or otherwise had an interest in the business. On this issue, the testimony was vague at best. Patently, such vague testimony does not rise to the level of clear and convincing evidence. n17

n17 In its brief in the Court of Special Appeals, the State argued, with respect to whether the claimant proved an ownership interest in the Mercedes Benz:

If the Court of Appeals [sic] finds no error in the determination of ownership, the appellant [the claimant] can not argue the merits of the case, only the true owner (the Estate of Keith Delante Joiner)

can argue the merits of the case. The State lost that right when their [sic] Answer was stricken due to the failure to provide discovery. Furthermore, the Estate failed to appear at the hearing and address the merits of the case.

State's brief in Court of Special Appeals at 11-12. No such argument is made in this Court and we do not address it.

[*36]**

[*285]

JUDGMENT REVERSED. COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.

EXHIBIT 10

Fourth Amendment applies to Forfeitures

ONE **1995 CORVETTE** VIN # 1G1YY22P585103433 v. MAYOR AND CITY COUNCIL OF BALTIMORE

No. 63, September Term, 1998

COURT OF APPEALS OF MARYLAND

353 Md. 114; 724 A.2d 680; 1999 Md. LEXIS 58

February 23, 1999, Filed

DISPOSITION: **[***1]** JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED AND CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO AFFIRM THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY; COSTS IN THIS COURT AND THE COURT OF SPECIAL APPEALS TO BE PAID BY RESPONDENT.

CORE TERMS: forfeiture, exclusionary rule, Fourth Amendment, quasi-criminal, rem, punitive, forfeiture action, forfeiture proceeding, exclusionary, contraband, seizure, bag, criminal proceeding, forfeiture statute, criminal penalties, subpoena, seized, sedan, civil proceeding, liquor, duty, fine, Fourth Amendment's, illegally seized, double jeopardy, imprisonment, criminality, deterrence, seize, Fifth Amendment

HEADNOTES: HEADNOTE: The exclusionary rule applies to civil in rem **forfeiture** actions based on evidence of criminal acts or intent, including a drug-related **forfeiture** action under Maryland Code, Art. 27, section 297.

JUDGES: Bell, C.J., Eldridge, Rodowsky, Chasanow, Raker, Wilner, Cathell, JJ. Opinion by Cathell, J. Chasanow and Raker, JJ., concur.

OPINIONBY: CATHELL

OPINION: **[**681]** **[*115]**

Opinion by Cathell, J.

Chasanow and Raker, JJ., concur.

Weldon Connell Holmes filed a petition for writ of certiorari with respect to a decision of the Court of Special Appeals that reversed the decision of the Circuit Court for Baltimore City suppressing evidence in a civil **forfeiture** case brought by the State's Attorney to seize petitioner's automobile. The issue presented in the petition is "whether the Exclusionary Rule, based on the Fourth Amendment of the United States Constitution, applies in a civil **forfeiture** case in Maryland seeking the **forfeiture** of an automobile allegedly used in the drug trade." **[*116]**

I. Facts

Based on an informant's tip, three veteran officers of the Baltimore City Police Department's Northwest District Drug Enforcement Unit were conducting a general surveillance **[***2]** on Parkview Avenue in Baltimore City when they observed petitioner park his **1995 Corvette** in the area. During the surveillance, they observed another man, also unknown to them, hand petitioner a large black bag through the **Corvette's** window, after which petitioner drove away. Even though the officers at that time had no prior knowledge of petitioner's involvement with controlled dangerous substances, they believed petitioner had conducted a drug transaction with the other man. The officers followed petitioner, but lost him. A police helicopter, however, tracked petitioner and eventually other officers stopped him in the 300 block of East Cold Spring Lane. The drug enforcement officers arrived on the scene and approached petitioner.

One of the officers, explaining that he believed petitioner may have been involved in a drug transaction, asked about the contents of the bag. Petitioner responded that it contained gym equipment. The officer explained to petitioner that petitioner need not reveal the contents of the bag, but that he would request a drug-sniffing dog because of the earlier observations. Petitioner quickly opened and closed the bag. An officer observed a plastic bag inside **[***3]** the black bag, which he believed contained a controlled dangerous substance.

Petitioner was arrested on drug-related charges. n1 During the arrest, another officer took the black bag out of the car and looked inside. The bag contained approximately 500 **[*117]** grams of cocaine. The three officers also found a brown paper bag inside the car that

contained smaller bags of cocaine totaling approximately forty-eight grams. The officers then seized the car.

n1 The criminal charges against petitioner later were dropped by the State's Attorney prior to the preliminary hearing in the District Court. Respondent correctly asserts that because of the nolle prosequi, no judicial determination as to the validity of the stop, search, and arrest was made in the criminal proceeding. Respondent also asserts that the record does not reflect why the prosecutor in the criminal action decided to drop the case. At the **forfeiture** hearing, however, respondent's counsel admitted that the criminal prosecutor "was not sure whether or not she would be able to win on a motion to suppress."

[*4]**

Respondent, through the State's Attorney for Baltimore City, filed a **forfeiture** action in the Circuit Court for Baltimore City against petitioner on June 6, 1996, pursuant to Maryland Code (1957, 1996 Repl. Vol., 1998 Cum. Supp.), n2 Art. 27, section 297. That provision states in relevant part:

n2 Legislative changes to section 297 since 1996, when respondent initiated its case, have not substantially altered the relevant subsections.

> (b) Property subject to **forfeiture**. -- The following shall be subject to **forfeiture** and no property right shall exist in them:
>
> (1) All controlled dangerous substances . . .
>
> (2) All raw materials, products and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled dangerous substance . . .
>
> . . . .
>
> **[**682]** (4) All . . . vehicles . . . which are used, or intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment **[***5]** of property described in paragraph (1) or (2) of this subsection . . .
>
> . . . .
>
> (10) Everything of value furnished, or intended to be furnished, in exchange for a controlled dangerous substance in violation of this subheading, all proceeds traceable to such an exchange . . . . [Emphasis added.]

Respondent based its complaint on subsections (4) and (10). At the **forfeiture** hearing, petitioner initially moved to dismiss the case because, he alleged, the evidence necessary to prove respondent's case, the bags of cocaine, had been obtained in violation of the Fourth Amendment and thus should be suppressed under the "exclusionary rule." See generally Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961); **[*118]** Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914). After both parties argued their positions, the trial judge denied petitioner's motion. Petitioner made the same motion twice more during the hearing. The trial judge again denied each motion, but permitted a continuing motion for the record. At the conclusion of the hearing, the trial judge offered the parties the opportunity to submit written memoranda on the issue. Ultimately, the **[***6]** trial court ruled that a Fourth Amendment violation had occurred and the exclusionary rule would apply, thus suppressing the evidence from the **forfeiture** trial. The court then dismissed the case. Respondent filed a timely appeal, arguing that the exclusionary rule does not apply to **forfeiture** proceedings under section 297. The Court of Special Appeals reversed, Mayor of Baltimore v. One **1995 Corvette**, 119 Md. App. 691, 706 A.2d 43 (1998), and we granted a writ of certiorari.

II. Plymouth Sedan

Central to this case is One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 702, 85 S. Ct. 1246, 1251, 14 L. Ed. 2d 170 (1965), in which the United States Supreme Court held that the exclusionary rule applies to **forfeiture** proceedings "such as the one involved" in that case. In Plymouth Sedan, officers of the Pennsylvania Liquor Control Board stopped George McGonigle shortly after he drove his 1958 Plymouth sedan across the Benjamin Franklin Bridge into Philadelphia, Pennsylvania. The officers, positioned at the foot of the bridge in New Jersey, had followed Mr. McGonigle after observing that the rear of his Plymouth was "low in the rear, quite low." Id. at **[***7]** 694, 85 S. Ct. at 1247, 14 L. Ed. 2d 170. During the stop, the officers searched the car without a warrant, finding thirty-one cases of liquor not bearing the necessary state tax seals. The officers arrested Mr. McGonigle.

The Commonwealth of Pennsylvania subsequently filed a petition for **forfeiture** of Mr. McGonigle's car based on a state statute that proclaimed "no property rights shall exist in any . . . vehicle . . . used in the illegal manufacture or illegal **[*119]** transportation of liquor . . . and the same shall be deemed contraband and proceedings for its **forfeiture** to the Commonwealth may . . . be instituted . . . ." Id. at 694 n.2, 85 S. Ct. at 1247 n.2, 14 L. Ed. 2d 170. Mr. McGonigle initially moved to

dismiss the case, arguing that because the evidence necessary to prove the Commonwealth's case, the thirty-one cases of liquor, had been obtained in violation of the Fourth Amendment, they should be suppressed under the exclusionary rule. The trial judge granted the motion and dismissed the case. The Commonwealth appealed, and the Superior Court of Pennsylvania reversed the trial court. The Pennsylvania Supreme Court affirmed the Superior Court, holding that "even if the instant **[***8]** automobile had been illegally seized, such fact would not preclude the instant civil proceeding of **forfeiture.**" Commonwealth v. One 1958 Plymouth Sedan, 414 Pa. 540, 547, 201 A.2d 427, 431 (1964), rev'd, 380 U.S. 693, 85 S. Ct. 1246, 14 L. Ed. 2d 170 (1965). The United States Supreme Court "granted certiorari to consider the important question of whether the constitutional exclusionary rule enunciated in [Weeks and Mapp] applies to **forfeiture** proceedings of the character involved here." Plymouth Sedan, 380 U.S. at 696, 85 S. Ct. at 1248, 14 L. Ed. 2d 170 (citations omitted). The Court held "that the constitutional exclusionary **[**683]** rule does apply to such **forfeiture** proceedings," and reversed the Pennsylvania Supreme Court. Id.

In Plymouth Sedan, the Supreme Court relied heavily on Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886), n3 a case in which it was alleged that crates of plate glass **[*120]** were imported without the payment of the proper customs duty. The statute in that case provided a criminal penalty of $50 to $5000, up to two years imprisonment, and **forfeiture** of the goods. The government instituted a civil in rem **forfeiture** **[***9]** action against the imported glass. Addressing the civil nature of the proceeding, the Supreme Court in Boyd explained:

n3 Part of the Court of Special Appeals's criticism of Plymouth Sedan is its "total reliance" on Boyd, which that court says "has been completely repudiated." See One **1995 Corvette**, 119 Md. App. at 726, 706 A.2d at 61. First, we do not agree that Plymouth Sedan's reliance on Boyd was "total." Second, Boyd, though rather limited by later Supreme Court cases, has not been completely repudiated. See Fisher v. United States, 425 U.S. 391, 407, 96 S. Ct. 1569, 1579, 48 L. Ed. 2d 39 (1976) ("Several of Boyd's express or implicit declarations have not stood the test of time." (emphasis added)). Its application of the Fifth Amendment to private papers has been greatly limited, see generally Unnamed Attorney v. Attorney Grievance Comm'n, 349 Md. 391, 708 A.2d 667 (1998), as has its application of the Fourth Amendment to subpoenas for private papers. See Fisher, 425 U.S. at 407, 96 S. Ct. at 1579, 48 L. Ed. 2d 39. Boyd's discussion of **forfeiture** actions themselves, and their "quasi-criminal" nature, appears to remain intact. We know of no other court which, prior to the Court of Special Appeals decision in the instant case, had challenged Plymouth Sedan based upon its reliance on Boyd.

[*10]**

If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants,--that is, civil in form,--can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one. . . . As, therefore, suits for penalties and **forfeitures,** incurred by the commission of offenses against the law, are of this quasi criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the fourth amendment of the constitution . . . .

116 U.S. at 633-34, 6 S. Ct. at 534, 29 L. Ed. 746, quoted in Plymouth Sedan, 380 U.S. at 697-98, 85 S. Ct. at 1249, 14 L. Ed. 2d 170. The Plymouth Sedan Court made clear that, although Boyd involved evidence sought by subpoena, that factual difference was irrelevant because "the essential question is whether evidence[,] . . . the obtaining of which violates the Fourth Amendment may be relied upon **[***11]** to sustain a **forfeiture.**" Plymouth Sedan, 380 U.S. at 698, 85 S. Ct. at 1249, 14 L. Ed. 2d 170. Going on to explain its holding, the Court in Plymouth Sedan reasoned that "there is nothing even remotely criminal in possessing an automobile. It is only the alleged use to which this particular automobile was put that subjects Mr. McGonigle to its possible loss." Id. at 699, 85 **[*121]** S. Ct. at 1250, 14 L. Ed. 2d 170. Additionally, "a **forfeiture** proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law." Id. at 700, 85 S. Ct. at 1250, 14 L. Ed. 2d 170. The Supreme Court summarized its holding, stating:

We conclude that the nature of a **forfeiture** proceeding, so well described . . . in Boyd, and the reasons which led the Court to hold that the exclusionary rule . . . is obligatory upon the States under the Fourteenth Amendment . . . in Mapp, support the conclusion that the exclusionary rule is applicable to **forfeiture** proceedings such as the one involved here.

Id. at 702, 85 S. Ct. at 1251, 14 L. Ed. 2d 170.

III. Discussion

The Court of Special Appeals, in **[***12]** its opinion below, criticized Plymouth Sedan and its modern application, stating:

Does [Plymouth Sedan] stand for the broad principle that Mapp's Exclusionary Rule must be applied to all drug-related **forfeitures** of automobiles regardless of whether those **forfeiture** proceedings are criminal or civil in character? A close reading of the opinion reveals that it most certainly does not. . . . Has One 1958 **[**684]** Plymouth Sedan, whatever it stood for, retained its vitality over the thirty-three years since it was handed down? No, it has not.

One **1995 Corvette**, 119 Md. App. at 695-96, 706 A.2d at 45. That court also attempted to distinguish Plymouth Sedan from the case at hand, noting that in Plymouth Sedan the criminal penalties were less detrimental to Mr. McGonigle than the potential loss of his car in the **forfeiture** proceedings, while in this case petitioner faced severe criminal penalties that eclipsed the potential loss of his **Corvette.** Respondent makes similar arguments before this Court.

A. The Continued Viability of Plymouth Sedan

Contrary to the Court of Special Appeals's opinion, Plymouth Sedan remains applicable. As recently **[***13]** as 1994, the **[*122]** Supreme Court cited the case as authority for the proposition that the exclusionary rule applies to civil **forfeiture** proceedings. United States v. James Daniel Good Real Property, 510 U.S. 43, 49, 114 S. Ct. 492, 499, 126 L. Ed. 2d 490 (1993) ("The Fourth Amendment does place restrictions on seizures conducted for purposes of civil **forfeiture,** One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 696, 85 S. Ct. 1246, 1248, 14 L. Ed. 2d 170 (1965) (holding that the exclusionary rule applies to civil **forfeiture)**, but it does not follow that the Fourth Amendment is the sole constitutional provision in question when the Government seizes property subject to **forfeiture.**"). Although the Court of Special Appeals opined that United States v. Ursery, 518 U.S. 267, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996), impliedly overruled Plymouth Sedan, that argument is inaccurate for two reasons: (1) Ursery dealt exclusively with the Fifth Amendment Due Process Clause, see infra, and (2) Ursery never discussed or cited Plymouth Sedan in the majority opinion. n4

n4 "It would have been quite remarkable for this Court both to have held unconstitutional a well-established practice, and to have overruled a long line of precedent, without having even suggested that it was doing so." Ursery, 518 U.S. at , 116 S. Ct. at 2147, 135 L. Ed. 2d 549. These words are persuasive as to whether the Court was attempting to overrule Plymouth Sedan even though the phrase was used in a different context in Ursery.

[*14]**

Similarly, respondent relies on the Court of Special Appeals's quotation of United States v. Janis, 428 U.S. 433, 447, 96 S. Ct. 3021, 3029, 49 L. Ed. 2d 1046 (1976), to argue Plymouth Sedan does not control this case. The quotation from Janis states that "in the complex and turbulent history of the [exclusionary] rule, the Court never has applied it to exclude evidence from a civil proceeding, federal or state." That particular sentence, however, is followed by footnote seventeen of that opinion, which states: "The Court has applied the exclusionary rule in a proceeding for **forfeiture** of an article used in violation of the criminal law." Id. at 447 n.17, 96 S. Ct. at 3029 n.17, 49 L. Ed. 2d 1046 (citing Plymouth Sedan, 380 U.S. 693, 85 S. Ct. 1246, 14 L. Ed. 2d 170). **[*123]**

Eleven of the thirteen United States Courts of Appeals have interpreted Plymouth Sedan to stand for the proposition that the exclusionary rule applies to civil in rem **forfeitures.** n5 Additionally, courts in thirty- **[**685]** four states have interpreted Plymouth Sedan to stand for the same proposition. n6 We note **[*124]** that in many of these federal and state cases, the various courts refer to Plymouth **[***15]** Sedan primarily in dicta. Nevertheless, the cases consistently accept the interpretation of Plymouth Sedan as applying the exclusionary rule to civil in rem **forfeiture** proceedings. Our examination of the cases has revealed no court that completely rejects that interpretation, as the Court of Special Appeals did in the case below. n7

n5 See United States v. 500 Delaware Street, 113 F.3d 310, 312 n.3 (2d Cir. 1997); United States v. One Lot of U.S. Currency, 103 F.3d 1048, 1052 n.3 (1st Cir. 1997); United States v. 9844 South Titan Court, 75 F.3d 1470, 1492 (10th Cir. 1996); Becker v. IRS, 34 F.3d 398, 407 n.25 (7th Cir. 1994); United States v. $191,910.00 in U.S. Currency, 16 F.3d 1051, 1063 (9th Cir. 1994); United States v. Taylor, 13 F.3d 786, 788 (4th Cir. 1994); Wolf v. Commissioner, 13 F.3d 189, 194 (6th Cir. 1993); United States v. Elgersma, 929 F.2d 1538, 1548, vacated and reh'g granted, 938 F.2d 179 (1991), aff'd on other grounds, 971 F.2d 690 (11th Cir. 1992); United States v. $639,558 in U.S. Currency, 293 U.S. App. D.C. 384, 955 F.2d 712, 715 (D.C. Cir. 1992); United States v. South Half of Lot 7 and Lot 8, 876 F.2d 1362, 1369, vacated and reh'g granted, 883 F.2d 53 (1989), rev'd on other grounds, 910 F.2d 488 (8th Cir. 1990), cert. denied, 499 U.S. 936, 111 S. Ct. 1389, 113 L. Ed. 2d 445 L. Ed. 2d (1991); United States v. One 1978 Mercedes Benz, 711 F.2d 1297, 1303 (5th Cir. 1983). Although the Third

Circuit has never addressed Plymouth Sedan, two of the United States District Courts within that circuit have recognized that the case extends the exclusionary rule to civil **forfeiture** proceedings. United States v. 92 Buena Vista Ave., 738 F. Supp. 854, 861 n.6 (D.N.J. 1990), aff'd in part, remanded in part on other grounds, 937 F.2d 98 (3d Cir. 1991), aff'd, 507 U.S. 111, 113 S. Ct. 1126, 122 L. Ed. 2d 469 (1993); United States v. 1988 BMW 750I L, 716 F. Supp. 171, 174 (E.D. Pa. 1989). See also William Patrick Nelson, Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset **Forfeiture**, 80 CAL. L. REV. 1309, 1339 (1992) (noting federal courts have uniformly applied the exclusionary rule to federal drug-related **forfeitures** under Plymouth Sedan).

[*16]**

n6 See Berryhill v. State, 372 So. 2d 355, 356 (Ala. Civ. App. 1979); Wohlstrom v. Buchanan, 180 Ariz. 389, 392, 884 P.2d 687, 690 (Ariz. 1994); Kaiser v. State, 296 Ark. 125, 127, 752 S.W.2d 271, 272 (1988); In re Conservatorship of Susan T., 8 Cal. 4th 1005, 1014, 884 P.2d 988, 993 (1994); People v. Lot 23, 707 P.2d 1001, 1003 (Colo. Ct. App. 1985), aff'd in part, rev'd in part on other grounds, 735 P.2d 184 (Colo. 1987); In re One 1987 Toyota, 621 A.2d 796, 799 (Del. Super. Ct. 1992); District of Columbia v. Ray, 305 A.2d 531, 533 (D.C. 1973); State Dept. of Highway Safety & Motor Vehicles v. Killen, 667 So. 2d 433, 436 (Fla. Dist. Ct. App. 1996); Pitts v. State, 207 Ga. App. 606, 607, 428 S.E.2d 650, 651 (1993); Idaho Dept. of Law Enforcement v. $34,000 U.S. Currency, 121 Idaho 211, 214, 824 P.2d 142, 145 (Idaho App. 1991); People v. Seeburg Slot Machines, 267 Ill. App. 3d 119, 128, 641 N.E.2d 997, 1003, 204 Ill. Dec. 567 (1994); Caudill v. State, 613 N.E.2d 433, 439 (Ind. Ct. App. 1993); In re Flowers, 474 N.W.2d 546, 548 (Iowa 1991); State v. Davis, 375 So. 2d 69, 73(La. 1979); Powell v. Secretary of State, 614 A.2d 1303, 1306 (Me. 1992); Boston Housing Auth. v. Guirola, 410 Mass. 820, 825, 575 N.E.2d 1100, 1104 (1991); In re **Forfeiture** of $176,598, 443 Mich. 261, 265, 505 N.W.2d 201, 203 (1993); State v. Carrier, 765 S.W.2d 671, 672 (Mo. Ct. App. 1989); State v. One 1987 Toyota Pickup, 233 Neb. 670, 677, 447 N.W.2d 243, 248 (1989); 1983 Volkswagen v. County of Washoe, 101 Nev. 222, 224, 699 P.2d 108, 109 (1985) (per curiam); In re $207,523.46 in U.S. Currency, 130 N.H. 202, 204-05, 536 A.2d 1270, 1272 (1987) (Souter, J.); State v. Seven Thousand Dollars, 136 N.J. 223, 239, 642 A.2d 967, 974-75 (1994); In re One 1967 Peterbilt Tractor, 84 N.M. 652, 654, 506 P.2d 1199, 1201 (N.M. 1973); Finn's Liquor Shop, Inc. v. State Liquor Auth., 24 N.Y.2d 647, 649-50, 249 N.E.2d 440, 442, 301 N.Y.S.2d 584, cert. denied, 396 U.S. 840, 90 S. Ct. 103, 24 L. Ed. 2d 91 (1969); State v. One 1990 Chevrolet Pickup, 523 N.W.2d 389, 394 (N.D. 1994); Loyal Order of Moose Lodge 1044 v. Ohio Liquor Control Comm'n, 105 Ohio App. 3d 306, 309, 663 N.E.2d 1306, 1308, appeal dismissed, 74 Ohio St. 3d 1456, 656 N.E.2d 951 (**1995)**; State ex rel. State Forester v. Umpqua River Navigation Co., 258 Ore. 10, 15-16, 478 P.2d 631, 634 (1970); In re Investigating Grand Jury, 496 Pa. 452, 461, 437 A.2d 1128, 1132 (1981); State v. Western Capital Corp., 290 N.W.2d 467, 472 & n.6 (S.D. 1980); Board of License Comm'rs v. Pastore, 463 A.2d 161, 162-63 (R.I. 1983), cert. dismissed as moot, 469 U.S. 238, 105 S. Ct. 685, 83 L. Ed. 2d 618 (1985); Pine v. State, 921 S.W.2d 866, 874 (Tex. App. 1996); Sims v. Collection Div., 841 P.2d 6, 13 (Utah 1992); Commonwealth v. E. A. Clore Sons, Inc., 222 Va. 543, 548 n.4, 281 S.E.2d 901, 904 n.4 (1981); Deeter v. Smith, 106 Wash. 2d 376, 378-79, 721 P.2d 519, 520 (1986).

[*17]**

n7 Only two cases appear to question whether Plymouth Sedan continues to extend the exclusionary rule to civil **forfeitures**. Both of these cases, however, addressed issues outside the scope of the Fourth Amendment. In State v. One 1990 Chevrolet **Corvette**, 695 A.2d 502, 506 (R.I. 1997), the Rhode Island Supreme Court held that the Double Jeopardy Clause does not apply to civil in rem **forfeitures,** following United States v. Ursery, 518 U.S. 267, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996). That court noted it earlier had applied the exclusionary rule to a civil liquor license revocation hearing based on Plymouth Sedan. Like respondent in this case, the court pondered whether Ursery had effectively overruled Plymouth Sedan. The court did not answer, but distinguished Plymouth Sedan from Ursery and the case before it because Plymouth Sedan involved the Fourth Amendment, while Ursery involved Fifth Amendment double jeopardy issues. One 1990 Chevrolet **Corvette,** 695 A.2d at 507.

In United States v. One 1988 Ford Mustang, 728 F. Supp. 495 (N.D. Ill. 1989), the United States District Court for the Northern District of Illinois held that the "proportionality" test used to enforce the Eighth Amendment Excessive Fines Clause does not apply to civil **forfeiture** cases. In reaching that holding, the court questioned whether Plymouth Sedan was still good law. The holding of One 1988 Ford Mustang has been impliedly overruled, however, by United States v. Bajakajian, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998), and Austin v. United States, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993).

[*125] [*18]**

This Court's interpretation of Plymouth Sedan has not differed from the conclusions reached by the majority of other courts, even those which distinguish Plymouth Sedan. In Sheetz v. Mayor of Baltimore, 315 Md. 208, 212, 553 A.2d 1281, 1283 (1989), we stated:

As a general matter, the federal exclusionary rule applies to criminal proceedings. **[**686]** However the Supreme Court has extended the rule to at least one civil proceeding in One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania, 380 U.S. 693, 85 S. Ct. 1246, 14 L. Ed. 2d 170 (1965). There the Court held that illegally obtained contraband evidence could not be admitted in an automobile **forfeiture** case. Noting that the cost of **forfeiture** was quasi-punitive in nature and exceeded the cost of the criminal fines, the Court reasoned that "it would be anomalous indeed, under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the **forfeiture** proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible." One Plymouth Sedan, 380 U.S. at 701, 85 S. Ct. at 1251, 14 L. Ed. 2d at 175. However since then, **[***19]** the Court has declined to extend the rule to other civil proceedings. See United States v. Janis, 428 U.S. 433, 96 S. Ct. 3021, 49 L. Ed. 2d 1046 (1976) (declining to apply the rule to federal tax proceedings where criminal evidence had been obtained by state police); Immigration and Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 104 S. Ct. 3479, 82 **[*126]** L. Ed. 2d 778 (1984) (refusing to apply the rule in the context of civil deportation proceedings). [Emphasis added.]

Cf. Whitaker v. Prince George's County, 307 Md. 368, 382, 514 A.2d 4, 11 (1986) ("Though [Janis] cannot be said to stand for the proposition that evidence may never be excluded in a civil proceeding, it nonetheless severely undermined those cases in lower courts which applied the exclusionary rule to civil proceedings.") Neither Sheetz, Janis nor Whitaker dealt directly with **forfeiture** proceedings. Janis, 428 U.S. 433, 96 S. Ct. 3021, 49 L. Ed. 2d 1046, declined to extend the exclusionary rule to a civil tax proceeding against an illegal bookmaker. Sheetz, 315 Md. at 215-16, 553 A.2d at 1284-85, held that the exclusionary rule was inapplicable to administrative discharge **[***20]** proceedings unless improper motivation by the investigators could be shown. Finally, Whitaker, 307 Md. at 380, 514 A.2d at 11, distinguished Plymouth Sedan in holding the exclusionary rule would not apply to the admissibility of items seized pursuant to a search warrant, even a defective warrant, in a public nuisance action in civil court.

Although we recognize, as did the Court of Special Appeals, that the reach of the exclusionary rule has been limited since Mapp and Plymouth Sedan, see One **1995 Corvette**, 119 Md. App. at 699-720, 706 A.2d at 49-58, we do not believe it to be appropriate, given the long and extensive history of reliance on Plymouth Sedan by the federal and state court systems, for this Court to attempt to overrule Plymouth Sedan. That is for the Supreme Court to do if it so chooses. It is our duty to continue to apply Plymouth Sedan. See In re Flowers, 474 N.W.2d 546, 548 (Iowa 1991) ("We are unwilling to anticipate the demise of Plymouth Sedan . . . in the absence of a clear indication from the Supreme Court that it is no longer to be followed.").

B. Plymouth Sedan Applies to the Case Sub Judice

We also **[***21]** address whether, as respondent argues, a civil in rem **forfeiture** proceeding under section 297 is distinguishable from the **forfeiture** proceeding in Plymouth Sedan. This argument, even if applicable, would depend on whether a civil **[*127]** in rem **forfeiture** action under section 297 is "quasi-criminal," thus requiring Fourth Amendment protections to be enforced through the exclusionary rule by reason of language within Boyd, Plymouth Sedan, and their progeny. We conclude that section 297 is "quasi-criminal."

1. The Intended Purpose of the Fourth Amendment

Both parties in this appeal argue that the exclusionary rule should or should not be applied to section 297 depending on whether the Legislature intended the law to be "punitive." Respondent, arguing the law is not intended to be punitive, relies on Ursery, 518 U.S. at , 116 S. Ct. at 2149, 135 L. Ed. 2d 549, which held that civil in rem **forfeitures,** particularly under 21 U.S.C. § 881, the federal equivalent to section 297, are not "punitive" for purposes of the Double Jeopardy Clause. In opposition, petitioner relies on Aravanis v. Somerset County, 339 Md. 644, **[**687]** 664 A.2d 888 (**1995)**, cert. **[***22]** denied, 516 U.S. 1115, 116 S. Ct. 916, 133 L. Ed. 2d 846 (1996), which held that "[section] 297 . . . is, like [21 U.S.C.] §§ 881(a)(4) and (a)(7), a punitive statute, the purpose of which is to require 'direct payment to a sovereign as punishment for some offense,'" under the Excessive Fines Clause contained in Article 25 of the Maryland Declaration of Rights. Id. at 655, 664 A.2d at 893 (quoting Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 265, 109 S. Ct. 2909, 2915, 106 L. Ed. 2d 219 (1989)). Aravanis was premised largely on Austin v. United States, 509 U.S. 602, 622, 113 S. Ct. 2801, 2812, 125 L. Ed. 2d 488 (1993), which held that the Eighth Amendment Excessive Fines Clause applies

to a federal civil **forfeiture** action under 21 U.S.C. § 881 because of the statute's punitive nature. See also United States v. Bajakajian, 524 U.S. 321, 118 S. Ct. 2028, 2033, 141 L. Ed. 2d 314 (1998) ("**Forfeitures** -- payments in kind -- are thus 'fines' if they constitute punishment for an offense.").

The determination of whether the prophylactic, judicially-created exclusionary rule applies to a civil in rem **forfeiture** action is not based **[***23]** on whether the **forfeiture** statute was intended to be "punitive." Rather, because the federal exclusionary **[*128]** rule remedies certain violations of the Fourth Amendment, but is not coextensive with it, we must determine whether the Fourth Amendment was intended to apply to proceedings outside the scope of a criminal trial. Although the purpose of the exclusionary rule may be to curb improper police conduct, the purpose of the Fourth Amendment is to insure "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." It protects everybody, not just those of the criminal milieu, and, thus, is not limited to criminal proceedings. This issue was discussed by the Supreme Court in Austin, 509 U.S. at 608 n.4, 113 S. Ct. at 2804-05 n.4, 125 L. Ed. 2d 488:

As a general matter, this Court's decisions applying constitutional protections to civil **forfeiture** proceedings have adhered to the distinction between [constitutional] provisions that are limited to criminal proceedings and provisions that are not. Thus, the Court has held that the Fourth Amendment's protection against unreasonable searches and seizures applies **[***24]** in **forfeiture** proceedings, [citing Plymouth Sedan and Boyd], but that the Sixth Amendment's Confrontation Clause does not, see United States v. Zucker, 161 U.S. 475, 480-482, 16 S. Ct. 641, 643, 40 L. Ed. 777 (1896). It has also held that the due process requirement that guilt in a criminal proceeding be proved beyond a reasonable doubt, see In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), does not apply to civil **forfeiture** proceedings. See Lilienthal's Tobacco v. United States, 97 U.S. 237, 271- 272, 24 L. Ed. 901 (1878).

The Double Jeopardy Clause has been held not to apply in civil **forfeiture** proceedings, but only in cases where the **forfeiture** could properly be characterized as remedial. See United States v. One Assortment of 89 Firearms, 465 U.S. 354, 364, 104 S. Ct. 1099, 1105, 79 L. Ed. 2d 361 (1984); One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237, 93 S. Ct. 489, 493, 34 L. Ed. 2d 438 (1972); see generally United States v. Halper, 490 U.S. 435, 446-449, 109 S. Ct. 1892, 1900-1902, 104 L. Ed. 2d 487 (1989) (Double Jeopardy **[*129]** Clause prohibits second sanction that may not fairly be characterized as remedial). **[***25]** Conversely, the Fifth Amendment's Self-Incrimination Clause, which is textually limited to "criminal cases," has been applied in civil **forfeiture** proceedings, but only where the **forfeiture** statute had made the culpability of the owner relevant, see United States v. United States Coin & Currency, 401 U.S. 715, 721-722, 91 S. Ct. 1041, 1045, 28 L. Ed. 2d 434 (1971), or where the owner faced the possibility of subsequent criminal proceedings, see Boyd, 116 U.S. at 634, 6 S. Ct. at 534; see also United States v. Ward, 448 U.S. 242, 253-254, 100 S. Ct. 2636, 2644, 65 L. Ed. 2d 742 (1980) (discussing Boyd).

And, of course, even those protections associated with criminal cases may apply to a civil **forfeiture** proceeding if it is so punitive that the proceeding must reasonably be considered criminal. See Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 **[**688]** S. Ct. 554, 9 L. Ed. 2d 644 (1963); Ward, supra. [Emphasis added.]

