

DOUBLE JEOPARDY IN FORFEITURE LAW: KEEPING THE DEFENSE BAR'S WINNING STREAK ALIVE

Richard J. Troberman

PROFESSOR GURULÉ: Let me . . . introduce Richard Troberman at this time. First of all, let me say that I'm very thankful to have Richard Troberman join us here today. He is here all the way from Seattle. He took the time away from his legal practice, and his family, on the weekend to come and join us here in South Bend to discuss civil forfeiture. Mr. Troberman is a graduate of the University of Southern California School of Law. He is a former president of the Washington Association of Criminal Defense Lawyers, and was recently elected to a three-year term on the National Association of Defense Lawyers' Board of Directors, where he serves as the co-chair of Forfeiture Abuse Task Force. As Miriam previously mentioned, he authored an *amicus* brief in the 405 case. He also authored an *amicus* brief in the Supreme Court in the [*United States v.*] *James Daniel Good Real Property* case [114 S. Ct. 492 (1993)]. Richard is also in the process of drafting an *amicus* brief in the *U.S. v. Libretti* case [38 F.3d 523 (10th Cir. 1994), *cert. granted*, ___ U.S. ___ (March 27, 1995)], also before the Supreme Court. He is extremely knowledgeable in the area of federal civil forfeiture. It is a pleasure to have him here today. Let's give a warm welcome and round of applause for Mr. Troberman.

RICHARD TROBERMAN: I would like to thank Professor Gurulé for his kind remarks. We've heard a lot today about forfeiture and there's certainly a lot to talk about. But first, I would like to give a little background, for those of you who are law students, about civil forfeiture and what an exciting area it is right now.

I graduated from law school in 1971 from the University of Southern California, and I didn't begin doing criminal defense until the late 1970s. One of the reasons I got into criminal defense was because it was the up-and-coming area of constitutional law that was being practiced at the time. It may have been as a result of high-priced lawyers being paid by drug defendants that had the resources to engage counsel, but the Fourth Amendment was where it was at in terms of a lawyer really being able to be engaged in the formation of the law, to be able to shape the law. It was fascinating, and I greatly enjoyed criminal defense for that reason.

Unfortunately, the Fourth Amendment has now been relegated to something of little more than historical importance under the Rehnquist Court. But interestingly enough, civil forfeiture now provides the same enjoyment that old search and seizure law provided. I truly believe that both civil and criminal forfeiture are on the cutting edge of constitutional law. It is unusual, in my opinion, for the Supreme Court to have taken so many cases in such a short span of time on such a relatively narrow area. In the last three terms, they have accepted five cases—six if you count *Kurth Ranch*—and most recently, the Supreme Court, on March 27th, accepted *certiorari* in *U.S. v. Libretti*, which I'm going to talk about towards the end of my remarks. So, they're still

interested in this issue. It is, as I said, a fascinating issue, and I encourage all of you to get involved and take a hard look at this. This may be something that when you go into private practice you may wish you had become much more involved in. It's not a dry topic by any means. In fact, it has really begun to catch on in the mainstream of America. It's as Professor Blakey pointed out; I mean, who would believe that this Supreme Court, as conservative as it is, would be handing down the decisions that they are? And the reason is because it is all about property rights. This Court is not all that concerned with liberty, but God forbid you should take somebody's property. For a change, that works to our advantage. And again, look at our ally in the House [of Representatives] in terms of forfeiture reform—it's Henry Hyde—one of the most conservative members of Congress. Who would have thought that he would be our champion on any issue? But there, at a press conference in Washington D.C., was Henry Hyde; and on his one side Nancy Hollander—the President of the National Association of Criminal Defense Lawyers—and on his other side was the President of A.C.L.U.. We may never again see such a sight.

As I say, it's mainstream. There's a recent best-selling book. I don't know if any of you are familiar with Dean Koontz, but typically he has a book on the best-seller list at any given time. And if you walk past the book stands, you'll usually see several of his books in paperback. His most recent book is called *Dark Rivers of the Heart*. The reason I brought it with me today is because civil asset forfeiture plays a special role in this book, and Mr. Koontz has some strong ideas on the subject. I recommend all of you to read it; it's not only an interesting thriller, but, as I said, there's an interesting discussion about asset forfeiture in there.

Anyway, let me get on with the meat of what I want to talk about: the last few terms of this Supreme Court, its decisions, and the way that the Supreme Court is looking at the government's position in some of these cases. I found one of the most interesting [recent Supreme Court opinions] to be Judge Stevens' concurring opinion in *Republic National Bank*—decided in 1992—which was in the first wave of these civil forfeiture cases to reach the Court. Basically, what happened in *Republic National Bank* was that the government seized a home belonging to a drug dealer. The parties agreed to sell the house and fight over the proceeds. The bank lost before the district court. The district court found that the bank knew, or should have known, that the person who obtained the loan was a drug dealer. And so the proceeds—the money resulting from the sale of the property—was placed in a bank account and was forfeited. The bank appealed to the Eleventh Circuit Court of Appeals, but it did not ask for a stay on the seizure of the bank account. And so, the government, very cleverly, transferred the money from one asset seizure account to a different asset forfeiture account [located in another circuit], went back to the Eleventh Circuit and said, "You have no jurisdiction. You can't proceed. The appeal is over." And sure enough, the Eleventh Circuit agreed with that position, and dismissed the appeal. The Supreme Court eventually reversed. But Judge Stevens made the following observation in his concurring opinion. He says, "[L]ike Justice White, and for the reasons stated in his separate opinion, I am surprised that the Government would make 'such a transparently fallacious' argument in support of its unconscionable position in this case" [113 S. Ct. at 565, quoting Justice White's opinion, at 489]. I think that about sums up the government's position in many of these cases.

