

No. 20 - 19-1344

IN THE
SUPREME COURT OF THE UNITED STATES

LAHKWINDER SINGH

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

ORIGINAL

On Petition for A Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

FILED

MAR 19 2020

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SUPREME COURT, U.S.

LAHKWINDER SINGH
Register Number: 55578-298

Petitioner Pro'Se

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RECEIVED

MAY 22 2020

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SUPREME COURT, U.S.

QUESTIONS PRESENTED

- I. Whether this Court should resolve the conflict between the circuits regarding whether the 'deprivation of livelihood' should be included in the proportionality analysis when determining whether a forfeiture meets the constitutionality requirements of the Eighth Amendment's ban on Excessive Fines?
- II. Whether the proportionality analysis under the Excessive Fines clause should include a 'fact specific' evaluation of the circumstances of a criminal act to include the factors of: 1) Negligence, 2) Recklessness, 3) Knowledge, 4) Intent, and 5) Maliciousness, to determine the extent of the defendant's level of participation, knowledge of the crime, and his degree of culpability to ensure the amount of forfeiture bears a relationship to the criminal activity?
- III. Whether the amount of forfeiture ordered in a financial structuring offense should be proportional to the ratio of legitimate funds structured, as compared to the amount of funds tainted by other criminal act(s), that resulted in minimal, or no, illegal gain, to meet the constitutional requirements of the Eighth Amendment?
- IV. Whether the proportionality analysis under the Excessive Fines Clause should require a relationship between: 1) the ratio of the sentence imposed, as compared to the upper limit of either the Guideline recommendation, or the applicable Statute; and 2) the amount of forfeiture ordered as compared to the amount of funds structured?

PARTIES TO THE PROCEEDINGS

Petitioner, Lakhwinder Singh, was the Defendant in the United States District Court for the Southern District of California, in the USDC Case 16-cr-729-BAS, Appellant in the United States Court of Appeals for the Ninth Circuit in USCA Case 18-50332, and was the Pro' Se Appellant in the United States Court of Appeals for the Ninth Circuit in a request for a Rehearing in USCA 18-50332.

Respondent, United States of America was the named Plaintiff in the United States District Court for the Southern District of California, in the USDC Case 16-cr-729-BAS, and Appellee in the United States Court of Appeals for the Ninth Circuit in USCA Case 18-50332.

No other relevant parties are represented in the instant action.

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OPINIONS BELOW

Mr. Singh, and his Co-defendant, Lovely Singh, a Corporation, agreed in a Plea Agreement to forfeit \$2,955,521 which represented 100 percent of all funds structured in a currency structuring offense which he pled guilty to. The District Court ordered Mr. Singh to forfeit \$1,955,521; and Lovely Singh to forfeit \$1,000,000 for a total of \$2,955,521. Within the structure of the Plea Agreement, Mr. Singh reserved the right to challenge the forfeiture as excessive under the Eighth Amendment.in the Appellate Court.

The unpublished memorandum disposition of the United States Court of Appeals for the Ninth Circuit can be found at USCA Case 18-50332. See; Appendix A, pages 1 through 4. Forfeiture Affirmed.

The unpublished Order of the United States Court of Appeals for the Ninth Circuit can be found at USCA Case 18-50332. See; Appendix B, page 1 of 1. Request for Panel Rehearing Denied.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. Section 1254 (1). The Ninth Circuit entered its final Order affecting the tolling of this Petition 15 January 2020, and this Petition was filed within 90 days of that order. See; Appendix B, Page 1 of 1, Appellate Court Order; and See; Petitioner's Certificate of Service

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

I. CONSTITUTIONAL PROVISIONS

This case involves a federal criminal defendant's constitutional rights under the Eighth Amendment to the Consti-

tution. The Eighth Amendment states:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

II. STATUTORY PROVISIONS - CRIMINAL

A. 21 U.S.C. Section 841(a)(1) [Prohibited Acts A]

This case involves the application of 21 U.S.C.

Section 841(a)(1), which states:

(a) Unlawful Acts

"Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally-

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance"

B. 21 U.S.C. Section 846 [Attempt & Conspiracy]

This case also involves the application of 21 U.S.

C. Section 846, which states:

"Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or Conspiracy."

C. 31 U.S.C. Section 5324(a)(1), (d)(2) [Structuring Transactions to evade reporting requirement prohibited]

This case also involves the application of 31 U.S.

C. Section 5324 (a)(1) which states in pertinent part:

(a) Domestic Coin and Currency transactions involving financial institutions-

"No person shall, for the purpose of evading

the reporting requirements of section 5313(a) or 5325 ... the reporting or recordkeeping requirements imposed by any order issued -

(1) Cause of attempt to cause a domestic financial institution to fail to file a report required under section 5313(a) or 5325 or any regulation prescribed under an section, to file a report or to maintain a record required ..."

This case also involves the application of 31 U.S.

C. Section 5324 (d)(2) which states in pertinent part:

(d) Criminal Penalty

(2) Enhanced penalty for aggravated cases -

Whoever violates this section while violating another law of the United States or as part of a pattern of any illegal activity involving more than \$100,000 in a 12 month period shall be fined twice the amount provided ... imprisoned for not more than 10 years, or both."

D. 31 U.S.C. Section 5324(a)(3) [Structuring Transactions to evade reporting requirement prohibited]

This case also involves the application of 31 U.S.

C. Section 5324 (a)(3) which states in pertinent part:

(a) Domestic Coin and Currency transactions involving financial institutions-

"No person shall, for the purpose of evading the reporting requirements of section 5313(a) or 5325 ... the reporting or record keeping requirements imposed by any order issued -

(3) Structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions."

E. 31 U.S.C. Section 5317(c)(1) [Search and forfeiture of monetary instruments]

This case also involves the application of 31 U.S.

C. Section 5317(c)(1) which states in pertinent part:

(c) Forfeiture -

(1) Criminal Forfeiture -

(A) In general -

"The court in imposing sentence for any violation of section ... 5324 of this title or conspiracy to commit such a violation, shall order the defendant to forfeit all property, real and personal, involved in the offense and any property traceable thereto."

(B) Procedure -

"Forfeitures under this paragraph shall be governed by the procedures established in section 413 of the Controlled Substances Act."