The Supreme Court as late as 1993 in Austin noted that the Fourth Amendment's provisions were not limited to criminal proceedings, but, that the Confrontation Clause, the due process "reasonable doubt" standard, double jeopardy, and self-incrimination **[***26]** provisions were so limited. It clearly distinguished the applicability of these various provisions, squarely refusing to limit the Fourth Amendment's provisions to criminal cases, relying on Plymouth Sedan and Boyd in the process. The Court thus clearly implied in Austin that although the exclusionary rule is a judicially-created remedy intended to apply primarily to criminal and "quasi-criminal" proceedings, the Fourth Amendment applies to all "unreasonable searches and seizures" by the government, regardless of context. See United States v. James Daniel Good Real Property, 510 U.S. 43, 51, 114 S. Ct. 492, 500, 126 L. Ed. 2d 490 (1993) ("It is true, of course, that the Fourth Amendment applies to searches and seizures in the civil context and may serve to resolve the legality of these governmental actions without reference to other constitutional provisions."). **[*130]**

Some administrative proceedings, although civil in nature, also can involve evidence that an administrative agency has searched for and seized while inspecting private property. Several Maryland statutes grant administrative agencies the right to seek search warrants to inspect private property. See **[***27]** Md. Code (1992, 1998 Repl Vol.), § 3-205 of the Business Regulation Article (amusement attractions); Md. Code (1982, 1996 Repl. Vol.), § 7-256.1 of the Environment Article (controlled hazardous substances); Md. Code (1991, 1998 Cum. Supp.), § 5.5-113 of the Labor & Employment Article (railroad safety and health conditions); § 6-105 of the Labor & Employment Article (high voltage power lines); Md. Code (1957, 1996 Repl.

Vol.), Art. 27, § 294 (controlled dangerous substances); Md. Code (1957, 1997 Repl. Vol.,), Art. 38A, § 8A (State Fire Marshal); Md. Code (1957, 1998 Repl. Vol.), Art. 89, § 2A (miscellaneous health and safety inspections by the Division of Labor and Industry). This Court, relying on Marshall v. Barlow's, Inc., 436 U.S. 307, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978), held that search warrants sought pursuant to then Art. 89, section 2A were constitutionally valid only when based on "probable cause." Fred W. Allnutt, Inc. v. Commissioner of Labor & Industry, 289 Md. 35, 50-51, 421 A.2d 1360, 1368 (1980). n8 That holding presumably applies to all statutorily authorized administrative search warrants. Although we realize that "probable cause" has somewhat **[***28]** different meanings in criminal and administrative contexts, see id. at 48-49, 421 A.2d at 1366-67, that Fourth Amendment protections apply to some administrative search warrants nonetheless demonstrates that the Fourth Amendment extends beyond traditional criminal cases.

n8 Barlow's has since been limited by Donovan v. Dewey, 452 U.S. 594, 101 S. Ct. 2534, 69 L. Ed. 2d 262 (1981), which held that warrantless administrative searches are constitutionally permissible when alternative protections, namely regularity, are in place and specific enforcement needs exist. Allnutt remains good law.

> The Fourth Amendment is not limited by its language or its history to the context of criminal trials. Its goal is to insure freedom from unreasonable governmental searches and seizures **[*131]** of any nature. By contrast, the goal of the Double Jeopardy Clause is to prevent multiple punishments and prosecutions (textually and historically criminal punishments and prosecutions), Ursery, 518 U.S. at , 116 S. Ct. at **[***29]** 2139-40, 135 L. Ed. 2d 549, and the goal of the Eighth Amendment Excessive Fines Clause is to prevent excessive punishments in the form of payments extracted by the government. See generally Bajakajian, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314; Austin, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488. After Austin, therefore, a determination of whether a **forfeiture** statute is "punitive" in nature is only necessary when a double jeopardy or Eighth Amendment violation is alleged or when some other "protections associated with criminal cases" other than Fourth Amendment protections, are involved. Austin, 509 U.S. at 608 n.4, 113 S. Ct. at 2804-05 n.4, 125 L. Ed. 2d 488 (citing Ward, 448 U.S. 242, 100 S. Ct. 2636, 65 L. Ed. 2d 742; Mendoza-Martinez, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d **[**689]** 644). Fourth Amendment protections, therefore, apply regardless of the criminality of the conduct of the owner of the property or the use to which the property is put.

As for other constitutional protections, a reviewing court should concern itself with whether the particular protection was intended to apply to the particular case before it. Often, this decision **[***30]** will be based on whether the particular constitutional protection was intended to be limited to criminal or civil matters. Thus, as noted in Austin, 509 U.S. at 608 n.4, 113 S. Ct. at 2804 n.4, 125 L. Ed. 2d 488, the Sixth Amendment Confrontation Clause, the "beyond a reasonable doubt" standard, and the Fifth Amendment protection against self-incrimination, generally limited to criminal causes, do not apply to civil **forfeitures.** As noted, the Fourth Amendment lacks any such textual limitations. The Fourth Amendment applies, regardless of context, in cases in which the government allegedly has committed an "unreasonable" search or seizure or both. **[*132]**

2. Plymouth Sedan's Definition of "Quasi-Criminal" Applies to Section 297

Respondent argues, as the Court of Special Appeals opined below, that because Plymouth Sedan involved a case in which the penalty under the civil **forfeiture** action could exceed the criminal penalties, the term "quasi-criminal" is limited to those circumstances, making the current case distinguishable. In support of this argument, respondent notes that in the case before us, petitioner stands to lose his **Corvette,** yet in criminal court he would have **[***31]** faced up to twenty years of imprisonment, $25,000 in fines, and a mandatory minimum of five years imprisonment without parole. By contrast, in Plymouth Sedan, the punishment for the liquor offense was a $100 to $500 fine, but Mr. McGonigle's car was worth $1,000. n9 Noting this, the Supreme Court stated in Plymouth Sedan, 380 U.S. at 700-01, 85 S. Ct. at 1251, 14 L. Ed. 2d 170, that "the **forfeiture** is clearly a penalty for the criminal offense and can result in even greater punishment than the criminal prosecution." The Court reasoned that "it would be anomalous indeed, under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the **forfeiture** proceeding, requiring the determination that the criminal **[*133]** law has been violated, the same evidence would be admissible." Id. at 701, 85 S. Ct. at 1251, 14 L. Ed. 2d 170.

n9 It is certainly possible that Mr. McGonigle's automobile could have been worth less than the criminal penalty. Given the wide range of available penalties in any given criminal statute compared to the wide range in values of property sought to be **forfeited,** it would prove difficult to say that a particular **forfeiture** law always

exceeds or does not exceed the related criminal penalties. Under respondent's argument, the application of the exclusionary rule would bear little relation to the nature of the **forfeiture** statute, or of the **forfeiture** itself, but only to the value of the item seized. An identical search of two vehicles, one a Rolls Royce and the other, a twenty-year-old economy car, could cause differing applications of the exclusionary rule. Because of the value of the Rolls Royce, the statute might be punitive while, because of the low value of the other vehicle, it might not be. In other words, the evidence might be excluded in one instance and admitted in the other. This argument would lead to the absurd situation where the exclusionary rule would or would not be applicable depending upon the value of the item seized. We note that in Boyd, the civil **forfeiture** penalty did not exceed the criminal penalty, which included **forfeiture,** as well as two years imprisonment and a $50 to $5,000 fine. Boyd, 116 U.S. at 617, 6 S. Ct. at 525, 29 L. Ed. 746.

[*32]**

Respondent also alleges that when Plymouth Sedan referred to a **forfeiture** action "such as the one involved here," the Court meant to limit its holding to **forfeiture** statutes similar to Pennsylvania's, which authorized a civil **forfeiture** action only after a criminal conviction. Respondent points out that under the Maryland **forfeiture** statute, criminal charges are irrelevant as to whether a **forfeiture** complaint may be filed under section 297 against the suspect property. Despite respondent's arguments, the conduct that gives rise to the **forfeiture** action under section 297 must, nevertheless, be criminal in nature. Under the statute, if there is no criminal conduct or criminal intent relating to the use of the object for which **forfeiture** is sought, no foundation for **forfeiture** exists. Subsection (b)(4) of section 297 provides that vehicles "used or intended for use, to transport . . . property described" in certain other **[**690]** paragraphs are subject to **forfeiture.** The property described in those paragraphs, subsections 297(b)(1) & (2), are controlled dangerous substances utilized "in violation of the provisions of this subheading." The laws contained within the subheading, "Health-Controlled **[***33]** Dangerous Substances," establish the criminality of the conduct at issue here -- the illegal manufacture, distribution, or possession of controlled dangerous substances, including possession in sufficient quantities to indicate an intent to distribute. Although criminal charges may not be necessary, criminal conduct or criminal intent is.

A more supportable interpretation of Plymouth Sedan is that it speaks in general terms, labeling as "quasi-criminal" any **forfeiture** action based upon inherently criminal activity, whether actually indictable or not, and no matter what the punishment. For instance, the Court noted that "as Mr. Justice Bradley aptly pointed out in Boyd, a **forfeiture** proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law." Plymouth Sedan, 380 U.S. at 700, 85 S. Ct. at 1250, 14 L. Ed. 2d 170. Moreover, immediately **[*134]** after noting the disparity in the **forfeiture** and criminal penalties in the case before it, the Plymouth Sedan Court noted in a footnote that Boyd "rejected any argument that the technical character of a **forfeiture** as an in rem proceeding **[***34]** against the goods had any effect on the right of the owner of the goods to assert as a defense violations of his constitutional rights." Id. at 702 n.11, 85 S. Ct. at 1251 n.11, 14 L. Ed. 2d 170 (emphasis added). Considering the use of this broad language, the Court was referring impliedly not just to **forfeitures** based upon the specific statutes in Boyd or Plymouth Sedan, but to all **forfeiture** actions requiring evidence of a criminal nature, i.e., evidence of criminality. It is this general application of the exclusionary rule to most civil in rem **forfeiture** proceedings based upon criminal conduct, i.e., "quasi-criminal" proceedings, that the eleven federal circuits and thirty-four sister states have accepted and applied. See supra.

We also note that the Supreme Court took great pains to distinguish its holding in Plymouth Sedan from United States v. Jeffers, 342 U.S. 48, 54, 72 S. Ct. 93, 96, 96 L. Ed. 59 (1951) and Trupiano v. United States, 334 U.S. 699, 710, 68 S. Ct. 1229, 1224-35, 92 L. Ed. 1663 (1948). In those cases, the Court stated in dicta that contraband per se, illegally seized and subsequently suppressed under the exclusionary **[***35]** rule, need not be returned to the criminal defendant because the contraband itself is illegal to possess. See Plymouth Sedan, 380 U.S. at 698-99, 85 S. Ct. at 1249-50, 14 L. Ed. 2d 170. By contrast, in Plymouth Sedan, the Court noted that possession of an automobile is not "even remotely criminal." Id. at 699, 85 S. Ct. at 1250, 14 L. Ed. 2d 170. Rather, the Court stated, "it is only the alleged use to which this particular automobile was put that subjects Mr. McGonigle to its possible loss." Id. The Court went on to explain that like in Boyd, the property involved in the **forfeiture** proceeding was "not intrinsically illegal in character." Id. at 700, 85 S. Ct. at 1250, 14 L. Ed. 2d 170.

Just as there was "nothing even remotely criminal in possessing" a 1958 Plymouth, it was not criminal for petitioner to **[*135]** own a **1995 Corvette.** To prove, therefore, that the derivative contraband in this case, the **Corvette, should be forfeited** under section 297, respondent must provide evidence of a drug crime or the intention to commit one by petitioner related to the use of the vehicle, just as the Commonwealth in Plymouth

Sedan had to prove evidence of contraband per se, **[***36]** the unsealed liquor, to seize Mr. McGonigle's car. A section 297 **forfeiture** action is, therefore, "quasi-criminal" litigation because criminality is at the basic foundation of the conduct from which a **forfeiture** suit may arise under the Maryland statute. n10

n10 We recognize that in Chase v. State, 309 Md. 224, 248, 522 A.2d 1348, 1360 (1987), we cited a major treatise which "pointed out that the courts which hold that the exclusionary rule applies in **forfeiture** proceedings rely on Plymouth's reasoning that the rule applies to proceedings which are 'quasi-criminal' in that their object is to penalize for the commission of an offense against the law and could result in even greater punishment than the criminal prosecution." (Emphasis added.) Again, the primary focus in **forfeiture** cases involving the Fourth Amendment is not on "punitiveness" and "punishment," but the Fourth Amendment's purpose of prohibiting "unreasonable searches and seizures." See Austin, 509 U.S. at 608 n.4, 113 S. Ct. at 2804, 125 L. Ed. 2d 488. The **forfeiture** statute in Plymouth Sedan had a penalty that, in that case, exceeded the possible criminal penalties, and also contained a condition precedent to the maintenance of the suit, i.e., a criminal conviction. It was, therefore, "quasi-criminal" in nature, adding support to the Supreme Court's decision. But, the Court did not limit its holding to only that factual context.

[*37]**

[691]** Finally, we reject respondent's argument that section 297, unlike the statute in Plymouth Sedan, does not require the actual commission of a crime to trigger a **forfeiture** action. Respondent cites United States v. One Assortment of 89 Firearms, 465 U.S. 354, 104 S. Ct. 1099, 79 L. Ed. 2d 361 (1984), and One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 93 S. Ct. 489, 34 L. Ed. 2d 438 (1972), for this proposition that Plymouth Sedan covered only **forfeiture** actions triggered by a criminal conviction. Both of these cases, however, addressed the Double Jeopardy Clause, which the Supreme Court has repeatedly held does not apply to civil **forfeiture** proceedings the Legislature does not intend to be "punitive." See generally Ursery, 518 U.S. 267, 116 S. Ct. 2135, 135 L. Ed. 2d 549. That a civil **forfeiture** statute requires a criminal **[*136]** conviction prior to filing is more relevant under the Double Jeopardy Clause, which, as we have noted, seeks to prevent multiple punishments for the same offense. Considering Austin, the "punitive" terminology is of much lesser relevance, if applicable at all, in Fourth Amendment cases.

Moreover, Boyd, upon which Plymouth **[***38]** Sedan relied heavily, concerned a revenue law that authorized **forfeiture** as a criminal penalty for failure to pay customs duties. Nevertheless, rather than initiating criminal proceedings, the government, in order to utilize a statute authorizing the issuance of a subpoena in non-criminal matters, filed a civil in rem action against the imported goods. The government's intention was obvious: the importer's papers were essential to prove the importer had not paid duties on the goods in question. The federal statute used by the government authorized it to issue a subpoena compelling production of such papers "in all suits and proceedings other than criminal, arising under any of the revenue laws of the United States." Boyd, 116 U.S. at 619, 6 S. Ct. at 526, 29 L. Ed. 746 (emphasis added). The government based its subpoena on its "showing that said action is a suit or proceeding other than criminal, arising under the customs revenue laws of the United States, and not for penalties." Id. (emphasis added). That the **forfeiture** derived from "an act [authorizing subpoenas,] which expressly excludes criminal proceedings from its operation, (though embracing civil **[***39]** suits for penalties and **forfeitures,**) and . . . an information not technically a criminal proceeding," id. at 633, 6 S. Ct. at 534, 29 L. Ed. 746, made little difference. The Court emphasized that because the government proceeded using a non-criminal action should not "relieve the proceedings or the law from being obnoxious to the prohibitions" of the Fourth Amendment. Id.

We, too, deal with a statute that does not create a criminal proceeding, even though criminal evidence or contraband per se, i.e., the drugs, is typically necessary to prove a **forfeiture** case as to derivative contraband, i.e., the car, under section 297. As Boyd points out, "it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." Id. at 635, 6 S. Ct. at **[*137]** 535, 29 L. Ed. 746. Like the Boyd Court, we decline to allow the government to avoid compliance with the requirements of the Fourth Amendment as traditionally applicable in criminal cases by proceeding under the auspices of a civil action that authorizes the taking of private property, but only if that property is used, or intended to be used, for criminally-related **[***40]** purposes. To do otherwise might facilitate a practice in which a car or other property, and the financial benefits resulting from **forfeiture,** might become the primary purpose of the actions rather than the apprehension and conviction of the criminals and their removal from society. See William Patrick Nelson, Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset **Forfeiture**, 80 CAL. **[**692]** L. REV. 1309, 1325-33 (arguing that pragmatic concerns, i.e.,

increased budgetary revenue, the ability to use valuable assets in future undercover operations, and an appearance of stronger job performance, have encouraged greater use of **forfeiture** laws).

3. Balancing Benefits Versus Social Costs

Respondent also argues that even if we classify section 297 **forfeiture** actions as "quasi-criminal," we still should decline to apply the exclusionary rule because the Supreme Court recently noted that the rule applies only in situations "where its deterrence benefits outweigh its 'substantial social costs.'" Pennsylvania Bd. of Probation v. Scott, 524 U.S. 357, 118 S. Ct. 2014, 2019, 141 L. Ed. 2d **[***41]** 344 (1998) (quoting United States v. Leon, 468 U.S. 897, 907, 104 S. Ct. 3405, 3412, 82 L. Ed. 2d 677 (1984)). Respondent contends that applying the rule to this case would provide minimal deterrence because the loss of the ability to use the evidence in petitioner's criminal prosecution alone would deter the police, especially given the severity of the criminal penalty versus the loss of his car. As we have indicated, this approach would result in the applicability of the exclusionary rule being dependent, at least in part, on the value of the vehicle seized. Such an approach, in our view, would not be feasible. **[*138]**

Scott, moreover, is distinguishable because that case dealt only with parole revocation hearings, a type of proceeding completely unrelated to any issue determinative to this case. Scott, 524 U.S. at , 118 S. Ct. at 2017-18, 2022, 141 L. Ed. 2d 344. The Court noted that parole is essentially an agreement, i.e., a contract, between the state and a prisoner, granting "a limited degree of freedom in return for the parolee's assurance that he will comply with the often strict terms and conditions of his release." Id. at , 118 S. Ct. at 2020, 141 L. Ed. **[***42]** 2d 344. To allow an exclusionary rule in that context would hinder the state's ability to maintain close supervision over a parolee and, in turn, prove to the parole board that a parolee has violated his or her end of the "deal," i.e., contract, thus exacting great societal costs which outweigh any deterrence effect. See id.

By contrast, in a civil drug-related **forfeiture** case, the need for deterrence exceeds the societal costs. Without the application of the exclusionary rule to section 297 **forfeiture** actions, officers could seize contraband, absent sufficient probable cause to do so, even if that same evidence would be inadmissible in a criminal context to prove the wrongdoer's criminality. We already have recognized that this consideration, "whether, at the time of the illegal search, the police were aware of the potential effect of using such evidence in civil proceedings" is one factor of several "in considering the motivation behind an improper search and seizure." Sheetz, 315 Md. at 216, 553 A.2d at 1285. The lack of the deterrent effect of the exclusionary rule under circumstances in which probable cause is lacking could lead to a separate line of police work devoted **[***43]** to **forfeiture.** We are keenly aware that governments increasingly have filed civil **forfeiture** actions in lieu of criminal charges, knowing that constitutional protections provide greater obstacles to their criminal cases, and that **forfeitures** have a great financial impact not only on the defendant but on the government's coffers as well. See Nelson, supra, at 1328 (noting one study in which eighty percent of property owners who lost their assets to **forfeiture** were never charged with a criminal offense). This practice has become more commonplace **[*139]** despite our repeated warning that in this state, "**forfeitures** are disfavored in law because they are considered harsh extractions, odious, and to be avoided when possible." State ex rel. Frederick City Police Dept. v. One 1988 Toyota Pick-up Truck, 334 Md. 359, 375, 639 A.2d 641, 649 (1994) (citing United States Coin & Currency v. Director of Finance, 279 Md. 185, 187, 367 A.2d 1243, 1244 (1977); Commercial Credit Corp. v. State, 258 Md. 192, 199, 265 A.2d 748, 752 (1970)). We believe that the benefits of the deterrent effect of the exclusionary rule outweigh the costs society may incur with its proper application to **forfeitures [***44]** under section 297.

IV. Conclusion

The holding of Plymouth Sedan remains applicable to civil in rem **forfeiture** cases. **[**693]** Furthermore, Plymouth Sedan applies to civil in rem **forfeiture** actions under Art. 27, section

297. We shall therefore reverse the Court of Special Appeals.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED AND CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO AFFIRM THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY; COSTS IN THIS COURT AND THE COURT OF SPECIAL APPEALS TO BE PAID BY RESPONDENT.

CONCURBY: Raker

CONCUR: Concurring Opinion by Raker, J.,

in which Chasanow, J. joins

Filed: February 23, 1999

I believe Judge Moylan, writing below for the Court of Special Appeals, was correct in his analysis of this case. I concur in the judgment of the Court reversing the intermediate appellate court for the sole reason that neither this Court, nor the Court of Special Appeals, has the power to disregard or overrule the United States Supreme Court holding in Plymouth Sedan.

The Supreme Court of Iowa expressed a similar sentiment in In re Flowers, 474 N.W.2d 546, 548 (Iowa 1991) when it said: **[*140]**

We are not unaware that, **[***45]** since the time the Plymouth Sedan and Janis cases were decided, some reshaping has occurred in fourth amendment jurisprudence involving the exclusionary rule. We are unwilling to anticipate the demise of Plymouth Sedan, however, in the absence of a clear indication from the Supreme Court that it is no longer to be followed.

For those reasons, I concur in the judgment only.

Judge Chasanow has authorized me to state that he joins in the views expressed herein.

EXHIBIT 11

No warrant required to seize a vehicle for forfeiture – only probable cause that it is forfeitable. But see Md. Law on warrant requirement.

FLORIDA, PETITIONER v. TYVESSEL TYVORUS WHITE

No. 98-223

SUPREME COURT OF THE UNITED STATES

526 U.S. 559*; *119 S. Ct. 1555*; *143 L. Ed. 2d 748*; *1999 U.S. LEXIS 3172*; *67 U.S.L.W. 4311*; *99 Cal. Daily Op. Service 3563*; *99 Daily Journal DAR 4545*; *1999 Colo. J. C.A.R. 2780*; *12 Fla. L. Weekly Fed. S 236

March 23, 1999, Argued
May 17, 1999, Decided

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

DISPOSITION: *710 So. 2d 949*, reversed and remanded.

DECISION:

Federal Constitution's Fourth Amendment held not to require police to obtain warrant before seizing automobile from public place when police have probable cause to believe that automobile is forfeitable contraband.

SUMMARY:

Florida police officers, while arresting an individual on unrelated charges, seized his automobile from his employer's parking lot without a warrant, on the ground that (1) the individual had previously been observed using the vehicle to deliver narcotics, and (2) the vehicle was therefore allegedly subject to forfeiture under the state's contraband forfeiture statute. During a subsequent inventory search, the police found narcotics in the vehicle. The individual was charged with possession of a controlled substance on the basis of that discovery. At his trial on the possession charge, the individual moved to suppress the narcotics from evidence on the theory that they were the fruits of the warrantless seizure of the vehicle, which allegedly violated the *Federal Constitution's Fourth Amendment*. A Florida trial court denied that motion after the jury returned a guilty verdict. The First District Court of Appeal of Florida affirmed (*680 So 2d 550*). However, the Supreme Court of Florida (1) expressed the view that absent exigent circumstances, the *Fourth Amendment* required police to obtain a warrant prior to seizing property which had been used in violation of the state statute; and (2) therefore, quashed the District Court's opinion and remanded the case (*710 So 2d 949*).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by Thomas, J., joined by Rehnquist, Ch. J., and O'Connor, Scalia, Kennedy, Souter, and Breyer, JJ., it was held that (1) the *Fourth Amendment* does not require police to obtain a warrant before seizing an automobile from a public place when the police have probable cause to believe that the vehicle itself is forfeitable contraband, and (2) therefore, the *Fourth Amendment* did not require a warrant under the circumstances of the case at hand.

Souter, J., joined by Breyer, J., concurred, expressing the view that the court's decision ought not to be read as a general endorsement of warrantless searches of anything a state chose to call contraband, regardless of whether the property was in public when seized.

Stevens, J., joined by Ginsburg, J., dissented, expressing the view that (1) warrantless searches are presumptively invalid under the *Fourth Amendment*; and (2) there was no legitimate basis for an exception to that rule where (a) the seizure was based on a belief that the vehicle might have been used in the past to assist illegal activity, and (b) the vehicle's owner was already in custody.

LAWYERS' EDITION HEADNOTES:

[*LEdHN1]**

SEARCH SEIZURE §10

-- seizure of vehicle -- contraband

Headnote:[1A][1B][1C]

The *Federal Constitution's Fourth Amendment* does not require the police to obtain a warrant before seizing an automobile from a public place when the police have probable cause to believe that the vehicle itself is forfeitable contraband, since (1) the recognized need to seize readily movable contraband before it is taken away is equally weighty when the automobile itself, as opposed to its contents, is the contraband that police seek to secure, and (2) the seizure, which occurs in a public place, does not involve any invasion of the vehicle owner's privacy; therefore, the *Fourth Amendment* does not require a warrant to seize an individual's automobile where the police, while arresting the individual on unrelated charges, seize the automobile from his employer's parking lot without a warrant, on the ground that (1) the individual was previously been observed using the vehicle to deliver narcotics, and (2) the vehicle was therefore allegedly subject to forfeiture as contraband under a state statute. (Stevens and Ginsburg, JJ., dissented from this holding.)

[*LEdHN2]**

SEARCH SEIZURE §10

-- vehicle -- contraband

Headnote:[2A][2B]

Florida's contraband forfeiture statute does not require police to obtain a warrant prior to seizing a vehicle that allegedly has been used in violation of the statute.

[*LEdHN3]**

SEARCH SEIZURE §5

-- Fourth Amendment

Headnote:[3A][3B]

The *Federal Constitution's Fourth Amendment* is to be construed in light of what was deemed an unreasonable search and seizure when the Amendment was adopted.

[*LEdHN4]**

ARREST §2

-- without warrant

Headnote:[4]

Although a warrant presumptively is required for a felony arrest in a suspect's home, the *Federal Constitution's Fourth Amendment* permits warrantless arrests in public places where an officer has probable cause to believe that a felony has occurred.

SYLLABUS

Two months after officers observed respondent using his car to deliver cocaine, he was arrested at his workplace on unrelated charges. At that time, the arresting officers seized his car without securing a warrant because they believed that it was subject to forfeiture under the Florida Contraband Forfeiture Act (Act). During a subsequent inventory search, the police discovered cocaine in the car. Respondent was then charged with a state drug violation. At his trial on the drug charge, he moved to suppress the evidence discovered during the search, arguing that the car's warrantless seizure violated the *Fourth Amendment*, thereby making the cocaine the "fruit of the poisonous tree." After the jury returned a guilty verdict, the court denied the motion, and the Florida First District Court of Appeal affirmed. It also certified to the Florida Supreme Court the question whether, absent exigent circumstances, a warrantless seizure of an automobile under the Act violated the *Fourth Amendment*. The latter court answered the question in the affirmative, quashed the lower court opinion, and remanded.

Held: The *Fourth Amendment* does not require the police to obtain a warrant before seizing an automobile from a public place when they have probable cause to believe that it is forfeitable contraband. In deciding whether a challenged governmental action violates the Amendment, this Court inquires whether the action was regarded as an unlawful search and seizure when the Amendment was framed. See, *e.g., Carroll v. United States, 267 U.S. 132, 149, 69 L. Ed. 543, 45 S. Ct. 280*. This Court has held that when federal officers have probable cause to believe that an automobile contains contraband, the *Fourth Amendment* does not require them to obtain a warrant prior to searching the car for and seizing the contraband. *Id. at 150-151*. Although the police here lacked probable cause to believe that respondent's car contained contraband, they had probable cause to believe that the vehicle *itself* was contraband under Florida law. A recognition of the need to seize readily movable contraband before it is spirited away undoubtedly underlies the early federal laws relied upon in *Carroll.* This need is equally weighty when the *automobile*, as opposed to its contents, is the contraband that the police seek to secure. In addition, this Court's *Fourth Amendment* jurisprudence has consistently accorded officers greater latitude in exercising their duties in public places. Here, because the police seized respondent's vehicle from a public area, the warrantless seizure is virtually indistinguishable from the seizure upheld in *G. M. Leasing Corp. v. United States, 429 U.S. 338, 351*. Pp. 3-7, *50 L. Ed. 2d 530, 97 S. Ct. 619*.

710 So. 2d 949, reversed and remanded.

COUNSEL: Carolyn M. Snurkowski argued the cause for petitioner.

Malcolm L. Stewart argued the cause for the United States, as amicus curiae, by special leave of court.

David P. Gauldin argued the cause for respondent.

JUDGES: THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, and BREYER, JJ., joined. SOUTER, J., filed a concurring opinion, in which BREYER, J., joined. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined.

OPINION BY: THOMAS

OPINION

[*561] [*751] [**1557]** JUSTICE THOMAS delivered the opinion of the Court.

[*LEdHR1A]** [1A] The Florida Contraband Forfeiture Act provides that certain forms of contraband, including motor vehicles used in violation of the Act's provisions, may be seized and potentially forfeited. In this case, we must decide whether the *Fourth Amendment* requires the police to obtain a warrant before seizing an automobile from a public place when they have probable cause to believe that it is forfeitable contraband. We hold that it does not.

I

[*LEdHR2A]** [2A]On three occasions in July and **[***752]** August 1993, police officers observed respondent Tyvessel Tyvorus White using his car to deliver cocaine, and thereby developed probable cause to believe that his car was subject to forfeiture under the Florida Contraband Forfeiture Act (Act), *Fla. Stat. § 932.701 et seq.* (1997). [1] Several months later, the police arrested respondent at his place of employment on charges unrelated to the drug transactions observed in July and August 1993. At the same time, the arresting officers, without securing a warrant, seized respondent's automobile in accordance with the provisions of the Act. See *§ 932.703(2)(a)*. [2] They seized **[**1558]** the **[*562]** vehicle solely because they believed that it was forfeitable under the Act. During a subsequent inventory search, the police found two pieces of crack cocaine in the ashtray. Based on the discovery of the cocaine, respondent was charged with possession of a controlled substance in violation of Florida law.

1 That Act provides, in relevant part: "Any contraband article, vessel, motor vehicle, aircraft, other personal property, or real property used in violation of any provision of the Florida Contraband Forfeiture Act, or in, upon, or by means of which any violation of the Florida Contraband Forfeiture Act has taken or is taking place, may be seized and shall be forfeited." *Fla. Stat. § 932.703(1)(a)* (1997).

2 **[***LEdHR2B]** [2B]

Nothing in the Act requires the police to obtain a warrant prior to seizing a vehicle. See *State v. Pomerance, 434 So. 2d 329, 330 (Fla. Ct. App. 1983)*. Rather, the Act simply provides that "personal property may be seized at the time of the violation or subsequent to the violation, if the person entitled to notice is notified at the time of the seizure . . . that there is a right to an adversarial preliminary hearing after the seizure to determine whether probable cause exists to believe that such property has been or is being used in violation of the Florida Contraband Forfeiture Act." *§ 932.703(2)(a)*.

At his trial on the possession charge, respondent filed a motion to suppress the evidence discovered during the inventory search. He argued that the warrantless seizure of his car violated the *Fourth Amendment*, thereby making the cocaine the "fruit of the poisonous tree." The trial court initially reserved ruling on respondent's motion, but later denied it after the jury returned a guilty verdict. On appeal, the Florida First District Court of Appeal affirmed. *680 So. 2d 550 (1996)*. Adopting the position of a majority of state and federal courts to have considered the question, the court rejected respondent's argument that the *Fourth Amendment* required the police to secure a warrant prior to seizing his vehicle. *Id. at 554*. Because the Florida Supreme Court and this Court had not directly addressed the issue, the court certified to the Florida Supreme Court the question whether, absent exigent circumstances, the warrantless seizure of an automobile under the Act violated the *Fourth Amendment*. *Id. at 555*.

In a divided opinion, the Florida Supreme Court answered the certified question in the affirmative, quashed the First District Court of Appeal's opinion, and remanded. *710 So. 2d 949, 955 (1998)*. The majority of the court concluded that, absent exigent circumstances, the *Fourth Amendment* requires the police to obtain a warrant prior to seizing property **[*563]** that has been used in violation of the Act. *Ibid.* According to the court, the fact that the police develop probable cause to believe that such a violation occurred does not, standing alone, justify a warrantless seizure. The court expressly rejected the holding of the Eleventh Circuit, see **[***753]** *United States v. Valdes, 876 F.2d 1554 (1989)*, and the majority of other Federal Circuits to have addressed the same issue in the context of the federal civil forfeiture

law, *21 U.S.C. § 881*, which is similar to Florida's. See *United States v. Decker, 19 F.3d 287 (CA6 1994) (per curiam); United States v. Pace, 898 F.2d 1218, 1241 (CA7 1990)*; *United States v. One 1978 Mercedes Benz, 711 F.2d 1297 (CA5 1983)*; *United States v. Kemp, 690 F.2d 397 (CA4 1982)*; *United States v. Bush, 647 F.2d 357 (CA3 1981)*. But see *United States v. Dixon, 1 F.3d 1080 (CA10 1993)*; *United States v. Lasanta, 978 F.2d 1300 (CA2 1992)*; *United States v. Linn, 880 F.2d 209 (CA9 1989)*. We granted certiorari, 525 U.S. (1998), and now reverse.