Now, let's talk a little bit about 405 and double jeopardy. We started off this discussion assuming that all of you knew a little about asset forfeiture and how it

works. I want to back track a little bit and fill you in on some of the blanks. First of all, I personally do not disagree that asset forfeiture is a very valuable and important tool—and a necessary tool—for law enforcement. I don't think my organization thinks any differently, and I think most right-thinking people in this country would agree that asset forfeiture—when properly used and with appropriate procedures and due process of law—is an important tool for law enforcement. The problem is in how these laws have been used. They've basically become revenue-enhancement devices for both the federal and state governments. The Supreme Court in the *James Daniel Good* case, in a footnote, made reference to a memo from the Attorney General of the United States to all offices of the U.S. Attorneys around the country, which said that they needed to dramatically increase the rate of forfeitures in the last three fiscal months of the year in order to meet their budget projections. [114 S. Ct. at 502, n.2]. That's pretty meaty language and I can't believe, first of all, that the Attorney General would write such a memo. He may express those thoughts, but you wouldn't think he'd put them in writing. In any event, it has come back to haunt them, because it has now found its way not only into that Supreme Court decision, but it has probably been quoted over and over again in at least a dozen opinions since then. Part of the problem is that, in asset forfeiture, the money goes basically to the law enforcement agency responsible for the forfeiture. So, on the state level, you have small police departments that are now more interested in asset forfeiture cases than rapes and murders and burglaries and those crimes that do not result in a forfeiture. We're now starting to see some language creep into both district court opinions and appellate level opinions criticizing this problem. I think one of the main fixes—and again we're going to talk about that this afternoon—to avoid some of these problems is to change where the money goes. As long as law enforcement has a vested interest in the outcome of the proceeding—that is, they get to keep the money—they're going to be more interested in these kinds of cases, and in abusing and violating citizens' rights in order to get the property. So I think that's really where we need to focus.

Now, a brief overview of the process behind civil forfeiture. The burden is on claimants to prove that they are innocent. Absolutely backwards from everything we ever learned in a civics class in grade school, and I'm sure everything you've ever learned in law school. There is no presumption of innocence; in fact, there is a presumption of guilt. The government need only establish probable cause, and at that point, the burden switches to the claimants to prove their innocence. The government can prove probable cause through hearsay. If an informant says, "I was in Troberman's car last night and he sold me a kilo of cocaine," that's all it takes for the government to take my car. And I am then brought into this nightmare of having to somehow show that it didn't happen, that I was somewhere else, that the informant wasn't around, that this is all a bunch of baloney. I even have to get dragged into court to do all of this. Except I don't necessarily get dragged into court. What happens is the government sends me a notice and it says, "We've taken your car," again without any notice to me before they took it, and without any opportunity for me to be heard . . . They take the property, they give you a notice, and say, "We've got it. If you want to contest it, you have two choices; you can file a 'petition for remission,' and we'll decide whether or not it was an appropriate forfeiture and whether or not you have a defense." If I don't like the outcome of that decision, it's over. I have no right to judicial review whatsoever. The agency that ultimately will benefit by keeping that property gets to make the decision.

But I have an option. I can file a “claim and cost bond,” which means I have to put up a bond equal to ten percent of the value of the property, as determined by the agency that took the property in the first place. They decide what the value is, and what the value of the bond is going to be. There is a procedure to request a waiver of the bond in some circumstances, but more often than not, in my experience, when I’ve applied for a waiver, it has been denied. And then, you get into this whole horrendous situation of trying to contest or litigate that denial, and it just isn’t worth it. So you post a bond, if you’ve got the money. Many times, the claimant doesn’t have it because the government has taken everything that the claimant has. After you file the bond, the government has no time limit in which it is required to file the action in district court.

The rule provided is—and here’s an interesting touch on all of this—forfeiture is governed by the Supplemental Rules of Admiralty, and that includes real property forfeitures as well. So we could be fighting over a house in Kansas and the rules of admiralty are going to govern the outcome of that proceeding, if that makes any sense to you. Under the rules of admiralty, once I file a claim and cost bond, the matter must be filed in the district where the actual conduct took place (or if there’s an actual criminal proceeding going on it may be filed in that district). But there’s no time limit to that. The only time limit is the statute of limitations, or a very vague due process argument that the Supreme Court came up with several years ago in a case involving 8,000 some-odd dollars. So you can wait until hell freezes over, sometimes, before the government will even file the thing, and before there’s anything you can do about it. And once that process has begun, you can no longer file a motion to return the property under Rule 41; you’re very limited in what you can do.

As I said earlier, hearsay is admissible in these proceedings to establish probable cause. You have no right to counsel. Most of the rights that generally attend to a criminal prosecution do not apply to a civil forfeiture action. That’s why most people can’t afford to contest a forfeiture, especially if you’re in a federal court and they’ve taken an automobile worth, say, five to ten thousand dollars. It is far and away going to cost you more than five to ten thousand dollars to retain a lawyer to fight that case, so even if you win you lose. And if you win, there’s typically no right to reimbursement for attorneys fees. Now, there may be some relief under the Equal Access to Justice Act, but only if you’ve shown the government is without probable cause in the first instance, which is very difficult to do. So that, in a nutshell, is what civil asset forfeiture is all about.