III. STATUTORY PROVISIONS - JUDICIAL

A. 28 U.S.C. 1254(1)

This case involves the application of 28 U.S.C. Section 1254 (1), which states in pertinent part:

"Cases in the Courts of Appeal must be reviewed by the Supreme Court by the following method:"

(1) "By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

STATEMENT OF THE CASE

I. ISSUE PRESENTED

The Petitioner, Lahkwinder Singh, pled guilty to one count of structuring currency transactions and received a 36 month sentence and was ordered to forfeit \$1,955,521. This amount, together with a \$1,000,000 forfeiture ordered against his corporation, and co-defendant, Lovely Singh, Inc., represents 100 percent of the funds involved in the structured transactions. Only a very small fraction of these funds represented proceeds received for the shipping of controlled pharmaceutical drugs that had been smuggled into the United States from Mexico by a small group of Mexican nationals who operated an organization that the Defendant did not belong to.

The Excessive Fines Clause of the Eighth Amendment to the United States Constitution requires that a forfeiture not be grossly disproportional to the gravity of the offense. This Court, the Ninth Circuit, and its sister circuits have provided case precedent that have established guidelines to determine this issue with numerous references that each case is unique and must be independently evaluated based on the facts presented.

Singh appeals the District Court's order that he forfeit \$1,955,521 and contends the amount of forfeiture imposed is excessive under the Eighth Amendment to the Constitution, which is designed to limit the power of the Government to impose punitive sanctions that exceed an acceptable threshold, as this forfeiture does.

II. FACTS AND PROCEEDINGS OF THE CASE

In 2012, federal agents began investigating the flow of Controlled Pharmaceutical Drugs (CPD's) from Mexico into the United States and then shipped across the United States from various border-area locations, to include in and around the greater San Diego Metropolitan vicinities. On one particular day, agents intercepted one female individual who was employed by a Mexican drug organization to carry pre-packaged CPD's into San Diego for further shipment to other domestic locations.

At the time, the Defendant operated two Postal Annexes in the San Diego area; One was in the Lemon Grove area which Singh had owned and operated since 2000. Another Annex had been acquired in the College Grove area (Re: the University Avenue Site) in 2009 which was operated by an employee, Alex Nava (Re: 'Nava'), who had been hired to manage this site from the date it opened until it closed in 2014. It was during a two (2) year period (2012 to 2014) the criminal investigation began.

Upon questioning, the female courier informed the agents that the CPD's she carried were destined for the University Avenue Postal Annex operated by Nava, who was her contact. The courier made no reference to Mr. Singh. This one courier, and the CPD's she carried, was the only time the Government explicitly knew, or had proof, of any drug activity being shipped by an employee of Singh's through the University Avenue Postal Annex.

On 9 March 2016, Singh was arrested and subsequently charged in a Second Superseding Indictment with the following violations:

Count	Description
1	21 USC §§ 841(a)(1) and 846
2 - 5	31 USC §§ 5324(a)(1) and (d)(2)
6	31 USC §§ 5324(a)(3) and (d)(2)

The Second Superseding Indictment also included a criminal forfeiture allegation seeking forfeiture of all property (proceeds) involved in the offenses under 31 USC § 5317(c)(1). One employee, Alex Nava, was named as a co-defendant on all counts, and Singh's closely held corporation, Lovely Singh, Inc., was named as a co-defendant in counts 2 through 6.

Singh pled guilty to Count number 6, Structuring Currency Transactions, and admitted to structuring \$2,955,521 during an approximate two year period between December 2011 and January 2014. In addition, a 'Forfeiture Addendum' to the Petitioner's Plea Agreement specified Singh's conviction would include a forfeiture of \$2,955,521 with the right of the Defendant to contest said forfeiture on the ground the forfeiture constitutes an excessive fine under the Eighth Amendment to the United States Constitution. See; Appendix C, Plea Agreement, Lahkwinder Singh, Pages 1 - 15. See; Appendix D, Forfeiture Addendum, Lahkwinder Singh, Pages 1 - 4. At sentencing, the District Court ordered Mr. Singh to forfeit \$1,955,521 and Lovely Singh \$1,000,000.

III. THE PLEA AGREEMENT

A. THE OFFENSE WAS STRUCTURING

This Honorable Court is aware that in addition to the Financial Structuring Offense, which the Defendant pled guilty to, the Defendant was also charged with one count of Conspiracy to Distribute a Schedule II Controlled Substance under 21 U.S.C. § 841. The Defendant rejected the Government's allegation that he was involved in any drug activity and as a result the Government dismissed all charges associated with drugs under § 841. Believing the issue relating to drug conduct was settled, the Defendant agreed to the plea offer.

However, within the Government prepared plea agreement there were recurring instances where the prosecution repeatedly attempted to associate the defendant with the drug conspiracy through inaccurate, vague and misleading commentary which was inconsistent with the facts agreed upon and often contradicted other elements within the plea agreement. At a minimum, the Government had also nuanced elements within the agreement to suggest either the Defendant had knowingly participated, was aware of a high probability of the drugs, or he knew or believed the proceeds from certain parcels were unlawful. See; Appendix C: Plea Agreement for the following references:

1. Page 3 of the plea, element 5, lines 26 - 28

"Beginning on an unknown date ... Singh and Nava distributed Schedule II controlled substances from Postal Annexes to persons located throughout the United States (the "Purchasers")..."

C: Plea Agreement

1. Page 3 of the plea, element 5, lines 26 - 28

While it may be true that the Defendant would on occasion assist his employee, Nava, at the University Avenue Annex, and therefore, could have shipped some of the pre-packaged parcels alleged to have CPDs, it is the assertion of the defendant that he had [NO] knowledge the parcels contained a controlled substance.

2. Page 4 of the plea, element 7, lines 11 - 13

"Singh was aware of a high probability that the hundreds of packages sent from the Postal Annexes contained a prohibited controlled substance, and he deliberately avoided learning the truth of their contents."

It is true that Singh was aware of the probability that drugs were being shipped through legal venues like his Postal Annexes, Federal Express, United Parcel, and even the U.S. Postal Services. His awareness came from the evening news, bulletins from UPS and the Post Office and alerts from Homeland Security. However, he was not aware whether any specific drugs were being sent through his Annexes and he had no authority to open any for an inspection. This explanation is completely opposite the inferences made by the Government in their attempt to nuance the wording of the plea agreement.

3. Page 6 of the Plea, element 16, lines 3 - 7

"In light of Singh's role as the packager and shipper of hundreds of packages ... and the person who conducted all of the structured cash deposits ... Singh knew or believed that the funds were proceeds of unlawful activity or were intended to promote unlawful activity."

This element was referenced as one of the reasons the Defendant was aware of the packages contents and was structuring to hide drug proceeds. However, elements 5 and 6 of the plea agreement contradicts the Government assertion that Singh was a packager, and therefore he must have known the contents of the parcels. Singh was not the packager. Singh only added labels to pre-packaged parcels received by his Annex.