II

[*LEdHR3A]** [3A] The *Fourth Amendment* guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and further provides that "no Warrants shall issue, but upon probable cause." *U.S. Const., Amdt. 4*. In deciding whether a challenged governmental action violates the Amendment, we have taken care to inquire whether the action was regarded as an unlawful search and seizure when the Amendment was framed. See *Wyoming v. Houghton, 526 U.S. 295, , 119 S. Ct. 1297, 143 L. Ed. 2d 408, 1999 U.S. LEXIS 2347 (1999)*; *Carroll v. United States, 267 U.S. 132, 149, 69 L. Ed. 543, 45 S. Ct. 280 (1925)* ("The *Fourth Amendment* is to be construed in light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens").

In *Carroll*, we held that when federal officers have probable cause to believe that an automobile contains contraband, **[*564]** the *Fourth Amendment* does not require them to obtain a warrant prior to searching the car for and seizing the contraband. Our holding was rooted in federal law enforcement practice at the time of the adoption of the *Fourth Amendment*. Specifically, we looked to laws of the First, Second, and Fourth Congresses that authorized federal officers to conduct warrantless searches of ships and to seize concealed goods subject to duties. *267 U.S. at 150-151* (citing Act of July 31, 1789, §§ 24, 29, 1 Stat. 43; Act of Aug. 4, 1790, § 50, 1 Stat. 170; Act of Feb. 18, 1793, **[**1559]** § 27, 1 Stat. 315; Act of Mar. 2, 1799, §§ 68-70, 1 Stat. 677, 678). These enactments led us to conclude that "contemporaneously with the adoption of the *Fourth Amendment*," Congress distinguished "the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant." *267 U.S. at 151*.

The Florida Supreme Court recognized that under *Carroll*, the police could search respondent's car, without obtaining a warrant, if they had probable cause to believe that it contained contraband. The court, however, rejected the argument that the warrantless seizure of respondent's vehicle *itself* also was appropriate under *Carroll* and its progeny. It reasoned that "there is a **[***754]** vast difference between permitting the immediate search of a movable automobile based on actual knowledge that it then contains contraband [and] the discretionary seizure of a citizen's automobile based upon a belief that it may have been used at some time in the past to assist in illegal activity." *710 So. 2d at 953*. We disagree.

[*LEdHR1B]** [1B] **[***LEdHR3B]** [3B]The principles underlying the rule in *Carroll* and the founding-era statutes upon which they are based fully support the conclusion that the warrantless seizure of respondent's car did not violate the *Fourth Amendment*. Although, as the Florida Supreme Court observed, the police lacked **[*565]** probable cause to believe that respondent's car contained contraband, see *710 So. 2d at 953*, they certainly had probable cause to believe that the vehicle *itself* was contraband under Florida law. [3] Recognition of the need to seize readily movable contraband before it is spirited away undoubtedly underlies the early federal laws relied upon in *Carroll*. See *267 U.S. at 150-152*; see also *California v. Carney, 471 U.S. 386, 390, 85 L. Ed. 2d 406, 105 S. Ct. 2066 (1985)*; *South Dakota v. Opperman, 428 U.S. 364, 367, 49 L. Ed. 2d 1000, 96 S. Ct. 3092 (1976)*. This need is equally weighty when the *automobile*, as opposed to its contents, is the contraband that the police seek to secure. [4] Furthermore, the early federal statutes that we looked to in *Carroll*, like the Florida Contraband Forfeiture Act, authorized the warrantless seizure of *both* goods subject to duties *and* the ships upon which those goods were concealed. See, *e.g.*, 1 Stat. 43, 46; 1 Stat. 170, 174; 1 Stat. 677, 678, 692.

3 The Act defines "contraband" to include any "vehicle of any kind, . . . which was used . . . as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony." *§ 932.701(2)(a)(5)*.

4 At oral argument, respondent contended that the delay between the time that the police developed probable cause to seize the vehicle and when the seizure actually occurred undercuts the argument that the warrantless seizure was necessary to prevent respondent from removing the car out of the jurisdiction. We express no opinion about whether excessive delay prior to a seizure could render probable cause stale, and the

seizure therefore unreasonable under the *Fourth Amendment*.

[*LEdHR1C]** [1C] **[***LEdHR4]** [4]In addition to the special considerations recognized in the context of movable items, our *Fourth Amendment* jurisprudence has consistently accorded law enforcement officials greater latitude in exercising their duties in public places. For example, although a warrant presumptively is required for a felony arrest in a suspect's home, the *Fourth Amendment* permits warrantless arrests in public places where an officer has probable cause to believe that a felony has occurred. See *United States v. Watson, 423 U.S. 411, 416-424, 46 L. Ed. 2d 598, 96 S. Ct. 820 (1976)*. In explaining this rule, we have drawn upon the established **[*566]** "distinction between a warrantless seizure in an open area and such a seizure on private premises." *Payton v. New York, 445 U.S. 573, 587, 63 L. Ed. 2d 639, 100 S. Ct. 1371 (1980)*; see also *id. at 586-587* ("It is also well settled that objects such as weapons or contraband found in a public place may be seized by the police without a warrant"). The principle that underlies *Watson* extends to the seizure at issue in this case. Indeed, the facts of this case are nearly indistinguishable from those **[***755]** in *G. M. Leasing Corp. v. United States, 429 U.S. 338, 50 L. Ed. 2d 530, 97 S. Ct. 619 (1977)*. There, we considered whether **[**1560]** federal agents violated the *Fourth Amendment* by failing to secure a warrant prior to seizing automobiles in partial satisfaction of income tax assessments. *Id. at 351*. We concluded that they did not, reasoning that "the seizures of the automobiles in this case took place on public streets, parking lots, or other open places, and did not involve any invasion of privacy." *Ibid.* Here, because the police seized respondent's vehicle from a public area -- respondent's employer's parking lot -- the warrantless seizure also did not involve any invasion of respondent's privacy. Based on the relevant history and our prior precedent, we therefore conclude that the *Fourth Amendment* did not require a warrant to seize respondent's automobile in these circumstances.

The judgment of the Florida Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

CONCUR BY: SOUTER

CONCUR

JUSTICE SOUTER, with whom JUSTICE BREYER joins, concurring.

I join the Court's opinion subject to a qualification against reading our holding as a general endorsement of warrantless seizures of anything a State chooses to call "contraband," whether or not the property happens to be in public when seized. The *Fourth Amendment* does not concede any talismanic **[*567]** significance to use of the term "contraband" whenever a legislature may resort to a novel forfeiture sanction in the interest of law enforcement, as legislatures are evincing increasing ingenuity in doing, cf., *e.g., Bennis v. Michigan, 516 U.S. 442, 443-446, 134 L. Ed. 2d 68, 116 S. Ct. 994 (1996)*; *id. at 458* (STEVENS, J., dissenting); *United States v. James Daniel Good Real Property, 510 U.S. 43, 81-82, 126 L. Ed. 2d 490, 114 S. Ct. 492, and n. 1 (1993)* (THOMAS, J., concurring in part and dissenting in part) (expressing concern about the breadth of new forfeiture statutes). Moreover, *G. M. Leasing Corp. v. United States, 429 U.S. 338, 50 L. Ed. 2d 530, 97 S. Ct. 619 (1977)*, (upon which we rely today) endorsed the public character of a warrantless seizure scheme by reference to traditional enforcement of government revenue laws, *id. at 351-352*, and n.18 (citing, *e.g., Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 18 HOW 272, 15 L. Ed. 372 (1856))*, and the legality of seizing abandoned contraband in public view, *429 U.S. at 352* (citing *Hester v. United States, 265 U.S. 57, 68 L. Ed. 898, 44 S. Ct. 445 (1924))*.

DISSENT BY: STEVENS

DISSENT

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

During the summer of 1993, Florida police obtained evidence that Tyvessel White was engaged in the sale and delivery of narcotics, and that he was using his car to facilitate the enterprise. For reasons unexplained, the police neither arrested White at that point nor seized his automobile as an instrumentality of his alleged narcotics offenses. Most important to the resolution of this case, the police did not seek to obtain **[***756]** a warrant before seizing White's car that fall -- over two months after the last event that justified the seizure. Instead, after arresting White at work on an unrelated matter and obtaining his car keys, the officers seized White's automobile without a warrant from his employer's parking lot and performed an inventory search. The Florida Supreme Court concluded that the seizure, which took place absent exigent circumstances or probable cause to believe **[*568]** that narcotics were present, was invalid. *710 So. 2d 949 (1998)*. [1]

1 The Florida Supreme Court's opinion could be read to suggest that due process protections in the Florida Constitution might independently require a warrant or other judicial process before seizure

under the Florida Contraband Forfeiture Act. See *710 So. 2d at 952* (discussing *Department of Law Enforcement v. Real Property, 588 So. 2d 957 (1991))*. However, the certified question put to that court referred only to the *Fourth Amendment to the United States Constitution710 So. 2d at 950*.. Thus, a viable federal question was presented for us to decide on certiorari, but of course we have no authority to determine the limits of state constitutional or statutory safeguards.

In 1971, after advising us that "we must not lose sight of the *Fourth Amendment's* fundamental guarantee," Justice Stewart **[**1561]** made this comment on what was then settled law:

"The most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the *Fourth Amendment* -- subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.' 'The burden is on those seeking the exemption to show the need for it.'" *Coolidge v. New Hampshire, 403 U.S. 443, 453, 454-455, 29 L. Ed. 2d 564, 91 S. Ct. 2022* (footnotes omitted).

Because the *Fourth Amendment* plainly "protects property as well as privacy" and seizures as well as searches, *Soldal v. Cook County, 506 U.S. 56, 62-64, 121 L. Ed. 2d 450, 113 S. Ct. 538 (1992)*, I would apply to the present case our longstanding warrant presumption. [2] **[*569]** In the context of property seizures by law enforcement authorities, the presumption might be overcome more easily in the absence of an accompanying privacy or liberty interest. Nevertheless, I would look to the warrant clause as a measure of reasonableness in such cases, *United States v. United States Dist. Court for Eastern Dist. of Mich., 407 U.S. 297, 315, 32 L. Ed. 2d 752, 92 S. Ct. 2125* **[***757]** *(1972)*, and the circumstances of this case do not convince me that the role of a neutral magistrate was dispensable.

2 *E.g., United States v. United States Dist. Court for Eastern Dist. of Mich., 407 U.S. 297, 315-318, 32 L. Ed. 2d 752, 92 S. Ct. 2125 (1972)* ("Though the *Fourth Amendment* speaks broadly of 'unreasonable searches and seizures,' the definition of 'reasonableness' turns, at least in part, on the more specific commands of the warrant clause"); *Coolidge v. New Hampshire, 403 U.S. 443, 454-455, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971)*; *Katz v. United States, 389 U.S. 347, 357, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967)*; *Johnson v. United States, 333 U.S. 10, 13-14, 92 L. Ed. 436, 68 S. Ct. 367 (1948)*; *Harris v. United States, 331 U.S. 145, 162, 91 L. Ed. 1399, 67 S. Ct. 1098 (1947)* (Frankfurter, J., dissenting) ("With minor and severely confined exceptions, inferentially a part of the Amendment, every search and seizure is unreasonable when made without a magistrate's authority expressed through a validly issued warrant"), overruled in part by *Chimel v. California, 395 U.S. 752, 23 L. Ed. 2d 685, 89 S. Ct. 2034 (1969)*; see also *Shadwick v. Tampa, 407 U.S. 345, 348, 32 L. Ed. 2d 783, 92 S. Ct. 2119 (1972)* (noting "the now accepted fact that someone independent of the police and prosecution must determine probable cause"); *Wong Sun v. United States, 371 U.S. 471, 481-482, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963)*.

The Court does not expressly disavow the warrant presumption urged by White and followed by the Florida Supreme Court, but its decision suggests that the exceptions have all but swallowed the general rule. To defend the officers' warrantless seizure, the State points to cases establishing an "automobile exception" to our ordinary demand for a warrant before a lawful search may be conducted. Each of those cases, however, involved searches of automobiles for contraband or temporary seizures of automobiles to effect such searches. [3] Such intrusions comport with the practice **[*570]** of federal customs officers during the Nation's early history on which the majority relies, as well as the practicalities of modern life. But those traditions and realities are weak support for a warrantless seizure of the vehicle itself, months after the property was proverbially tainted by its physical proximity to the drug trade, and while the owner is safely in police custody.

3 See, *e.g., Carroll v. United States, 267 U.S. 132, 153, 69 L. Ed. 543, 45 S. Ct. 280 (1925)* (where the police have probable cause, "contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant"); *United States v. Ross, 456 U.S. 798, 820, n. 26, 825, 72 L. Ed. 2d 572, 102 S. Ct. 2157 (1982)* ("During virtually the entire history of our country -- whether contraband was transported in a horse-drawn carriage, a 1921 roadster, or a modern automobile -- it has been assumed that a lawful search of a vehicle would include a search of any container that might conceal the object of the search"); *Wyoming v. Houghton, 526 U.S. 295, , 143 L. Ed. 2d 408, 119 S. Ct. 1297, 1999 U.S. LEXIS 2347 (1999)* (slip op., at 3-5);

Pennsylvania v. Labron, 518 U.S. 938, 940, 135 L. Ed. 2d 1031, 116 S. Ct. 2485 (1996) (per curiam) ("If a car is readily mobile and probable cause exists to believe it contains contraband, the *Fourth Amendment* thus permits police to search the vehicle without more").

The stated purposes for allowing warrantless vehicle searches are likewise insufficient to validate the seizure at issue, whether one emphasizes the ready mobility of automobiles **[**1562]** or the pervasive regulation that diminishes the owner's privacy interests in such property. No one seriously suggests that the State's regulatory regime for road safety makes acceptable such unchecked and potentially permanent seizures of automobiles under the State's criminal laws. And, as the Florida Supreme Court cogently explained, an exigent circumstance rationale is not available when the seizure is based upon a belief that the automobile may have been used at some time in the past to assist in illegal activity and the owner is already in custody. [4] Moreover, the state court's conclusion that the warrant process is a sensible protection from abuse of government power is bolstered by the inherent risks of hindsight at post-seizure hearings and law enforcement agencies' pecuniary interest in the seizure of such property. See *Fla. Stat. § 932.704(1)* (1997); cf. *United States v. James Daniel Good* **[***758]** *Real Property, 510 U.S. 43, 55-56, 126 L. Ed. 2d 490, 114 S. Ct. 492 (1993)*.

4 *710 So. 2d 949, 953-954 (Fla. 1998)* ("There simply was no concern presented here that an opportunity to seize evidence would be missed because of the mobility of the vehicle. Indeed, the entire focus of the seizure here was to seize the vehicle itself as a prize because of its alleged prior use in illegal activities, rather than to search the vehicle for contraband known to be therein, and that might be lost if not seized immediately"). The majority notes, *ante*, at 5, n.4, but does not confront, the argument that the mobility of White's vehicle was not a substantial governmental concern in light of the delay between establishing probable cause and seizure.

[*571] Were we confronted with property that Florida deemed unlawful for private citizens to possess regardless of purpose, and had the State relied on the plain-view doctrine, perhaps a warrantless seizure would have been defensible. See *Horton v. California, 496 U.S. 128, 110 L. Ed. 2d 112, 110 S. Ct. 2301 (1990)*; *Arizona v. Hicks, 480 U.S. 321, 327, 94 L. Ed. 2d 347, 107 S. Ct. 1149 (1987)* (citing *Payton v. New York, 445 U.S. 573, 63 L. Ed. 2d 639, 100 S. Ct. 1371 (1980))*. But "'there is nothing even remotely criminal in possessing an automobile,'" *Austin v. United States, 509 U.S. 602, 621, 125 L. Ed. 2d 488, 113 S. Ct. 2801 (1993)* (quoting *One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699, 14 L. Ed. 2d 170, 85 S. Ct. 1246 (1965))*; no serious fear for officer safety or loss of evidence can be asserted in this case considering the delay and circumstances of the seizure; and only the automobile exception is at issue, *710 So. 2d at 952*; Brief for Petitioner 6, 28. [5]

5 There is some force to the majority's reliance on *United States v. Watson, 423 U.S. 411, 46 L. Ed. 2d 598, 96 S. Ct. 820 (1976)*, which held that no warrant is required for felony arrests made in public. *Ante*, at 6. With respect to the seizures at issue in *Watson*, however, I consider the law enforcement and public safety interests far more substantial, and the historical and legal traditions more specific and ingrained, than those present on the facts of this case. See *423 U.S. at 415-424*; *id. at 429* (Powell, J., concurring) ("Logic sometimes must defer to history and experience").

In any event, it seems to me that the State's treatment of certain vehicles as "contraband" based on past use provides an added reason for insisting on an appraisal of the evidence by a neutral magistrate, rather than a justification for expanding the discretionary authority of the police. Unlike a search that is contemporaneous with an officer's probable-cause determination, *Horton, 496 U.S. at 130-131*, a belated seizure may involve a serious intrusion on the rights of innocent persons with no connection to the earlier offense. Cf. *Bennis v. Michigan, 516 U.S. 442, 134 L. Ed. 2d 68, 116 S. Ct. 994 (1996)*. And a seizure supported only by the officer's conclusion that at some time in the past there was probable cause to believe that the car was then being used illegally is especially intrusive when followed by a routine and predictable inventory search -- **[*572]** even though there may be no basis for believing the car then contains any contraband or other evidence of wrongdoing. [6]

6 The Court's reliance on *G. M. Leasing Corp. v. United States, 429 U.S. 338, 50 L. Ed. 2d 530, 97 S. Ct. 619 (1977)*, is misplaced. The seizure in that case was supported by an earlier tax assessment that was "given the force of a judgment." *Id. at 352, n. 18* (internal quotation marks omitted). We emphasized that the owner of the automobiles in question lacked a privacy interest, but he had also lost any possessory interest in the property by way of the prior judgment. In this case, despite plenty of time to obtain a warrant that would provide similar pre-seizure authority for the police, they acted entirely on their own assessment of the probative

force of evidence relating to earlier events. In addition, White's property interests in his car were apparently not extinguished until, at the earliest, the seizure took place. See *Fla. Stat. §§ 932.703(1)(c)-(d)* (1997) (the State acquires rights, interest, and title in contraband articles at the time of seizure, and the seizing agency may not use the seized property until such rights, interest, and title are "perfected" in accordance with the statute); *§ 932.704(8)*; *Soldal v. Cook County, 506 U.S. 56, 63-64, 121 L. Ed. 2d 450, 113 S. Ct. 538 (1992)*. This statutory scheme and its aims, see *Fla. Stat. § 932.704(1)* (1997), also distinguish more mundane and temporary vehicle seizures performed for regulatory purposes and immediate public needs, such as a tow from a no-parking zone. No one contends that a warrant is necessary in that case.

[1563]** Of course, requiring police officers **[***759]** to obtain warrants in cases such as the one before us will not allay every concern private property owners might have regarding government discretion and potentially permanent seizures of private property under the authority of a State's criminal laws. Had the officers in this case obtained a warrant in July or August, perhaps they nevertheless could or would have executed that warrant months later; and, as the Court suggests, *ante*, at 5, n.4, delay between the basis for a seizure and its effectuation might support a *Fourth Amendment* objection whether or not a warrant was obtained. That said, a warrant application interjects the judgment of a neutral decisionmaker, one with no pecuniary interest in the matter, see *Connally v. Georgia, 429 U.S. 245, 250-251, 50 L. Ed. 2d 444, 97 S. Ct. 546 (1977) (per curiam)*, before the burden of obtaining possession of the property shifts to the individual. Knowing that a neutral party **[*573]** will be involved before private property is seized can only help ensure that law enforcement officers will initiate forfeiture proceedings only when they are truly justified. A warrant requirement might not prevent delay and the attendant opportunity for official mischief through discretionary timing, but it surely makes delay more tolerable.

Without a legitimate exception, the presumption should prevail. Indeed, the particularly troubling aspect of this case is not that the State provides a weak excuse for failing to obtain a warrant either before or after White's arrest, but that it offers us no reason at all. The justification cannot be that the authorities feared their narcotics investigation would be exposed and hindered if a warrant had been obtained. *Ex parte* warrant applications provide neutral review of police determinations of probable cause, but such procedures are by no means public. And the officers had months to take advantage of them. On this record, one must assume that the officers who seized White's car simply preferred to avoid the hassle of seeking approval from a judicial officer. I would not permit bare convenience to overcome our established preference for the warrant process as a check against arbitrary intrusions by law enforcement agencies "engaged in the often competitive" -- and, here, potentially lucrative -- "enterprise of ferreting out crime." *Johnson v. United States, 333 U.S. 10, 14-15, 92 L. Ed. 436, 68 S. Ct. 367 (1948)*.

Because I agree with the Florida Supreme Court's judgment that this seizure was not reasonable without a warrant, I respectfully dissent.

REFERENCES

25 Am Jur 2d, Drugs and Controlled Substances 212; *36 Am Jur 2d, Forfeitures and Penalties 30*; *68 Am Jur 2d, Searches and Seizures 32, 61*

USCS, *Constitution, Amendment 4*

Fla Stat 932.701 et seq.

L Ed Digest, Search and Seizure 10

L Ed Index, Automobiles and Highway Traffic

Annotation References:

Validity, under Federal Constitution, of warrantless search of motor vehicle-- Supreme Court cases. *89 L Ed 2d 939*.

Supreme Court's views as to the federal legal aspects of the right of privacy. *43 L Ed 2d 871*.

Forfeitability of property, under Uniform Controlled Substances Act or similar statute, where property or evidence supporting forfeiture was illegally seized. *1 ALR5th 346*.

Relief to owner of motor vehicle subject to state forfeiture for use in violation of narcotics laws. *50 ALR3d 172*.

Lawfulness of seizure of property used in violation of law as prerequisite to forfeiture action or proceeding. *8 ALR3d 473*.

EXHIBIT 12

The 8th Amendment - excessive fines – applies to forfeiture

RICHARD LYLE AUSTIN, PETITIONER V. UNITED STATES

No. 92-6073

SUPREME COURT OF THE UNITED STATES

509 U.S. 602; 113 S. Ct. 2801; 1993 U.S. LEXIS 4407; 125 L. Ed. 2d 488; 61 U.S.L.W. 4811; 93 Cal. Daily Op. Service 4820; 93 Daily Journal DAR 8138; 7 Fla. Law W. Fed. S 572

June 28, 1993, Decided

PRIOR HISTORY: **[***1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

DISPOSITION: 964 F.2d 814, reversed and remanded.

CORE TERMS: forfeiture, rem, fine, Eighth Amendment, deodand, punish, excessive, forfeited, culpability, innocent, punitive, remedial, ship, fiction, vessel, forfeit, common-law, serving, bail, personam, real property, forfeitable, conveyance, monetary, remedial purpose, innocence, body shop, excessiveness, summary judgment, mobile home

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DECISION: Eighth Amendment's excessive fines clause held to apply to drug-related forfeitures of property to United States under 21 USCS 881(a)(4) and 881(a)(7).

SUMMARY: With respect to drug-related forfeitures of property to the United States, two of the provisions that have been described as authorizing "civil" forfeitures are (1) 21 USCS 881(a)(4), which, subject to an "innocent owner" defense, generally provides that a conveyance--including an aircraft, vehicle, or vessel--is forfeitable if it is used to or intended for use to facilitate the transportation of controlled substances, their raw materials, or the equipment used to manufacture or distribute them; and (2) 21 USCS 881(a)(7), which, subject to an "innocent owner" defense, generally provides that real property is forfeitable if it is used or intended for use to facilitate the commission of a drug-related crime punishable by more than 1 year's imprisonment. In August 1990, an individual was indicted on four counts of violating South Dakota's drug laws. The individual pleaded guilty to one count and was sentenced by the state court to 7 years' imprisonment. In September 1990, the United States filed an in rem action in the United States District Court for the District of South Dakota, seeking forfeiture of the individual's mobile home and auto body shop under 881(a)(4) and 881(a)(7). Rejecting the individual's argument that the forfeiture in question would violate the Federal Constitution's Eighth Amendment, the District Court entered summary judgment for the United States. On appeal, the United States Court of Appeals for the Eighth Circuit, in affirming, expressed the view that the Eighth Amendment did not apply to civil, in rem actions for the forfeiture of property to the government (964 F2d 814).

On certiorari, the United States Supreme Court reversed the judgment of the Court of Appeals and remanded the case for further proceedings. In an opinion by Blackmun, J., joined by White, Stevens, O'Connor, and Souter, JJ., it was held that (1) the clause of the Eighth Amendment prohibiting the imposition of excessive fines applied to a drug-related forfeiture of property to the United States under 881(a)(4) and 881(a)(7), because such a forfeiture constituted payment to a sovereign as punishment for some offense and did not serve solely a remedial purpose, since (a) forfeiture generally and statutory in rem forfeiture in particular historically have been understood, at least in part, as punishment, and (b) nothing in 881(a)(4) and 881(a)(7) or these provisions' legislative history contradicted the historical understanding of forfeiture as, at least in part, punishment; (2) the case would be remanded for consideration of the question whether the forfeiture at issue was constitutionally "excessive"; and (3) while the Supreme Court's decision did not rule out the possibility that the connection between the forfeited property and the offense might be relevant, the decision in no way limited the Court of Appeals from considering other factors in determining such excessiveness.

Scalia, J., concurring in part and concurring in the judgment, expressed the view that (1) however the theory

of statutory in rem forfeiture may be expressed, such a taking of lawful property must be considered, in whole or in part, punitive; (2) the Supreme Court's opinion needlessly attempted to derive from sparse caselaw the questionable proposition that the owner of property taken pursuant to an in rem forfeiture was always blameworthy; (3) even if punishment of personal culpability was necessary for a forfeiture to be a "fine" for Eighth Amendment purposes, and even if in rem forfeitures in general do not punish personal culpability, the forfeiture at issue constituted a fine, where (a) the statute in question required that the owner not be innocent, and (b) the value of the property was irrelevant to whether it was forfeited; and (4) the relevant inquiry on remand, in determining whether the forfeiture at issue was constitutionally excessive, ought to be whether the confiscated property had a close enough relationship to the offense, rather than how much the property was worth.

Kennedy, J., joined by Rehnquist, Ch. J., and Thomas, J., concurring in part and concurring in the judgment, expressed the view that while he was in substantial agreement with points 2 and 3 above of Scalia, J., the question also ought to have been reserved as to whether in rem forfeitures always amount to an intended punishment of the owner of the forfeited property.

LEXIS HEADNOTES - Classified to U.S. Digest Lawyers' Edition:

<=8> DRUGS, NARCOTICS, AND POISONS §5
forfeitures -- prohibition against excessive fines --

Headnote: <=9> [1A] <=10> [1B] <=11> [1C] <=12> [1D] <=13> [1E] <=14> [1F]
The clause of the Federal Constitution's Eighth Amendment prohibiting the imposition of excessive fines applies to a drug-related forfeiture of property to the United States under 21 USCS 881(a)(4) and 881(a)(7), because such a forfeiture constitutes payment to a sovereign as punishment for some offense and does not serve solely a remedial purpose, since (1) forfeiture generally and statutory in rem forfeiture in particular historically have been understood, at least in part, as punishment; and (2) nothing in 881(a)(4) and 881(a)(7) or these provisions' legislative history contradicts the historical understanding of forfeiture as, at least in part, punishment, where (a) unlike traditional forfeiture statutes, 881(a)(4) and 881(a)(7) expressly provide an "innocent owner" defense, thus focusing on the owner's culpability and disclosing an intent to punish only those involved in drug trafficking, (b) Congress has chosen to tie such forfeitures directly to the commission of drug offenses, given that (i) under 881(a)(4), a conveyance--including an aircraft, vehicle, or vessel--is forfeitable if it is used to or intended for use to facilitate the transportation of controlled substances, their raw materials, or the equipment used to manufacture or distribute them, and (ii) under 881(a)(7), real property is forfeitable if it is used or intended for use to facilitate the commission of a drug-related crime punishable by more than 1 year's imprisonment, (c) the legislative history of 21 USCS 881 confirms the two provisions' punitive nature, (d) the forfeitable items at issue cannot be considered dangerous or illegal items as such, and (e) the dramatic variations in the value of forfeitable conveyances and real properties undercut any argument to the effect that such forfeitures act as a reasonable form of liquidated damages.

<=17> APPEAL §1750
remand -- what may be considered --

Headnote: <=18> [2A] <=19> [2B] <=20> [2C]
On certiorari, the United States Supreme Court--having held that the excessive fines clause of the Federal Constitution's Eighth Amendment applies to drug-related forfeitures of property to the United States under 21 USCS 881(a)(4) and 881(a)(7) and having reversed a Federal Court of Appeals' decision to the contrary in a case involving such a forfeiture--will remand the case for consideration of the question whether the forfeiture at issue was constitutionally "excessive," where (1) the Court of Appeals had no occasion to consider what factors should inform the excessiveness decision, because the Court of Appeals thought that it was foreclosed from engaging in the inquiry, and (2) prudence dictates that the Supreme Court allow the lower courts to consider that question in the first instance; while the Supreme Court's decision does not rule out the possibility that the connection between the forfeited property and the offense may be relevant, the decision in no way limits the Court of Appeals from considering other factors in determining such excessiveness.

<=22> CRIMINAL LAW §75

<=23> FORFEITURES AND PENALTIES §2
prohibition against excessive fines -- applicability --

Headnote: <=24> [3A] <=25> [3B]
For purposes of determining whether the clause of the Federal Constitution's Eighth Amendment prohibiting the imposition of excessive fines is applicable to federal statutory forfeitures of property to the United States, the question is whether such forfeitures impose punishment, not whether they are civil or criminal, for (1) the Eighth

Amendment's text is not expressly limited to criminal cases; (2) the Eighth Amendment's history does not require such a limitation, where (a) there were no proposals for such a limitation when the Eighth Amendment was being framed, and (b) the final version of 10 of the English Bill of Rights of 1689, a predecessor of the Eighth Amendment, contains no such limitation; (3) the purpose of the Eighth Amendment, apart from its bail clause, was to limit the government's power to punish; (4) the excessive fines clause in particular limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense; and (5) the notion of punishment, as commonly understood, cuts across the division between civil and criminal law.

<=26> FORFEITURES AND PENALTIES §2
proceedings -- protections --

Headnote: <=27> [4A] <=28> [4B] <=29> [4C] <=30> [4D]
While the federal constitutional protections normally associated with criminal cases may apply to a civil forfeiture proceeding if it is so punitive that the proceeding must reasonably be considered as criminal, the question whether a nominally civil forfeiture proceeding should be reclassified as criminal--so that the safeguards that attend a criminal prosecution are required--is separate from the question whether
SYLLABUS: After a state court sentenced petitioner Austin on his guilty plea to one count of possessing cocaine with intent to distribute in violation of South Dakota law, the United States filed an in rem action in Federal District Court against his mobile home and auto body shop under 21 U.S.C. §§ 881(a)(4) and (a)(7), which provide for the forfeiture of, respectively, vehicles and real property used, or intended to be used, to facilitate the commission of certain drug-related crimes. In granting the Government summary judgment on the basis of an officer's affidavit that Austin had brought two grams of cocaine from the mobile home to the body shop in order to consummate a prearranged sale there, **[***2]** the court rejected Austin's argument that forfeiture of his properties would violate the Eighth Amendment's Excessive Fines Clause. The Court of Appeals affirmed, agreeing with the Government that the Eighth Amendment is inapplicable to in rem civil forfeitures.

Held:

1. Forfeiture under §§ 881(a)(4) and (a)(7) is a monetary punishment and, as such, is subject to the limitations of the Excessive Fines Clause. Pp. 606-622.

punishment is imposed by such a forfeiture for purposes of determining the applicability of the excessive fines clause of the Federal Constitution's Eighth Amendment.

<=31> FORFEITURES AND PENALTIES §2
excessiveness --

Headnote: <=32> [5A] <=33> [5B] <=34> [5C]
In view of the fact that sanctions frequently serve more than one purpose, the United States Supreme Court--in order to conclude that a forfeiture is subject to the limitations of the excessive fines clause of the Federal Constitution's Eighth Amendment--need not exclude the possibility that the forfeiture serves remedial purposes, but must determine that the forfeiture can only be explained as serving in part to punish.

<=35> CRIMINAL LAW §75
excessive fines --

Headnote: <=36> [6A] <=37> [6B]
For purposes of the excessive fines clause of the Federal Constitution's Eighth Amendment, which clause prohibits only the imposition of "excessive" fines, a fine that serves purely remedial purposes cannot be considered "excessive" in any event.

(a) The determinative question is not, as the Government would have it, whether forfeiture under §§ 881(a)(4) and (a)(7) is civil or criminal. The Eighth Amendment's text is not expressly limited to criminal cases, and its history does not require such a limitation. Rather, the crucial question is whether the forfeiture is monetary punishment, with which the Excessive Fines Clause is particularly concerned. Because sanctions frequently serve more than one purpose, the fact that a forfeiture serves remedial goals will not exclude it from the Clause's purview, so long as it can only be explained as serving in part to punish. See United States v. Halper, 490 U.S. 435, 448, 104 L. Ed. 2d 487, 109 S. Ct. 1892. Thus, consideration must be given to whether, at **[***3]** the time the Eighth Amendment was ratified, forfeiture was understood at least in part as punishment and whether forfeiture under §§ 881(a)(4) and (a)(7) should be so understood today. Pp. 606-611.

(b) A review of English and American law before, at the time of, and following the ratification of the Eighth Amendment demonstrates that forfeiture generally, and statutory in rem forfeiture in particular, historically have been understood, at least in part, as punishment. See, e.g., Peisch v. Ware, 8 U.S. 347, 4 Cranch 347, 364, 2 L. Ed. 643. The same understanding runs through this

Court's cases rejecting the "innocence" of the owner as a common-law defense to forfeiture. See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683, 686, 687. Pp. 611-618, 40 L. Ed. 2d 452, 94 S. Ct. 2080.