Let’s talk about double jeopardy Double jeopardy, as Ms. Krinsky said, generally protects against three things: a second prosecution following conviction, a second prosecution following an acquittal, or multiple punishments for the same offense. In *United States v. Halper*, the Supreme Court held that a civil sanction that constitutes punishment may not be imposed following a criminal prosecution based on the same offense. Very simple. So the label “civil” and “criminal” doesn’t matter. It doesn’t matter how the legislature denominates it; if the affect is a penalty, it cannot be imposed. *Austin* then comes along—and it was a unanimous Supreme Court in *Austin*, just as it was in *Halper*—and says that a civil forfeiture under 21 U.S.C. § 881(a)(4) and (a)(7) constitutes punishment. And then, the third case of the trilogy that we are typically looking at in double jeopardy is *Kurth Ranch*. In *Kurth Ranch*, as again Ms. Krinsky said, the Court said the civil tax imposed on the possession—which was assessed after the criminal prosecution based on the same offense—violated dou-

ble jeopardy. Now, it seems to me very clear—and quite frankly we were arguing these cases before 405 was decided, and I must give credit to Mr. Wren and Mr. Arlt who proceeded without the benefit of counsel—that if you take those three cases together, then the conclusion is inescapable: that a criminal prosecution following a civil forfeiture based on the same offense violates double jeopardy. It is as simple as one plus one equals two. If *Halper* says, “if it’s a penalty, you can’t have a criminal prosecution follow that,” and if *Austin* says, “a forfeiture is a penalty,” then the only result you’re going to have is that a civil forfeiture cannot be followed by a criminal prosecution based on the same offense without violating the Fifth Amendment’s Double Jeopardy Clause.

There are a lot of things at issue in 405, and one of the interesting things is that two days before 405 was decided, a district judge in the Western District of Washington, Judge Dwyer, a judge widely respected as being one of the finest judges in the District of Washington, and maybe within that Circuit, vacated a judgment and sentence in a case called *United States v. McCaslin* [863 F.Supp. 1299 (W.D. Wash 1994)]. And interestingly enough, Judge Dwyer was the same judge who four years earlier had denied the defendant’s motion in the case before him initially. A very clever defense lawyer in Seattle, Jeff Steinborn, as soon as *Halper* was decided, caved on the civil forfeiture and then moved to dismiss the indictment on the basis that it was barred by double jeopardy. Jeff was a little bit ahead of a lot of us in this area; I think he saw the light. Unfortunately, *Austin* hadn’t been decided then, and the law under earlier Supreme Court decisions was typically that forfeitures weren’t punishment. Judge Dwyer denied the motion and eventually Mr. McCaslin was convicted and sentenced. The Ninth Circuit affirmed that decision [in *United States v. McCaslin*, 959 F.2d 786 (9th Cir. 1992)], and that became the single case in the Ninth Circuit—and quoted all over the country, for that matter—for the proposition that a civil forfeiture is not an imposition of punishment for double jeopardy purposes. And then as I said, two days before 405 was decided by the Ninth Circuit, Judge Dwyer issued his order in *McCaslin* [1994] vacating the judgment and sentence, and recognizing that in the light of subsequent developments during the four years after his original denial of the motion, the law had simply changed, and that *McCaslin* [1992] was no longer good law in the Ninth Circuit. Judge Dwyer admitted that the Supreme Court had taught the Ninth Circuit that they were wrong when they decided *McCaslin*. And then you have, as I said, just two days later, 405 come down, that eventually said the same thing.

Now, I agree with Miriam that 405 is a multiple punishments case. I am startled, quite frankly, by the number of decisions that have come down in the wake of 405 that say that it is a successive prosecutions case. And unfortunately, the panel takes some responsibility for that, because the panel in 405 really blurred the line. Judge Reinhardt, who authored the opinion, talks about multiple punishments and successive prosecutions in the same sentence, and, in fact, talks about the core protection of the Double Jeopardy Clause being a protection against successive criminal prosecutions. But it is absolutely clear in my mind that, although forfeitures are punishment under *Halper* and *Austin*, they’re not criminal prosecutions under the *Kennedy v. Mendoza-Martinez* [372 U.S. 144 (1963)] and the *United States v. Ward* [448 U.S. 242 (1980)] line of cases. And I think the Supreme Court in *Austin* was very clear in a footnote to say they were not disturbing that fact. And it makes sense that that’s still the law because—think about it—if these were criminal prosecutions, then all of the rights that would apply in a criminal prosecution—the right to counsel, proof beyond a reasonable

doubt, all of those—would apply in a civil forfeiture. And they don't. So there's no way that they can be characterized as criminal prosecutions. And if it's not a criminal prosecution, it can't be a successive prosecution.