The plea's reference to 'Singh knew or believed' is another example of the Government's nuanced word play in their attempt to construe something that is false and misleading to the reader. Singh interpreted this to mean the unlawful proceeds were a reference to his structuring of funds. The Government would have the reader believe it was CPDs shipping fees as the source.

B. SUMMARY - PLEA

The Plea Agreement, crafted by the Government Prosecution, provide examples of the Government's efforts to discredit the Defendant with conduct beyond the Structuring Offense he had agreed to plead to. The Government tries to accomplish this through willful distortions of the facts, half truths taken out of context in order to suggest a mere 'possibility' of an allegation which was never proven by the Government, and ambiguous references that were contradicted by other element statements of fact.

Sadly, this scornful and abusive tactic was used by the Government as a ploy to support their earlier allegations that the Defendant was an active participant in the drug shipment scheme. Allegations they could not prove in Court, but were useful to increase the severity and culpability of the Defendant's actions in the Structuring Offense and could then be used as an enhancement in the forfeiture proceeding.

IV. THE SENTENCING HEARING

The Sentencing Hearing included a review of the pertinent issues which are summarized below:

A. THE DEFENDANT'S ROLE

As already noted, throughout the period of the Government's investigation the controlled CPD substances were being shipped through the Postal Annex on University Avenue, which was managed and operated by Alxe Nava, the individual who was an

employee of Mr. Singh. There is no proof that any controlled substances of any kind were being shipped through the Annex operated by the Defendant during the period of the investigation (i.e. the Lemon Grove Annex). Mr. Singh's only role was to pick the daily cash receipts twice each day for deposit into a bank account, and to help operate the University Avenue Annex (where the CPDs were shipped) in the rare time that the manager, Alex Nava, was away from the store.

The following are excerpts from the Sentencing Hearing, found in Appendix E:

1. "Mr. Nava primarily ran the College Grove Postal Annex." Page 5, Lines 10 & 11. Defense Counsel
2. "but for Mr. Nava, there would have been no pills that ever went through the Postal Annex. All the connections to the pills were directly related to Mr. Nava's connections to Mexico." Page 5, lines 20 to 23. Defense Counsel
3. "we know for a fact that Mr. Singh didn't know exactly what was in these packages" Page 13, lines 2 & 3. Defense Counsel
4. "it was based on what we were able to seize. On one point in time one courier was coming across, and she was caught." Page 40, lines 6 to 8.
"That was just one courier on one day..." Page 40, lines 12 & 13. Prosecution
"And those were the only drugs that we actually seized." Page 40, lines 14 & 15. Prosecution
5. "in 2008 when Mr. Nava was hired by Mr. Singh, and what Mr. Nava would say and what he told the agents was that shortly after he was hired, he was approached by these two individuals, Garcia and Dicianno and these people were connected to people that Mr. Nava knew in Mexico, and also other people were arrested that Mr. Nava had known..." Page 41, lines 20 to 25. Defense Counsel

B. THE STRUCTURING OFFENSE

The Government has suggested that Mr. Singh's Financial Structuring was to hide the receipt of the minimal funds his Annex had received for the shipment of the CPDs. However, the record clearly reveals that the financial structuring Singh has admitted to began years before when he became a Western Union agent.

The following excerpts are from the Sentencing Hearing, found in Appendix E:

1. "Defendant Singh began operating the Postal Annex as licensed money transmitting businesses in 2006 as an agent of Western Union. And that's when he became educated on the fact that you had these reporting requirements for amounts over \$10,000. This amounted to thousands of dollars from these people that Mr. Singh had to put into the bank, and that was what resulted in the structuring." Page 7, lines 10 to 14 and lines 18 to 20. Defense Counsel.
2. "If people were coming in with vitamine C pills, aspirin [instead of CPDs] ... Mr. Singh would have still been structuring money." Page 13, lines 12 to 14. Defense Counsel
3. "There was never one pill shipment payment that there is any evidence caused a structured deposit. We know that they were at most 2,000 to \$2,500 in one day." Page 13, lines 17 to 19. Defense
4. "The structuring exists before the pills arrived. So, I can't emphasize strongly enough, Your Honor, that this is a structuring case, not a drug distribution case and that the pill shipments were not the reason for or the motivation behind structuring." Page 14, lines 10 to 15. Defense Counsel.

C. PROPORTIONALITY - PROFITS & PROCEEDS

One of the most important aspects of this case involves the issue of proportionality. The culpability of the Defendant

ant and the severity of the crime are supposed to be guiding criteria when determining the amount of funds to forfeit. There should be a corresponding relationship between these factors.

The following excerpts are from the Sentencing Hearing, found in Appendix E:

1. "He pled guilty to structuring. He did not plead guilty to a drug count. And when you look at structuring from a forfeiture standpoint, i.e., is the forfeiture grossly disproportional to the conduct of the defendant ..." Page 10, lines 8 to 11, Defense Counsel.
2. "there was approximately \$4 million roughly that went into the two accounts, most of which was money transmissions or money orders. It was money that fleetingly passed through the account..." Page 11 lines 1 to 4, Defense Counsel
3. "in 2012 the corporation had a profit of \$23,000, and in 2013 it was about \$50,000. So we're talking about \$75,000 profit over the two years walking him into a \$2.9 million forfeiture. Page 11 lines 10 to 13. Defense Counsel.
4. "If we count every single shipment from the San Diego office as a pill shipment, that's 9 percent of all the deposits over those two years. And I submit there were packages that didn't contain pills. Page 14, lines 4 to 7. Defense Counsel.
5. "and part of the problem I have is I'm not sure it's clear from the record that this was a gain to Mr. Singh." Page 31, lines 13 & 14, Court (judge) discussing the \$2.9 million forfeiture requested by the Government.
6. "90 percent of the money that was being structured was legitimate money that did not even -- most of it did not even belong to Mr. Singh, but rather went to pay rent and utility bills." Page 44, lines 22 to 25. Defense Counsel.
7. "looking at it in light most favorable to the government, we have a maximum sentencing Guideline fine of \$200,000. We have a maximum statutory fine of 500,000. They're (Government) asking for \$3 million. That's 15 times the max guideline fine. Page 15 lines 23 to 25, Page 16, lines 1 & 2. Defense.

D. SENTENCE IMPOSED

The District Court made two factual findings regarding the case which influenced the judge's decision with respect to sentencing.