(c) Forfeitures under §§ 881(a)(4) and (a)(7) are properly considered punishment today, since nothing in these provisions contradicts the historical understanding, since both sections clearly focus on the owner's culpability by expressly providing "innocent owner" defenses and by tying forfeiture directly to the commission of drug offenses, and since the legislative history confirms **[***4]** that Congress understood the provisions as serving to deter and to punish. Thus, even assuming that the sections serve some remedial purpose, it cannot be concluded that forfeiture under the sections serves only that purpose. Pp. 619-622.

2. The Court declines to establish a test for determining whether a forfeiture is constitutionally "excessive," since prudence dictates that the lower courts be allowed to consider that question in the first instance. Pp. 622-623.

COUNSEL: Richard L. Johnson argued the cause for petitioner. With him on the briefs was Scott N. Peters.

Miguel A. Estrada argued the cause for the United States. With him on the brief were Acting Solicitor General Bryson, Acting Assistant Attorney General Keeney, and Thomas E. Booth. *

* Briefs of amici curiae urging reversal were filed for the American Civil Liberties Union by Gerard E. Lynch, Steven R. Shapiro, and John A. Powell; and for the National Association of Criminal Defense Lawyers by David B. Smith and Justin M. Miller.

Roger L. Conner, Robert Teir, Edward S. G. Dennis, Jr., and Peter Buscemi filed a brief for the American Alliance for Rights and Responsibilities et al. urging affirmance.

A brief of amici curiae was filed for the State of Arizona et al. by Grant Woods, Attorney General of Arizona, and Cameron H. Holmes and Sandra L. Janzen, Assistant Attorneys General, Daniel E. Lungren, Attorney General of California, George Williamson, Chief Assistant Attorney General, and Gary W. Schons, Domenick Galluzzo, Acting Chief State's Attorney of Connecticut, and by the Attorneys General for their respective jurisdictions as follows: Winston Bryant of Arkansas, Robert A. Butterworth of Florida, Michael J. Bowers of Georgia, Robert A. Marks of Hawaii, Larry EchoHawk of Idaho, Robert T. Stephan of Kansas, Chris Gorman of Kentucky, Richard P. Ieyoub of Louisiana, Michael Carpenter of Maine, J. Joseph Curran, Jr., of Maryland, Scott Harshbarger of Massachusetts, Frank J. Kelley of Michigan, Hubert H. Humphrey III of Minnesota, Michael Moore of Mississippi, Joseph P. Mazurek of Montana, Don Stenberg of Nebraska, Frankie Sue Del Papa of Nevada, Jeffrey R. Howard of New Hampshire, Tom Udall of New Mexico, Michael F. Easley of North Carolina, Susan B. Loving of Oklahoma, Ernest D. Preate, Jr., of Pennsylvania, Jeffrey B. Pine of Rhode Island, T. Travis Medlock of South Carolina, Dan Morales of Texas, Jan Graham of Utah, Stephen D. Rosenthal of Virginia, Christine O. Gregoire of Washington, Joseph B. Meyer of Wyoming, and Rosalie Simmonds Ballentine of the Virgin Islands.

JUDGES: BLACKMUN, J., delivered the opinion of the Court, in which WHITE, STEVENS, O'CONNOR, and SOUTER, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, post, p. 623. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, in which REHNQUIST, C. J., and THOMAS, J., joined, post, p. 628.

OPINIONBY: BLACKMUN

OPINION: **[*604]** **[**2803]** JUSTICE BLACKMUN delivered the opinion of the Court. In this case, we are asked to decide whether the Excessive Fines Clause of the Eighth Amendment applies to forfeitures of property under 21 U.S.C. §§ 881(a)(4) and (a)(7). We hold that it does and therefore remand the case for consideration of the question **[***5]** whether the forfeiture at issue here was excessive.

I

On August 2, 1990, petitioner Richard Lyle Austin was indicted on four counts of violating South Dakota's drug laws. Austin ultimately pleaded guilty to one count of possessing cocaine with intent to distribute and was sentenced by the state court to seven years' imprisonment. On September 7, the United States filed an in rem action in the United States District Court for the District of South Dakota seeking forfeiture of Austin's mobile home and auto body shop under **[*605]** 21 U.S.C. §§ 881(a)(4) and (a)(7). n1 Austin filed a claim and an answer to the complaint.

n1 These statutes provide for the forfeiture of:

"(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of [controlled substances, their raw materials, and equipment used in their manufacture and distribution]

. . . .

"(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment . . . ."

Each provision has an "innocent owner" exception. See §§ 881(a)(4)(C) and (a)(7).

[*6]** On February 4, 1991, the United States made a motion, supported by an affidavit from Sioux Falls Police Officer Donald Satterlee, for summary judgment. According to Satterlee's affidavit, Austin met Keith Engebretson at Austin's body shop on June 13, 1990, and agreed to sell cocaine to Engebretson. Austin left the shop, went to his mobile home, and returned to the shop with two grams of cocaine which he sold to Engebretson. State authorities executed a search warrant on the body shop and mobile home the following day. They discovered small amounts of marijuana and cocaine, a .22 caliber revolver, drug paraphernalia, and approximately $4,700 in cash. App. 13. In opposing summary judgment, Austin argued that forfeiture of the properties would violate the Eighth Amendment. n2 The District Court rejected this argument and entered summary judgment for the United States. Id., at 19.

n2 "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., Amdt. 8.

The **[***7]** United States Court of Appeals for the Eighth Circuit "reluctantly agreed with the government" and affirmed. **[*606]** United States v. One Parcel of Property, 964 F.2d 814, 817 (1992). Although it thought that "the principle of proportionality should be applied in civil actions that result in harsh penalties," ibid., and that the Government was "exacting too high a penalty in relation to the offense committed," id., at 818, the court felt constrained from holding the forfeiture unconstitutional. It cited this Court's decision in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 40 L. Ed. 2d 452, 94 S. Ct. 2080 (1974), for the proposition that, when the Government is proceeding against property in rem, the guilt or innocence of the property's owner "is constitutionally irrelevant." 964 F.2d at 817. It then reasoned: "We are constrained to agree with the Ninth Circuit that '[i]f the constitution allows in rem forfeiture to be visited upon innocent owners . . . the constitution hardly requires proportionality review of forfeitures.'" Ibid., quoting United States v. Tax Lot 1500, 861 F.2d 232, 234 (CA9 1988), **[***8]** cert. denied sub nom. Jaffee v. United States, 493 U.S. 954, 107 L. Ed. 2d 351, 110 S. Ct. 364 (1989).

[2804]** We granted certiorari, 506 U.S. 1074 (1993), to resolve an apparent conflict with the Court of Appeals for the Second Circuit over the applicability of the Eighth Amendment to in rem civil forfeitures. See United States v. Certain Real Property, 954 F.2d 29, 35, 38-39, cert. denied sub nom. Levin v. United States, 506 U.S. 815, 121 L. Ed. 2d 24, 113 S. Ct. 55 (1992).

II

Austin contends that the Eighth Amendment's Excessive Fines Clause applies to in rem civil forfeiture proceedings. See Brief for Petitioner 10, 19, 23. We have had occasion to consider this Clause only once before. In Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 106 L. Ed. 2d 219, 109 S. Ct. 2909 (1989), we held that the Excessive Fines Clause does not limit the award of punitive damages to a private party in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages. Id., at 264. The Court's opinion and JUSTICE O'CONNOR's **[*607]** opinion, concurring in part and dissenting in part, reviewed in some detail the history of the Excessive **[***9]** Fines Clause. See id., at 264-268, 286-297. The Court concluded that both the Eighth Amendment and § 10 of the English Bill of Rights of 1689, from which it derives, were intended to prevent the government from abusing its power to punish, see id., at 266-267, and therefore that "the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government," id., at 268. n3

n3 In Browning-Ferris, we left open the question whether the Excessive Fines Clause applies to qui tam actions in which a private party brings suit in the name of the United States and shares in the proceeds. See 492 U.S. at 276, n. 21. Because the instant suit was prosecuted by the United States and because Austin's

property was forfeited to the United States, we have no occasion to address that question here.

> We found it unnecessary to decide in Browning-Ferris whether **[***10]** the Excessive Fines Clause applies only to criminal cases. Id., at 263. The United States now argues that

"any claim that the government's conduct in a civil proceeding is limited by the Eighth Amendment generally, or by the Excessive Fines Clause in particular, must fail unless the challenged governmental action, despite its label, would have been recognized as a criminal punishment at the time the Eighth Amendment was adopted." Brief for United States 16 (emphasis added).

It further suggests that the Eighth Amendment cannot apply to a civil proceeding unless that proceeding is so punitive that it must be considered criminal under Kennedy v. Mendoza-Martinez, 372 U.S. 144, 9 L. Ed. 2d 644, 83 S. Ct. 554 (1963), and United States v. Ward, 448 U.S. 242, 65 L. Ed. 2d 742, 100 S. Ct. 2636 (1980). Brief for United States 26-27. We disagree. Some provisions of the Bill of Rights are expressly limited to criminal cases. The Fifth Amendment's Self-Incrimination Clause, for example, provides: "No person . . . shall be compelled in any criminal case to be a witness **[*608]** against himself." The protections provided by the Sixth Amendment are explicitly **[***11]** confined to "criminal prosecutions." See generally Ward, 448 U.S. at 248. n4 The text of the Eighth **[**2805]** Amendment includes no similar limitation. See n. 2, supra.

n4 As a general matter, this Court's decisions applying constitutional protections to civil forfeiture proceedings have adhered to this distinction between provisions that are limited to criminal proceedings and provisions that are not. Thus, the Court has held that the Fourth Amendment's protection against unreasonable searches and seizures applies in forfeiture proceedings, see One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 696, 14 L. Ed. 2d 170, 85 S. Ct. 1246 (1965); Boyd v. United States, 116 U.S. 616, 634, 29 L. Ed. 746, 6 S. Ct. 524 (1886), but that the Sixth Amendment's Confrontation Clause does not, see United States v. Zucker, 161 U.S. 475, 480-482, 40 L. Ed. 777, 16 S. Ct. 641 (1896). It has also held that the due process requirement that guilt in a criminal proceeding be proved beyond a reasonable doubt, see In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970), does not apply to civil forfeiture proceedings. See Lilienthal's Tobacco v. United States, 97 U.S. 237, 271-272, 24 L. Ed. 901 (1878).

The Double Jeopardy Clause has been held not to apply in civil forfeiture proceedings, but only in cases where the forfeiture could properly be characterized as remedial. See United States v. One Assortment of 89 Firearms, 465 U.S. 354, 364 (1984); One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237, 34 L. Ed. 2d 438, 93 S. Ct. 489 (1972); see generally United States v. Halper, 490 U.S. 435, 446-449, 104 L. Ed. 2d 487, 109 S. Ct. 1892 (1989) (Double Jeopardy Clause prohibits second sanction that may not fairly be characterized as remedial). Conversely, the Fifth Amendment's Self-Incrimination Clause, which is textually limited to "criminal case[s]," has been applied in civil forfeiture proceedings, but only where the forfeiture statute had made the culpability of the owner relevant, see United States v. United States Coin & Currency, 401 U.S. 715, 721-722, 28 L. Ed. 2d 434, 91 S. Ct. 1041 (1971), or where the owner faced the possibility of subsequent criminal proceedings, see Boyd, 116 U.S. at 634; see also United States v. Ward, 448 U.S. 242, 253-254, 65 L. Ed. 2d 742, 100 S. Ct. 2636 (1980) (discussing Boyd). And, of course, even those protections associated with criminal cases may apply to a civil forfeiture proceeding if it is so punitive that the proceeding must reasonably be considered criminal. See Kennedy v. Mendoza-Martinez, 372 U.S. 144, 9 L. Ed. 2d 644, 83 S. Ct. 554 (1963); Ward, supra.

[*12]** Nor does the history of the Eighth Amendment require such a limitation. JUSTICE O'CONNOR noted in Browning-Ferris: "Consideration of the Eighth Amendment immediately followed consideration of the Fifth Amendment. **[*609]** After deciding to confine the benefits of the Self-Incrimination Clause of the Fifth Amendment to criminal proceedings, the Framers turned their attention to the Eighth Amendment. There were no proposals to limit that Amendment to criminal proceedings . . . ." 492 U.S. at 294. Section 10 of the English Bill of Rights of 1689 is not expressly limited to criminal cases either. The original draft of § 10 as introduced in the House of Commons did contain such a restriction, but only with respect to the bail clause: "The requiring excessive Bail of Persons committed in criminal Cases, and imposing excessive Fines, and illegal Punishments, to be prevented." 10 H. C. Jour. 17 (1688). The absence of any similar restriction in the other two clauses suggests that they were not limited to criminal cases. In the final version, even the reference to criminal cases in the bail clause was omitted. See 1 W. & M., 2d Sess., ch. **[***13]** 2, 3

Stat. at Large 441 (1689) ("That excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted"); see also L. Schwoerer, The Declaration of Rights, 1689, p. 88 (1981) ("But article 10 contains no reference to 'criminal cases' and, thus, would seem to apply . . . to all cases"). n5

n5 In Ingraham v. Wright, 430 U.S. 651, 51 L. Ed. 2d 711, 97 S. Ct. 1401 (1977), we concluded that the omission of any reference to criminal cases in § 10 was without substantive significance in light of the preservation of a similar reference to criminal cases in the preamble to the English Bill of Rights. Id., at 665. This reference in the preamble, however, related only to excessive bail. See 1 W. & M., 2d Sess., ch. 2, 3 Stat. at Large 440 (1689). Moreover, the preamble appears designed to catalog the misdeeds of James II, see ibid., rather than to define the scope of the substantive rights set out in subsequent sections.

[*14]** The purpose of the Eighth Amendment, putting the Bail Clause to one side, was to limit the government's power to punish. See Browning-Ferris, 492 U.S. at 266-267, 275. The Cruel and Unusual Punishments Clause is self-evidently concerned with punishment. The Excessive Fines Clause limits the government's power to extract payments, whether **[*610]** in cash or in kind, "as punishment for some offense." Id., at 265 (emphasis added). "The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law." United States v. Halper, 490 U.S. 435, 447-448, 104 **[**2806]** L. Ed. 2d 487, 109 S. Ct. 1892 (1989). "It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties." Id., at 447. See also United States ex rel. Marcus v. Hess, 317 U.S. 537, 554, 87 L. Ed. 443, 63 S. Ct. 379 (1943) (Frankfurter, J., concurring). Thus, the question is not, as the United States would have it, whether forfeiture under §§ 881(a)(4) and (a)(7) is civil or criminal, **[***15]** but rather whether it is punishment. n6

n6 For this reason, the United States' reliance on Kennedy v. Mendoza-Martinez and United States v. Ward is misplaced. The question in those cases was whether a nominally civil penalty should be reclassified as criminal and the safeguards that attend a criminal prosecution should be required. See Mendoza-Martinez, 372 U.S. at 167, 184; Ward, 448 U.S. at 248. In addressing the separate question whether punishment is being imposed, the Court has not employed the tests articulated in Mendoza-Martinez and Ward. See, e.g., United States v. Halper, 490 U.S. at 447. Since in this case we deal only with the question whether the Eighth Amendment's Excessive Fines Clause applies, we need not address the application of those tests.

In considering this question, we are mindful of the fact that sanctions frequently serve more than one purpose. We need not **[***16]** exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We, however, must determine that it can only be explained as serving in part to punish. We said in Halper that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." 490 U.S. at 448. We turn, then, to consider whether, at the time the Eighth Amendment was ratified, forfeiture was understood at least in part as punishment **[*611]** and whether forfeiture under §§ 881(a)(4) and (a)(7) should be so understood today.

III

A Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture upon conviction for a felony or treason, and statutory forfeiture. See Calero-Toledo, 416 U.S. at 680-683. Each was understood, at least in part, as imposing punishment.

"At common law the value of an inanimate object directly or indirectly causing the accidental **[***17]** death of a King's subject was forfeited to the Crown as a deodand. The origins of the deodand are traceable to Biblical and pre-Judeo-Christian practices, which reflected the view that the instrument of death was accused and that religious expiation was required. See O. Holmes, The Common Law, c. 1 (1881). The value of the instrument was forfeited to the King, in the belief that the King would provide the money for Masses to be said for the good of the dead man's soul, or insure that the deodand was put to charitable uses. 1 W. Blackstone, Commentaries *300. When application of the deodand to religious or eleemosynary purposes ceased, and the deodand became a source of Crown revenue, the institution was justified as a penalty for carelessness." Id., at 680-681 (footnotes omitted).

As Blackstone put it, "such misfortunes are in part owing to the negligence of the owner, and therefore he is

properly punished by such forfeiture." 1 W. Blackstone, Commentaries *301.

The second kind of common-law forfeiture fell only upon those convicted of a felony or of treason. "The convicted felon forfeited his chattels to the Crown and his lands escheated **[*612]** to his **[***18]** lord; the convicted traitor forfeited all of his property, real and personal, to the Crown." Calero-Toledo, 416 U.S. at 682. **[**2807]** Such forfeitures were known as forfeitures of estate. See 4 W. Blackstone, at *381. These forfeitures obviously served to punish felons and traitors, see The Palmyra, 25 U.S. 1, 12 Wheat. 1, 14, 6 L. Ed. 531 (1827), and were justified on the ground that property was a right derived from society which one lost by violating society's laws, see 1 W. Blackstone, at *299; 4 id., at *382.

Third, "English Law provided for statutory forfeitures of offending objects used in violation of the customs and revenue laws." Calero-Toledo, 416 U.S. at 682. The most notable of these were the Navigation Acts of 1660 that required the shipping of most commodities in English vessels. Violations of the Acts resulted in the forfeiture of the illegally carried goods as well as the ship that transported them. See generally L. Harper, English Navigation Laws (1939). The statute was construed so that the act of an individual seaman, undertaken without the knowledge of the master or owner, could result in forfeiture **[***19]** of the entire ship. See Mitchell v. Torup, Park. 227, 145 Eng. Rep. 764 (Ex. 1766). Yet Blackstone considered such forfeiture statutes "penal." 3 W. Blackstone, at *261.

In Calero-Toledo, we observed that statutory forfeitures were "likely a product of the confluence and merger of the deodand tradition and the belief that the right to own property could be denied the wrongdoer." 416 U.S. at 682. Since each of these traditions had a punitive aspect, it is not surprising that forfeiture under the Navigation Acts was justified as a penalty for negligence: "But the Owners of Ships are to take Care what Master they employ, and the Master what Mariners; and here Negligence is plainly imputable to the Master; for he is to report the Cargo of the Ship, and if he had searched and examined the Ship with proper care, according to his Duty, he would have found the Tea . . . and **[*613]** so might have prevented the Forfeiture." Mitchell, Park., at 238, 145 Eng. Rep. at 768.

B

Of England's three kinds of forfeiture, only the third took hold in the United States. "Deodands did not become **[***20]** part of the common-law tradition of this country." Calero-Toledo, 416 U.S. at 682. The Constitution forbids forfeiture of estate as a punishment for treason "except during the Life of the Person attainted," U.S. Const., Art. III, § 3, cl. 2, and the First Congress also abolished forfeiture of estate as a punishment for felons. Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 117. "But 'long before the adoption of the Constitution the common law courts in the Colonies -- and later in the states during the period of Confederation -- were exercising jurisdiction in rem in the enforcement of [English and local] forfeiture statutes.'" Calero-Toledo, 416 U.S. at 683, quoting C. J. Hendry Co. v. Moore, 318 U.S. 133, 139, 87 L. Ed. 663, 63 S. Ct. 499 (1943).

The First Congress passed laws subjecting ships and cargos involved in customs offenses to forfeiture. It does not follow from that fact, however, that the First Congress thought such forfeitures to be beyond the purview of the Eighth Amendment. Indeed, examination of those laws suggests that the First Congress viewed forfeiture as punishment. For example, by the Act of **[***21]** July 31, 1789, ch. 5, § 12, 1 Stat. 39, Congress provided that goods could not be unloaded except during the day and with a permit.

"And if the master or commander of any ship or vessel shall suffer or permit the same, such master and commander, and every other person who shall be aiding or assisting in landing, removing, housing, or otherwise securing the same, shall forfeit and pay the sum of four hundred dollars for every offence; shall moreover be disabled from holding any office of trust or profit under the United States, for a term not exceeding seven years; and it shall be **[**2808]** the duty of the collector of the district, to **[*614]** advertise the names of all such persons in the public gazette of the State in which he resides, within twenty days after each respective conviction. And all goods, wares and merchandise, so landed or discharged, shall become forfeited, and may be seized by any officer of the customs; and where the value thereof shall amount to four hundred dollars, the vessel, tackle, apparel and furniture, shall be subject to like forfeiture and seizure."

Forfeiture of the goods and vessel is listed alongside the other provisions for punishment. It is also of some interest **[***22]** that "forfeit" is the word Congress used for fine. See ibid. ("shall forfeit and pay the sum of four hundred dollars for every offence"). n7 Other early forfeiture statutes follow the same pattern. See, e.g., Act of Aug. 4, 1790, ch. 34, §§ 13, 22, 27, 28, 1 Stat. 157, 161, 163.

n7 Dictionaries of the time confirm that "fine" was understood to include "forfeiture" and vice versa. See 1 T. Sheridan, A General Dictionary of the English Language (1780) (unpaginated) (defining "fine" as: "A mulct, a pecuniary punishment; penalty; forfeit, money paid for any exemption or liberty"); J. Walker, A Critical Pronouncing Dictionary (1791) (unpaginated) (same); 1 Sheridan, supra (defining "forfeiture" as: "The act of forfeiting; the thing forfeited, a mulct, a fine"); Walker, supra (same); J. Kersey, A New English Dictionary (1702) (unpaginated) (defining "forfeit" as: "default, fine, or penalty").

C

Our cases also have recognized that statutory in rem forfeiture imposes punishment. In Peisch v. Ware, 8 U.S. 347, 4 Cranch 347, 2 L. Ed. 643 (1808), **[***23]** for example, the Court held that goods removed from the custody of a revenue officer without the payment of duties should not be forfeitable for that reason unless they were removed with the consent of the owner or his agent. Chief Justice Marshall delivered the opinion for a unanimous Court:

"The court is also of opinion that the removal for which the act punishes the owner with a forfeiture of **[*615]** the goods must be made with his consent or connivance, or with that of some person employed or trusted by him. If, by private theft, or open robbery, without any fault on his part, his property should be invaded, while in the custody of the officer of the revenue, the law cannot be understood to punish him with the forfeiture of that property." Id., at 364. n8

n8 In Peisch, the removal of the goods from the custody of the revenue officer occurred not by theft or robbery, but pursuant to a writ of replevin issued by a state court. See 4 Cranch at 360. Thus, Peisch stands for the general principle that "the law is not understood to forfeit the property of owners or consignees, on account of the misconduct of mere strangers, over whom such owners or consignees could have no control." Id., at 365.

[*24]** The same understanding of forfeiture as punishment runs through our cases rejecting the "innocence" of the owner as a common-law defense to forfeiture. See, e.g., Calero-Toledo, 416 U.S. at 683; J. W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 65 L. Ed. 376, 41 S. Ct. 189 (1921); Dobbins's Distillery v. United States, 96 U.S. 395, 24 L. Ed. 637 (1878); Harmony v. United States, 43 U.S. 210, 2 HOW 210, 11 L. Ed. 239 (1844); The Palmyra, 25 U.S. 1, 12 Wheat. 1, 6 L. Ed. 531 (1827). In these cases, forfeiture has been justified on two theories -- that the property itself is "guilty" of the offense, and that the owner may be held accountable for the wrongs of others to whom he entrusts his property. Both theories rest, at bottom, on the notion that the owner has been negligent in allowing his property to be misused and that he is properly punished for that negligence.

The fiction that "the thing is primarily considered the offender," Goldsmith-Grant Co., 254 U.S. at 511, has a venerable history in our case law. n9 See The Palmyra, 12 Wheat., **[*616]** at 14 (" **[***25]** The thing is **[**2809]** here primarily considered as the offender, or rather the offence is attached primarily to the thing"); Harmony, 2 HOW at 233 ("The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner"); Dobbins's Distillery, 96 U.S. at 401 ("The offence . . . is attached primarily to the distillery, and the real and personal property used in connection with the same, without any regard whatsoever to the personal misconduct or responsibility of the owner"). Yet the Court has understood this fiction to rest on the notion that the owner who allows his property to become involved in an offense has been negligent. Thus, in Goldsmith-Grant Co., the Court said that "ascribing to the property a certain personality, a power of complicity and guilt in the wrong," had "some analogy to the law of deodand." 254 U.S. at 510. It then quoted Blackstone's explanation of the reason for deodand: that "'such misfortunes are in part owing to the **[***26]** negligence of the owner, and therefore he is properly punished by such forfeiture.'" Id., at 510-511, quoting 1 W. Blackstone, at *301.

n9 The Government relies heavily on this fiction. See Brief for United States 18. We do not understand the Government to rely separately on the technical distinction between proceedings in rem and proceedings in personam, but we note that any such reliance would be misplaced. "The fictions of in rem forfeiture were developed primarily to expand the reach of the courts," Republic Nat. Bank of Miami v. United States, 506 U.S. 80, 87, 121 L. Ed. 2d 474, 113 S. Ct. 554 (1992), which, particularly in admiralty proceedings, might have lacked in personam jurisdiction over the owner of the property. See also Harmony v. United States, 43 U.S. 210, 2 HOW 210, 233, 11 L. Ed. 239 (1844). As is discussed in the text, forfeiture proceedings historically have been understood as imposing punishment despite their in rem nature.

In **[***27]** none of these cases did the Court apply the guilty-property fiction to justify forfeiture when the owner had done all that reasonably could be expected to prevent the unlawful use of his property. In The Palmyra, it did no more than reject the argument that the criminal conviction of the owner was a prerequisite to the forfeiture of his property. See 12 Wheat. at 15 ("No personal conviction of the offender is necessary to enforce a forfeiture in rem in cases of this nature"). In Harmony, the owners' claim of "innocence" was limited to the fact that they "never contemplated **[*617]** or authorized the acts complained of." 2 HOW at 230. And in Dobbins's Distillery, the Court noted that some responsibility on the part of the owner arose "from the fact that he leased the property to the distiller, and suffered it to be occupied and used by the lessee as a distillery." 96 U.S. at 401. The more recent cases have expressly reserved the question whether the fiction could be employed to forfeit the property of a truly innocent owner. See, e.g., Goldsmith-Grant Co., 254 U.S. at 512; **[***28]** Calero-Toledo, 416 U.S. at 689-690 (noting that forfeiture of a truly innocent owner's property would raise "serious constitutional questions"). n10 If forfeiture had been understood not to punish the owner, there would have been no reason to reserve the case of a truly innocent owner. Indeed, it is only on the assumption that forfeiture serves in part to punish that the Court's past reservation of that question makes sense.

n10 Because the forfeiture provisions at issue here exempt "innocent owners," we again have no occasion to decide in this case whether it would comport with due process to forfeit the property of a truly innocent owner.

The second theory on which the Court has justified the forfeiture of an "innocent" owner's property is that the owner may be held accountable for the wrongs of others to whom he entrusts his property. In Harmony, it reasoned that "the acts of the master and crew, in cases of this sort, bind the interest of the owner of the ship, whether **[***29]** he be innocent or guilty; and he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs." 2 HOW at 234. **[**2810]** It repeated this reasoning in Dobbins's Distillery:

"The unlawful acts of the distiller bind the owner of the property, in respect to the management of the same, as much as if they were committed by the owner himself. Power to that effect the law vests in him by virtue of his lease; and, if he abuses his trust, it is a matter to be settled between him and his lessor; but the acts of violation **[*618]** as to the penal consequences to the property are to be considered just the same as if they were the acts of the owner." 96 U.S. at 404.

Like the guilty-property fiction, this theory of vicarious liability is premised on the idea that the owner has been negligent. Thus, in Calero-Toledo, we noted that application of forfeiture provisions "to lessors, bailors, or secured creditors who are innocent of any wrongdoing . . . may have the desirable effect of inducing them to exercise greater care in transferring possession of their property." 416 U.S. at 688. n11

n11 In the criminal context, we have permitted punishment in the absence of conscious wrongdoing, so long as the defendant was not "'powerless' to prevent or correct the violation." United States v. Park, 421 U.S. 658, 673, 44 L. Ed. 2d 489, 95 S. Ct. 1903 (1975) (corporate officer strictly liable under the Food, Drug, and Cosmetic Act). There is nothing inconsistent, therefore, in viewing forfeiture as punishment even though the forfeiture is occasioned by the acts of a person other than the owner.

[*30]** In sum, even though this Court has rejected the "innocence" of the owner as a common-law defense to forfeiture, it consistently has recognized that forfeiture serves, at least in part, to punish the owner. See Peisch v. Ware, 4 Cranch at 364 ("The act punishes the owner with a forfeiture of the goods"); Dobbins's Distillery, 96 U.S. at 404 ("The acts of violation as to the penal consequences to the property are to be considered just the same as if **[***31]** they were the acts of the owner"); Goldsmith-Grant Co., 254 U.S. at 511 ("'Such misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by such forfeiture'"). More recently, we have noted that forfeiture serves "punitive and deterrent purposes," Calero-Toledo, 416 U.S. at 686, and "impos[es] an economic penalty," id., at 687. We conclude, therefore, that forfeiture generally and statutory in rem forfeiture in particular historically have been understood, at least in part, as punishment. n12

n12 The doubts that JUSTICE SCALIA, see post, at 625-627, and JUSTICE KENNEDY, see post, at 629, express with regard to the historical understanding of forfeiture as punishment appear to stem from a misunderstanding of the relevant question. Under United States v. Halper, 490 U.S. 435, 448, 104 L. Ed. 2d 487, 109 S. Ct. 1892 (1989), the question is whether forfeiture serves in part to punish, and one need not exclude the

possibility that forfeiture serves other purposes to reach that conclusion.

[*619] **[***32]** IV We turn next to consider whether forfeitures under 21 U.S.C. §§ 881(a)(4) and (a)(7) are properly considered punishment today. We find nothing in these provisions or their legislative history to contradict the historical understanding of forfeiture as punishment. Unlike traditional forfeiture statutes, §§ 881(a)(4) and (a)(7) expressly provide an "innocent owner" defense. See § 881(a)(4)(C) ("No conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner"); § 881(a)(7) ("No property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner"); see also United States v. Parcel of Rumson, N.J., Land, 507 U.S. 111, 122-123, 113 S. Ct. 1126, 122 L. Ed. 2d 469 (1993) (plurality opinion) (noting difference from traditional forfeiture statutes). These exemptions serve to focus the provisions on the **[**2811]** culpability of **[***33]** the owner in a way that makes them look more like punishment, not less. In United States v. United States Coin & Currency, 401 U.S. 715, 28 L. Ed. 2d 434, 91 S. Ct. 1041 (1971), we reasoned that 19 U.S.C. § 1618, which provides that the Secretary of the Treasury is to return the property of those who do not intend to violate the law, demonstrated Congress' intent "to impose a penalty only upon those who are significantly involved in a criminal enterprise." 401 U.S. at 721-722. The inclusion of innocent-owner defenses in §§ 881(a)(4) and (a)(7) reveals a similar congressional intent to punish only those involved in drug trafficking.

[*620] Furthermore, Congress has chosen to tie forfeiture directly to the commission of drug offenses. Thus, under § 881(a)(4), a conveyance is forfeitable if it is used or intended for use to facilitate the transportation of controlled substances, their raw materials, or the equipment used to manufacture or distribute them. Under § 881(a)(7), real property is forfeitable if it is used or intended for use to facilitate the commission of a drug-related crime punishable by more than one year's imprisonment. **[***34]** See n. 1, supra.

The legislative history of § 881 confirms the punitive nature of these provisions. When it added subsection (a)(7) to § 881 in 1984, Congress recognized "that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs." S. Rep. No. 98-225, p. 191 (1983). n13 It characterized the forfeiture of real property as "a powerful deterrent." Id., at 195. See also Joint House-Senate Explanation of Senate Amendment to Titles II and III of the Psychotropic Substances Act of 1978, 124 Cong. Rec. 34671 (1978) (noting "the penal nature of forfeiture statutes").

n13 Although the United States omits any reference to this legislative history in its brief in the present case, it quoted the same passage with approval in its brief in United States v. Parcel of Rumson, N. J., Land, 507 U.S. 111, 113 S. Ct. 1126, 122 L. Ed. 2d 469 (1993). See Brief for United States, O. T. 1992, No. 91-781, pp. 41-42.

The Government argues that §§ 881(a)(4) and (a)(7) are not punitive **[***35]** but, rather, should be considered remedial in two respects. First, they remove the "instruments" of the drug trade "thereby protecting the community from the threat of continued drug dealing." Brief for United States 32. Second, the forfeited assets serve to compensate the Government for the expense of law enforcement activity and for its expenditure on societal problems such as urban blight, drug addiction, and other health concerns resulting from the drug trade. Id., at 25, 32.

[*621] In our view, neither argument withstands scrutiny. Concededly, we have recognized that the forfeiture of contraband itself may be characterized as remedial because it removes dangerous or illegal items from society. See United States v. One Assortment of 89 Firearms, 465 U.S. 354, 364 (1984). The Court, however, previously has rejected government's attempt to extend that reasoning to conveyances used to transport illegal liquor. See One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699, 14 L. Ed. 2d 170, 85 S. Ct. 1246 (1965). In that case it noted: "There is nothing even remotely criminal in possessing an automobile." Ibid. The same, without question, is true of the properties involved **[***36]** here, and the Government's attempt to characterize these properties as "instruments" of the drug trade must meet the same fate as Pennsylvania's effort to characterize the 1958 Plymouth sedan as "contraband."