In the wake of 405, there have been a number of courts wrestling with [28 U.S.C. §] 2255 petitions to set aside convictions, and also cases where motions are being made to dismiss indictments that are still pending before district court judges. And so, the courts are having to deal with this. And the first judge to tackle the issue was Judge Jones in the District of Oregon in a case called the *United States v. Stanwood* [872 F.Supp. 791 (D. Or. 1994)]. And, in a somewhat scholarly decision, Judge Jones goes through the history of all of this, and tries to set out the various points at which jeopardy is going to attach both in the criminal case and in the civil case. And he concluded—and he was the first judge to my knowledge to reach this conclusion in the wake of 405—that 405 is a successive prosecutions case. It was important in that case because Judge Jones recognized in a footnote that whether it's a multiple punishments or a multiple prosecutions case is going to determine when jeopardy attaches [*Stanwood*, 872 F.Supp. at 798, n.2]. In the Ninth Circuit, different dates apply, depending on whether it's a multiple punishments or successive prosecutions case. If it is a multiple punishments case, the law in the Circuit has been—under a case called the *United States v. Von Moos* [660 F.2d 748 (9th Cir. 1981)]—that jeopardy attaches at the time the defendant begins serving his sentence. Whereas, if it's a successive prosecutions case, jeopardy attaches at the time the plea is accepted by the court [under *United States v. Smith*, 912 F.2d 322 (9th Cir. 1990)] . . . Judge Jones concluded that jeopardy attached in the criminal case at the time the plea was entered. And what happened in that case was, between the time the plea was entered and the time he was sentenced, Mr. Stanwood had forfeited some property. So that date became critical as to which came first. If jeopardy didn't attach until he began serving his sentence, then jeopardy would have attached first in the civil case and the criminal prosecution would have been barred by double jeopardy and he should have been released on his § 2255 petition. But because Judge Jones found that *Smith* applied, and that it was a successive prosecutions case, he held that jeopardy attached first in the criminal case.

And that's what judges have been wrestling with ever since 405. When does jeopardy attach in a civil case? When does it attach in a criminal case? And, it spawned, I think—yesterday I ran a search on 405—28 citations as of yesterday, some published, some not. All of them except one say that 405 is a successive prosecutions case, remarkable as that may be.

Recently, a judge in the Eastern District of Washington, Judge Van Sickle, in an opinion that is published [in *United States v. Groceman*, 882 F.Supp. 976 (E.D. Wash. 1995)] . . . for the first time said, "Wait a minute, these are not criminal prosecutions. We're dealing with multiple punishments, and so jeopardy attaches at a certain point in time." Then—unfortunately, in my opinion—he totally misunderstood the *Von Moos* line of cases and said that *Von Moos* is no longer good law because the case it relied upon was overruled by a subsequent Supreme Court decision which would extend the point in time when jeopardy attached. So, Judge Van Sickle instead shrunk it, and said, "Okay, I agree with everybody else that *Smith* applies, and jeopardy attaches at the time you enter your plea." And the bottom line in all of these cases, quite frankly, is that by doing so, they're denying the relief requested [by the defendant]. I can almost bet you that if the result occasioned in those cases would have been to deny the relief,

if they had gone the other way, that's the way they would have gone.

A couple of things that Ms. Krinsky said about 405, I feel we need to talk about. First of all, she says that it is her belief . . . that *Austin* was limited to an Eighth Amendment analysis. There is nothing in *Austin* to so limit the analysis. The critical language in the *Austin* decision is as follows. The Supreme Court, towards the end of the opinion, says, "In light of the historical understanding of forfeiture punishment, the clear focus of §§ 881(a)(4) and (a)(7) on the capability 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 [note reference omitted]. We therefore conclude that forfeiture under these provisions constitutes 'payment to a sovereign as punishment for some offense.'" [*Austin*, 113 S. Ct. at 2812]. Nothing there limits that holding, nor should it, to the Eighth Amendment. If it is punishment for Eighth Amendment purposes, it is punishment for Fifth Amendment purposes. There is no principled reason why there should be a different analysis; punishment is punishment. The only difference is that in an Eighth Amendment analysis, you have to quantify it to determine whether or not is excessive. For Fifth Amendment purposes, if it's punishment, that's as far as you have to go to determine whether or not jeopardy may be violated by the imposition of the second penalty.

Now, the vote is nine to nothing. And Ms. Krinsky is correct that Justice Scalia, along with Justice Thomas—and there's a big surprise—dissented in *Kurth Ranch*. Justice Scalia saw the light at the end of the tunnel, which was clearly a train coming at the Court with respect to what was going to happen with the holdings in *Halper* and *Austin* and where double jeopardy was going. And so, all of a sudden, Justice Scalia, who had no problems when he decided *Halper*, decided, "Wait a minute, maybe we were wrong in *Halper*." And I think his words were, "It's time to put the genie back in the bottle." But significantly, no one joined Justice Scalia's dissenting opinion, other than Justice Thomas. So while Justice Scalia may harbor doubts now about *Halper*, at least seven members—a substantial majority of the Court—do not harbor such a fear.