The following excerpts are from the Sentencing Hearing found in Appendix E:

1. "First of all, I find that the reason for the Structuring was to avoid the attention of the government." Page 48, Lines 24 & 25.

2. And I find that the reason Mr. Singh wanted to avoid the attention of the government was to avoid detection that he was shipping illegal drugs." Page 48 line 25; and Page 49, lines 1 to 3. District Court

3. "With respect to the underlying sentence, I have considered ... the nature and circumstances of the offense, and I do agree with the government that this is a serious structuring case." Page 50, lines 2 to 5. District Court

"And this was sophisticated structuring." Page 50, line 8. District Court

"I have also taken into consideration Mr. Singh's history and characteristics" Page 50, lines 13 to 14. District Court

"but I do think it's very important, the deterrence" Page 50, line 20. District Court

"Drug traffickers cannot complete what they do without the support of the money people, and Mr. Singh was one of those money people. Page 50, line 25; & Page 51, lines 1 & 2. District Court

"Structuring is an important part of the financial system" Page 51, lines 4 & 5. District Court

4. "And I do find that a three-year sentence or 36 months in custody is sufficient but not greater than necessary to satisfy the policies of 3553(a)... followed by three years of supervised release." Page 51, lines 13 to 16. District Court

5. "I will not impose a fine." Page 51 line 25. Court

6. "Let's talk about the forfeiture." Page 52, line 19

7. "I have considered, first of all, the nature and extent of the crime" and "how serious I think this crime is." "I've considered whether this violation is related to other illegal activities. It is. And I have considered other penalties that can be imposed and the extent of harm caused." "ultimately I am concerned that Mr. Singh hid by playing this shell game of moving money around. It makes it particularly hard to find out how much he made, how much was **laundered.**" Page 52, lines 21 to 25 & Page 53, lines 1 to 5. District Court
8. "And at least some of the money being structured was proceeds of drug trafficking." Page 53, lines 13 & 14. District Court
9. "So I do find that the recommended forfeiture by the government is appropriate in this case. I find that it has a relationship to the gravity of the offense, and at this point I will order forfeiture in the amount of \$1,955,521 for Mr. Singh." Page 53, lines 15 to 19. District Court

V. APPELLATE COURT DECISIONS

A. THE INITIAL APPEAL

The Defendant appealed the District Court's forfeiture order based on the Eighth Amendment's prohibition of excessive fines that are grossly disproportionate to the gravity of the Defendant's offense. Utilizing the four factors outlined in *United States v. Bajakajian*, 524 U.S. 321, the Defendant provided a detailed proportionality analysis that considered the nature of the crime, whether it was related to other illegal activities, the punishment and fine prescribed under the Sentencing Guidelines, and the harm caused. *Id.* at 338-339. Mr. Singh also argued that other factors may be relevant to determine the harshness of a fine, including the "deprivation of livelihood" in the proportionality analysis. See; *United*

States v. Hantzis, 403 F.App'x 170, 172 (9th Cir. 2010); and United States v. Levesque, 546 F.3d 78, 83 (1st Cir. 2008).

1. NATURE OF THE CRIME

Currency seized for violations of reporting and structuring offenses may be from legitimate sources and not used to promote a criminal enterprise. Such is the case herein.

The appeal noted the overwhelming bulk of the funds structured, in excess of 90 percent, were from legal sources associated with Western Union transactions, the sale of merchandise and packaging materials, and proceeds from shipments unrelated to CPDs.

The Defendant pled guilty to Structuring, something that had occurred consistently throughout the years prior to the first shipment of CPDs.

2. OTHER ILLEGAL ACTIVITIES

Although the District Court found that Singh had structured to hide drug proceeds, the Defendant argued that finding defied logic. As already noted, Singh began structuring in 2006, five (5) years before any CPDs were shipped, when he became a Western Union agent. In addition, the dollar amount of the proceeds received from shipping CPDs were far too small to warrant structuring.

The Defendant also informed the Court that he had made little or no profit from the shipment of CPDs due to the heavily discounted shipping rate he had charged for the pre-packaged parcels from Mexico; a point also noted by the District Court that has already been referenced herein on Page 13, Point number 5. At best, the parcels contributed to the salary of the University Avenue personnel who put on a label and shipped the parcels via UPS.

3. PUNISHMENT AND FINE PRESCRIBED

The statutory maximum fine is \$500,000. 18 U.S.C. § 3571(b). The forfeiture ordered is 4 times the statutory limit.

The Ninth Circuit looks to the Guideline range in determining proportionality. The correct Guideline range is from \$10,000 to \$100,000. U.S. Sentencing

Guidelines § 5E1.2(c)(3)(2014). Thus, the forfeiture imposed is approximately twenty times the high end of the Guidelines (\$100,000) and 200 times the low end of the range (\$10,000). As noted, the 9th Circuit looks to the Guideline range, not the statutory maximum fine in determining proportionality.

Irrespective of the two measurements available, the Defendant argued the forfeiture ordered is far out of proportion to the gravity of the offense as determined by the Sentencing Commission and Congress.

4. EXTENT OF THE HARM

The District Court noted that Singh played a very important role in the financial system because he was a qualified Western Union agent... and at least some of the money being structured was the proceeds of drug trafficking. See; Appendix E, Sentencing Hearing, page 53, lines 8 & 9; and lines 13 & 14.

The Appellate Court for the Ninth Circuit 'Affirmed' the District Court's forfeiture order noting that "Singh does not dispute that his structuring activity was related to illicit drug proceeds. See; Appendix A: Appellate Court Memorandum, Page 3, Lines 1 and 2. The Memorandum also referenced the maximum guideline punishments of 71 months imprisonment and a \$100,000 fine. Furthermore, the Court noted that a reporting violation causes 'significant harm' when the currency is connected to drug trafficking. In consideration of those factors, the Appellate Court found the Guideline limitations may be exceeded.

The Appellate Court also referenced the 'financial hardship' factor raised by Singh, but declined to address the matter. It is important to note that the Court did Not specifically identify "deprivation of livelihood" in their comments.

B. THE REQUEST FOR REHEARING

The Defendant filed a timely Pro'Se request for a Rehearing which was accepted by the Ninth Circuit Appellate Court. The Defendant noted therein that in the initial appeal of the District Court Order, the Appellate Court heard facts presented by the Government and by the Counsel for Defense. In his request for a Rehearing, Singh reasserted some of those facts, qualified others for their misrepresentations and introduced clarifying, or new facts, not previously provided to the Ninth Circuit panel. Request for Rehearing denied.