The Government's second argument about the remedial nature of this forfeiture is no more persuasive. We previously have upheld the forfeiture of goods involved in customs violations as "a reasonable form of liquidated damages." One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237, 34 L. Ed. 2d 438, 93 S. Ct. 489

(1972). But the **[**2812]** dramatic variations in the value of conveyances and real property forfeitable under §§ 881(a)(4) and (a)(7) undercut any similar argument with respect to those provisions. The Court made this very point in Ward: The "forfeiture of property . . . [is] a penalty that ha[s] absolutely no correlation to any damages sustained by society or to the cost of enforcing the law." 448 U.S. at 254. Fundamentally, even assuming that §§ 881(a)(4) and (a)(7) serve some remedial purpose, the Government's argument must fail. "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only **[***37]** be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." Halper, 490 U.S. at 448 (emphasis added). In light of the historical understanding of forfeiture as punishment, the **[*622]** clear focus of §§ 881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish, we cannot conclude that forfeiture under §§ 881(a)(4) and (a)(7) serves solely a remedial purpose. n14 We therefore conclude that forfeiture under these provisions constitutes "payment to a sovereign as punishment for some offense," Browning-Ferris, 492 U.S. at 265, and, as such, is subject to the limitations of the Eighth Amendment's Excessive Fines Clause.

n14 In Halper, we focused on whether "the sanction as applied in the individual case serves the goals of punishment." 490 U.S. at 448. In this case, however, it makes sense to focus on §§ 881(a)(4) and (a)(7) as a whole. Halper involved a small, fixed-penalty provision, which "in the ordinary case . . . can be said to do no more than make the Government whole." Id., at 449. The value of the conveyances and real property forfeitable under §§ 881(a)(4) and (a)(7), on the other hand, can vary so dramatically that any relationship between the Government's actual costs and the amount of the sanction is merely coincidental. See Ward, 448 U.S. at 254. Furthermore, as we have seen, forfeiture statutes historically have been understood as serving not simply remedial goals but also those of punishment and deterrence. Finally, it appears to make little practical difference whether the Excessive Fines Clause applies to all forfeitures under §§ 881(a)(4) and (a)(7) or only to those that cannot be characterized as purely remedial. The Clause prohibits only the imposition of "excessive" fines, and a fine that serves purely remedial purposes cannot be considered "excessive" in any event.

[*38]** V Austin asks that we establish a multifactor test for determining whether a forfeiture is constitutionally "excessive." See Brief for Petitioner 46-48. We decline that invitation. Although the Court of Appeals opined that "the government is exacting too high a penalty in relation to the offense committed," 964 F.2d at 818, it had no occasion to consider what factors should inform such a decision because it thought it was foreclosed from engaging in the inquiry. Prudence dictates that we allow the lower courts to consider that question **[*623]** in the first instance. See Yee v. Escondido, 503 U.S. 519, 538, 118 L. Ed. 2d 153, 112 S. Ct. 1522 (1992). n15

n15 JUSTICE SCALIA suggests that the sole measure of an in rem forfeiture's excessiveness is the relationship between the forfeited property and the offense. See post, at 627-628. We do not rule out the possibility that the connection between the property and the offense may be relevant, but our decision today in no way limits the Court of Appeals from considering other factors in determining whether the forfeiture of Austin's property was excessive.

[*39]** The judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

CONCURBY: SCALIA (In Part); KENNEDY (In Part)

CONCUR: JUSTICE SCALIA, concurring in part and concurring in the judgment.

We recently stated that, at the time the Eighth Amendment was drafted, the term "fine" was "understood to mean a payment to a sovereign as punishment for some offense." Browning-Ferris Industries of Vt., Inc. v. **[**2813]** Kelco Disposal, Inc., 492 U.S. 257, 265, 106 L. Ed. 2d 219, 109 S. Ct. 2909 (1989). It seems to me that the Court's opinion obscures this clear statement, and needlessly attempts to derive from our sparse case law on the subject of in rem forfeiture the questionable proposition that the owner of property taken pursuant to such forfeiture is always blameworthy. I write separately to explain why I consider this forfeiture a fine, and to point out that the excessiveness inquiry for statutory in rem forfeitures is different from the usual excessiveness inquiry.

I

Whether any sort of forfeiture of property may be covered by the Eighth Amendment is not a difficult question. "Forfeiture" and "fine" each appeared **[***40]** as one of many definitions of the other in various 18th-century dictionaries. See ante, at 614, n. 7. "Payment,"

the word we used in Browning-Ferris **[*624]** as a synonym for fine, certainly includes in-kind assessments. Webster's New International Dictionary 1797 (2d ed. 1950) (defining "payment" as "that which is paid; the thing given to discharge a debt or an obligation"). Moreover, for the Eighth Amendment to limit cash fines while permitting limitless in-kind assessments would make little sense, altering only the form of the Star Chamber abuses that led to the provision of the English Bill of Rights, from which our Excessive Fines Clause directly derives, see Browning-Ferris, supra, at 266-267. Cf. Harmelin v. Michigan, 501 U.S. 957, 978-979, n. 9, 115 L. Ed. 2d 836, 111 S. Ct. 2680 (1991) (opinion of SCALIA, J.). In Alexander v. United States, ante, at 558, we have today held that an in personam criminal forfeiture is an Eighth Amendment "fine."

In order to constitute a fine under the Eighth Amendment, however, the forfeiture must constitute "punishment," and it is a much closer question whether statutory in rem forfeitures, as opposed to in personam **[***41]** forfeitures, meet this requirement. The latter are assessments, whether monetary or in kind, to punish the property owner's criminal conduct, while the former are confiscations of property rights based on improper use of the property, regardless of whether the owner has violated the law. Statutory in rem forfeitures have a long history. See generally Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-686, 40 L. Ed. 2d 452, 94 S. Ct. 2080 (1974). The property to which they apply is not contraband, see the forfeiture Act passed by the First Congress, ante, at 613-614, nor is it necessarily property that can only be used for illegal purposes. The theory of in rem forfeiture is said to be that the lawful property has committed an offense. See, e.g., The Palmyra, 25 U.S. 1, 12 Wheat. 1, 14-15, 6 L. Ed. 531 (1827) (forfeiture of vessel for piracy); Harmony v. United States, 43 U.S. 210, 2 HOW 210, 233-234, 11 L. Ed. 239 (1844) (forfeiture of vessel, but not cargo, for piracy); Dobbins's Distillery v. United States, 96 U.S. 395, 400-403, 24 L. Ed. 637 (1878) (forfeiture of distillery and real property for evasion of revenue **[***42]** laws); J. W. Goldsmith, Jr. Grant Co. v. United **[*625]** States, 254 U.S. 505, 510-511 (1921) (forfeiture of goods concealed to avoid taxes).

However the theory may be expressed, it seems to me that this taking of lawful property must be considered, in whole or in part, see United States v. Halper, 490 U.S. 435, 448, 104 L. Ed. 2d 487, 109 S. Ct. 1892 (1989), punitive. * Its purpose is not compensatory, to make someone whole for injury caused by unlawful use of the property. See ibid. Punishment is being imposed, **[**2814]** whether one quaintly considers its object to be the property itself, or more realistically regards its object to be the property's owner. This conclusion is supported by Blackstone's observation that even confiscation of a deodand, whose religious origins supposedly did not reflect any punitive motive but only expiation, see Law of Deodands, 34 Law Mag. 188, 189 (1845), came to be explained in part by reference to the owner as well as to the offending property. 1 W. Blackstone, Commentaries *301; accord, Law of Deodands, supra, at 190. Our cases have described statutory in rem forfeiture as "likely a product of the confluence and merger **[***43]** of the deodand tradition and the belief that the right to own property could be denied the wrongdoer." Calero-Toledo, supra, at 682.

* Thus, contrary to the Court's contention, ante, at 618-619, n. 12, I agree with it on this point. I do not agree, however, that culpability of the property owner is necessary to establish punitiveness, or that punitiveness "in part" is established by showing that at least in some cases the affected property owners are culpable. That is to say, the statutory forfeiture must always be at least "partly punitive," or else it is not a fine. See ante, at 622, n. 14.

The Court apparently believes, however, that only actual culpability of the affected property owner can establish that a forfeiture provision is punitive, and sets out to establish (in Part III) that such culpability exists in the case of in rem forfeitures. In my view, however, the case law is far more ambiguous than the Court acknowledges. We have never held that the Constitution requires negligence, or **[***44]** any other degree of culpability, to support such forfeitures. See ante, **[*626]** at 616-617, and n. 10; Goldsmith-Grant, supra, at 512 (reserving question); Calero-Toledo, supra, at 689-690 (same). A prominent 19th-century treatise explains statutory in rem forfeitures solely by reference to the fiction that the property is guilty, strictly separating them from forfeitures that require a personal offense of the owner. See 1 J. Bishop, Commentaries on Criminal Law §§ 816, 824, 825, 833 (7th ed. 1882). If the Court is correct that culpability of the owner is essential, then there is no difference (except perhaps the burden of proof) between the traditional in rem forfeiture and the traditional in personam forfeiture. Well-established common-law distinctions should not be swept away by reliance on bits of dicta. Moreover, if some degree of personal culpability on the part of the property owner always exists for in rem forfeitures, see ante, at 614-618, then it is hard to understand why this Court has kept reserving the (therefore academic) question whether personal culpability is constitutionally required, see ante, at

617, as the Court does again today, see **[***45]** ante, at 617, n. 10.

I would have reserved the question without engaging in the misleading discussion of culpability. Even if punishment of personal culpability is necessary for a forfeiture to be a fine; and even if in rem forfeitures in general do not punish personal culpability; the in rem forfeiture in this case is a fine. As the Court discusses in Part IV, this statute, in contrast to the traditional in rem forfeiture, requires that the owner not be innocent -- that he have some degree of culpability for the "guilty" property. See also United States v. Parcel of Rumson, N. J., Land, 507 U.S. 111, 121-123, 113 S. Ct. 1126;, 122 L. Ed. 2d 469 (1993) (plurality opinion) (contrasting drug forfeiture statute with traditional statutory in rem forfeitures). Here, the property must "offend" and the owner must not be completely without fault. Nor is there any consideration of compensating for loss, since the value of the property is irrelevant to whether it is forfeited. That is enough to satisfy the Browning-Ferris standard, and to make the entire discussion **[*627]** in Part III dictum. Statutory forfeitures under § 881(a) are certainly payment (in kind) to a sovereign **[***46]** as punishment for an offense.

II

That this forfeiture works as a fine raises the excessiveness issue, on which the Court remands. I agree that a remand is in order, but think it worth pointing out that on remand the excessiveness analysis must be different from that applicable to monetary fines and, perhaps, to in personam forfeitures. In the case of a monetary fine, the Eighth Amendment's origins in the English Bill of Rights, intended to limit the abusive penalties assessed against the King's opponents, **[**2815]** see Browning-Ferris, 492 U.S. at 266-267, demonstrate that the touchstone is value of the fine in relation to the offense. And in Alexander v. United States, we indicated that the same is true for in personam forfeiture. Ante, at 558.

Here, however, the offense of which petitioner has been convicted is not relevant to the forfeiture. Section § 881 requires only that the Government show probable cause that the subject property was used for the prohibited purpose. The burden then shifts to the property owner to show, by a preponderance of the evidence, that the use was made without his "knowledge, **[***47]** consent, or willful blindness," 21 U.S.C. § 881(a)(4)(C), see also § 881(a)(7), or that the property was not so used, see § 881(d) (incorporating 19 U.S.C. § 1615). Unlike monetary fines, statutory in rem forfeitures have traditionally been fixed, not by determining the appropriate value of the penalty in relation to the committed offense, but by determining what property has been "tainted" by unlawful use, to which issue the value of the property is irrelevant. Scales used to measure out unlawful drug sales, for example, are confiscable whether made of the purest gold or the basest metal. But an in rem forfeiture goes beyond the traditional limits that the Eighth Amendment permits if it applies to property that cannot properly be regarded as an instrumentality **[*628]** of the offense -- the building, for example, in which an isolated drug sale happens to occur. Such a confiscation would be an excessive fine. The question is not how much the confiscated property is worth, but whether the confiscated property has a close enough relationship to the offense.

This inquiry for statutory forfeitures has common-law **[***48]** parallels. Even in the case of deodands, juries were careful to confiscate only the instrument of death and not more. Thus, if a man was killed by a moving cart, the cart and its horses were deodands, but if the man died when he fell from a wheel of an immobile cart, only the wheel was treated as a deodand, since only the wheel could be regarded as the cause of death. 1 M. Hale, Pleas of the Crown *419-*422; 1 W. Blackstone, Commentaries *301-*302; Law of Deodands, 34 Law Mag., at 190. Our cases suggest a similar instrumentality inquiry when considering the permissible scope of a statutory forfeiture. Cf. Goldsmith-Grant, 254 U.S. at 510, 513; Harmony, 2 HOW at 235 (ship used for piracy is forfeited, but cargo is not). The relevant inquiry for an excessive forfeiture under § 881 is the relationship of the property to the offense: Was it close enough to render the property, under traditional standards, "guilty" and hence forfeitable?

I join the Court's opinion in part, and concur in the judgment.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, concurring in part and concurring in the judgment.

[*49]** I am in substantial agreement with Part I of JUSTICE SCALIA's opinion concurring in part and concurring in the judgment. I share JUSTICE SCALIA'S belief that Part III of the Court's opinion is quite unnecessary for the decision of the case, fails to support the Court's argument, and seems rather doubtful as well.

In recounting the law's history, we risk anachronism if we attribute to an earlier time an intent to employ legal concepts **[*629]** that had not yet evolved. I see something of that in the Court's opinion here, for in its eagerness to discover a unified theory of forfeitures, it

recites a consistent rationale of personal punishment that neither the cases nor other narratives of the common law suggest. For many of the reasons explained by JUSTICE SCALIA, I am not convinced that all in rem forfeitures were on account of the owner's blameworthy conduct. Some impositions of in rem forfeiture may have been designed either to remove property that was itself causing injury, see, e.g., Harmony v. United States, 43 U.S. 210, 2 HOW 210, 233, 11 L. Ed. 239 **[**2816]** (1844), or to give the court jurisdiction over an asset that it could control in order to make injured parties **[***50]** whole, see Republic Nat. Bank of Miami v. United States, 506 U.S. 80, 87, 121 L. Ed. 2d 474, 113 S. Ct. 554 (1992).

At some point, we may have to confront the constitutional question whether forfeiture is permitted when the owner has committed no wrong of any sort, intentional or negligent. That for me would raise a serious question. Though the history of forfeiture laws might not be determinative of that issue, it would have an important bearing on the outcome. I would reserve for that or some other necessary occasion the inquiry the Court undertakes here. Unlike JUSTICE SCALIA, see ante, at 625, I would also reserve the question whether in rem forfeitures always amount to an intended punishment of the owner of forfeited property.

With these observations, I concur in part and concur in the judgment.

EXHIBIT 13

Application of 8th Amendment to currency forfeiture

UNITED STATES, PETITIONER v. HOSEP KRIKOR BAJAKAJIAN

No. 96-1487

SUPREME COURT OF THE UNITED STATES

524 U.S. 321; 118 S. Ct. 2028; 1998 U.S. LEXIS 4172; 141 L. Ed. 2d 314; 66 U.S.L.W. 4514; 98 Cal. Daily Op. Service 4757; 98 Daily Journal DAR 6736; 11 Fla. Law W. Fed. S 662; 1998 Colo. J. C.A.R. 3239

June 22, 1998, Decided

NOTICE: **[*1]**

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

DISPOSITION: 84 F.3d 334, affirmed.

SYLLABUS: **[**320]** After customs inspectors found respondent and his family preparing to board an international flight carrying $357,144, he was charged with, inter alia, attempting to leave the United States without reporting, as required by 31 U.S.C. § 5316(a)(1)(A), that he was transporting more than $10,000 in currency. The Government also sought forfeiture of the $357,144 under 18 U.S.C. § 982(a)(1), which provides that a person convicted of willfully violating § 5316 shall forfeit "any property . . . involved in such an offense." Respondent pleaded guilty to the failure to report and elected to have a bench trial on the forfeiture. The District Court found, among other things, that the **[*2]** entire $357,144 was subject to forfeiture because it was "involved in" the offense, that the funds were not connected to any other crime, and that respondent was transporting the money to repay a lawful debt. Concluding that full forfeiture would be grossly disproportional to the offense in question and would therefore violate the Excessive Fines Clause of the Eighth Amendment, the court ordered forfeiture of **[**321]** $15,000, in addition to three years' probation and the maximum fine of $5,000 under the Sentencing Guidelines. The Ninth Circuit affirmed, holding that a forfeiture must fulfill two conditions to satisfy the Clause: The property forfeited must be an "instrumentality" of the crime committed, and the property's value must be proportional to its owner's culpability. The court determined that respondent's currency was not an "instrumentality" of the crime of failure to report, which involves the withholding of information rather than the possession or transportation of money; that, therefore, § 982(a)(1) could never satisfy the Clause in a currency forfeiture case; that it was unnecessary to apply the "proportionality" prong of the test; and that the Clause did not permit forfeiture **[*3]** of any of the unreported currency, but that the court lacked jurisdiction to set the $15,000 forfeiture aside because respondent had not cross-appealed to challenge it.

Held: Full forfeiture of respondent's $357,144 would violate the Excessive Fines Clause. Pp. 5-21.

(a) The forfeiture at issue is a "fine" within the meaning of the Clause, which provides that "excessive fines [shall not be] imposed." The Clause limits the Government's power to extract payments, whether in cash or in kind, as punishment for some offense. Austin v. United States, 509 U.S. 602, 609-610, 125 L. Ed. 2d 488, 113 S. Ct. 2801. Forfeitures--payments in kind--are thus "fines" if they constitute punishment for an offense. Section § 982(a)(1) currency forfeitures do so. The statute directs a court to order forfeiture as an additional sanction when "imposing sentence on a person convicted of" a willful violation of § 5316's reporting requirement. The forfeiture is thus imposed at the culmination of a criminal proceeding and requires conviction of an underlying felony, and it cannot be imposed upon an innocent owner of unreported currency. Cf. id., at 619. The Court rejects the Government's argument that such forfeitures **[*4]** serve important remedial purposes -- by deterring illicit movements of cash and giving the Government valuable information to investigate and detect criminal activities associated with that cash -- because the asserted loss of information here would not be remedied by confiscation of respondent's $357,144. The Government's argument that the § 982(a)(1) forfeiture is constitutional because it falls within a class

of historic forfeitures of property tainted by crime is also rejected. In so arguing, the Government relies upon a series of cases involving traditional civil in rem forfeitures that are inapposite because such forfeitures were historically considered nonpunitive. See, e.g., The Palmyra, 25 U.S. 1, 12 Wheat. 1, 14-15, 6 L. Ed. 531. Section 982(a)(1) descends from a different historical tradition: that of in personam, criminal forfeitures. Similarly, the Court declines to accept the Government's contention that the forfeiture here is constitutional because it involves an "instrumentality" of respondent's crime. Because instrumentalities historically have been treated as a form of "guilty property" forfeitable in civil in rem proceedings, it is irrelevant whether respondent's currency **[*5]** is an instrumentality; the forfeiture is punitive, and the test for its excessiveness involves solely a proportionality determination. Pp. 5-11.

[322]** (b) A punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of the offense that it is designed to punish. Although the proportionality principle has always been the touchstone of the inquiry, see, e.g., Austin, supra, at 622-623, the Clause's text and history provide little guidance as to how disproportional a forfeiture must be to be "excessive." Until today, the Court has not articulated a governing standard. In deriving the standard, the Court finds two considerations particularly relevant. The first, previously emphasized in cases interpreting the Cruel and Unusual Punishments Clause, is that judgments about the appropriate punishment belong in the first instance to the legislature. See, e.g., Solem v. Helm, 463 U.S. 277, 290, 77 L. Ed. 2d 637, 103 S. Ct. 3001. The second is that any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise. Because both considerations counsel against requiring strict proportionality, the Court adopts the gross disproportionality **[*6]** standard articulated in, e.g., id., at 288. Pp. 11-14.

(c) The forfeiture of respondent's entire $357,144 would be grossly disproportional to the gravity of his offense. His crime was solely a reporting offense. It was permissible to transport the currency out of the country so long as he reported it. And because § 982(a)(1) orders currency forfeited for a "willful" reporting violation, the essence of the crime is a willful failure to report. Furthermore, the District Court found his violation to be unrelated to any other illegal activities. Whatever his other vices, respondent does not fit into the class of persons for whom the statute was principally designed: money launderers, drug traffickers, and tax evaders. And the maximum penalties that could have been imposed under the Sentencing Guidelines, a 6-month sentence and a $5,000 fine, confirm a minimal level of culpability and are dwarfed by the $357,144 forfeiture sought by the Government. The harm that respondent caused was also minimal. The failure to report affected only the Government, and in a relatively minor way. There was no fraud on the Government and no loss to the public fisc. Had his crime gone undetected, **[*7]** the Government would have been deprived only of the information that $357,144 had left the country. Thus, there is no articulable correlation between the $357,144 and any Government injury. Pp. 14-17.

(d) The Court rejects the contention that the proportionality of full forfeiture is demonstrated by the fact that the First Congress, at roughly the same time the Eighth Amendment was ratified, enacted statutes requiring full forfeiture of goods involved in customs offenses or the payment of monetary penalties proportioned to the goods' value. The early customs statutes do not support the Government's assertion because, unlike § 982(a)(1), the type of forfeiture they imposed was not considered punishment for a criminal offense, but rather was civil in rem forfeiture, in which the Government proceeded against the "guilty" property itself. See, e.g., Harford v. United States, 12 U.S. 109, 8 Cranch 109, 3 L. Ed. 504. Similarly, the early statutes imposing monetary "forfeitures" proportioned to the value of the goods involved were considered not as punishment for an offense, but **[**323]** rather as serving the remedial purpose of reimbursing the Government for the losses accruing from evasion of customs duties. **[*8]** See, e.g., Stockwell v. United States, 80 U.S. 531, 13 Wall. 531, 546-547. Pp. 17-21, 20 L. Ed. 491.

84 F.3d 334, affirmed.

JUDGES: THOMAS, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C. J., and O'CONNOR and SCALIA, JJ., joined.

OPINIONBY: THOMAS

OPINION: JUSTICE THOMAS delivered the opinion of the Court.

Respondent Hosep Bajakajian attempted to leave the United States without reporting, as required by federal law, that he was transporting more than $10,000 in currency. Federal law also provides that a person convicted of willfully violating this reporting requirement shall forfeit to the government "any property . . . involved in such offense." 18 U.S.C. § 982(a)(1). The question in this case is whether forfeiture of the entire

$357,144 that respondent failed to declare would violate the Excessive Fines Clause of the Eighth Amendment. We hold that it would, because full forfeiture of respondent's currency would be grossly disproportional to the gravity of his offense.

I

On June 9, 1994, respondent, his wife, and his two daughters were waiting at Los Angeles International Airport to board **[*9]** a flight to Italy; their final destination was Cyprus. Using dogs trained to detect currency by its smell, customs inspectors discovered some $230,000 in cash in the Bajakajians' checked baggage. A customs inspector approached respondent and his wife and told them that they were required to report all money in excess of $10,000 in their possession or in their baggage. Respondent said that he had $8,000 and that his wife had another $7,000, but that the family had no additional currency to declare. A search of their carry-on bags, purse, and wallet revealed more cash; in all, customs inspectors found $357,144. The currency was seized and respondent was taken into custody.

A federal grand jury indicted respondent on three counts. Count One charged him with failing to report, as required by 31 U.S.C. § 5316(a)(1)(A), n1 that he was transporting more than $10,000 outside the United States, and with doing so "willfully," in violation of § 5322(a). n2 Count Two charged him with making a false material statement to the United States Customs Service, in **[**324]** violation of 18 U.S.C. § 1001. Count Three sought forfeiture of the $357,144 pursuant to 18 U.S.C. § 982(a)(1), which provides: **[*10]**

"The court, in imposing sentence on a person convicted of an offense in violation of section . . . 5316, . . . shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property." 18 U.S.C. § 982(a)(1).

n1 The statutory reporting requirement provides:

"[A] person or an agent or bailee of the person shall file a report . . . when the person, agent, or bailee knowingly--

"(1) transports, is about to transport, or has transported, monetary instruments of more than $10,000 at one time--

"(A) from a place in the United States to or through a place outside the United States . . . ." 31 U.S.C. § 5316(a).

n2 Section 5322(a) provides: "A person willfully violating this subchapter . . . shall be fined not more than $250,000, or imprisoned for not more than five years, or both." § 5322(a).

Respondent pleaded guilty to the failure to report in Count One; the Government agreed to dismiss the false statement charge in **[*11]** Count Two; and respondent elected to have a bench trial on the forfeiture in Count Three. After the bench trial, the District Court found that the entire $357,144 was subject to forfeiture because it was "involved in" the offense. Ibid. The court also found that the funds were not connected to any other crime and that respondent was transporting the money to repay a lawful debt. Tr. 61-62 (Jan. 19, 1995). The District Court further found that respondent had failed to report that he was taking the currency out of the United States because of fear stemming from "cultural differences": Respondent, who had grown up as a member of the Armenian minority in Syria, had a "distrust for the Government." Id., at 63; see Tr. of Oral Arg. 30.

Although § 982(a)(1) directs sentencing courts to impose full forfeiture, the District Court concluded that such forfeiture would be "extraordinarily harsh" and "grossly disproportionate to the offense in question," and that it would therefore violate the Excessive Fines Clause. Tr. 63. The court instead ordered forfeiture of $15,000, in addition to a sentence of three years of probation and a fine of $5,000--the maximum fine under the Sentencing **[*12]** Guidelines--because the court believed that the maximum Guidelines fine was "too little" and that a $15,000 forfeiture would "make up for what I think a reasonable fine should be." Ibid.

The United States appealed, seeking full forfeiture of respondent's currency as provided in § 982(a)(1). The Court of Appeals for the Ninth Circuit affirmed. 84 F.3d 334 (1996). Applying Circuit precedent, the Court held that, to satisfy the Excessive Fines Clause, a forfeiture must fulfill two conditions: The property forfeited must be an "instrumentality" of the crime committed, and the value of the property must be proportional to the culpability of the owner. Id., at 336 (citing United States v. Real Property Located in El Dorado County, 59 F.3d 974, 982 (CA9 1995)). A majority of the panel determined that the currency was not an

"instrumentality" of the crime of failure to report because "'the crime [in a currency reporting offense] is the withholding of information, . . . not the possession or the transportation of the money.'" 84 F.3d at 337 (quoting United States v. $69,292 in United States Currency, 62 F.3d 1161, 1167 (CA9 1995)). The majority therefore **[*13]** held that § 982(a)(1) could never satisfy the Excessive Fines Clause in cases involving forfeitures of currency and that it was unnecessary to apply the "proportionality" prong of the test. Although the panel majority concluded that the Excessive Fines Clause did not permit forfeiture of any of the unreported currency, **[**325]** it held that it lacked jurisdiction to set the $15,000 forfeiture aside because respondent had not cross-appealed to challenge that forfeiture. 84 F.3d at 338.

Judge Wallace concurred in the result. He viewed respondent's currency as an instrumentality of the crime because "without the currency, there can be no offense," id., at 339, and he criticized the majority for "striking down a portion of" the statute, id., at 338. He nonetheless agreed that full forfeiture would violate the Excessive Fines Clause in respondent's case, based upon the "proportionality" prong of the Ninth Circuit test. Finding no clear error in the District Court's factual findings, he concluded that the reduced forfeiture of $15,000 was proportional to respondent's culpability. Id., at 339-340.

Because the Court of Appeals' holding--that the forfeiture ordered by § 982(a)(1) **[*14]** was per se unconstitutional in cases of currency forfeiture--invalidated a portion of an act of Congress, we granted certiorari. 520 U.S. (1997).

II

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., Amdt. 8. This Court has had little occasion to interpret, and has never actually applied, the Excessive Fines Clause. We have, however, explained that at the time the Constitution was adopted, "the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense." Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 265, 106 L. Ed. 2d 219, 109 S. Ct. 2909 (1989). The Excessive Fines Clause thus "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" Austin v. United States, 509 U.S. 602, 609-610, 125 L. Ed. 2d 488, 113 S. Ct. 2801 (1993) (emphasis deleted). Forfeitures -- payments in kind -- are thus "fines" if they constitute punishment for an offense.

We have little trouble concluding that the forfeiture of currency ordered by § 982(a)(1) constitutes punishment. The statute directs a court to order forfeiture as **[*15]** an additional sanction when "imposing sentence on a person convicted of" a willful violation of § 5316's reporting requirement. The forfeiture is thus imposed at the culmination of a criminal proceeding and requires conviction of an underlying felony, and it cannot be imposed upon an innocent owner of unreported currency, but only upon a person who has himself been convicted of a § 5316 reporting violation. n3 Cf. Austin v. United States, supra, at 619 **[**326]** (holding forfeiture to be a "fine" in part because the forfeiture statute "expressly provided an 'innocent owner' defense" and thus "looked . . . like punishment").

n3 Although the currency reporting statute provides that "a person or an agent or bailee of the person shall file a report," 31 U.S.C. § 5316(a), the statute ordering the criminal forfeiture of unreported currency provides that "the court, in imposing sentence on a person convicted of" failure to file the required report, "shall order that the person forfeit to the United States" any property "involved in" or "traceable to" the offense, 18 U.S.C. § 982(a)(1). The combined effect of these two statutes is that an owner of unreported currency is not subject to criminal forfeiture if his agent or bailee is the one who fails to file the required report, because such an owner could not be convicted of the reporting offense. The United States endorsed this interpretation at oral argument in this case. See Tr. of Oral Arg. 24-25.

> For this reason, the dissent's speculation about the effect of today's holding on "kingpins" and "cash couriers" is misplaced. See post, at 9, 11. Section 982(a)(1)'s criminal, in personam forfeiture reaches only currency owned by someone who himself commits a reporting crime. It is unlikely that the Government, in the course of criminally indicting and prosecuting a cash courier, would not bother to investigate the source and true ownership of unreported funds.

[*16]

The United States argues, however, that the forfeiture of currency under § 982(a)(1) "also serves important remedial purposes." Brief for United States 20. The Government asserts that it has "an overriding sovereign interest in controlling what property leaves and enters the country." Ibid. It claims that full forfeiture of unreported currency supports that interest by serving to "deter illicit movements of cash" and aiding in providing the Government with "valuable information to investigate and detect criminal activities associated with that cash."

Id., at 21. Deterrence, however, has traditionally been viewed as a goal of punishment, and forfeiture of the currency here does not serve the remedial purpose of compensating the Government for a loss. See Black's Law Dictionary 1293 (6th ed. 1990) ("Remedial action" is one "brought to obtain compensation or indemnity"); One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 34 L. Ed. 2d 438, 93 S. Ct. 489 (1972) (per curiam) (monetary penalty provides "a reasonable form of liquidated damages," id., at 237, to the Government and is thus a "remedial" sanction because it compensates government for lost revenues). Although the Government has **[*17]** asserted a loss of information regarding the amount of currency leaving the country, that loss would not be remedied by the Government's confiscation of respondent's $357,144. n4

n4 We do not suggest that merely because the forfeiture of respondent's currency in this case would not serve a remedial purpose, other forfeitures may be classified as nonpunitive (and thus not "fines") if they serve some remedial purpose as well as being punishment for an offense. Even if the Government were correct in claiming that the forfeiture of respondent's currency is remedial in some way, the forfeiture would still be punitive in part. (The Government concedes as much.) This is sufficient to bring the forfeiture within the purview of the Excessive Fines Clause. See Austin v. United States, 509 U.S. 602, 621-622, 125 L. Ed. 2d 488, 113 S. Ct. 2801 (1993).

> The United States also argues that the forfeiture mandated by § 982(a)(1) is constitutional because it falls within a class of historic forfeitures of property tainted by crime. See Brief for United **[*18]** States 16 (citing, inter alia, The Palmyra, 25 U.S. 1, 12 Wheat. 1, 13, 6 L. Ed. 531 (1827) (forfeiture of ship); Dobbins's Distillery v. United States, 96 U.S. 395, 400-401, 24 L. Ed. 637 (1878) (forfeiture of distillery)). In so doing, the Government relies upon a series of cases involving traditional civil in rem forfeitures that are inapposite because such forfeitures were historically considered nonpunitive.

The theory behind such forfeitures was the fiction that the action was directed against "guilty property," rather than against the offender **[**327]** himself. n5 See, e.g., Various Items of Personal Property v. United States, 282 U.S. 577, 581, 75 L. Ed. 558, 51 S. Ct. 282 (1931) ("It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient"); see also R. Waples, Proceedings In Rem 13, 205-209 (1882). Historically, the conduct of the property owner was irrelevant; indeed, the owner of forfeited property could be entirely innocent of any crime. See, e.g., Origet v. United States, 125 U.S. 240, 246, 31 L. Ed. 743, 8 S. Ct. 846 (1888) ("The merchandise is to be forfeited irrespective of any criminal prosecution . . . The person punished **[*19]** for the offence may be an entirely different person from the owner of the merchandise, or any person interested in it. The forfeiture of the goods of the principal can form no part of the personal punishment of his agent"). As Justice Story explained:

> "The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offence be malum prohibitum, or malum **[*20]** in se . . . . The practice has been, and so this Court understand the law to be, that the proceeding in rem stands independent of, and wholly unaffected by any criminal proceeding in personam." The Palmyra, 12 Wheat. at 14-15.

n5 The "guilty property" theory behind in rem forfeiture can be traced to the Bible, which describes property being sacrificed to God as a means of atoning for an offense. See Exodus 21:28. In medieval Europe and at common law, this concept evolved into the law of deodand, in which offending property was condemned and confiscated by the church or the Crown in remediation for the harm it had caused. See 1 M. Hale, Pleas of the Crown 420-424 (1st Am. ed. 1847); 1 W. Blackstone, Commentaries on the Law of England 290-292 (1765); O. Holmes, The Common Law 10-13, 23-27 (M. Howe ed. 1963).

