No. _____

In the
Supreme Court of the United States

GEORGE ABERNATHY,
Petitioner,
v.
UNITED STATES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

IN *U. S. V. SIMMONS*, THIS COURT IN ASSAYING IT'S VIEWS ON OUR BILL OF RIGHTS WHEN IT WROTE, THAT "ONE CONSTITUTIONAL RIGHT SHOULD NOT HAVE TO BE SURRENDERED IN ORDER TO ASSERT ANOTHER". *UNITED STATES V. SIMMONS, 390 U. S. 377 (1968).* THE QUESTION, HERE, ASKS WHETHER THE COURT HAS ABANDONED THIS THESIS.

II

DID THE SEVENTH CIRCUIT GET IT RIGHT WHEN IT WROTE IN *U. S. V. ONE RESIDENCE* THAT, "THE GOVERNMENT CAN NOT SEIZE PRIVATE PROPERTY AND COMPEL THE PERSON IN WHOSE POSSESSION IN WHOSE POSSESSION IT WAS FOUND TO PROVE LAWFUL POSSESSION?" *UNITED STATES V. ONE RESIDENCE AND ATTACHED GARAGE OF ANTHONY J. ACCARDO, 603 F.2D 1231 (7TH CIR. 1979).* THE SIXTH CIRCUIT IN THIS CASE SAYS IT CAN. THE QUESTION THEN IS, SINCE BOTH COURTS CANNOT BE RIGHT, WHO IS RIGHT AND WHO IS WRONG?

STATEMENT OF RELATED PROCEEDINGS

There are no related cases or proceedings that counsel is aware of. This case involved an isolated incident.

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CASES

CONSTITUTION AND STATUTE

To the Honorable, the Chief Justice and Associate Justices of The Supreme Court of the United States:

The Petitioner, George Abernathy, respectfully prays that a Writ of Certiorari be issued to review the judgment of the Sixth Circuit Court of Appeals, originally filed in this case on January 27, 2020.

OPINIONS BELOW

U.S. v. $46,340.00 in U.S. Currency, 791 Fed. Appx. 596 (2020)

Abernathy v. Kral, 2018 WL 4075875

U.S. v.$46,340.00 in U.S. Currency, 2019 WL 481168

JURISDICTION

The judgment of the Federal Court of Appeals was rendered on **January 27, 2020**. This Petition is being seasonably filed under favor of 28 U.S.C. §1254(1). With this being so, it follows the due date, expanded because of the coronavirus until, June 25, 2020 is being met.

CONSTITUTIONAL PROVISIONS INVOLVED

The principle provisions of the United States Constitution involved in this case are the search and seizure clause of the Fourth Amendment and the self-incriminating clause and the taking clause of the Fifth Amendment. Likewise, relevant here is the due process clauses of the Fifth and Fourteenth Amendments. The pertinent text of these read as follows:

AMENDMENT IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be

confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

For reasons this counsel simply cannot fathom, the Court below, in its dispositive thesis seems clearly (as we see it) to misread its prerogatives in reviewing cases of this type as viewing as it did, certain beliefs this counsel has, as prerogatives that entitle it to enact legislation that enables it to trump even constitutional enactments. For here, despite the facts that our Constitution sought to protect the people from being victimized, as the founders had been by a tyranny, by unreasonable searches and seizures, it enacted the Fourth Amendment and further embellished it so to speak by the taking clause it inserted in the Fifth Amendment. All that aside, we can suppose the due process clause was seen as playing a part in all this. Indeed, when years later one would surely have

thought, as we did, and do, when this Court wrote in *United States v. Simmons*, 390 U.S. 377 (1968) that "one constitutional right should not have to be surrendered in order to assert another" and in *One Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 U.S. 693 at 702 (1965). The thesis is one gets from those writings is the concept that those writings were impervious to being traversed. Yet, it seems that may not be so.