A summary of the significant points follow:

1. Referencing the facts of the case, Singh clearly identified the actual members of the organization located in Mexico which did not include him. He also reminded the Court that the shipments of CBD took place in the Annex that was managed and also operated by the man who had the only contacts to the Mexican organization. These facts were corroborated by the only courier the border agents caught bringing CPDs into the United States.
2. The Defendant disputed that he intentionally ever spread the CPD shipments between UPS, FedEx and the Post Office to conceal the presence of drugs. Rather, that 98 percent of all CPD shipments were made through UPS with only a few being routed to other shipping services due to their unique location. The Defendant also disputed that he ever received any specific warning from UPS suggesting that he was in fact shipping illegal contraband and that he should cease doing so.
3. The Defendant corrected the amount of CPD shipments made through the University Avenue Annex and adjusted the amount of proceeds and profits accordingly, which were dramatically lower than the amount alleged by the Government. The Defendant also provided new ratios of the actual CPD shipments for proportional comparisons to the level of total shipments and structured funds.

4. Singh clarified that he made two (2) daily deposits for his two Annexes for immediate safety of his cash receipts and to have sufficient funds in his business account to cover the Western Union withdrawals. He further stated that each deposit was a consolidation of both Annex locations which was equal to one daily deposit for each site.
5. Singh explained that he had a high number of different bank accounts to cover his two business location, a Western Union account, an investment account and a personal account at each bank. Furthermore, Singh had to open new accounts at two new banks during the investigation because the banks notified him that they would no longer accept his business due to the investigations.
6. Singh identified the numerous inconsistencies, contradictions and misleading elements within his plea.
7. Singh reminded the Appellate Court that both it, and the District Court, were conveniently ignoring the truth of when the structuring began. Each court asserted that he began structuring to hide the proceeds from the shipping fees of the CPDs. But that conclusion only works if the courts use the period during the investigation and not the entire five (5) years preceding the first shipment of CPDs when the structuring began and continued. But these two lower courts do not want to see the factual evidence because that would disprove one of their key allegations that increases the severity of the Defendant's crime and allows one of the meager justifications these courts are using to seize all of Singh's assets. Once again, Singh did NOT structure funds to hide any illegal activity. The structuring began innocently in 2006 because Mr. Singh was under the belief he was exempt because he had established MSB (Merchant Service Banking) which excluded him from having to file any reports.
8. Finally, there simply is no motive for Singh to have participated in shipping any controlled substances. He was not part of the drug organization and did not actively participate in their shipment from the Annex operated and managed by the individual who did plead guilty to a drug offense. Nor did Singh ever

8. Continued

receive any monetary benefit from these shipments. There were no profits from the actual shipments and there is no evidence that he ever received any additional reward for the very high risk he would have been taking had he known.

The Defendant summarized all the above information in his argument and re-examined the proportionality analysis to include all of the factual evidence from the case. The Defendant argued that the District Court failed to consider any of the constitutional issues before ordering a 100 percent forfeiture of the funds structured, to include:

1. The Defendant's degree of culpability considering all the factual evidence.
2. The degree of illegal activities compared to the amount of legitimate business conducted as a ratio to determine a fair level of forfeiture.
3. The amount of benefit reaped by the Defendant in the shipment of CPDs
4. The Defendant's lack of any financial reward or other motive to engage in illegal activity.
5. The requirement of the court to perform a fact-specific evaluation of all the circumstances of the illegal acts to include the actual extent of the defendant's criminal activities

Cases referenced included:

1. United States v. Busher, 817 F.2d, 1409 (9th Cir. 1987)
2. Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001 (1983)
3. United States v. Bieri, 21 F.3d 819 (8th Cir. 1993)
4. United States v. Bajakajian, 524 U.S. 321
5. United States v. Umagat, 998 F.2d, 770 (9th Cir. 1992)
6. United States v. Bibbero, 749 F.2d 581 (9th Cir. 1984)

SUMMARY OF THE ARGUMENT

The Excessive Fines Clause of the Eighth Amendment to the United States Constitution requires that a forfeiture not be grossly disproportionate to the gravity of the defendant's offense. In *Bajakajian*, 524 U.S. 321 (1998), the Supreme Court established four (4) factors for courts to consider within a proportional analysis that included the following:

1. The Nature and Extent of the Crime
2. Other Illegal Activities
3. The Punishment and Fine Prescribed
4. The Extent of the Harm done

In addition, in *Bajakajian* the Supreme Court noted that the Excessive Fines Clause was "taken verbatim from the English Bill of Rights of 1689" which referenced the Magna Carta as "the law of the land" wherein a fine "should be proportional to the offense and that they should not deprive a wrongdoer of his livelihood." *Id.* at 335.

Applying the four (4) factors noted above, it is apparent that the lower courts failed to appropriately perform a proportional analysis that would have determined a forfeiture that was proportionally relative to the known facts of the case, to include the culpability of the defendant, the degree of illegal activities compared to the amount of legitimate business conducted, the amount of benefit reaped by the defendant, the lack of motive to engage in any criminal acts, the defendant's intent, the statutory and guideline limitations on fines, the ratio of the sentence imposed to the upper sentence guideline and the deprivation of livelihood issue.

The District Court ordered, and the Ninth Appellate Court affirmed, a 100 percent forfeiture of the funds involved in the financial structuring of business proceeds. These proceeds, totalling \$2,955,521, included approximately \$140,000 of payments for the shipment of Controlled Pharmaceutical Drugs which netted a profit of less than \$10,000 over a 25 month period. Of the total amount of the forfeiture ordered, Mr. Singh was ordered to pay \$1,955,521, and his Corporation was ordered to pay the remaining \$1 million.

Beyond the proportional analysis issues summarized above, the courts failed to adequately explain, justify or address the facts that the forfeiture ordered against Mr. Singh is 4 times the Statutory limit and 20 times greater than the recommended Guideline fine.

Given these facts, a 100 percent forfeiture, totalling nearly \$2 million, is grossly disproportional to the crime and must be vacated and reduced

ARGUMENT

I. REASONS FOR GRANTING THE WRIT

The Supreme Court, the Ninth Circuit and its sister circuits have all provided case precedent that have established recognizable points of law regarding appropriate forfeiture limitations in all categories except the deprivation of livelihood consideration.

The deprivation of livelihood issue is more complex because there is a lack of consensus, or collective opinion amongst the circuits. This conflict between the circuits makes this case an ideal vehicle to resolve the circuit split, which is critically important to the fair administration of justice.