> Traditional in rem forfeitures were thus not considered punishment against the individual for an offense. See id., at 14; Dobbins's Distillery v. United States, supra, at 401; Van Oster v. Kansas, 272 U.S. 465, 467-468, 71 L. Ed. 354, 47 S. Ct. 133 (1926); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683-684, 40 L. Ed. 2d 452, 94 S. Ct. 2080 (1974); Taylor v. United States, 44 U.S. 197, 3 HOW 197, 210, 11 L. Ed. 559 (1845) (opinion of Story, J.) (laws providing for in rem forfeiture of goods imported in violation of customs laws, although in one sense "imposing a penalty or forfeiture[,] . . . truly deserve to be called, remedial"); see also United States v. Ursery, 518 U.S. 267, 293, 135 L. Ed. 2d 549, 116 S. Ct. 2135 (1996) (KENNEDY, J., concurring) ("Civil in rem forfeiture is not punishment of the wrongdoer for his criminal offense"). Because they were viewed as nonpunitive, such forfeitures traditionally were considered to occupy a place outside the domain of the Excessive

Fines Clause. Recognizing **[*21]** the nonpunitive character of such proceedings, we have held that the Double Jeopardy Clause does not bar the institution of a civil, in rem forfeiture action after the criminal conviction of the defendant. See id., at **[**328]** 278. n6

n6 It does not follow, of course, that all modern civil in rem forfeitures are nonpunitive and thus beyond the coverage of the Excessive Fines Clause. Because some recent federal forfeiture laws have blurred the traditional distinction between civil in rem and criminal in personam forfeiture, we have held that a modern statutory forfeiture is a "fine" for Eighth Amendment purposes if it constitutes punishment even in part, regardless of whether the proceeding is styled in rem or in personam. See Austin v. United States, supra, at 621-622 (although labeled in rem, civil forfeiture of real property used "to facilitate" the commission of drug crimes was punitive in part and thus subject to review under the Excessive Fines Clause).

The forfeiture in this **[*22]** case does not bear any of the hallmarks of traditional civil in rem forfeitures. The Government has not proceeded against the currency itself, but has instead sought and obtained a criminal conviction of respondent personally. The forfeiture serves no remedial purpose, is designed to punish the offender, and cannot be imposed upon innocent owners.

Section 982(a)(1) thus descends not from historic in rem forfeitures of guilty property, but from a different historical tradition: that of in personam, criminal forfeitures. Such forfeitures have historically been treated as punitive, being part of the punishment imposed for felonies and treason in the Middle Ages and at common law. See W. McKechnie, Magna Carta 337-339 (2d ed. 1958); 2 F. Pollock & F. Maitland, The History of English Law 460-466 (2d ed. 1909). Although in personam criminal forfeitures were well established in England at the time of the Founding, they were rejected altogether in the laws of this country until very recently. n7

n7 The First Congress explicitly rejected in personam forfeitures as punishments for federal crimes, see Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 117 ("No conviction or judgment . . . shall work corruption of blood, or any forfeiture of estate"), and Congress reenacted this ban several times over the course of two centuries. See Rev. Stat. § 5326 (1875); Act of Mar. 4, 1909, ch. 321, § 341, 35 Stat. 1159; Act of June 25, 1948, ch. 645, § 3563, 62 Stat. 837, codified at 18 U.S.C. § 3563 (1982 ed.); repealed effective Nov. 1, 1987, Pub. L. 98-473, 98 Stat. 1987.

It was only in 1970 that Congress resurrected the English common law of punitive forfeiture to combat organized crime and major drug trafficking. See Organized Crime Control Act of 1970, 18 U.S.C. § 1963, and Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 848(a). In providing for this mode of punishment, which had long been unused in this country, the Senate Judiciary Committee acknowledged that "criminal forfeiture . . . represents an innovative attempt to call on our common law heritage to meet an essentially modern problem." S. Rep. No. 91-617, p. 79 (1969). Indeed, it was not until 1992 that Congress provided for the criminal forfeiture of currency at issue here. See 18 U.S.C. § 982(a).

[*23]

The Government specifically contends that the forfeiture of respondent's currency is constitutional because it involves an "instrumentality" of respondent's crime. n8 According to the Government, the unreported cash is an instrumentality because it **[**329]** "does not merely facilitate a violation of law," but is "'the very sine qua non of the crime.'" Brief for United States 20 (quoting United States v. United States Currency in the Amount of One Hundred Forty-Five Thousand, One Hundred Thirty-Nine Dollars, 18 F.3d 73, 75 (CA2), cert. denied sub nom. Etim v. United States, 513 U.S. 815, 130 L. Ed. 2d 27, 115 S. Ct. 72 (1994)). The Government reasons that "there would be no violation at all without the exportation (or attempted exportation) of the cash." Brief for United States 20.

n8 Although the term "instrumentality" is of recent vintage, see Austin v. United States, 509 U.S. at 627-628 (SCALIA, J., concurring in part and concurring in judgment), it fairly characterizes property that historically was subject to forfeiture because it was the actual means by which an offense was committed. See infra, at 11; see, e.g., J. W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 508-510, 65 L. Ed. 376, 41 S. Ct. 189 (1921). "Instrumentality" forfeitures have historically been limited to the property actually used to commit an offense and no more. See United States v. Austin, supra, at 627-628 (SCALIA, J., concurring in part and concurring in judgment). A forfeiture that reaches beyond this strict historical limitation is ipso facto punitive and therefore subject to review under the Excessive Fines Clause.

[*24]

Acceptance of the Government's argument would require us to expand the traditional understanding of instrumentality forfeitures. This we decline to do. Instrumentalities historically have been treated as a form of "guilty property" that can be forfeited in civil in rem proceedings. In this case, however, the Government has sought to punish respondent by proceeding against him criminally, in personam, rather than proceeding in rem against the currency. It is therefore irrelevant whether respondent's currency is an instrumentality; the forfeiture is punitive, and the test for the excessiveness of a punitive forfeiture involves solely a proportionality determination. See infra, at 11-14. n9

n9 The currency in question is not an instrumentality in any event. The Court of Appeals reasoned that the existence of the currency as a "precondition" to the reporting requirement did not make it an "instrumentality" of the offense. See 84 F.3d at 337. We agree; the currency is merely the subject of the crime of failure to report. Cash in a suitcase does not facilitate the commission of that crime as, for example, an automobile facilitates the transportation of goods concealed to avoid taxes. See, e.g., J. W. Goldsmith, Jr.-Grant Co. v. United States, supra, at 508. In the latter instance, the property is the actual means by which the criminal act is committed. See Black's Law Dictionary 801 (6th ed. 1990) ("Instrumentality" is "something by which an end is achieved; a means, medium, agency").

[*25]

III

Because the forfeiture of respondent's currency constitutes punishment and is thus a "fine" within the meaning of the Excessive Fines Clause, we now turn to the question of whether it is "excessive."

A

The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish. See Austin v. United States, 509 U.S. at 622-623 (noting Court of Appeals' statement that "'the government is exacting too high a penalty in relation to the offense committed'"); Alexander v. United States, 509 U.S. 544, 559, 125 L. Ed. 2d 441, 113 S. Ct. 2766 (1993) ("It is in the light of the extensive criminal activities which petitioner apparently conducted . . . that the question whether the forfeiture was 'excessive' must be considered"). Until today, however, we have not articulated a standard for determining whether a punitive forfeiture is constitutionally excessive. We now hold that a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense.

The text and history of the Excessive Fines **[*26]** Clause demonstrate the centrality of proportionality to the excessiveness inquiry; nonetheless, **[**330]** they provide little guidance as to how disproportional a punitive forfeiture must be to the gravity of an offense in order to be "excessive." Excessive means surpassing the usual, the proper, or a normal measure of proportion. See 1 N. Webster, American Dictionary of the English Language (1828) (defining excessive as "beyond the common measure or proportion"); S. Johnson, A Dictionary of the English Language 680 (4th ed. 1773) ("beyond the common proportion"). The constitutional question that we address, however, is just how proportional to a criminal offense a fine must be, and the text of the Excessive Fines Clause does not answer it.

Nor does its history. The Clause was little discussed in the First Congress and the debates over the ratification of the Bill of Rights. As we have previously noted, the Clause was taken verbatim from the English Bill of Rights of 1689. See Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. at 266-267. That document's prohibition against excessive fines was a reaction to the abuses of the King's judges during the reigns of **[*27]** the Stuarts, id., at 267, but the fines that those judges imposed were described contemporaneously only in the most general terms. See Earl of Devonshire's Case, 11 State Tr. 1367, 1372 (H. L. 1689) (fine of &pound 30,000 "excessive and exorbitant, against Magna Charta, the common right of the subject, and the law of the land"). Similarly, Magna Charta--which the Stuart judges were accused of subverting--required only that amercements (the medieval predecessors of fines) should be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood:

"A Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement; (2) and a Merchant likewise, saving to him his merchandise; (3) and any other's villain than ours shall be likewise amerced, saving his wainage." Magna Charta, 9 Hen. III, ch. 14 (1225), 1 Stat. at Large 6-7 (1762 ed.).

None of these sources suggests how disproportional to the gravity of an offense a fine must be in order to be deemed constitutionally excessive.

We must therefore rely on other considerations in deriving a constitutional **[*28]** excessiveness standard, and there are two that we find particularly relevant. The first, which we have emphasized in our cases interpreting the Cruel and Unusual Punishments Clause, is that judgments about the appropriate punishment for an offense belong in the first instance to the legislature. See, e.g., Solem v. Helm, 463 U.S. 277, 290, 77 L. Ed. 2d 637, 103 S. Ct. 3001 (1983) ("Reviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes"); see also Gore v. United States, 357 U.S. 386, 393, 2 L. Ed. 2d 1405, 78 S. Ct. 1280 (1958) ("Whatever views may be entertained regarding severity of punishment, . . . these are peculiarly questions of legislative policy"). The second is that any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise. Both of these principles **[**331]** counsel against requiring strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense, and we therefore adopt the standard of gross disproportionality articulated in our Cruel and Unusual Punishments Clause precedents. See, e.g., Solem v. Helm, supra, **[*29]** at 288; Rummel v. Estelle, 445 U.S. 263, 271, 63 L. Ed. 2d 382, 100 S. Ct. 1133 (1980).

In applying this standard, the district courts in the first instance, and the courts of appeals, reviewing the proportionality determination de novo, n10 must compare the amount of the forfeiture to the gravity of the defendant's offense. If the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional.

n10 At oral argument, respondent urged that a district court's determination of excessiveness should be reviewed by an appellate court for abuse of discretion. See Tr. of Oral Arg. 32. We cannot accept this submission. The factual findings made by the district courts in conducting the excessiveness inquiry, of course, must be accepted unless clearly erroneous. See Anderson v. Bessemer City, 470 U.S. 564, 574-75, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985). But the question of whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context de novo review of that question is appropriate. See Ornelas v. United States, 517 U.S. 690, 697, 134 L. Ed. 2d 911, 116 S. Ct. 1657 (1996).

[*30]

B

Under this standard, the forfeiture of respondent's entire $357,144 would violate the Excessive Fines Clause. n11 Respondent's crime was solely a reporting offense. It was permissible to transport the currency out of the country so long as he reported it. Section 982(a)(1) orders currency to be forfeited for a "willful" violation of the reporting requirement. Thus, the essence of respondent's crime is a willful failure to report the removal of currency from the United States. n12 Furthermore, as the District Court **[**332]** found, respondent's violation was unrelated to any other illegal activities. The money was the proceeds of legal activity and was to be used to repay a lawful debt. Whatever his other vices, respondent does not fit into the class of persons for whom the statute was principally designed: He is not a money launderer, a drug trafficker, or a tax evader. n13 See Brief for United States 2-3. And under the Sentencing Guidelines, the maximum sentence that could have been imposed on respondent was six months, while the maximum fine was $5,000. App. to Pet. for Cert. 17a (transcript of District Court sentencing hearing); United States Sentencing Commission, Guidelines Manual, **[*31]** § 5(e)1.2, Sentencing Table (Nov. 1994). Such penalties confirm a minimal level of culpability. n14

n11 The only question before this Court is whether the full forfeiture of respondent's $357,144 as directed by § 982(a)(1) is constitutional under the Excessive Fines Clause. We hold that it is not. The Government petitioned for certiorari seeking full forfeiture, and we reject that request. Our holding that full forfeiture would be excessive reflects no judgment that "a forfeiture of even $15,001 would have suffered from a gross disproportion," nor does it "affirm the reduced $15,000 forfeiture on de novo review." Post, at 6. Those issues are simply not before us. Nor, indeed, do we address in any respect the validity of the forfeiture ordered by the District Court, including whether a court may disregard the terms of a statute that commands full forfeiture: As noted, supra, at 4, respondent did not cross-appeal the $15,000 forfeiture ordered by the District Court. The Court of Appeals thus declined to address the $15,000 forfeiture, and that question is not properly presented here either.

[*32]

n12 Contrary to the dissent's contention, the nature of the nonreporting offense in this case was not altered by respondent's "lies" or by the "suspicious circumstances" surrounding his transportation of his currency." See post, at 9-10. A single willful failure to declare the currency

constitutes the crime, the gravity of which is not exacerbated or mitigated by "fables" that respondent told one month, or six months, later. See post, at 10. The Government indicted respondent under 18 U.S.C. § 1001 for "lying," but that separate count did not form the basis of the nonreporting offense for which § 982(a)(1) orders forfeiture.

Further, the District Court's finding that respondent's lies stemmed from a fear of the Government because of "cultural differences," supra, at 3, does not mitigate the gravity of his offense. We reject the dissent's contention that this finding was a "patronizing excuse" that "demeans millions of law-abiding American immigrants by suggesting they cannot be expected to be as truthful as every other citizen." Post, at 10. We are confident that the District Court concurred in the dissent's incontrovertible proposition that "each American, regardless of culture or ethnicity, is equal before the law." Ibid. The District Court did nothing whatsoever to imply that "cultural differences" excuse lying, but rather made this finding in the context of establishing that respondent's willful failure to report the currency was unrelated to any other crime--a finding highly relevant to the determination of the gravity of respondent's offense. The dissent's charge of ethnic paternalism on the part of the District Court finds no support in the record, nor is there any indication that the District Court's factual finding that respondent "distrusted . . . the Government," see supra, at 3, was clearly erroneous.

[*33]

n13 Nor, contrary to the dissent's repeated assertion, see post, at 1, 3, 4, 5, 6, 7, 8, 11, 12, and 13, is respondent a "smuggler." Respondent owed no customs duties to the Government, and it was perfectly legal for him to possess the $357,144 in cash and to remove it from the United States. His crime was simply failing to report the wholly legal act of transporting his currency.

n14 In considering an offense's gravity, the other penalties that the Legislature has authorized are certainly relevant evidence. Here, as the Government and the dissent stress, Congress authorized a maximum fine of $250,000 plus five years' imprisonment for willfully violating the statutory reporting requirement, and this suggests that it did not view the reporting offense as a trivial one. That the maximum fine and Guideline sentence to which respondent was subject were but a fraction of the penalties authorized, however, undercuts any argument based solely on the statute, because they show that respondent's culpability relative to other potential violators of the reporting provision--tax evaders, drug kingpins, or money launderers, for example--is small indeed. This disproportion is telling notwithstanding the fact that a separate Guideline provision permits forfeiture if mandated by statute, see post, at 8. That Guideline, moreover, cannot override the constitutional requirement of proportionality review.

[*34]

The harm that respondent caused was also minimal. Failure to report his currency affected only one party, the Government, and in a relatively minor way. There was no fraud on the United States, and respondent caused no loss to the public fisc. Had his crime gone undetected, the Government would have been deprived only of the information that $357,144 had left the country. The Government and the dissent contend that there is a correlation between the amount forfeited and the harm that the Government would have suffered had the crime gone undetected. See Brief for United States 30 (forfeiture is "perfectly calibrated"); post, at 1 ("a fine calibrated with this accuracy"). We disagree. There is no inherent proportionality in such a forfeiture. It is impossible to conclude, for example, that the harm respondent caused is anywhere near 30 times greater than that caused by a hypothetical drug dealer who willfully fails to report taking $12,000 out of **[**333]** the country in order to purchase drugs.

Comparing the gravity of respondent's crime with the $357,144 forfeiture the Government seeks, we conclude that such a forfeiture would be grossly disproportional to the gravity of his offense. **[*35]** n15 It is larger than the $5,000 fine imposed by the District Court by many orders of magnitude, and it bears no articulable correlation to any injury suffered by the Government.

n15 Respondent does not argue that his wealth or income are relevant to the proportionality determination or that full forfeiture would deprive him of his livelihood, see supra, at 13, and the District Court made no factual findings in this respect.

C

Finally, we must reject the contention that the proportionality of full forfeiture is demonstrated by the fact that the First Congress enacted statutes requiring full forfeiture of goods involved in customs offenses or the payment of monetary penalties proportioned to the goods' value. It is argued that the enactment of these statutes at roughly the same time that the Eighth

Amendment was ratified suggests that full forfeiture, in the customs context at least, is a proportional punishment. The early customs statutes, however, do not support such a conclusion because, unlike § 982(a)(1), **[*36]** the type of forfeiture that they imposed was not considered punishment for a criminal offense.

Certain of the early customs statutes required the forfeiture of goods imported in violation of the customs laws, and, in some instances, the vessels carrying them as well. See, e.g., Act of Aug. 4, 1790, § 27, 1 Stat. 163 (goods unladen without a permit from the collector). These forfeitures, however, were civil in rem forfeitures, in which the Government proceeded against the property itself on the theory that it was guilty, not against a criminal defendant. See, e.g., Harford v. United States, 12 U.S. 109, 8 Cranch 109, 3 L. Ed. 504 (1814) (goods unladen without a permit); Locke v. United States, 11 U.S. 339, 7 Cranch 339, 340, 3 L. Ed. 364 (1813) (same). Such forfeitures sought to vindicate the Government's underlying property right in customs duties, and like other traditional in rem forfeitures, they were not considered at the Founding to be punishment for an offense. See supra, at 8-9. They therefore indicate nothing about the proportionality of the punitive forfeiture at issue here. Ibid. n16

n16 The nonpunitive nature of these early forfeitures was not lost on the Department of Justice, in commenting on the punitive forfeiture provisions of the Organized Crime Control Act of 1970:

> "'The concept of forfeiture as a criminal penalty which is embodied in this provision differs from other presently existing forfeiture provisions under Federal statutes where the proceeding is in rem against the property and the thing which is declared unlawful under the statute, or which is used for an unlawful purpose, or in connection with the prohibited property or transaction, is considered the offender, and the forfeiture is no part of the punishment for the criminal offense. Examples of such forfeiture provisions are those contained in the customs, narcotics, and revenue laws.'" S. Rep. No. 91-617, p. 79 (1969) (emphasis added).

[*37]

Other statutes, however, imposed monetary "forfeitures" proportioned to the value of the goods involved. See, e.g., Act of July 31, 1789, § 22, 1 Stat. 42 (if an importer, "with design to defraud the revenue," did not invoice his goods at their actual cost at the place of export, "all such goods, wares or merchandise, or the **[**334]** value thereof . . . shall be forfeited"); § 25, id., at 43 (any person concealing or purchasing goods, knowing they were liable to seizure for violation of the customs laws, was liable to "forfeit and pay a sum double the value of the goods so concealed or purchased"); see also Act of Aug. 4, 1790, §§ 10, 14, 22, id., at 156, 158, 161. Similar statutes were passed in later Congresses. See, e.g., Act of Mar. 2, 1799, §§ 24, 28, 45, 46, 66, 69, 79, 84, id., at 646, 648, 661, 662, 677, 678, 687, 694; Act of Mar. 3, 1823, ch. 58, § 1, 3 Stat. 781.

These "forfeitures" were similarly not considered punishments for criminal offenses. This Court so recognized in Stockwell v. United States, 80 U.S. 531, 13 Wall. 531, 20 L. Ed. 491 (1871), a case interpreting a statute that, like the Act of July 31, 1789, provided that a person who had concealed goods liable to seizure **[*38]** for customs violations should "forfeit and pay a sum double the amount or value of the goods." Act of Mar. 3, 1823, ch. 58, § 2, 3 Stat. 781-782. The Stockwell Court rejected the defendant's contention that this provision was "penal," stating instead that it was "fully as remedial in its character, designed as plainly to secure [the] rights [of the Government], as are the statutes rendering importers liable to duties." 13 Wall. at 546. The Court reasoned:

> "When foreign merchandise, subject to duties, is imported into the country, the act of importation imposes on the importer the obligation to pay the legal charges. Besides this the goods themselves, if the duties be not paid, are subject to seizure . . . . Every act, therefore, which interferes with the right of the government to seize and appropriate the property which has been forfeited to it . . . is a wrong to property rights, and is a fit subject for indemnity." Id., at 546.

Significantly, the fact that the forfeiture was a multiple of the value of the goods did not alter the Court's conclusion:

> "The act of abstracting goods illegally imported, receiving, concealing, or buying them, interposes difficulties **[*39]** in the way of a government seizure, and impairs, therefore, the value of the government right. It is, then, hardly accurate to say that the only loss the government can sustain from concealing the goods liable to seizure is their single value . . . . Double the value may not be more than complete indemnity." Id., at 546-547.

The early monetary forfeitures, therefore, were considered not as punishment for an offense, but rather

as serving the remedial purpose of reimbursing the Government for the losses accruing from the evasion of customs duties. n17 They were thus no different in purpose and effect than the in rem forfeitures of the **[**335]** goods to whose value they were proportioned. n18 Cf. One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237, 34 L. Ed. 2d 438, 93 S. Ct. 489 (1972) (per curiam) (customs statute requiring the forfeiture of undeclared goods concealed in baggage and imposing a monetary penalty equal to the value of the goods imposed a "remedial, rather than [a] punitive sanction"). n19 By contrast, the full forfeiture mandated by § 982(a)(1) in this case serves no remedial purpose; it is clearly punishment. The customs statutes enacted by the First Congress, therefore, **[*40]** in no way suggest that § 982(a)(1)'s currency forfeiture is constitutionally proportional.

n17 In each of the statutes from the early Congresses cited by the dissent, the activities giving rise to the monetary forfeitures, if undetected, were likely to cause the Government losses in customs revenue. The forfeiture imposed by the Acts of Aug. 4, 1790 and Mar. 2, 1799 was not simply for "transferring goods from one ship to another," post, at 3, but rather for doing so "before such ship . . . shall come to the proper place for the discharge of her cargo . . . and be there duly authorized by the proper officer or officers of the customs to unlade" the goods, see 1 Stat. 157, 158, 648, whereupon duties would be assessed. Similarly, the forfeiture imposed by the Act of Mar. 3, 1823 was for failing to deliver the ship's manifest of cargo--which was to list "merchandise subject to duty"--to the collector of customs. See Act of Mar. 2, 1821, § 1, 3 Stat. 616; Act of Mar. 3, 1823, § 1, id., at 781. And the "invoices" that if "false" gave rise to the forfeiture imposed by the Act of Mar. 3, 1863 were to include the value or quantity of any dutiable goods. § 1, 12 Stat. 737-738.

[*41]

n18 The nonpunitive nature of the monetary forfeitures was also reflected in their procedure: like traditional in rem forfeitures, they were brought as civil actions, and as such are distinguishable from the punitive criminal fine at issue here. Instead of instituting an information of libel in rem against the goods, see, e.g., Locke v. United States, 11 U.S. 339, 7 Cranch 339, 3 L. Ed. 364 (1813), the Government filed "a civil action of debt" against the person from whom it sought payment. See, e.g., Stockwell v. United States, 80 U.S. 531, 13 Wall. 531, 541-542, 20 L. Ed. 491 (1871). In both England and the United States, an action of debt was used to recover import duties owed the Government, being "the general remedy for the recovery of all sums certain, whether the legal liability arise from contract, or be created by a statute. And the remedy as well lies for the government itself, as for a citizen." United States v. Lyman, 26 F. Cas. 1024, 1030 (No. 15,647) (CC Mass. 1818) (Story, C. J.). Thus suits for the payment of monetary forfeitures were viewed no differently than suits for the customs duties themselves.

n19 One Lot Emerald Cut Stones differs from this case in the most fundamental respect. We concluded that the forfeiture provision in Emerald Cut Stones was entirely remedial and thus nonpunitive, primarily because it "provided a reasonable form of liquidated damages" to the Government. 409 U.S. at 237. The additional fact that such a remedial forfeiture also "serves to reimburse the Government for investigation and enforcement expenses," ibid.; see post, at 4, is essentially meaningless, because even a clearly punitive criminal fine or forfeiture could be said in some measure to reimburse for criminal enforcement and investigation. Contrary to the dissent's assertion, this certainly does not mean that the forfeiture in this case--which, as the dissent acknowledges, see post, at 1 (respondent's forfeiture is a "fine"), 10 (§ 982(a)(1) imposes a "punishment"), is clearly punitive--"would have to [be treated] as nonpunitive." Post, at 3.

[*42]

* * *

For the foregoing reasons, the full forfeiture of respondent's currency would violate the Excessive Fines Clause. The judgment of the Court of Appeals is

Affirmed.

DISSENTBY: KENNEDY

DISSENT: JUSTICE KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE SCALIA join, dissenting.

For the first time in its history, the Court strikes down a fine as excessive under the Eighth Amendment. The decision is disturbing both for its specific holding and for the broader upheaval it foreshadows. At issue is a fine Congress fixed in the amount of the currency respondent sought to smuggle or to transport without reporting. If a fine calibrated with this accuracy fails the Court's test, its decision portends serious disruption of a vast range of statutory fines. The Court all but says the offense is not serious anyway. This disdain for the statute is wrong as an empirical matter and disrespectful **[**336]** of the

separation of powers. The irony of the case is that, in the end, it may stand for narrowing constitutional protection rather than enhancing it. To make its rationale work, the Court appears to remove important classes of fines from any excessiveness inquiry at all. This, too, is unsound; **[*43]** and with all respect, I dissent.

I

A

In striking down this forfeiture, the majority treats many fines as "remedial" penalties even though they far exceed the harm suffered. Remedial penalties, the Court holds, are not subject to the Excessive Fines Clause at all. See, e.g., ante, at 20. Proceeding from this premise, the majority holds customs fines are remedial and not at all punitive, even if they amount to many times the duties due on the goods. See ante, at 19-22. In the majority's universe, a fine is not a punishment even if it is much larger than the money owed. This confuses whether a fine is excessive with whether it is a punishment.

This novel, mistaken approach requires reordering a tradition existing long before the Republic and confirmed in its early years. The Court creates its category to reconcile its unprecedented holding with a six-century-long tradition of in personam customs fines equal to one, two, three, or even four times the value of the goods at issue. E.g., Cross v. United States, 6 F. Cas. 892 (No. 3,434) (CC Mass. 1812) (Story, J., Cir. J.); United States v. Riley, 88 F. 480 (SDNY 1898); United States v. Jordan, 26 **[*44]** F. Cas. 661 (No. 15,498) (Mass. 1876); In re Vetterlein, 13 Blatchf. 44, 28 F. Cas. 1172 (No. 16,929) (CC SDNY 1875); United States v. Hughes, 12 Blatchf. 553, 26 F. Cas. 417 (No. 15,417) (CC SDNY 1875); McGlinchy v. United States, 4 Cliff. 312, 16 F. Cas. 118 (No. 8,803) (CC Me. 1875); United States v. Hutchinson, 26 F. Cas. 446 (No. 15,431) (Me. 1868); Tariff Act of 1930, § 497, 46 Stat. 728, as amended, 19 U.S.C. § 1497(a) (failing to declare goods); Act of Mar. 3, 1863, § 1, 12 Stat. 738 (same); Act of Mar. 3, 1823, ch. 58, § 1, 3 Stat. 781 (importing without a manifest); Act of **[**337]** Mar. 2, 1799, §§ 46, 79, 84, 1 Stat. 662, 687, 694 (failing to declare goods; failing to re-export goods; making false entries on forms); Act of Aug. 4, 1790, §§ 10, 14, 22, 1 Stat. 156, 158, 161 (submitting incomplete manifests; unloading before customs; unloading duty-free goods); Act of July 31, 1789, §§ 22, 25, 1 Stat. 42, 43 (using false invoices; buying uncustomed goods); King v. Manning, 2 Comyns 616, 92 Eng. Rep. 1236 (K. B. 1738) (assisting smugglers); 1 Eliz. 1, ch. 11, § 5 (1558-1559) (Eng.) (declaring goods under wrong person's name); 1 & 2 Phil. & M., ch. 5, §§ 1, 3 (1554-1555) (Eng.) (exporting **[*45]** food without a license; exporting more food than the license allowed); 5 Rich. 2, Stat. 1, chs. 2, 3 (1381) (Eng.) (exporting gold or silver without a license; using ships other than those of the King's allegiance).

In order to sweep all these precedents aside, the majority's remedial analysis assumes the settled tradition was limited to "reimbursing the Government for" unpaid duties. Ante, at 20. The assumption is wrong. Many offenses did not require a failure to pay a duty at all. See, e.g., Act of Mar. 3, 1863, § 1, 12 Stat. 738 (importing under false invoices); Act of Mar. 3, 1823, ch. 58, § 1, 3 Stat. 781 (failing to deliver ship's manifest); Act of Mar. 2, 1799, § 28, 1 Stat. 648 (transferring goods from one ship to another); Act of Aug. 4, 1790, § 14, 1 Stat. 158 (same); 5 Rich. II, st. 1, ch. 2 (1381) (Eng.) (exporting gold or silver without a license). None of these in personam penalties depended on a compensable monetary loss to the government. True, these offenses risked causing harm, ante, at 20, n. 17, but so does smuggling or not reporting cash. A sanction proportioned to potential rather than actual harm is punitive, though the potential harm may **[*46]** make the punishment a reasonable one. See TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 460-462, 125 L. Ed. 2d 366, 113 S. Ct. 2711 (1993) (opinion of STEVENS, J.). The majority nonetheless treats the historic penalties as nonpunitive and thus not subject to the Excessive Fines Clause, though they are indistinguishable from the fine in this case. (It is a mark of the Court's doctrinal difficulty that we must speak of nonpunitive penalties, which is a contradiction in terms.)

Even if the majority's typology were correct, it would have to treat the instant penalty as nonpunitive. In this respect, the Court cannot distinguish the case on which it twice relies, One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 34 L. Ed. 2d 438, 93 S. Ct. 489 (1972) (per curiam). Ante, at 6, 21. Emerald Stones held forfeiture of smuggled goods plus a fine equal to their value was remedial and not punitive, for purposes of double jeopardy, because the fine "serves to reimburse the Government for investigation and enforcement expenses." 409 U.S. at 237. The logic, however, applies with equal force here. Forfeiture of the money involved in the offense would compensate for the investigative and enforcement expenses of **[*47]** the Customs Service. There is no reason to treat the cases differently, just because a small duty was at stake in one and a disclosure form in the other. See Bollinger's Champagne, 70 U.S. 560, 3 Wall. 560, 564, 18 L. Ed. 78 (1866) (holding falsehoods on customs forms justify forfeiture even if the lies do not affect the duties due and paid). The majority, in short, is not even faithful to its own artificial category of remedial penalties.

B

The majority's novel holding creates another anomaly as well. The majority suggests in rem forfeitures of the instrumentalities of crimes are not fines at all. See ante, at 10-11, and nn. 8, 9. The point of the instrumentality theory is to distinguish goods having a "close enough relationship to the offense" from those incidentally related to it. Austin v. United States, 509 U.S. 602, 628, 125 L. Ed. 2d 488, 113 S. Ct. 2801 (SCALIA, J., concurring in part and concurring in judgment). From this, the Court concludes the money in a cash smuggling or non-reporting offense cannot be an instrumentality, unlike, say, a car used to transport goods concealed from taxes. Ante, at 11, n. 9. There is little logic in this rationale. The car plays an important role in the offense but is not essential; **[*48]** one could also transport goods by jet or by foot. The link between the cash and the cash-smuggling offense is closer, as the offender must fail to report while smuggling more than $10,000. See 31 U.S.C. §§ 5316(a), 5322(a). The cash is not just incidentally related to the offense of cash smuggling. It is essential, **[**338]** whereas the car is not. Yet the car plays an important enough role to justify forfeiture, as the majority concedes. A fortiori, the cash does as well. Even if there were a clear distinction between instrumentalities and incidental objects, when the Court invokes the distinction it gets the results backwards.

II

Turning to the question of excessiveness, the majority states the test: A defendant must prove a gross disproportion before a court will strike down a fine as excessive. See ante, at 12. This test would be a proper way to apply the Clause, if only the majority were faithful in applying it. The Court does not, however, explain why in this case forfeiture of all of the cash would have suffered from a gross disproportion. The offense is a serious one, and respondent's smuggling and failing to report were willful. The cash was lawful to own, but this fact shows **[*49]** only that the forfeiture was a fine; it cannot also prove that the fine was excessive.