Ms. Krinsky also talked about [her] opinion in reference to the *United States v. Tilley* decision—a Fifth Circuit decision that held that the forfeiture of proceeds is remedial, and therefore not punishment, and therefore not subject to double jeopardy analysis. She said, if I understood her correctly—and we'll talk more about this in the afternoon I'm sure—that what the court [in 405] did was invalidate the entire forfeiture statute: that, in the end, if the forfeiture statute—in this case, section 881 in Title 18—provided for a penalty, then the whole statute would fail a double jeopardy analysis. Now, I may have misunderstood her, but I don't think that's what the court did. The court did look at each provision under the statute, bearing in mind that in *Austin*, the [Supreme] Court had taken the categorical approach and said all forfeitures under § 881(a)(4) and all forfeitures under § 881(a)(7)—because those were the two statutes that were at issue in that case—are punishment. [The Supreme Court] didn't do a fact-based analysis [in deciding on the double jeopardy implications of those two sections]. Well, proceeds—the particular subsection that was at issue in 405—is under § 881(a)(6). The court [in 405] didn't say because § 881(a)(4) and § 881(a)(7) are punishment, that therefore § 881(a)(6) is. What the court did was it looked specifically to the language in § 881(a)(6), and it found that it contained the identical [innocent owner] . . . provision that was set forth in (a)(4) and (a)(7). And it was because it had the same provision that the court found that it was bound, by *Austin*, to conduct a categorical approach. It is really quite simple.

There was this talk [in 405] about how *Halper* didn't go this far and how *Halper* was very limited and it was limited to the rare case, etc., etc.. *Halper* was different because it involved a civil money penalty and it was aimed at people who defraud the government. The civil money penalty is different than a civil forfeiture. The civil money penalty was designed and intended by Congress to allow the government to roughly recover its actual damages in such a case. And so, we have to do a fact-dependant analysis to determine whether or not the government is going to be made whole. But the Court in *Austin*, in a footnote, said that forfeitures are different and "any relationship between the Government's actual costs and the amount of the sanction is merely coincidental." [*Austin*, 113 S. Ct. at 2812, n.14]. The Court went further in *Kurth Ranch*, and basically said *Halper*'s fact-dependent approach simply doesn't work in the case of a tax statute, and they lumped tax statute and civil forfeitures really in the same group in other language in the opinion. *Austin* and *Kurth Ranch* are both categorical approaches; they're not fact-dependent. Only Justice O'Connor—who is not joined by anybody in her dissenting opinion in *Kurth Ranch*—would have followed a fact-dependent approach. So you've got eight of the nine Justices who would appear to follow a categorical approach to determine whether or not a statute or a penalty is going to be punishment.

Now, one of the other problems that has arisen in the wake of 405 is determining whether or not there has been punishment. The first case that came out to really discuss that was a case out of the Seventh Circuit, called *United States v. Torres* [28 F.3d 1463 (7th Cir. 1994)]. What happened in *Torres* was that Mr. Torres was caught up in a "reverse sting." He was trying to buy \$60,000 worth of cocaine from an undercover police officer and he was arrested at the time he made that attempt, and the money was seized. The government initiated a forfeiture action against the \$60,000. They sent the administrative notices of forfeiture and Mr. Torres, probably under the advice of his counsel, did not file a claim—because undoubtedly he wanted to distance himself from the money at that point to hopefully aid him in his criminal defense. He was also indicted in a separate proceeding. He was convicted, and on appeal to the Seventh Circuit he argued that because he forfeited the \$60,000, his criminal conviction was barred by double jeopardy. Judge Easterbrook, writing for a unanimous panel in the Seventh Circuit [in *Torres*], said "No, it's not double jeopardy." It would be if he'd filed a claim, or writings would certainly infer that. But initially, he didn't file a claim and, in fact, he has never acknowledged—that is, Mr. Torres has never acknowledged—that the \$60,000 belonged to him. He didn't file a claim in the civil proceeding and he never said anything about it in the criminal proceeding. Therefore, we don't even know if it's his money. If we don't know that it is his money, how can we say that he's been punished by the forfeiture? He may have just been a courier and the money may have belonged to somebody else. Therefore, we cannot say under the specific facts of this case that jeopardy attached.

But, what has happened now is that judges all over the country are seizing on a portion of that decision in order to deny relief to people who are trying to get relief under § 2255—if they're trying to set aside a criminal conviction—or arguably under Rule 60(b)—if they're trying to set aside a forfeiture. Now, [the decision in *Torres*] by itself, seems to be pretty reasonable. But, there is a problem with whether or not it is an administrative forfeiture or a judicial forfeiture. If a person receives a forfeiture notice and does nothing, then I think an argument may be made—as the government has made—that the defendant never entered a claim, and therefore we can't say for

certain that they've been punished. But it makes a difference if the property is money, as opposed to if the property is something that is titled to someone—like an automobile—where there is no dispute that it belonged to the person. It may well be, for whatever reason, that the person chose not to file a claim—either he didn't have the money, he couldn't hire a lawyer, he recognized that he didn't have very good defense, or that it would be a waste of time to pursue it—and so the person let it go. At least one district court, in a case called *United States v. Kemmish* [869 F.Supp. 803 (S.D. Cal. 1994)], in the Southern District of California, has said that even in the case of titled property, if you don't file a claim, even in an administrative proceeding, there's no jeopardy and therefore you can never claim double jeopardy in a criminal case. I think that's wrong. I think that if it's titled property, you shouldn't be required to file a claim. Because, after all, in most cases, you're just wasting everybody's time. Perhaps the way to do it is to file a claim and then default, I don't know. If you administratively say, "Yes, it's my property" and, "Yes, I did it, but please give it back," maybe that would be enough to trigger jeopardy. Nobody seems to know at this point, and until we get some guidance from the [Supreme Court], we don't know. It's a little bit different on the judicial side. If you file a claim and cost bond, but then either withdraw your claim at some point in the proceedings, or offer to confess judgment, then it seems to me that's sufficient.