II. ARGUMENTS TO THE QUESTIONS PRESENTED

A. DEPRIVATION OF LIVELIHOOD

Within the Opening Brief of his Direct Appeal to the Ninth Circuit Court of Appeals, the Defendant argued for the inclusion of the 'deprivation of livelihood' within the proportional analysis evaluation, citing United States v. Hantzis, 403 F. App'x 170 172 (9th Cir. 2010) and United States v. Real Prop. Located in El Dorado City, 59 F.3d 974, 985-86 (9th Cir. 1995), abrogated in part by Bajakajian, 524 U.S. 321; and United States v..Levesque, 546 F.3d 78, 83 (1st Cir. 2008)[Excessive Fines Clause analysis should 'consider whether forfeiture would deprive the defendant of his or her livelihood.']. Within the appeal, Singh argued that the forfeiture far exceeded his net worth and after selling all of his assets he would still be over \$500,000 in debt. This, combined with his 59 years of age, three (3) years of incarceration and his various health problems, to include diabetes, would preclude him from being able to start a new company which would be the only way for him to earn a meaningful wage with his criminal felony in his record. See; Appendix F, Opening Brief, pages 32 & 33.

In the Ninth Circuit's opinion in the Hantzis case (Id.) the three judge panel opined the court would consider such an argument that had been drafted specifically to address the issue of livelihood deprivation, citing Bajakajian at 335. However, in its response to this case, the Ninth Circuit panel improperly chose to ignore this aspect of Singh's appeal and appeared to consolidate

this issue into a generalized response to financial hardship, which it then declined to address. Because this argument was timely made and preserved in the defendant's original appeal, Singh raises this issue once again in this Writ for Certiorari.

As previously noted on page 21 of this document, the Supreme Court noted in the Bajakajian Case (Id.) that the Eighth Amendment was derived literally from the English Bill of Rights of 1689, which relied heavily on the Magna Carta. Within that document, the lords of England recognized the amount of excessive and exorbitant fines as being unacceptable and decried that they should be both proportional to the offense, and that they should **not deprive a wrongdoer of his livelihood**. See; Bajakajian (Id.) at 335.

The issue associated with the deprivation of livelihood is complex because there is conflict between various circuits. The Eighth and Eleventh Circuits have held that the Eighth Amendment bars inquiry into a defendant's personal circumstances, although these circuits have not distinguished such an inquiry from the question of whether a forfeiture would destroy a defendant's livelihood. See; United States v. Smith, 656 F.3d 821, 828 (8th Cir. 2011); and United States v. Dicter, 198 F.3d 1284, 1292 n.11 (11th Cir. 1999). As noted in Hantzis (Id.), the Ninth appears willing to consider a question of the defendant's livelihood, although it declined to do so in the appeal of this case. However, the First and Second Circuits have concluded that the deprivation of livelihood should be included within the proportionality analysis with

the standard four factors noted on page 21 of this document. In the First Circuit, See; United States v. Fogg, 666 F.3d 13, 19 (1st Cir. 2011): "Excessive Fines inquiry runs deeper where a defendant raises the issue of deprivation of livelihood." "[A] court should also consider whether forfeiture would deprive the defendant of his or her livelihood." Citing United States v. Levesque 546 F.3d @ 83 (1st Circuit, 2008) (referencing a 3 part test for gross disproportionality described in United States v. Heldeman, 402 F.3d 220, 223 (1st Cir. 2005), where the court stated: "However ... this test is not the end of the inquiry under the Excessive Fines Clause." Beyond the 3 factors described in Heldeman (Id.), a court "should also consider whether forfeiture would deprive the defendant of his or her livelihood"; Citing: U.S. v. Jose, 499 F. 3d @ 113 - Reference to Bajakajian (Id.) at 334.).

In the Second Circuit, See; United States v. Viloski, 814 F. 3d 104 (2nd Cir. 2016). "Indeed, Bajakajian itself leads us to conclude that one additional factor is especially important ... a penalty for some offense - "not be so large as to deprive [an offender] of his livelihood." at 110. "As the First Circuit has recognized, hostility to livelihood-destroying fines became "deeply rooted" in Anglo-American constitutional thought and played an important role in shaping the Eighth Amendment." Citing, Levesque (Id., at 84). "Whether a forfeiture would destroy a defendant's livelihood is a component of the **proportionality** analysis, not a separate inquiry." at 111 and 112 (Id.), Viloski.

Furthermore, in Viloski, the Appellate Court addressed the other personal factors of an individual that can relate to the deprivation of livelihood at 112; and 113; (Id.):

"We also emphasize that asking whether a forfeiture would destroy a defendant's **future** livelihood is different from considering as a discrete factor a defendant's **present** personal circumstances, including age, health and financial situation. While hostility to livelihood-destroying fines is deeply rooted in our constitutional tradition, consideration of personal circumstances is not." Citing Bajakajian at 335-36. (@ 112) "It is possible, of course, that a person's health and financial condition might bear on his ability to make a living. Personal circumstances might thus be indirectly relevant to a **proportionality** determination, to the extent that those circumstances, in conjunction with the challenged forfeiture, would deprive the defendant of his livelihood. Our holding bars only the separate consideration of personal circumstances as a **distinct** factor. (@ 113).

"Bearing that limited role in mind, we hold that courts may not consider as a discrete factor a defendant's personal circumstances, such as age, health or **present** financial condition, when considering whether a criminal forfeiture would violate **Excessive Fines Clause.**"[Viloski - Id. @ 112]

As noted in the original appeal, as in this request for a Writ, the defendant's livelihood is presented with the 100 percent forfeiture of \$1,955,521, and his situation at the end of a three year term of incarceration, or in the **future** tense, to include his age and diabetes, which are permanent and not subject to change after time.

The Court should grant certiorari in this case to resolve the circuit split regarding whether a deprivation of livelihood should be included within the proportionality analysis, to include those **future** personal circumstances the Court deems relevant, in an evaluation/determination of whether a forfeiture is considered to be excessive, and therefore unconstitutional, under the Eighth Amendment to the Constitution.

B. PROPORTIONALITY ANALYSIS

ELEMENT'S IN A 'FACT SPECIFIC' EVALUATION TO DETERMINE THE GRAVITY OF A CRIME

"The text and history of the Excessive Fines Clause demonstrates the centrality of proportionality to the excessiveness inquiry; nonetheless, they provide little guidance as to how disproportional a punitive forfeiture must be to the gravity of an offense in order to be "excessive". See; Bajakajian (Id.) at 335. In order to bridge the open issues related to proportionality, the Court identified the four non-exclusive factors for the lower courts to analyze, as noted on page 21 of this document. The Court further referenced that any "judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise." Id. at 336. Therefore, the Court adopted the standard of 'gross disproportionality' as articulated in their previous case precedents for Eighth Amendment reviews; referencing Solem v. Helm Supra, at 288, Id.; and Rummel v. Estelle, 445 US 263, 271, 100 S. Ct. 1133 (1980). Thus, gross disproportionality is the imbalance between the gravity of the offense and the amount of forfeiture. Thus, our focus must be on determining the gravity, or severity of the offense.