The majority illuminates its test with a principle of deference. Courts "'should grant substantial deference to the broad authority that legislatures necessarily possess'" in setting punishments. Ante, at 13 (quoting Solem v. Helm, 463 U.S. 277, 290, 77 L. Ed. 2d 637, 103 S. Ct. 3001 (1983)). Again, the principle is sound but the implementation is not. The majority's assessment of the crime accords no deference, let alone substantial deference, to the judgment of Congress. Congress deems the crime serious, but the Court does not. Under the congressional statute, the crime is punishable by a prison sentence, a heavy fine, and the forfeiture here at issue. As the statute makes clear, the Government needs the information to investigate other serious crimes, and it needs the penalties to ensure compliance.

A

By affirming, the majority in effect approves a meager $15,000 forfeiture. The majority's holding purports to be narrower, saying only that forfeiture of the entire $357,144 would be excessive. Ante, at 14, and n. 11. This narrow holding is artificial in constricting the question presented for this Court's review. **[*50]** The statute mandates forfeiture of the entire $357,144. See 18 U.S.C. § 982(a)(1). The only ground for reducing the forfeiture, then, is that any higher amount would be unconstitutional. The majority affirms the reduced $15,000 forfeiture on de novo review, see ante, at 14, and n. 11, which it can do only if a forfeiture of even $15,001 would have suffered from a gross disproportion. Indeed, the majority leaves open whether the $15,000 forfeiture itself was too great. See ante, at 14, n. 11. Money launderers, among the principal targets of this statute, may get an even greater return from their crime.

The majority does not explain why respondent's knowing, willful, serious crime deserves no higher penalty than $15,000. It gives only a cursory explanation of why forfeiture of all of the money would have suffered from a gross disproportion. The majority justifies its evisceration of the fine because the money was legal to have and came from a legal source. See ante, at 16. **[**339]** This fact, however, shows only that the forfeiture was a fine, not that it was excessive. As the majority puts it, respondent's money was lawful to possess, was acquired in a lawful manner, **[*51]** and was lawful to export. Ante, at 15-16. It was not, however, lawful to possess the money while concealing and smuggling it. Even if one overlooks this problem, the apparent lawfulness of the money adds nothing to the argument. If the items possessed had been dangerous or unlawful to own, for instance narcotics, the forfeiture would have been remedial and would not have been a fine at all. See Austin, 509 U.S. at 621; e.g., United States v. One Assortment of 89 Firearms, 465 U.S. 354, 364 (1984) (unlicensed guns); Commonwealth v. Dana, 43 Mass. 329, 337 (1841) (forbidden lottery tickets). If respondent had acquired the money in an unlawful manner, it would have been forfeitable as proceeds of the crime. As a rule, forfeitures of criminal proceeds serve the nonpunitive ends of making restitution to the rightful owners and of compelling the surrender of property held without right or ownership. See United States v. Ursery,

518 U.S. 267, 284, 135 L. Ed. 2d 549, 116 S. Ct. 2135 (1996). Most forfeitures of proceeds, as a consequence, are not fines at all, let alone excessive fines. Hence, the lawfulness of the money shows at most that the forfeiture was a fine; it cannot at the same time **[*52]** prove that the fine was excessive.

B

1

In assessing whether there is a gross disproportion, the majority concedes, we must grant "'substantial deference'" to Congress' choice of penalties. Ante, at 13 (quoting Solem, 463 U.S. at 290). Yet, ignoring its own command, the Court sweeps aside Congress' reasoned judgment and substitutes arguments that are little more than speculation.

Congress considered currency smuggling and nonreporting a serious crime and imposed commensurate penalties. It authorized punishments of five years' imprisonment, a $250,000 fine, plus forfeiture of all the undeclared cash. 31 U.S.C. § 5322(a); 18 U.S.C. § 982(a)(1). Congress found the offense standing alone is a serious crime, for the same statute doubles the fines and imprisonment for failures to report cash "while violating another law of the United States." 31 U.S.C. § 5322(b). Congress experimented with lower penalties on the order of one year in prison plus a $1,000 fine, but it found the punishments inadequate to deter lucrative money laundering. See President's Commission on Organized Crime, The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering 27, 60 **[*53]** (Oct. 1984). The Court today rejects this judgment.

The Court rejects the congressional judgment because, it says, the Sentencing Guidelines cap the appropriate fine at $5,000. See ante, at 16, and n. 14. The purpose of the Guidelines, however, is to select punishments with precise proportion, not to opine on what is a gross disproportion. In addition, there is no authority for elevating the Commission's judgment **[**340]** of what is prudent over the congressional judgment of what is constitutional. The majority, then, departs from its promise of deference in the very case announcing the standard.

The Court's argument is flawed, moreover, by a serious misinterpretation of the Guidelines on their face. The Guidelines do not stop at the $5,000 fine the majority cites. They augment it with this vital point: "Forfeiture is to be imposed upon a convicted defendant as provided by statute." United States Sentencing Commission, Guidelines Manual § 5E1.4 (Nov. 1995). The fine thus supplements the forfeiture; it does not replace it. Far from contradicting congressional judgment on the offense, the Guidelines implement and mandate it.

2

The crime of smuggling or failing to report cash is more **[*54]** serious than the Court is willing to acknowledge. The drug trade, money laundering, and tax evasion all depend in part on smuggled and unreported cash. Congress enacted the reporting requirement because secret exports of money were being used in organized crime, drug trafficking, money laundering, and other crimes. See H. R. Rep. No. 91-975, pp. 12-13 (1970). Likewise, tax evaders were using cash exports to dodge hundreds of millions of dollars in taxes owed to the Government. See ibid.

The Court does not deny the importance of these interests but claims they are not implicated here because respondent managed to disprove any link to other crimes. Here, to be sure, the Government had no affirmative proof that the money was from an illegal source or for an illegal purpose. This will often be the case, however. By its very nature, money laundering is difficult to prove; for if the money launderers have done their job, the money appears to be clean. The point of the statute, which provides for even heavier penalties if a second crime can be proved, is to mandate forfeiture regardless. See 31 U.S.C. § 5322(b); 18 U.S.C. § 982(a)(1). It is common practice, of course, for a cash **[*55]** courier not to confess a tainted source but to stick to a well-rehearsed story. The kingpin, the real owner, need not come forward to make a legal claim to the funds. He has his own effective enforcement measures to ensure delivery at destination or return at origin if the scheme is thwarted. He is, of course, not above punishing the courier who deviates from the story and informs. The majority is wrong, then, to assume in personam forfeitures cannot affect kingpins, as their couriers will claim to own the money and pay the penalty out of their masters' funds. See ante, at 6, n. 3. Even if the courier confessed, the kingpin could face an in personam forfeiture for his agent's authorized acts, for the kingpin would be a co-principal in the commission of the crime. See 18 U.S.C. § 2.

In my view, forfeiture of all the unreported currency is sustainable whenever a willful violation is proven. The facts of this case exemplify how hard it can be to prove ownership and other crimes, and they also show respondent is far from an innocent victim. For one thing, he was guilty of repeated lies to Government agents and suborning lies by others. Customs inspectors told respondent of **[*56]** his duty to report cash. He and his

wife claimed they **[**341]** had only $15,000 with them, not the $357,144 they in fact had concealed. He then told customs inspectors a friend named Abe Ajemian had lent him about $200,000. Ajemian denied this. A month later, respondent said Saeed Faroutan had lent him $170,000. Faroutan, however, said he had not made the loan and respondent had asked him to lie. Six months later, respondent resurrected the fable of the alleged loan from Ajemian, though Ajemian had already contradicted the story. As the District Court found, respondent "has lied, and has had his friends lie." Tr. 54 (Jan. 19, 1995). He had proffered a "suspicious and confused story, documented in the poorest way, and replete with past misrepresentation." Id., at 61-62.

Respondent told these lies, moreover, in most suspicious circumstances. His luggage was stuffed with more than a third of a million dollars. All of it was in cash, and much of it was hidden in a case with a false bottom.

The majority ratifies the District Court's see-no-evil approach. The District Court ignored respondent's lies in assessing a sentence. It gave him a two-level downward adjustment for acceptance of responsibility, **[*57]** instead of an increase for obstruction of justice. See id., at 62. It dismissed the lies as stemming from "distrust for the Government" arising out of "cultural differences." Id., at 63. While the majority is sincere in not endorsing this excuse, ante, at 15, n. 12, it nonetheless affirms the fine tainted by it. This patronizing excuse demeans millions of law-abiding American immigrants by suggesting they cannot be expected to be as truthful as every other citizen. Each American, regardless of culture or ethnicity, is equal before the law. Each has the same obligation to refrain from perjury and false statements to the Government.

In short, respondent was unable to give a single truthful explanation of the source of the cash. The multitude of lies and suspicious circumstances points to some form of crime. Yet, though the Government rebutted each and every fable respondent proffered, it was unable to adduce affirmative proof of another crime in this particular case.

Because of the problems of individual proof, Congress found it necessary to enact a blanket punishment. See S. Rep. No. 99-130, p. 21 (1985); see also Drug Money Laundering Control Efforts, Hearing before the **[*58]** Subcommittee on Consumer and Regulatory Affairs of the Senate Banking, Housing, and Urban Affairs Committee, 101st Cong., 1st Sess., 84 (1989) (former IRS agent found it "'unbelievably difficult'" to discern which money flows were legitimate and which were tied to crime). One of the few reliable warning signs of some serious crimes is the use of large sums of cash. See id., at 83. So Congress punished all cash smuggling or non-reporting, authorizing single penalties for the offense alone and double penalties for the offense coupled with proof of other crimes. See 31 U.S.C. §§ 5322(a), (b). The requirement of willfulness, it judged, would be enough to protect the innocent. See ibid. The majority second-guesses this judgment without explaining why Congress' blanket approach was unreasonable.

Money launderers will rejoice to know they face forfeitures of less **[**342]** than 5% of the money transported, provided they hire accomplished liars to carry their money for them. Five percent, of course, is not much of a deterrent or punishment; it is comparable to the fee one might pay for a mortgage lender or broker. Cf. 15 U.S.C. § 1602(aa)(1)(B) (high-cost mortgages cost more than 8% in points **[*59]** and fees). It is far less than the 20-26% commissions some drug dealers pay money launderers. See Hearings on Money Laundering and the Drug Trade before the Subcommittee on Crime of the House Judiciary Committee, 105th Cong., 1st Sess. (1997) (testimony of M. Zeldin); Andelman, The Drug Money Maze, 73 Foreign Affairs 108 (July/August 1994). Since many couriers evade detection, moreover, the average forfeiture per dollar smuggled could amount, courtesy of today's decision, to far less than 5%. In any event, the fine permitted by the majority would be a modest cost of doing business in the world of drugs and crime. See US/Mexico Bi-National Drug Threat Assessment 84 (Feb. 1997) (to drug dealers, transaction costs of 13%-15% are insignificant compared to their enormous profit margins).

Given the severity of respondent's crime, the Constitution does not forbid forfeiture of all of the smuggled or unreported cash. Congress made a considered judgment in setting the penalty, and the Court is in serious error to set it aside.

III

The Court's holding may in the long run undermine the purpose of the Excessive Fines Clause. One of the main purposes of the ban on excessive fines was to **[*60]** prevent the King from assessing unpayable fines to keep his enemies in debtor's prison. See Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 267, 106 L. Ed. 2d 219, 109 S. Ct. 2909 (1989); 4 W. Blackstone, Commentaries on the Laws of England 373 (1769) ("Corporal punishment, or a stated imprisonment, . . . is better than an excessive fine, for that amounts to imprisonment for life. And this is the reason why fines in the king's court are frequently denominated ransoms . . . .") Concern with imprisonment may explain why the

Excessive Fines Clause is coupled with, and follows right after, the Excessive Bail Clause. While the concern is not implicated here -- for of necessity the money is there to satisfy the forfeiture -- the Court's restrictive approach could subvert this purpose. Under the Court's holding, legislators may rely on mandatory prison sentences in lieu of fines. Drug lords will be heartened by this, knowing the prison terms will fall upon their couriers while leaving their own wallets untouched.

At the very least, today's decision will encourage legislatures to take advantage of another avenue the majority leaves open. The majority subjects this forfeiture to scrutiny because **[*61]** it is in personam, but it then suggests most in rem forfeitures (and perhaps most civil forfeitures) may not be fines at all. Ante, at 8, 18, and n. 16; but see ante, at 9, n. 6. The suggestion, one might note, is inconsistent or at least in tension with Austin v. United States, 509 U.S. 602, 125 L. Ed. 2d 488, 113 S. Ct. 280 (1993). In any event, these remarks may encourage a legislative shift from in personam to in rem forfeitures, avoiding mens rea as a predicate and giving owners fewer **[**343]** procedural protections. By invoking the Excessive Fines Clause with excessive zeal, the majority may in the long run encourage Congress to circumvent it.

IV

The majority's holding may not only jeopardize a vast range of fines but also leave countless others unchecked by the Constitution. Non-remedial fines may be subject to deference in theory but overbearing scrutiny in fact. So-called remedial penalties, most in rem forfeitures, and perhaps civil fines may not be subject to scrutiny at all. I would not create these exemptions from the Excessive Fines Clause. I would also accord genuine deference to Congress' judgments about the gravity of the offenses it creates. I would further follow the **[*62]** long tradition of fines calibrated to the value of the goods smuggled. In these circumstances, the Constitution does not forbid forfeiture of all of the $357,144 transported by respondent. I dissent.

EXHIBIT 14

Proof of Innocent Owner Defense.

ONE 1988 JEEP CHEROKEE VIN NO. 1JCMT7898JT159481 v. The CITY OF SALISBURY

No. 359, September Term, 1993

COURT OF SPECIAL APPEALS OF MARYLAND

98 Md. App. 676; 635 A.2d 21; 1994 Md. App. LEXIS 6

January 4, 1994, Filed

PRIOR HISTORY: **[***1]** APPEAL FROM THE Circuit Court for Wicomico County. Alfred T. Truitt, Jr., JUDGE

DISPOSITION: JUDGMENT REVERSED. COSTS TO BE PAID BY APPELLEE.

CORE TERMS: forfeiture, innocent, actual knowledge, conveyance, forfeited, burden of proving, harshly, drug problem, subheading, transport, forfeiture statute, burden of proof, ordering, searched, subject to forfeiture, illegally, driving, revised, seized, arrest, presumptive, entitlement, innocence, revision, exclusive possession, objective standard, failed to prove, order to avoid, preponderance, veterinary

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R. Mark Nasteff, Robert A. Eaton, P.A., (Davis R. Ruark, State's Atty. for Wicomico County and Sampson G. Vincent, Asst. State's Atty. for Wicomico County, on the brief) Salisbury, for appellee.

JUDGES: Alpert, Wenner and Fischer, JJ.

OPINIONBY: WENNER

OPINION: **[*678]** **[**22]** We shall here interpret the so-called "innocent owner" defense contained in Md.Code (1957, 1992 Repl.Vol.) Art. 27 § 297. In this appeal, appellant, Dr. Richard Long (Dr. Long), challenges an order of the Circuit Court for Wicomico County granting a Petition for Forfeiture filed by appellee, the City of Salisbury (City). On appeal, Dr. Long presents us with four questions:

1. Whether the trial court erred in granting the Petition for Forfeiture when the City of Salisbury failed to prove a nexus between the vehicle which had been used to facilitate the possession of illegal drugs and the illegal drugs.

2. Whether the trial court erred in admitting evidence that Appellant may have known **[***2]** of his son's prior drug use.

3. Whether the trial court erred in finding that possession of the Jeep Cherokee was sufficient to order forfeiture when the registered owner had no actual knowledge that the conveyance in question was to be used in violation of Article 27. § 297.

4. Whether the Order of Forfeiture of the Jeep Cherokee was a violation of the Appellant's constitutional right to protection from excessive punishment under the Eighth Amendment of the United States Constitution and Article 25 of the Maryland Declaration of Rights when the value of the forfeited property far exceeded the value of the contraband seized.

We shall answer Dr. Long's third question in the affirmative, and shall reverse the judgment of the circuit court.

BACKGROUND

While driving Dr. Long's 1988 Jeep Cherokee (Cherokee), his son, Kevin, was stopped by Trooper David Owens of the Maryland State Police. Trooper Owens searched the Cherokee and found various drugs, including one Valium pill, two partially burned marijuana cigarettes, and a residue of white **[*679]** powder contained in a pill crusher. Trooper Owens also found small quantities of prescription drugs, Torbutral and Zantac.

The **[***3]** City filed a Petition for Forfeiture of the Cherokee and Dr. Long responded, requesting that it be denied.

At a hearing held on February 8, 1992, Dr. Long testified that he had purchased the Cherokee for use in his veterinary practice, and had loaned it to Kevin for use in driving to and from his job in Ocean City. Dr. Long was out of state when the Cherokee was stopped, searched, and seized.

According to Dr. Long, he kept in the Cherokee various drugs and instruments associated with his profession. He said that Torbutral was an animal cough suppressant and that Zantac was a prescription medicine for Kevin's ulcer. Dr. Long also said that he was unaware that Kevin was using the Cherokee to transport controlled dangerous substances.

Dr. Long acknowledged that he was aware that Kevin had been convicted in August of 1990 of Driving Under the Influence. n1 Although **[**23]** the arresting officer testified that, following Kevin's arrest in August of 1990, Dr. Long had told him of Kevin's drug problem, Dr. Long had no recollection of the conversation. Nevertheless, Dr. Long testified at the hearing that he suspected that Kevin had removed some drugs from his veterinary clinic.

n1 Dr. Long denied knowing that the conviction was drug related; however, Trooper Owens testified that it was drug related.

[*4]**

As we have mentioned, after considering all of the testimony, the trial court ordered the Cherokee forfeited.

I.

In 1989, the General Assembly rewrote Maryland's forfeiture statute, Md.Code (1957, 1992 Repl.Vol.), Art. 27 § 297. 1989 Md.Laws, Ch. 285. Although many of its sections remained the same, some were deleted and several new sections were added.

[*680] The forfeiture statute now contains a section of definitions, § 297(a), as well as sections governing the forfeiture of real property, §§ 297(m) and (n). Section 297(r), entitled "Rights of Lienholder" was also added, as was § 297(s), entitled "Powers of Court."

In addition, the so called "Innocent Owner Defense," was significantly changed. In previous Art. 27 § 297, the innocent owner defense was contained in § 297(a)(4)(iii). It provided:

No conveyance shall be forfeited under the provisions of this section to the extent of the interest of an owner of the conveyance who neither knew nor should have known that the conveyance was used or was to be used in violation of this subtitle.

We had occasion in State v. One 1985 Ford, 72 Md.App. 144, 527 A.2d 1311 (1987) **[***5]** to explain the operation of the innocent owner defense within the legislative scheme of Art. 27, § 297. In One 1985 Ford, the trial court had dismissed the State's petition for forfeiture after the State had presented its case. Writing for us, Judge Moylan explained that the dismissal was premature:

We hold that once the illicit use of the vehicle is shown, the vehicle is presumptively subject to forfeiture and the burden of proof is upon the owner to demonstrate entitlement to an exception from that presumptive forfeiture.

Id. at 147, 527 A.2d 1311.

Judge Moylan emphasized that the burden of proving entitlement to an exception from the presumptive forfeiture is on the party claiming innocent ownership. Moreover Judge Moylan went on to say that a mother, whose son transported drugs in her car was required to show "(1) that she did not know and (2) that there was no reason that she should have known that her son was using her automobile to transport, to possess, or to conceal drugs." Id. We then held that the trial court erred in finding that the mother was an innocent owner without requiring her to so prove, and remanded **[***6]** the case to the trial court for further proceedings.

[*681] Perhaps in response to One 1985 Ford, revised Art. 27, § 297 explicitly sets forth the burden of proof explained by Judge Moylan, and contains other significant changes.

In previous Art. 27, § 297, the innocent owner defense varied depending on the type of property subject to forfeiture. If a motor vehicle was subject to forfeiture, an innocent owner could prevail if the owner "neither knew nor should have known that the conveyance was used or was to be used in violation of this subtitle." See Supra § 297(a)(4)(iii). If the property seized consisted of anything of value furnished, or intended to be furnished, in exchange for a controlled dangerous substance, the innocent owner could avoid forfeiture if the "act or

omission" giving rise to forfeiture occurred "without the owner's knowledge or consent." § 297(a)(9). n2

n2 Section 297(a)(9) is part of the paragraph entitled Property Subject to Forfeiture and appears in its entirety as follows:

> Everything of value furnished, or intended to be furnished, in exchange for a controlled dangerous substance in violation of this subheading, all proceeds traceable to such an exchange, and all negotiable instruments and securities used, or intended to be used, to facilitate any violation of this subheading. However, property may not be forfeited under this paragraph, to the extent of the interest of any owner, by reason of any act or omission established by the owner to have been committed without the owner's knowledge or consent.

[*7]**

[24]** Whatever the reason for designating different standards for the forfeiture of different types of property, the General Assembly has now standardized the innocent owner defense by moving it to a section of its own:

(c) Property not subject to forfeiture. -- Property or an interest in property described under subsection (b)(4), (9), and (10) of this section may not be forfeited if the owner establishes by a preponderance of the evidence that the violation of this subheading was done without the owner's actual knowledge.

We note that, in addition to the organizational change, revised Art. 27, § 297, et seq., changed significantly the burden to be met by the owner in order to avoid forfeiture. In contrast to both sections of previous § 297, under new **[*682]** § 297(c), the owner of certain property could have avoided forfeiture by proving that "the violation of this subheading was done without [his or her] actual knowledge." § 297(c) (Emphasis added.) It is this change that leads us to our decision in the case at hand.

II.

Notwithstanding new Art. 27, § 297(c), the problem of what evidence one must present in order to show that one lacked "actual knowledge," **[***8]** or what evidence the State must present in order to overcome an owner's claim that he or she lacked "actual knowledge" must still be determined. Dr. Long contends that he clearly met his burden of proving that he lacked actual knowledge that Kevin was illegally using the Cherokee. Pointing out that other jurisdictions have said that actual knowledge can be inferred from the circumstances, the City contends that the trial judge did not err in finding that Dr. Long had not met the burden of proving the innocent owner defense.

The legislative history of revised Art. 27, § 297 sheds little light on why the standard of proving knowledge was changed, or how it should be interpreted. Thus, "in our efforts to discover purpose, aim, or policy, we [shall] look to the words of the statute." State v. One 1984 Toyota Truck, 311 Md. 171, 181, 533 A.2d 659 (1987) quoting Kaczorowski v. City of Baltimore, 309 Md. 505, 513, 525 A.2d 628 (1987).

"Actual knowledge" is a subjective standard, requiring specific awareness. In contrast, an objective standard contemplates the knowledge of a reasonable person under **[***9]** similar circumstances, and is often phrased as whether or not one "should have known." n3 Because the owner has the burden of proof, § 297(c), it follows that proving lack of "actual" knowledge is a less burdensome task than proving that the owner "neither knew or should have known."

n3 See Judge Chasanow's concurring opinion in State v. McCallum, 321 Md. 451, 583 A.2d 250 (1991) for a thorough discussion of the different degrees of knowledge.

> **[*683]** We recognize that former § 297(a)(4)(iii) contained the objective standard for proving the innocent owner defense. On the other hand, § 297(c) considerably eases the burden of proving the innocent owner defense. Thus, it appears to us that by enacting § 297(c) the General Assembly intended to provide additional protection for the interests of innocent owners.

New Art. 27, § 297(s) supports this view because it explicitly acknowledges the court's role in protecting innocent owners:

(s) Powers of Court. -- In **[***10]** a proceeding under this section, a court may:

(1) Grant requests for mitigation or remission of forfeiture, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section.

The addition of § 297(s) is significant. Former Art. 27, § 297 had been harshly applied, often at the expense of "innocent owners." State v. 1982 Plymouth, 67 Md.App. 310, 507 A.2d 633 (1986). In Prince George's County v. Blue Bird Cab Co., 263 Md. 655, 284 A.2d 203 (1971),

the Court of Appeals held that the innocence of the title owner of the vehicle was no defense, and in State v. One 1967 Ford Mustang, 266 Md. 275, 292 A.2d 64 (1972), the Court held that within the scheme of Art. 27, § 297 the judiciary had virtually no discretion to deny forfeiture.

[25]** In 1972, the General Assembly added § 297(a)(4)(iii) to include an innocent owner defense. State v. One 1984 Toyota Truck, supra, 311 Md. at 179, 533 A.2d 659. The wording **[***11]** of § 297(a)(4)(iii) remained largely the same, see § 297(a)(4)(iii), supra, until the 1989 revision of Art. 27, § 297, appearing, as we have said, further to protect innocent owners by requiring an innocent owner only to prove lack of "actual knowledge."

With this in mind, we shall now review the trial court's application of Art. 27, § 297.

[*684] III.

The trial court first recognized that, in order to avoid forfeiture, the owner "must establish by a preponderance of the evidence that what occurred was done without his actual knowledge." The trial court then concluded:

> We here have a vehicle seized pursuant to a valid arrest on May 2nd of 1992. The intervene [sic] order says that he was in Georgia when this offense occurred, and that he had no actual knowledge of what had occurred. The evidence additionally indicates that the Doctor was aware that his son had a drug problem. There was a previous arrest in August of 1990. It's not disputed that he may have told the officer at that time that his son was having a drug problem.
>
> The items found in the vehicle were in the officer's description full. It was full of clothes, tools, boxes, cases of empty beer cans, **[***12]** and other personal property which indicates to the Court that the automobile was for his personal use and indicates exclusive possession in the son. I order forfeiture.

Although we accept the trial court's findings of fact, we fail to see how they led him to conclude that Dr. Long had failed to establish that Kevin had illegally used the Cherokee without the doctor's actual knowledge. n4 We have no doubt that Dr. Long failed to show lack of knowledge according to previous Art. 27, § 297, because the facts found by the trial court established that Dr. Long knew, or should have known, of Kevin's drug problem, and thus, "should have known" that Kevin was using the Cherokee to transport illegal drugs. Therefore, if § 297(a)(4)(iii) were still in effect, the trial court **[*685]** would have been correct in ordering forfeiture of Dr. Long's Cherokee. As we have discussed at length, however, by changing "should have known" to "actual knowledge" in revising Art. 27, § 297 in 1989, the General Assembly has made it easier for an innocent owner to avoid forfeiture. Dr. Long testified at the forfeiture hearing that he did not actually know that Kevin was using the Cherokee to transport **[***13]** illegal drugs. Consequently, the trial court's finding of facts with respect to Dr. Long's knowledge of Kevin's drug problem fails to obviate Dr. Long's testimony, because they show only that Dr. Long should have known that Kevin was illegally using the Cherokee. n5 The trial court thus erred in ordering forfeiture of Dr. Long's Cherokee.

n4 In its decision, the trial court, in part, relied on its finding that the Cherokee was in Kevin's exclusive possession. In our view, this has nothing to do with whether Dr. Long actually knew that Kevin was transporting illegal drugs in the Cherokee. Rather, the trial court's finding suggests that Kevin owned the Cherokee. The trial court did not elaborate on the implication of this finding, but we note that Dr. Long is the "owner" of the Cherokee as defined in § 297(a):

> (9)(i) "Owner" means a person having a legitimate legal, equitable, or possessory interest in property.

n5 We shall not decide when and under what circumstances courts should find that persons claiming innocent ownership have failed to meet their burden of showing lack of actual knowledge. We note, however, that circumstances suggesting "willful blindness" or "deliberate ignorance" may indeed defeat an owner's claim of innocence. See in general, State v. McCallum, supra, (Chasanow, J., concurring); Owens-Illinois v. Zenobia, 325 Md. 420, 462 n. 23, 601 A.2d 633 (1992). See also U.S. v. Ground Known as 2511 E. Fairmount Ave., 737 F.Supp. 878 (D.Md.1990) (Although they maintained that they did not know, claimants failed to prove that they lacked "actual knowledge" that their son had purchased certain properties with proceeds received from drug trafficking. The trial court found that the claimants knew that one property had been searched and narcotics found, had themselves been tied up by assailants who demanded money and drugs, and knew that their son had purchased a mobile home for $19,000 cash.)

[*14]**

[26]** IV.

The City feels that the General Assembly intended that Art. 27, § 297, be harshly applied and cites cases in support of its position. As Judge Adkins pointed out for the Court of Appeals in State v. One Toyota Truck, supra at 190, 533 A.2d 659, "we read the law as harshly as the General Assembly writes it; the 'innocent owner' defense is obviously intended to mitigate harshness." As we have discussed at length, the 1989 revision of Art. 27, § 297, particularly § 297(c), further protects "innocent owners." In ordering forfeiture of Dr. Long's Cherokee, the trial court applied the forfeiture statute **[*686]** more harshly than the General Assembly intended it to be applied.

JUDGMENT REVERSED.

COSTS TO BE PAID BY APPELLEE.

EXHIBIT 15

Dog Sniff / Trace Analysis not enough to provide basis for forfeiture.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. $ **506,231** IN **UNITED STATES** CURRENCY, Defendant. APPEALS OF: ANTHONY LOMBARDO and STEPHEN M. KOMIE

Nos. 96-3308, 96-3309, 97-2282

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

125 F.3d 442; 1997 U.S. App. LEXIS 23216

September 3, 1997, Decided

PRIOR HISTORY: **[**1]** Appeal from the **United States** District Court for the Northern District of Illinois, Eastern Division. No. 93 C 1603. George M. Marovich, Judge.

DISPOSITION: VACATED and REMANDED.

CORE TERMS: forfeiture, currency, claimant, pizzeria, narcotics, probable cause, seized, van, seizure, cocaine, probable, dog, subject to forfeiture, search warrant, emergency, inside, Supplemental Rules, summary judgment, seize, forfeiture action, verified, police officers, driver, nexus, guns, federal authorities, federal government, motion to suppress, motion to dismiss, criminal activity

COUNSEL: For **UNITED STATES** OF AMERICA, (96-3308, 96-3309) Plaintiff - Appellee: Jonathan C. Haile, Matthew D. Tanner, OFFICE OF THE **UNITED STATES** ATTORNEY, Civil Division, Chicago, IL USA.

For ANTHONY LOMBARDO, (96-3308) Claimant - Appellant: Stephen M. Komie, Brian E. King, KOMIE & ASSOCIATES, Chicago, IL USA. Douglas W. Godfrey, Chicago, IL USA.

For STEPHEN M. KOMIE, (96-3309, 97-2282) Claimant - Appellant, Appellant: Douglas W. Godfrey, Chicago, IL USA.

For **UNITED STATES** OF AMERICA, (97-2282) Plaintiff - Appellee: Michele S. Schroeder, Submitted, OFFICE OF THE **UNITED STATES** ATTORNEY, Rockford, IL USA. Jonathan C. Haile, OFFICE OF THE **UNITED STATES** ATTORNEY, Civil Division, Chicago, IL USA.

JUDGES: Before BAUER, HARLINGTON WOOD, JR., and MANION, Circuit Judges.

OPINIONBY: BAUER

OPINION: **[*444]** BAUER, Circuit Judge. The **United States** Marshals Service currently possesses over half a million dollars which is claimed by Anthony Lombardo and Stephen M. Komie. The government filed a complaint for forfeiture of this currency **[**2]** pursuant to 21 U.S.C. § 881(a)(6). The district court granted summary judgment in favor of the **United States,** finding that there was probable cause to believe the money was subject to forfeiture. However, because the district court never properly obtained jurisdiction over the money, and neither the government nor the district court has sufficiently explained the requisite nexus between the money and drug or other criminal activity, we cannot affirm the district court's ruling. We therefore vacate and remand this case to the district court with directions to dismiss for lack of jurisdiction over the res.

Background

On February 11, 1993, Sergeant Michael J. Thomas of the Chicago Police Department filed a complaint for search warrant in the Circuit Court of Cook County. The warrant issued based on information given by one Josue Torres, who had been arrested for burglary. Torres told Sergeant Thomas that he regularly sold stolen property at various places in Chicago in order to feed his crack habit. One of the places where he said he fenced property was the Congress Pizzeria, located at 2033 N. Milwaukee Avenue in Chicago, Illinois, which is owned and operated by Claimant **[**3]** Anthony Lombardo. Torres said that he would bring the stolen property to the back door of the pizzeria where he would meet Sam or Frank Lombardo, Anthony's sons, haggle with them over the price, and eventually make the sale.

On February 11, 1993, Chicago Police conducted a search pursuant to the warrant at the pizzeria. The warrant authorized the police to search the pizzeria and Sam and Frank Lombardo, and to seize a camera, a snowblower, a television, and three VCRs. The police did not find these items during the course of their search; however, they did find and seize three unregistered guns and $506,076 in **United States** currency. n1 The money was found inside a forty-four-gallon barrel which was located inside either a boarded-up elevator or a dumbwaiter shaft, although the record is slightly unclear. It was wrapped in plastic bags and consisted of mostly small bills.

n1 The record is not entirely clear as to why discrepancies exist as to the amount of the seized currency. The Chicago Police report listing the seized items reported that $506,076 was seized. The government's initial complaint for forfeiture in this case referred to the amount seized as $**506,231,** but the government's amended complaint corrected the amount to $506,641 and indicated that the money had originally been under-counted by $410. We assume that the Chicago Police also made an error when they initially counted the money.