Now, there's some language from an earlier Supreme Court case that was cited by the Seventh Circuit, called *Serfass v. United States* [420 U.S. 377 (1975)], that basically says that if you don't put yourself at risk of guilt, then jeopardy doesn't attach. I don't think that the Court is saying, and certainly I don't think they intend to say, that in order to preserve your Fifth Amendment rights, and in order for jeopardy to attach, you have to follow this thing from start to finish: that you have to go through a contested trial, and if you don't go through a contested trial, then jeopardy would never attach. That wouldn't make sense. The courts would certainly rue the day that they ever made such a holding, because the federal courts would be so flooded with frivolous forfeiture cases that they wouldn't be able to get anything else done. In effect, they would be saying that you have to subject yourself and your counsel to Rule 11 sanctions and pursue a more or less frivolous defense in order to preserve your Fifth Amendment rights. That simply doesn't make any sense. So somewhere along the way, someone is going to have to decide that, so long as you make clear that it is your property, and therefore enter a claim—and it seems to me that the appropriate time that would occur is at the time you file the claim, not necessarily at the time you answer—that should be sufficient.

I had a case recently. I don't think any of us came here to tell war stories, but I just lost a § 2255 motion based on a poor recommendation by the magistrate, in which my client, after vigorously contesting a forfeiture of a vessel of which he was the legal and registered owner under maritime law. The government acknowledged that he was the owner after they had indicted him and they filed the civil forfeiture complaint. They alleged in the complaint that he was the owner in order to get jurisdiction and venue in the State of Washington, because the vessel was in Alaska. There was no one that questioned that he was the owner. Shortly after he plead guilty in the case, we withdrew our claim—that was the agreed-upon resolution of the case between myself and the assistant U.S. Attorney handling the case (it was easier for the government if my client withdrew his claim than if he had agreed to the forfeiture because of certain things the government has to do if there actually is a forfeiture). Well, the government

then argued in this case that by withdrawing his claim, my client had never subjected himself to risk and therefore jeopardy never attached, even though he lost \$350,000 of equity by way of the forfeiture. We're in the stage now where we are filing objections before the district court judge and hopefully the district court judge will see it differently. But that is the kind of thing that we're seeing in some of these district court opinions, and there are a bunch of them now Like I said, there's *United States v. Kemmish* out of the Southern District of California There's *Stanwood*. They are just all over the board. We are at a critical juncture where I think the courts will have to make a determination.

What has happened in the wake of *Stanwood* is that most courts have said that jeopardy doesn't attach in a civil case until the final judgment of the forfeiture is entered. So, if you stipulate to the forfeiture but the government, for whatever reason, wastes some period of time before they go to the judge and get a final judgment of forfeiture, most district court judges are saying that jeopardy doesn't attach until the government takes that last and final step. Interestingly enough, on the administrative side, what I understand is happening in the wake of 405 is that the government sends out the administrative notice saying we have seized your property and these are the steps that you can take in order to preserve your rights to contest. If the person to whom that notice was sent does not respond within the applicable period of time, the government takes no action. Whereas in the past, the government would then obtain an administrative decree of forfeiture. They now no longer do that, at least in the Ninth Circuit. They are sending out a notice saying, basically, "Thank you for not responding, we are going to hold this in abeyance until we resolve whatever criminal action may be pending." And so, they are just sitting on it because nobody, frankly, knows what to do in order to preserve their rights, the government or the defense.

We are in uncharted territory and every day it seems that I find another case that is fascinating because of some weird tangent that the court went off on. The Ninth Circuit tackled this—or attempted to—in a very strange opinion called the *United States v. Barton* [46 F.3d 51 (9th Cir. 1995)]. This was originally decided on January 20th of this year. *Barton* is a non-decision. Most of us, when we looked at it, thought, "Why did they even publish this?" From the way they wrote the opinion, any other result would have been absurd. It is a very short opinion; it is only two pages. There is virtually no authority and no analysis. One and a half pages or two pages of the opinion is a recitation of the chronology of events in the case. Except that they left out what was—at least for the claimant—the most important date in the case, and that was the date that he began serving his sentence. I spoke to the lawyers who litigated the case and they told me that was the main issue on the briefs The Ninth Circuit lists all these dates but leaves out the date that the defendant began serving his sentence. You can't really tell from the opinion that he didn't begin to serve his sentence until everything else was done, because even though there was a guilty plea, he had been out on bond pending a lengthy appeal. So the last thing that happened in the case was that he started to serve his sentence. Everything else was done. The court does not even mention that. They come out with the decision: one paragraph. It basically says that the defendant made a superficially appealing argument, but it doesn't withstand closer scrutiny, and everything was done in the criminal case before the property was forfeited. Ergo, no relief. The defendant's lawyer then immediately filed a motion for rehearing, arguing that the appellate court had missed the boat. The whole issue here is whether [*United States v.*] *Smith* applies or whether *Van Moos* applies; and the court

didn't even put in the date as to when he started serving his sentence.