Although the Supreme Court provided some direction in Bajakajian, the four factors presented are on too broad a scale to be applied in an accurate and consistent manner at the District Court level, and used exclusively for review by the Appellate Courts. Certainly, a review of the 'nature and extent' of the crime, and

whether the violation involved other illegal activities, are two of the factors that, on a broad basis, help define the severity of offense. But a more detailed set of components would help stratify the actions of individuals by layered degrees to establish a more accurate assessment of a defendant's culpability.

As this Court noted in Bajakajian, the members of the Court in Solem (Id.) addressed this issue. "Turning to the culpability of the offender, there are again clear distinctions that courts may recognize and apply." "Most would agree that negligent conduct is less serious than intentional conduct." Id. at 293. The Court then listed "criminal acts in ascending order of seriousness..."

- 1) Negligent Acts
- 2) Reckless Acts
- 3) Knowing Acts
- 4) Intentional Acts
- 5) Malicious Acts

"A court, of course, is entitled to look at a defendant's motive in committing a crime." Id. at 293. Solem.

Had the Lower Courts in this case been directed to utilize these more detailed components, the result would have been far different. In ordering a 100 percent forfeiture, the District Court improperly categorized the defendant with performing a malicious act. Even a nominal review of the evidence would easily dispute this consideration. Based on the evidence available, and taking into consideration the ambiguities and inconsistencies found in the defendant's plea agreement, degree of the criminal act at best is merely negligent, and at worst, reckless, but not malicious.

Alex Nava, Mr. Singh's full time employee was the Manager and operator of the University Avenue store where all the alleged shipment of CPDs were made throughout the period of the investigation. It was Mr. Nava who was contacted by members of a Mexican drug organization, the members which had close association with Mr. Nava's family and friends. And it was Mr. Nava who negotiated the shipping deal and obtained the drug owners a discounted shipping price, arranged for the shipment of parcels from Mexico, and was even caught bringing the pre-packaged parcels into the United States from Mexico after he had helped package them. For this, Mr. Nava was charged with and convicted of the drug crime, not Singh. Singh's only offense was being a hard working small businessman who trusted an employee. But, that should not have been an act that destroyed the life of his family.

It is too obvious that the lower courts were able to look past all of the evidence and to show the defendant as an active participant who knew about and willingly participated in a scheme to ship drugs throughout the United States. It does not the evidence, nor the character of the individual.

And finally, there was no motive, as also referenced by the Solem Court. No financial gain, no use of any drugs, and no contact with anyone in the drug organization other than Mr. Nava, his full time employee. This information alone causes a wave. Why would anyone participate in a drug operation and not receive some kind of financial benefit? It fails to make rational sense.

C. PROPORTIONALITY ANALYSIS

THE USE OF A RATIO THAT COMPARES THE AMOUNT OF FUNDS TAINTED BY OTHER CRIMINAL ACTS - TO THE AMOUNT OF LEGITIMATE FUNDS STRUCTURED

Mr. Singh pled guilty to one count of Structuring Financial transactions under 31 U.S.C. 5324(a)(3) and (d)(2). In addition, the government alleged that Singh was also involved in the shipment of CPDs from his Postal Annex. By itself, the Structuring offense would have involved a minimum fine and little, or no period of incarceration. However, the severity of the offense was increased dramatically by the District Court under the relevant conduct provisions associated with the alleged drug trafficking activity. Accordingly, the modest amount of fine and incarceration also increased with the Court ordering a 36 month sentence and the forfeiture of 100 percent of the funds involved in the structuring which totalled \$2,955,521, of which, \$1,955,521 was allocated to the Defendant.

Whatever evidence the government has is circumstantial to Mr. Singh's involvement in the shipment of CPDs. This court is aware of the history of the case and can judge the level of the Defendant's active and knowing participation. Regardless, the amount of forfeiture ordered against Mr. Singh is very disproportionate to whichever level of activity is determined.

Throughout the period of the investigation, approximately \$5 million of cash flowed through the Defendant's business accounts; of which, the government alleges nearly \$3, million was structured.

Of these funds, it is estimated that \$140,000 of cash was paid to the Defendant's Shipping Annex for the shipment of CPDs, of which there was approximately \$5,000 in profits. The ratio of proceeds to total funds received, and to the amount of funds structured are 3 and 5 percent respectively. The ratio of profits to the same criteria are 1/10 and 2/10 of one percent respectively. Thus, no matter how the defendant's crime is viewed, or the level of culpability placed on him, the punishment is disproportionate to the crime.

The facts in the instant offense is strikingly similar to another Ninth Circuit case, *United States v. Busher*, 817 F.2d 1409. In establishing a *prima facie* showing, Busher successfully argued that his forfeiture was excessive because it was based on business transactions deemed fraudulent which represented only 8 percent of his total enterprise. Irrespective, under the RICO statute that he was found guilty of, the District Court ordered a 100% forfeiture of his business, to include some real estate owned by the enterprise. The Ninth Circuit acknowledged that the RICO laws (18 U.S.C. 1961 through 1963) were broad and inflexible, but it cautioned, "no penalty is *per se* constitutional" and "Since RICO's forfeiture provision is quite literally without limitation, it may well exceed constitutional bounds in any particular case." *Busher* (Id.) at 1414, citing *Solem* (Id.) at 290. The Defendant faces the same excessiveness of forfeiture under 31 U.S.C. 5317(c)(1) which also requires the entire amount of proceeds structured be forfeited.

Although 31 U.S.C. § 5317 requires the court "shall order defendant to forfeit all property, real and personal, involved in the offense, and all property traceable thereto..." a court must still perform a proportionality test to determine the constitutionality of a penalty. "Even though the statute provides no discretion, the district court **must** avoid unconstitutional results by fashioning forfeiture orders that stay within constitutional bounds." Busher (Id.) at 1415.