[4]**

Frank Lombardo was present at the pizzeria at the time of the search. He was arrested and charged in the Circuit Court of Cook County with illegally possessing unregistered firearms. In the state court, Judge Patrick Morse suppressed the guns as evidence because he found that "it was not immediately apparent that the guns were contraband per se" and that "the guns were seized prior to the establishment of probable cause to seize them." Judge Morse reserved the question of whether there was probable cause to seize the currency because the question was not before him. No other state or federal criminal case was ever investigated or charged in connection with this alleged fencing operation or the Congress Pizzeria.

Pursuant to Illinois law, the Chicago Police, as an agent of the Clerk of the Circuit Court of Cook County, held the money until **[*445]** further order from that court. The currency was deposited in a commercial bank account. Anthony Lombardo filed a Motion for Return of Seized Property in the state court on March 10, 1993. On March 12, 1993, Anthony Lombardo assigned 15% of his interest in the res ($75,911.40) to his attorney, Claimant Stephen Komie. On March 16, 1993, the state **[**5]** court granted Lombardo's motion in part and denied it in part, and continued the matter of the disposition of the property to March 19, 1993. On March 19, the state court ordered the currency returned to Anthony Lombardo, and ordered the property custodian "not to transfer the property to any other persons or the **United States.**" A check was then issued to Anthony Lombardo.

Meanwhile, on March 9, 1993, the **United States** had applied for a seizure warrant for the currency, pursuant to 21 U.S.C. § 881(a)(6). n2 The application for seizure warrant was supported by information contained in the affidavit of Special Agent Paulin of the Criminal Investigations Division of the IRS. Agent Paulin's affidavit basically restated the information given by Torres which was contained in Sergeant Thomas' complaint for search warrant. Agent Paulin's affidavit also included one reference to the presence of cocaine in a delivery truck outside the pizzeria. The government has admitted that this reference was not contained in Sergeant Thomas' complaint for search warrant, and also has admitted that it does not possess any Chicago Police reports indicating the presence of narcotics inside or outside the **[**6]** pizzeria. According to Agent Paulin's affidavit, one of the police officers present during the search of the pizzeria described Frank as "extremely distraught" and "visibly shaken when he was told that the money was being seized." The affidavit also states that, "according to the police officers present, . . . [Frank] offered no explanation for the huge cash horde. Several hours later, Frank went to the police station and stated that the money belonged to his father, Anthony, who is currently in Florida." Magistrate Judge Edward A. Bobrick issued the seizure warrant on March 9, 1993, finding that probable cause existed to believe the money was subject to § 881(a)(6) forfeiture. That warrant was never executed, and it expired by its own terms on March 19, 1993.

n2 Title 21 U.S.C. § 881(a)(6) authorizes the forfeiture of:

> All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C. § 881(a)(6).

[7]**

On March 17, 1993, before the state court returned the money to Anthony Lombardo, the government filed a verified complaint for forfeiture of the currency pursuant to 21 U.S.C. § 881(a)(6). The complaint explicitly noted that the money was still in police custody. The complaint was also supported by Agent Paulin's affidavit. On March 18, 1993, the government filed an "Emergency Motion" in aid of the district court's jurisdiction. This motion indicated that Anthony Lombardo had filed a motion for the return of the currency in the Circuit Court of Cook County, and that the Assistant State's Attorney handling the case had advised the state court that a federal seizure warrant had been issued and that the state had no interest in detaining the funds. The government's emergency motion informed the district court that the state court would rule on Lombardo's motion the following morning at 11:30 a.m. It also addressed the government's concerns that "if, pursuant to the state court's order, any of these funds are released and delivered to Mr. Lombardo and/or Mr. Komie, the funds could be disbursed or otherwise made unavailable for federal forfeiture, defeating this court's jurisdiction." **[**8]** The government asked the district court to order Anthony Lombardo and/or Stephen Komie to surrender to the **United States** Marshals Service any of the defendant funds they might receive from the Circuit Court of Cook County. In support of its request and its **[*446]** argument that the district court had inherent power to issue orders effectuating its jurisdiction, the government cited the All Writs Act, 28 U.S.C. § 1651(a).

The district court granted the emergency motion on March 18, 1993. The government filed an amended verified complaint on March 19, 1993, which reiterated that the currency was still in police custody. On March 23, 1993, the district court entered a written order granting the government's emergency motion. The order provided that, following entry of any order in the state court case regarding the funds, and

upon delivery of any portion of the seized property in the form of check(s) or any other form to Stephen Komie, Anthony Lombardo, or any other person or entity, in accordance with the state court's order, the seized property shall be delivered forthwith to the **United States** Marshal for execution of the warrant of seizure and monition issued in this case.
[9]**

On March 29, 1993, Anthony Lombardo and Stephen Komie ("Claimants") both filed verified claims for restitution of the property with the district court. On April 5, 1993, Anthony Lombardo delivered the check he received from the state court to the **United States** Marshals Service.

On May 3, 1993, Claimants filed a joint motion to dismiss the complaint for lack of subject matter jurisdiction over the res. They argued that at the time the government filed its complaint for forfeiture, the district court did not possess the defendant res and, therefore, the district court had no jurisdiction over it. Rather, Claimants argued, the res was in the custody of the Circuit Court of Cook County and under the state court's jurisdiction. Claimants also argued that seizure of the res violated the Supplemental Rules for Certain Admiralty and Maritime Claims that govern seizures pursuant to 21 U.S.C. § 881. The district court denied Claimants' motion to dismiss on September 28, 1993 and found that it had not interfered with the state court's jurisdiction.

Claimants then filed a motion to suppress the currency, arguing that the seizure was unconstitutional because the Chicago **[**10]** police exceeded their authority under the warrant. The district court denied the motion to suppress on April 22, 1994, finding that the money was seized pursuant to the plain view doctrine and that, because it was reasonable for the police officers to believe the currency might represent the proceeds from the sale of stolen property, the seizure was legally justified.

Claimants next filed another "motion to suppress," requesting the district court to conduct an evidentiary hearing pursuant to Franks v. Delaware, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978), because they believed the statements made by Sergeant Thomas in the complaint for search warrant were made

falsely or with reckless disregard for the truth. On February 7, 1995, finding that Claimants had not made the requisite preliminary showing to warrant a Franks hearing, the district court denied this motion to suppress as well.

Finally, on May 9, 1996, the government filed a motion for summary judgment, arguing that there was probable cause to believe the currency was subject to forfeiture. In support of its motion, the government argued that Magistrate Judge Bobrick had already determined there was probable cause to find the currency subject **[**11]** to forfeiture. The government also argued that, because Anthony Lombardo had invoked his Fifth Amendment privilege against self-incrimination in response to one interrogatory when asked to explain the source of the money, Lombardo could not meet his burden of proof as to why the currency should not be subject to forfeiture. The district court granted summary judgment in favor of the government and against Claimants on July 11, 1996, and ordered the defendant $506,641 to be forfeited to the **United States.** The district court found that the government had satisfied its burden of establishing probable cause and that Lombardo's refusal to explain where the money came from and his "bald" denial of the government's charges was insufficient to defeat the motion for summary judgment. The district court denied motions to reconsider by both Claimants.

Claimants appeal from the grant of summary judgment and the denial of their motions **[*447]** for reconsideration. They argue (1) that the district court never properly acquired jurisdiction over the defendant res because the res was under the jurisdiction of the Circuit Court of Cook County; (2) that the district court erred in denying the motion **[**12]** to suppress evidence and the motion for a Franks hearing; and (3) that the district court erred in granting summary judgment in favor of the government and against Claimants. Claimants also argue that the forfeiture was disproportionate and therefore violative of the Eighth Amendment's prohibition against excessive fines. n3

n3 Because we conclude today that the district court never properly exercised jurisdiction over the res and that the government did not establish probable cause, we need not reach the Eighth Amendment issue in this opinion.

Analysis

A. Jurisdiction

We review the district court's denial of Claimants' motion to dismiss for lack of jurisdiction over the res de novo. **United States** v. One 1987 Mercedes Benz Roadster, 2 F.3d 241, 243 (7th Cir. 1993). Civil forfeiture actions are in rem proceedings. "Since the earliest days of the Republic the rule has been established that, when state and federal courts each proceed against the same res, 'the court first assuming **[**13]** jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other.'" **United States** v. $79,123.49 in **United States** Cash and Currency, 830 F.2d 94, 96 (7th Cir. 1987) (citing Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 195, 79 L. Ed. 850, 55 S. Ct. 386 (1935)); see also **United States** v. One 1979 Chevrolet C-20 Van, 924 F.2d 120, 121 (7th Cir. 1991). "The purpose of the rule is 'to avoid unseemly and disastrous conflicts in the administration of our dual judicial system, and to protect the judicial processes of the court first assuming jurisdiction.'" $79,123.49, 830 F.2d at 96 (citing Penn General, 294 U.S. at 195). This rule does not apply to cases of concurrent in personam jurisdiction; in those cases, a state and a federal court may proceed simultaneously. Id. at 97 (citations omitted). However, the rule is applicable in quasi in rem and in rem actions. Id.

Our analysis in this case is controlled by our previous holding in $79,123.49. In that case, the defendant currency was seized during a drug transaction on June 15, 1984. On July 10, 1984, the state filed a civil complaint for forfeiture in Dane County Circuit Court **[**14]** in Wisconsin. On November 5, 1985, the state court dismissed the complaint because the state failed to abide by the time limitation provided by Wisconsin law. On December 16, 1985, the state court ordered the Clerk to turn the money over to the lawyer for one of the claimants. That order was stayed for ten days. The following day, December 17, 1985, while the stay was still in effect, the **United States** filed an action against the defendant currency in district court, pursuant to 21 U.S.C. § 881(a)(6). A seizure warrant was issued, and a **United States**

Marshal took possession of the currency at the Dane County courthouse and placed it in an asset seizure fund account.

Thereafter, the state and federal cases continued on parallel tracks for a short period, with both courts asserting jurisdiction over the res. The state court directed the Sheriff of Dane County to seek return of the res from the **United States** Marshal unless the district court determined the federal courts had a superior claim to the res. The district court denied a motion to dismiss the action on the grounds that the state court had previously taken jurisdiction over the res and, instead, found that it **[**15]** had jurisdiction. We vacated and remanded the case to be dismissed for the district court's lack of jurisdiction over the res. Id. at 99. We concluded that both Wisconsin and the federal government were proceeding in rem and that Wisconsin had jurisdiction before the federal government. Id. at 97. We cited the rules from Penn General and other time-honored cases which require "'the court or its officer [to] have possession or control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought.'" Id. (citing Penn General, 294 U.S. at 195). We noted that the case presented "all of the logistical problems and potential for federal-state conflict **[*448]** inherent in two courts simultaneously competing for control of one res." Id. We therefore held that a federal court may not take jurisdiction over property seized by a federal agent prior to the termination of a state court proceeding involving the same res. Id. at 95. This holding has been followed by several of our sister circuits. See, e.g., Scarabin v. Drug Enforcement Administration, 966 F.2d 989, 994 (5th Cir. 1992); **United States** v. One 1985 Cadillac **[**16]** Seville, 866 F.2d 1142, 1145 (9th Cir. 1989); see also Madewell v. Downs, 68 F.3d 1030, 1041 n.13 (8th Cir. 1995).

We see no reason to depart from our analysis or holding in $79,123.49 here. The district court did not possess or have jurisdiction over the res when it ordered Claimants to turn over the defendant currency to the **United States** Marshals. Instead, the district court's exercise of jurisdiction was in "conflict with the authority of the court having jurisdiction over the control and disposition of the property." Penn General, 294 U.S. at 198 (citations omitted). The state court had possession and control over the defendant res at the very least until March 19, when it ordered the res returned to Claimants. The state court recognized its own jurisdiction in the March 19 order when it stated: "This Court has jurisdiction over the subject matter of the seizure." More importantly, the state court explicitly exercised its own jurisdiction to the exclusion of the federal court and did not intend to transfer the property directly to the federal authorities. This is evidenced by the strong language the state court used in its March 19 order turning over **[**17]** the money to Claimants: "The property custodian of the Chicago Police Department is commanded not to transfer the property to any other persons or to the **United States**." (emphasis added). Therefore, the state court had jurisdiction over the control and disposition of the defendant currency, to the exclusion of the federal court, both when the government filed its warrant for seizure on March 9 and when the government filed its compliant for forfeiture on March 17. Most significantly, the state court still maintained exclusive control and jurisdiction of the res on March 18, when the government filed its emergency motion in aid of jurisdiction and when the district court ordered the res turned over to the **United States** Marshals.

The government points out that in the state court, the Cook County Assistant State's Attorney informed Judge Morse that the State was not interested in pursuing forfeiture of the money and that, instead, the federal government had already instituted a forfeiture action. n4 We are not concerned with what the State's Attorney or the **United State's** Attorney told the state court about intending to proceed against the currency--we are concerned with **[**18]** which sovereign had jurisdiction. In its March 23 written order memorializing the March 18 order, the district court concluded that:

While jurisdiction over the res is necessary to proceed against the property and secure its forfeiture, it is not necessary to have obtained such jurisdiction the moment the complaint for forfeiture is filed. . . . The initial warrant issued by the magistrate judge was not, nor could it have been executed while the seized funds were under the jurisdiction of the state court. Because we conclude that the property need not be under the Court's control the moment the complaint is filed, the lack of the ability to obtain such control either on March 17 or March 19 when the Government filed its complaint is irrelevant.

The district court is partially correct; the property need not be under the Court's control the moment the complaint for forfeiture is filed if no one else is asserting jurisdiction over the control and disposition of the property. But our case turns on the fact that the state court was exercising jurisdiction--and openly exercising it to the exclusion of the federal court. The state court's strong comments **[**19]** make it clear that it was not willing to **[*449]** hand the property over on a platter to the federal authorities, and that makes all the difference. n5

n4 In fact, this actually seems to undercut the government's argument that there was probable cause to find the money forfeitable (see infra) since both logic and pragmatism inform us that if the state felt there was any legitimate nexus between the money and narcotics activities, it certainly would have pursued forfeiture of the money itself rather than handing it off to the federal government.

n5 In addition, both the government and the district court believe that the forfeiture procedures set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims ("Supplemental Rules") also support their contention that the property need not be under federal jurisdiction the moment the complaint for forfeiture is filed. Again, however, both the district court and the government fail to acknowledge that the situation changes when another sovereign is actively and exclusively exercising jurisdiction over the res.

In **United States** v. All Assets and Equipment of West Side Building Corp., 58 F.3d 1181, 1187 (7th Cir. 1995), cert. denied, 116 S. Ct. 698 (1996), we described the three procedures by which the government may attach property through forfeiture proceedings: (1) following the procedure presented in the Supplemental Rules under § 881(b); (2) obtaining a court-ordered seizure warrant under Rule 41(c) of the Federal Rules of Criminal Procedure; and (3) seizing the property without judicial process "when the Attorney General has probable cause to believe the property is subject to civil forfeiture." 21 U.S.C. § 881(b)(4).

Federal district courts have subject matter jurisdiction over civil forfeiture actions brought by the **United States.** See 28 U.S.C. §§ 1345 and 1355. The Supplemental Rules are applicable to civil forfeiture proceedings pursuant to 28 U.S.C. § 2461(b). The Supplemental Rules require a valid arrest of the property for an in rem action, and Supplemental Rule C(3) provides: "In actions by the **United States** for forfeitures for federal statutory violations, the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances."

The district court found that "such a procedure clearly contemplates both the need and the power to bring the property alleged to be subject to forfeiture under the Court's control after the complaint is filed." The government agrees with this position, but as we said above, the fact that another sovereign was first exercising jurisdiction over the control and disposition of the res is crucial. In that scenario, the rule from Penn General applies.

[20]**

Strangely, both the district court and the Assistant **United States** Attorney ("AUSA") appear to have understood the applicable jurisdictional rules. On the morning of March 18, when the AUSA addressed the district court about the emergency motion, the very first comment she made was, "Your Honor, this is the **United States'** emergency motion regarding the five hundred and six some odd dollars [sic] in currency which was seized sometime in February, which is now currently under State Court jurisdiction." (emphasis added). The AUSA also stated to the district court that morning:

This Court cannot obtain jurisdiction over the defendant property until that property is seized by the **United States** Marshals and is taken into custody. That's what gives this Court jurisdiction. And then at that point we can discuss all of the-- you know, any attorney's fees issue as far as the standing, as far as the probable cause with warrants, which I understand is one of Mr. Komie's concerns. There will be a forum for everybody, and we can discuss everything at that point. But we need to get the money under this Court's jurisdiction.

(emphasis added). After reviewing the transcript **[**21]** of March 18, we have found that the district court also understood the limitations on its own jurisdiction:

My understanding of the current status of the law, and since I first visited it months if not years ago, it seems to have been reiterated, I mean, you cannot bypass the State Court if that is who has got the res, and they obviously do. And I suppose--I seem to have read in there it doesn't make any difference who is making [sic] claim or thinks that they got it or whatever. In order for there to be jurisdiction, the party who has it has to surrender it and give it over to somebody else rather than for me taking it away.

The district court's initial reaction was exactly correct--it did not have jurisdiction, nor could it bypass the state court's possession and control over the res.

Despite its correct understanding of the limits on its jurisdictional authority, the district court nonetheless entered an order disposing of the property which it labeled "conditional." The district court suggested on March 18 that this "conditional" order was "innocuous" and "harmless" because it would only take effect if and when the state court relinquished jurisdiction **[**22]** over the funds. The district court can label the order anything it **[*450]** likes, but the fact remains that no order in an in rem proceeding will have any force whatsoever if the court entering it does not have jurisdiction over the res.

In an attempt to defeat the obvious precedential mandate of the holdings in $79,123.49 and Penn General, the government also argues that because 28 U.S.C. § 1355 makes forfeiture actions "federal" in terms of subject-matter jurisdiction, the requirement of possessing the res does not apply. However, Claimants' argument, and our holding, is not that the district court does not have the power to hear forfeiture actions; but, rather, that the district court does not have power to issue orders in a forfeiture action while the defendant res is still under the jurisdiction of the state court. Calling an order "conditional," "innocuous," "harmless," or "contingent" does not confer this power. Nor is this power conferred by the fact that the March 18 order was merely a minute order, which was actually memorialized and entered on March 23, after the state court had returned the funds to Claimants. This is all irrelevant, because the district **[**23]** court was trying to assert jurisdiction over the res while it was still under the exclusive jurisdiction of the state court.

Both parties correctly assert that our decision today turns, at least in part, on our previous decision in **United States** v. One 1979 Chevrolet C20 Van, 924 F.2d 120 (7th Cir. 1991). n6 In One 1979 Chevrolet C-20 Van, we specifically stated that "This case does not turn upon who won the forfeiture 'foot race' in the courts, but rather upon the fact that there is no authority for the type of transfer between executives of agencies that took place here." 924 F.2d at 122. Our case, rather, does turn on who won the foot race--not the race to the courts, but the race to obtain possession and control over the res--and clearly, the state court was the victor. We stated in One 1979 Chevrolet C-20 Van:

At the time the complaint was filed in federal district court, the state forfeiture action was pending and the state court had jurisdiction over the van to the exclusion of the federal court. The fact that the federal authorities muscled in on the van and began an administrative forfeiture proceeding before the state court action was filed **[**24]** did not confer jurisdiction on the federal court.

Although our facts are different than those in One 1979 Chevrolet C-20 Van because an actual "forfeiture action" was not pending in state court here, we are also faced with a case in which the federal authorities "muscled in" on state court proceedings in an attempt to improperly and prematurely get their hands on money. This kind of strong-arming is hardly permitted, not by common law, federal statutory authority or by our case law.

n6 In One 1979 Chevrolet C-20 Van, local police officers arrested the claimant and seized her van. Four days later, the police asked the FBI to initiate forfeiture proceedings. The FBI did so, and the police relinquished custody of the van to FBI agents. The claimant notified the FBI that she desired to contest the forfeiture, and the proceedings moved to federal court. 924 F.2d at 121. We held that the district court lacked jurisdiction to order forfeiture of the van because at the time the proceedings moved to federal court, a state forfeiture action was pending and the state court had jurisdiction over the van to the exclusion of the federal court. Id. at 123. We noted that under Illinois law, the local police could not simply turn over the van it had seized to the FBI; they were required to obtain an order from a state court. Id.

[25]**

The district court attempted to distinguish One 1979 Chevrolet C-20 Van on the basis of the different method used to accomplish the transfer of the res from the state court to the federal court. The distinction is irrelevant. Whether the transfer happens covertly or via order from the district court is a distinction without a difference for subject-matter jurisdiction, something we value highly in our exercise of federal jurisdiction. As we indicated in One 1979 Chevrolet C-20 Van, the procedure which the government should have followed here was to seek a turn-over order in the state court. See also **United States** v. One 1987 Mercedes Benz Roadster, 2 F.3d 241 (7th Cir. 1993). The government may not simply assert jurisdiction over the res because it is concerned with losing money or having money disbursed. These concerns do not give either the government or the district court the right to improperly assert jurisdiction over property which is **[*451]** under state court jurisdiction or to circumvent the law of jurisdiction. Absent a turn-over order in this case, the district court did not properly have jurisdiction over the defendant currency.

We also take this opportunity **[**26]** to point out that Claimants are not entirely off the mark in arguing that Younger v. Harris, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971) required the district court to abstain from proceeding. The government asserts waiver, but jurisdictional matters can never be waived. Although we need not decide whether the Younger abstention doctrine applies here, we certainly recognize that concerns of federalism, comity and respect for sovereign power are important in this case.

B. Probable Cause

Assuming arguendo that the district court properly exercised jurisdiction over the defendant res, we hold, alternatively, that the district court erred in granting summary judgment in favor of the government because the government failed to satisfy its initial burden of establishing probable cause. The record is utterly devoid of facts which would support the government's contention that it had probable cause to believe this currency was subject to forfeiture under 21 U.S.C. § 881(a)(6).

Under the forfeiture provision of the Comprehensive Drug Abuse Prevention & Control Act of 1970, 21 U.S.C. § 881, property used to commit a violation of the Act, including proceeds traceable to drug trafficking, are forfeitable. **[**27]** Of course, probable cause is required to initiate a forfeiture action. The probable cause threshold in a drug forfeiture case is the same as the probable cause threshold which is applicable everywhere else. **United States** v. Edwards, 885 F.2d 377, 389-90 (7th Cir. 1989). The burden of proof is well-established--the government, as the party seeking the forfeiture, has the initial burden of establishing probable cause to believe the property is subject to forfeiture. **United States** v. $87,118.00 in **United States** Currency, 95 F.3d 511, 518 (7th Cir. 1996) (citing **United States** v. All Assets and Equipment of West Side Building Corp., 58 F.3d 1181, 1187 (7th Cir. 1995), cert. denied, 116 S. Ct. 698 (1996); **United States** v. $94,000 in **United States** Currency, 2 F.3d 778, 782 (7th Cir. 1993)). To establish probable cause, the government must demonstrate a "reasonable ground for the belief of guilt supported by less than prima facie proof but more than mere suspicion." $87,118.00, 95 F.3d at 518 (citing All Assets, 58 F.3d 1181 at 1188); see also **United States** v. On Leong Chinese Merchants Ass'n. Bldg., 918 F.2d 1289, 1292 (7th Cir. 1990), cert. denied, 502 U.S. 809, **[**28]** 116 L. Ed. 2d 29, 112 S. Ct. 52 (1991). Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of criminal activity. **United States** v. Certain Real Property Commonly Known as 6250 Ledge Rd., 943 F.2d 721, 725 (7th Cir. 1991) (citing Edwards, 885 F.2d at 389-90). The government may rely on direct evidence as well as on circumstantial and hearsay evidence. All Assets, 58 F.3d at 1188. Probable cause for the forfeiture exists if the government demonstrates a nexus between the seized property and illegal

narcotics activity. $87,118.00, 95 F.3d at 518 (emphasis added) (citing All Assets, 58 F.3d at 1188 & n.13; Certain Real Property Commonly Known as 6250 Ledge Rd., 943 F.2d at 725). Once the government meets its burden of establishing the existence of probable cause, "the ultimate burden shifts to the claimant to prove by a preponderance of the evidence that the property is not subject to forfeiture" by demonstrating that the property was not used in connection with drug activities. All Assets, 58 F.3d at 1189 (quoting $94,000, 2 F.3d at 782-83). If the claimant fails to rebut the government's proof, the probable cause showing, **[**29]** standing alone, will support a judgment of forfeiture. Id. The claimant, of course, need not do anything to rebut the government's proof if the government's proof is insufficient to demonstrate the requisite nexus between the property and illegal narcotics activity.

In this case, we need not concern ourselves with the burden shifting from the government to Claimants; the government has not met its initial burden of proof. The government has not made any showing of a nexus between the money and narcotics related activities **[*452]** or any criminal activities that rises even slightly above the level of "mere suspicion." A brief view of the entire wealth of evidence that could possibly demonstrate any narcotics-nexus assures us that we are correct.

Both the district court and the government base their belief that probable cause exists on seven "undisputed" factors: (1) an unusually large amount of cash was found at the pizzeria; (2) this large amount of cash was in small bill denominations; (3) this large amount of cash was "unusually" stored; (4) to date, no one has identified a legitimate source of the currency or explained the reason for the currency's unusual storage; (5) three unregistered **[**30]** handguns were found on the premises; (6) an informant identified a large amount of cocaine being delivered to the pizzeria (more on this later); and (7) a trained drug dog identified traces of narcotics on the defendant currency. In our opinion, none of these factors alone can constitute probable cause, and even taking them as true and considering them all together, they still do not constitute probable cause.

First, none of the factors cited by the district court or the government concerning the amount of currency or the method of storing it have any bearing on the probable cause determination. The existence of any sum of money, standing alone, is not enough to establish probable cause to believe the money is forfeitable. See, e.g., **United States** v. $5,000 in **United States** Currency, 40 F.3d 846, 850 (6th Cir. 1994); **United States** v. $191,910.00 in **United States** Currency, 16 F.3d 1051, 1072 (9th Cir. 1994); **United States** v. Baro, 15 F.3d 563, 568 (6th Cir.) ("To date, this Court has not held that currency is contraband."), cert. denied, 513 U.S. 912, 130 L. Ed. 2d 201, 115 S. Ct. 285 (1994); **United States** v. $67,220.00 in **United States** Currency, 957 F.2d 280, 285 (6th Cir. 1992) ("No court yet **[**31]** has held that the presence of a large sum of cash is sufficient, standing alone, to establish probable cause for forfeiture."). As far as we can tell, no court in the nation has yet held that, standing alone, the mere existence of currency, even a lot of it, is illegal. We are certainly not willing to be the first to so hold. Absent other evidence connecting the money to drugs, the existence of money or its method of storage are not enough to establish probable cause for forfeiture under § 881.

Second, we do not consider any of the evidence of the handguns at the pizzeria as necessarily having anything to do with either narcotics activity or any other criminal activity. Even putting aside the fact that the state court suppressed the guns as evidence against Frank Lombardo, we have no reason to believe that the presence of handguns should necessarily implicate narcotics activity or that their presence need be seen as anything other than protection in a small business setting.

Third, the information from Torres and the affidavit of Agent Paulin do not establish a connection between narcotics and the money, or between narcotics and the pizzeria. The only reference to narcotics **[**32]** whatsoever in the complaint for forfeiture comes from uncorroborated and unsubstantiated double hearsay in Agent Paulin's affidavit. n7 Agent Paulin stated:

The CI [Torres] related to police officers that he worked as a driver for the pizzeria up until a few months ago. At times he was also called upon to unload trucks delivering supplies and food to the pizzeria. Within the last year, the CI and another driver were requested to unload a truck delivering sausage. The other

driver assisting the CI opened one of the sausage boxes and observed one pound of cocaine which he showed to the CI. The CI and the other driver split the cocaine between themselves.

There is no allegation by Torres or anyone else that cocaine was ever brought inside the pizzeria, but, rather, Torres allegedly told unnamed "police officers" that he and the other driver stole the cocaine. No allegations have been made that narcotics were used inside or at the pizzeria, that any narcotics transactions occurred inside or at the pizzeria, or that there was ever any money **[*453]** (much less the money in issue here) exchanged for narcotics inside or at the pizzeria. No arrest, federal complaint, or federal **[**33]** investigation into narcotics activities or other criminal activities has ever arisen in connection with Torres' statement to Sergeant Thomas or to these other "police officers." We find it highly significant that Torres' statement to Sergeant Thomas, which was memorialized in the complaint for search warrant in the state court, does not make any connection between narcotics and the pizzeria. In fact, Torres' statement to Sergeant Thomas does not contain any reference to narcotics whatsoever. The government admitted that the reference to narcotics in Agent Paulin's affidavit was not contained in Sergeant Thomas' complaint for search warrant, and the government also admitted that it did not possess any Chicago police reports indicating the presence of narcotics at or outside the pizzeria. Rather, the reference to cocaine did not show up in this case until the government filed its verified complaint for forfeiture on March 17. We can only assume that if information about narcotics were known to Sergeant Thomas, he would have included that information in his complaint for search warrant. Instead, Torres' statement to Sergeant Thomas only discusses the alleged fencing operation.

n7 We know that it is permissible to rely on hearsay, All Assets, 58 F.3d at 1188 & n.12, we just do not believe that this hearsay is particularly reliable.

[34]**

Finally, we are unwilling to take seriously the evidence of the post-seizure dog sniff. After the Chicago Police Department seized the money, a narcotics canine named "Rambo" was brought to the station (not the pizzeria) to check the money for the presence of drugs. Rambo was instructed to "fetch dope," and he grabbed one bundle of money from a table and ripped the packaging apart. That behavior apparently indicated the presence of drugs on the money. However, the dog only identified narcotics on one bundle of the seized currency even though the officers seized 31,392 separate bills in multiple bundles. Even the government admits that no one can place much stock in the results of dog sniffs because at least one-third of the currency in the **United States** is contaminated with cocaine in any event. n8 Other recent cases have verified our belief that the probative value of dog sniffs is, at most, minimal. See **United States** v. $53,082.00 in **United States** Currency, 985 F.2d 245, 250 n.5 (6th Cir. 1993) ("There is some indication that residue from narcotics contaminates as much as 96% of the currency currently in circulation") (citing **United States** v. $80,760.00 in **United States** **[**35]** Currency, 781 F. Supp. 462, 475 & n.32 (N.D. Tex. 1991)); see also **United States** v. $5,000 in **United States** Currency, 40 F.3d 846, 849 (6th Cir. 1994); **United States** v. Carr, 25 F.3d 1194, 1214-18 (3d Cir. 1994) (Becker, J., concurring in part and dissenting in part); **United States** v. $639,558.00 in **United States** Currency, 293 U.S. App. D.C. 384, 955 F.2d 712, 714 n.2 (D.C. Cir. 1992) (referencing expert testimony that 90% of all cash in the **United States** contains sufficient quantities of cocaine to alert a trained dog).

n8 As Attorney Komie pointed out at oral argument, an American Bar Association Journal article described how Attorney General Janet Reno was subject to a canine-sniff and the bills in her purse triggered the dogs' response. See Courts Reject Drug-Tainted Evidence, 79 A.B.A. J. 22 (Aug. 1993). The record in this case also contains the memo of a Drug Enforcement Agent chemist which states that the Federal Reserve rollers have been contaminated by cocaine, making the usefulness of dog sniffs limited.

[36]**

In sum, the government is unable to come up with the requisite narcotics-nexus to meet its initial burden of showing probable cause. Even at oral argument, the government's lawyer had difficulty explaining why the government attempted to go after this money. After repeated questioning, the most the government

could offer as evidence of probable cause was the "existence of the money, combined with the evidence from the confidential informant, the firearms and what-not." We have already explained why this evidence does not come close to showing any connection between the money and narcotics. The government conceded at oral argument that "the informant did not directly tie this money to any drug trafficking." The government then tried to claim that the tie between the money and drug transactions was "evidence that drug trafficking was going on, was being operated, out of the Pizzeria." As we have repeatedly explained, there is no evidence that drug trafficking was going on at the pizzeria. Therefore, nothing ties this **[*454]** money to any narcotics activities that the government knew about or charged, or to any crime that was occurring when the government attempted to seize the money. **[**37]**

We reiterate that the government may not seize money, even half a million dollars, based on its bare assumption that most people do not have huge sums of money lying about, and if they do, they must be involved in narcotics trafficking or some other sinister activity. Moreover, the government may not require explanations for the existence of large quantities of money absent its ability to establish a valid narcotics-nexus. In response to the government's motion for summary judgment, Anthony Lombardo filed an affidavit in which he attested that he owned the money, that it was not furnished or intended to be furnished in exchange for controlled substances, and that it was not intended to be used to facilitate the exchange of controlled substances. He denied having any involvement with drugs or narcotics, and attested that the Congress Pizzeria operates only as a pizza parlor. But Anthony Lombardo did not have to go even this far, because the government provided absolutely no preliminary showing of probable cause. An owner does not have to prove where he obtained money until the government demonstrates that it has probable cause to believe the money is forfeitable. As we said in **[**38]** a much more notorious case than the one at bar, albeit not in the forfeiture context, "Property of private citizens simply cannot be seized and held in an effort to compel the possessor to 'prove lawful possession.'" **United States** v. One Residence and Attached Garage of Anthony J. Accardo, 603 F.2d 1231, 1234 (7th Cir. 1979).

As has likely been obvious from the tone of this opinion, we believe the government's conduct in forfeiture cases leaves much to be desired. We are certainly not the first court to be "enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for the due process that is buried in those statutes." **United States** v. All Assets of Statewide Auto Parts, Inc., 971 F.2d 896, 905 (2d Cir. 1992).

Conclusion

The judgment of the district court is VACATED and the case is REMANDED to be dismissed for lack of jurisdiction over the res. The district court should order the money returned to Claimants.