On March 7th, the Ninth Circuit denied the motion for rehearing, but two days later issued an amended opinion in *Barton*, and the only thing that it did was to change the last two sentences. They did not change the chronology; they still did not add the date that Barton began serving his sentence; and they never tackled the issue of which date applies. All they did—which threw every other district court decision into chaos—was that they said that the earliest that jeopardy could have attached in the civil case was on April 12, 1992, when Barton filed his answer. Because Barton had already entered his guilty plea [at that time], jeopardy had not attached [in the civil case], and therefore there is no double jeopardy violation. Well, what does that mean? We have all these other cases that say that jeopardy does not attach in civil cases until the final judgment of forfeiture is entered. Now, we have the Ninth Circuit stepping into the fray and gratuitously saying that jeopardy could have attached as soon as Barton filed his answer. It doesn't say that it *did*. It doesn't say what criterion a court should look at to decide whether jeopardy would attach when an answer is filed. It just says the earliest that it could attach is when the answer is filed. This, again, makes no sense. If you think about it, they are, in effect, saying that these are successive prosecution cases; because how could jeopardy attach when you file your answer? You're not punished when you file an answer. The second sentence of the opinion is just as bad. They say that the defendant entered his guilty plea, and therefore jeopardy attached in the criminal case at that time—again consistent with Ninth Circuit law (that would be the application of *United States v. Smith*). And therefore the Ninth Circuit, by implication, says that these are successive prosecution cases. Nobody seems to know what is going on. About the only thing that the government and I agree on is that these are *not* successive prosecution cases. They are multiple punishment cases. Thus, even though the lawyers on both sides are saying that, the courts are going off on their own and are saying that they are successive prosecutions.

I am not going to predict any more than Ms. Krinsky was willing to predict what ultimately is going to happen with 405, but I will go so far as to say this. I think—and I hope—that the Ninth Circuit will issue an amended opinion in 405 before it goes *en banc*. It needs to. It needs to address some of these issues that have been raised as to the chaos now, about trying to figure out when jeopardy attaches in a civil case and a criminal case. Did they really mean what they said when they blurred the line between successive prosecutions and multiple punishments? There was a lot that could have been said in 405 that wasn't said in order to support the results that they reached, and a lot of that was pointed out in the various briefs that were filed, and we are hopeful that Judge Reinhardt will issue an amended opinion. I suspect that whether he does or he doesn't, certainly a vote will be taken as to whether to grant *en banc* review. I think the Ninth Circuit will grant review, but I hope it is a stronger opinion by the time that they do that.

Whether or not this will get to be the first case that gets to the Supreme Court, I don't know. There is a split in the circuits. The issue of proceeds is an interesting issue. I think a lot of U.S. Attorneys I have spoken with would agree with me that double jeopardy is here to stay as far as facilitation forfeitures go, but the issue of proceeds is a tough one to swallow. Politically, it would be very difficult for any court to say that taking away the ill-gotten gains of a drug dealer is anything other than remedial, and that it counts as punishment. But I think *Tilley* was wrongly decided, for a couple of reasons. *Tilley* didn't look to the innocent owner defense in § 881(a)(6). It

didn't follow the approach of *Austin* to analyze these kinds of things. One of the things that we talk about when we talk about proceeds is that you have to focus on the statute itself. These statutes typically involve more than just proceeds. For example, § 881(a)(6), as pointed out by the panel in *405*, doesn't just get at the proceeds of drug trafficking. It can encompass property that is purchased with money that is set aside, or a bank account that is intended to be used to purchase property that is itself going to be used to facilitate. The other thing is that it is not limited to ill-gotten gains. Let me suggest this to you. A businessman goes to a bank—obviously a legitimate source—and borrows \$10,000. He then goes out and takes that \$10,000 and buys a kilo of cocaine and he sells that kilo for \$15,000. What would you say were the proceeds? Is it the entire \$15,000, or is it just the \$5,000 that was profit? The Court has not tackled that issue yet, and they do not seem to address it. I think that it should be limited to the \$5,000. If the money came from the bank, that's not proceeds.

The other interesting thing about *Tilley*—and it's really quite amazing, frankly—is that the Fifth Circuit totally ignored its own precedent. The same three-judge panel, in a case decided in 1989 called *Wood v. United States* [863 F.2d 417 (5th Cir. 1989)], came to the exact opposite conclusion, and held that the forfeiture of proceeds cannot be considered anything other than punishment. In doing so, the court took pains to note that they were bound by prior decisions of the Fifth Circuit. They were required to follow it. Then when *Tilley* comes along, they not only ignore their obligation to follow their own precedent, but they disregard their own opinion. This is what the same three judges said in *Wood v. United States*: "Forfeiture cannot seriously be considered anything other than an economic penalty for drug trafficking. *Holt* observed that 'the primary purpose of such forfeitures is to cripple illegal drug trafficking and narcotics activities by depriving narcotics peddlers of the operating tools of their trade.' The legislative history of 21 U.S.C. § 881 reveals that the forfeiture provision was designed to reach drug traffickers 'where it hurts the most' . . . and to 'augment the traditional criminal sanctions of fines and imprisonment.'" [*Wood*, 863 F.2d at 421, quoting *Holt v. Commissioner*, 611 F.2d 1160 (5th Cir. 1980)]. And yet, just a few years later in *Tilley*, forfeiture of proceeds is purely remedial and not punishment and not double jeopardy. The good news—at least from my perspective—in *Tilley* is that the court makes it clear that the fact that they were reviewing *proceeds* in that case was critical to its holding, suggesting that if it had been [a facilitation forfeiture], the Fifth Circuit would have gone along with the analysis of *405*—although it obviously pre-dated *405*—and found a violation of double jeopardy.