James Busher was convicted of a number of charges to include Mail Fraud (18 USC § 1341), Submitting false Statements (18 USC § 1001), Presenting false claims (18 USC § 287), Tax Evasion (26 USC § 7201) and Submitting false Tax Returns (26 USC § 7206(1)). In comparison, the Defendant was convicted of one far less offensive crime - Structuring, with [NO] additional convictions, but only an allegation that he was aware of the controlled substance shipments. "The District Court **must**, consistent with Solem, consider the harshness of the penalty in light of the gravity of the offense ... and should look at the defendant's culpability." Busher (Id.) at 1415; Citing Solem (Id.) at 292. Although the Defendant's single conviction was far fewer than Busher's, and individually far less egregious, the Ninth Circuit nevertheless denied Singh the relief it awarded Busher.

This Court has the opportunity to affirm the findings in Busher (Id.) from the Ninth Circuit, wherein the Appellate Court ruled that a court "may consider the degree to which the enterprise

operated by the defendant is infected by criminal conduct. The court should be reluctant to order forfeiture of a defendant's entire interest in an enterprise that is essentially legitimate and where he has committed relatively minor [] violations not central to the conduct of the business and resulting in relatively little illegal gain in proportion to its size and legitimate income." Busher (Id.) at 1415.

Although the defendant's case runs parallel to the Busher case, the findings were far different. Based on the forfeiture ordered against Mr. Singh, the amount is grossly disproportionate to the offense. This Court is urged to include the analysis of comparative ratios, as demonstrated herein, to the determination of Excessive Fines, to ensure no forfeiture is disproportionate to the offense committed, and "limit the forfeiture to such portion of the interest it deems consistent with these principles." Busher (Id.) at 1415.

D. PROPORTIONALITY ANALYSIS

THE COMPARATIVE RELATIONSHIP BETWEEN THE SENTENCE IMPOSED AS COMPARED TO THE UPPER GUIDELINE OR STATUTE LIMITATION AND THE AMOUNT OF FORFEITURE ORDERED AS COMPARED TO THE AMOUNT OF FUNDS STRUCTURED

When considering the type and kind of punishment in a Structuring Offense, the District Courts may impose a sentence of incarceration, a Fine, and/or a Forfeiture. In the instant offense, the court chose a 36 month incarceration and a 100 percent forfeiture of all funds structured.

The Guideline sentencing range for the Defendant was 57 to 71 months, or an upper range of 71 months, and a Statutory limit of 10 years. Thus, the ratio of time imposed to the Upper Guideline limit was 36/71 or 51 percent; and the Statutory limit was 36/120 or 30 percent. The sentence imposed was determined to be the fair amount of incarceration based on the gravity of the crime and the sentence imposed within the district for other defendant's convicted of the same kind of offense. A summary review of the findings suggests the court believed the Defendant should be given a period of incarceration somewhere between one-third and one-half of the upper Guideline and Statute sentencing limitations, respectively.

However, the amount of the forfeiture ordered was 100 percent of the funds structured, which the court based upon the seriousness of the crime. The District Court should not be able to vacillate between degrees of culpability and the levels of severity when determining the amount of punishment by different category. Either it is a serious crime, which requires the maximum level of punishment, or the crime is less than that, as noted in the amount of incarceration ordered.

In the instant offense, both the courts and the government spent considerable time reviewing the amount of time that would be appropriate given the circumstances noted above. Although the government recommended a 40 month period of incarceration, the District Court ultimately chose 36 months which was a four month, or

10 percent downward departure from the government's request; a 35 month, or 49 percent downward departure from the Guideline's Upper range limit; and an 84 month, or 70 percent downward departure from the Statutory limit.

This kind of wholesale leniency was not awarded to the Defendant in the forfeiture area, nor was there an appreciable time spent reviewing the available options by the District Court. Nor did the Government spend the time that should have been spent on such a critical issue. On page 29 of the Sentencing Hearing, in Appendix E, the government, in answer to the question from the court of where the forfeiture amount came from, answered that it was the amount alleged in the indictment. See; page 29, lines 14 to 19. Furthermore, the government admitted that they "would be put to our paces to argue the forfeiture beyond a reasonable doubt." Id. page 29, lines 1 and 2. This suggests the government was simply grabbing an amount, a \$3 million amount, from thin air. Not a very reassuring statement that either the court or the government knew whether the requested amount of forfeiture was, in fact, a fair amount.

A further review of the court's comments in subsequent pages of the Sentencing Hearing continues to reveal the court had very little sense of the dynamics of selecting a proper forfeiture order. On page 32 of Sentencing Hearing (S.H.), Appendix E, the court once again stumbles and must ask the government for confirmation about the correlation between a fine and forfeiture - both ultimately, and incorrectly agreeing there was no correlation. Page 32,

lines 8 through 13. Additionally, lines 21 to 25, page 32; accompanied by lines 1 to 17 on page 33 reflect a continuing ramble of improbable forfeiture scenarios supposedly based on legal fact.

On page 34 of the S.H., Appendix E, lines 1 to 21, the court continues to seek, literally ask the government what it wanted the court to do on the forfeiture issue. There was no scholarly discussion on the merits of the forfeiture, it's relationship to either the elements of the crime or the gravity of the offense. Nor was there any kind of reconciliation to the sentence. Rather, it was about what the government wanted, by a court seemingly unaware of the legal and technical issues involved and in total reliance on the adversary of the defendant. Not surprisingly, on page 53 of the S.H., lines 15 to 19, the court completely acquiesces to the whim of the government and orders the exact amount suggested by the government; an amount completely out of proportion to the sentence imposed, the gravity of the offense, or the relationship to the legal versus the illegal activity occurring within the defendant's small business.

The Defendant appreciates the Court's patience in tracking this dialogue through the Sentencing Hearing, but it was done to convey to the Court just how little analysis is required of the District Courts. Analysis, meaning real numbers and real issues of objectivity that would require a court to challenge the evidence in a case rather than just pander to the government for guidance and an answer that is so clearly disproportional to the offense.

Analytical prerequisites that would give the defendants and the Appellate Courts the tools to more easily define the elements of proportionality to replace the vagueness and the uncertainties that are currently present.

The Defendant urges this Court to adopt a finding that requires the lower courts to reconcile any differences in degrees of culpability and the severity of the offense, as they are applied to a defendant's punishment, to ensure continuity and consistency between the imposition of incarceration, amount of fine imposed and the forfeiture ordered.

Based on the amount of sentence imposed for incarceration, the defendant believes the 100 percent forfeiture, totalling \$2 million is grossly disproportionate to the offense.

CONCLUSION

The Court should grant the petition for a writ of certiorari to resolve the issues associated with the conflict between the circuits, and to provide more specificity to the proportional analysis.

Respectfully Submitted,

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