In the few minutes that I have left, let me talk about *Libretti*. Most of what we have talked about this morning has been civil forfeiture. *Libretti* is a criminal forfeiture case. It is the second criminal forfeiture case that the Supreme Court has tackled in the last couple of terms. The companion case to *Austin* was a case called *Alexander v. United States* [113 S. Ct. 2766 (1993)] which was a criminal prosecution and involved a criminal forfeiture. The Court held that the Eighth Amendment Excessive Fines Clause applied in the criminal forfeiture context as well. The Supreme Court granted *certiorari* in *United States v. Libretti*, which is a Tenth Circuit case, cited at 38 F.3d 523 [(1994)]. There are two issues in *Libretti*. First, must a court advise a defendant of his right to a jury trial on forfeiture issues at the time it accepts a guilty plea? Second, must the court make a determination that there is a factual basis for the forfeiture at the time it accepts the plea? The circuits are split. The earlier decisions that came down said, "Yes, clearly a court had to advise that there was a right to a jury trial and

to make a factual determination.” The Fifth Circuit came in with a statement that kind of blurs the distinction, and then the Eleventh Circuit said, “No, you don’t have to advise the defendant.” What happened with [Mr.] Libretti, as Professor Blakey said earlier, is that he was indicted for a 21 U.S.C. § 848 continuing criminal enterprise that carries a 20-year minimum mandatory. On top of that, he was facing a consecutive 30-year sentence because he had an unregistered automatic weapon. In the middle of the trial, it became apparent to Libretti that he was going to lose on both counts, and so he entered into a plea agreement to the § 848. At the plea colloquy, there was no discussion that he had a right to a jury trial on the forfeiture issues, because they had not gotten that far in the criminal case. The judge advised him that he had a right to a jury on criminal issues but did not say anything about his right on forfeiture issues. The court never made a factual determination that the properties at issue were actually subject to forfeiture. What Libretti said was, “Yeah, I’m guilty and I’ll give you all the moneys I made from my drug trafficking.” He thought that would be the end of it. Well, he shows up at the sentencing, and he’s standing there, and his lawyer is making his pitch, and the government says, “We want everything.” And the judge says, “Okay, you get everything.” And as they are hauling him out the door, he said, “Is this over?” His counsel made no objection to this. The objection, on the record, was actually made by Mr. Libretti. What happened was that he had an IRA account and some other things that were clearly not related to drug trafficking and pre-existed his criminal activity. There was no dispute about that. Under § 848, the government is entitled to substitute assets, and I am sure that the government somewhere along the way is going to argue that they would have gotten it anyway. But there was never a hearing on that. Mr. Libretti thought, apparently, at the time of sentencing—or at least before all of his property was taken—that he would, somewhere along the line, have some hearing at which he could adjudicate what property was subject to forfeiture and what was not. But he never received such a hearing and was never told he had a right to it.

I think where this is going to be most critical is in the issue of third-party litigants. If a court does not have to advise a criminal defendant of the right to a jury trial, and does not ever have to make a factual determination that the property is subject to forfeiture, then that issue would never, ever be decided by any court. This is because a third party claimant does not have a right to contest the forfeitability of the property. That is a done deal. The third-party claimant only has a right to appear after the government has obtained an order of forfeiture in the criminal case, and then the third-party claimant comes in and says “I have a superior right.” But the issue of ultimate forfeitability of the property will never be determined by anybody. It will be a *fait accompli* if the court is not required—even when there is a guilty plea—to make a factual determination that the property is actually subject to forfeiture.

I think that [Libretti] is an important case. I hope that Professor Blakey is right in his prognostication. I am cautiously optimistic that is the direction the Court is going, if for no other reason than that in the earlier cases deciding these issues, they denied *certiorari*. When the government petitioned for *certiorari* when they lost, they got no relief from the Court. I find it hard to believe that the Court has [now] accepted review in this case simply to affirm the Tenth Circuit. That would be inconsistent with the way the Court normally handles things. But, you know, anything can happen, and usually does happen, up there. That case, *Libretti*, will be argued in October. And by this time next year, we will hopefully have a decision in that case. Hopefully the string will be kept alive and the government will have suffered its seventh

consecutive defeat. Thank you.

PROFESSOR GURULÉ: Thank you, Richard, for your comments. I think once again, Mr. Troberman's comments underscore the complexity of the issues facing the Court. In the *Libretti* case, for instance, Mr. Troberman raises the issue that if there is no factual determination [as to whether the property is forfeitable] at the time of the entry of the guilty plea, then there never will be. But the courts that have taken the opposite view—that have taken the view consistent with the Tenth Circuit's decision in *Libretti*—have looked at forfeiture as punishment. So, the argument is that we're not talking about a substitute crime, here, for which there must be a factual basis before the defendant enters a guilty plea. We're talking about punishment, here. And because it is a penalty, that is a different animal than a criminal offense, and for purposes of entry of a guilty plea we are talking about the factual basis for the crime upon which the defendant is entering a guilty plea. So here, once again, we have the lines blurring as to whether or not forfeiture is punishment, or whether it's "punishment plus." Whether it is a substantive offense of sorts, or a quasi-criminal offense (in addition to the Court's recent pronouncement that civil forfeiture is punishment, as well). It will be interesting, once again, to see how the Supreme Court addresses these issues.