Indeed, it seems that a Court located in Ohio, as State that gave us Col. Grant and Col. Sherman, has now said that one cannot exercise both Fourth and Fifth Amendments in the same case. And, in the Sixth Circuit, people like Abernathy in this case, and the Claimants in *United States v. $31,000.00 in U.S. Currency*, 774 Fed. Appx. 288 (6th Cir. 2019), the Claimants in *United States v. $99,500.00 in U.S. Currency* 795 Fed. Appx 332 (6th Cir. 2019), and the Claimants in *United States v. $46,340.00.00 in U.S. Currency*, 791 Fed. Appx. 596 (6th Cir. 2020), cannot assert both of these Amendments in the same case because the Government has the right to seize private property to compel them to prove lawful possession. While that was bad enough, the fact that the Court says that because the facts that the Government's belief was that the Claimants were drug dealers the Constitution did not apply full strength to them. For this counsel, he truly had thought the Constitution applied full strength to all people. Didn't Lincoln (a fellow Kentuckian, as well as, Grant and Sherman) go to war to make the point that the rights of the very best amongst us are only as secure as those of the vilest, most reprehensible (which surely would include

drug dealers and racists) are protected? This counsel still believes it was for that reason Lincoln (as well as Grant and Sherman), really won a war – at least in counsel's judgment.

Be all that as it may, let's be clear, here, the issue in this case is whether the Government can seize private property and compel the person from whom it was seized (arguably in violation of their Fourth, Fifth, and Fourteenth Amendment rights to prove law possession. Given the fact that the people in the 7th Circuit (in a Chicago case) were told the Government cannot seize private property and force the person in whose possession it was found to prove lawful possession, surely this Court must believe something is wrong with that picture.

We know, and all of us realize, Cleveland and Chicago are fierce competitors when they compete. Here the arguments show their views should prevail on the Forfeiture issues raised. Let's be very clear, the District Court granted Summary Judgment to the Government based solely, as it was, on the basis of Abernathy's assertion of his Fifth Amendment rights to the questions put to him in the Government's Special Interrogatories. Clearly this constituted a penalty for him. In doing so, we contend both his Fourth and Fifth Amendment rights were offended and he was denied due process. This inexorably follows, in our judgment, because as we understand the law, one's Fifth Amendment rights cannot be subordinated to any other of his constitutional rights. And, for sure, no constitutional right can be trumped by a legislative enactment. Here, **Rule** ____, was enacted by Congress.

Also, it is a fact, and there is no case the Government or Court of Appeals could rely on, except the Circuit's own cases, as we also said in *United States v. $506,231.00 in U.S. Currency*, 125 F.3d 442 (7th Cir. 1997) that shows contrary to the compellingly cogent holding that:

> We "reiterate that the government may not seize money, even half a million dollars, based on its bare assumption that most people do not have huge sums of money lying **about**, and if they do, they must be involved in narcotics trafficking or some other sinister activity."

Id. at 452-454 (7th Cir. 1997). *See also*, *U.S. v. Baro*, 15 F.3d 563, 568 (6th Cir. 1994), which holds that "currency" is not **per se** "contraband". Indeed, one has to wonder, if ". . . probable cause is the standard of proof the Government must meet in forfeiture cases," as was said in *United States v. Land, Winston County*, 163 F.3d 1295, 1363 (1998). Given the categorical views of the Sixth Circuit as expressed recently in several cases, this Court refused to grant Certiorari on one of the issues in this Petition. Here, reference is to *United States v. $31,000.00 in U.S. Currency*, 774 Fed. Appx. 288 (6th Cir. 2019) and *United States v. $99,500.00 in U.S. Currency,* 795 Fed. Appx 332 (2019). To the contrary, as expressed in those cases, our belief continues to be that eventually this Court will tell all of us directly whether this Court is still of the view that it is "intolerable that one constitutional right should have been surrendered in order to assert another" as the Court wrote in *United States v. Simmons*, 390 U.S. 377 (1968).

For sure, as well, we believe this is so, and because we do believe that Abernathy, the Petitioner herein, was victimized by the Courts below, and was within his rights when he (1) asserted the Fifth Amendment to questions put to him in the various Special Interrogatories; and (2) insisted that he was entitled to a ruling on his Motion to Suppress and for the return of his illegally seized property. First, as we see it, if what was said by this Court is still viable, clearly we are right in taking the stance we did. Thus, the question that needs to be answered, simply put, is whether the Seventh Circuit got it right when it wrote in *United States v. The Residence and Attached Garage of Anthony Accordo*, 603 F.2d 1231 (7th Cir. 1979), that the Government cannot seize private property and then compel the person from whom it was taken to prove lawful possession. *Id*. at 1234. Well, that view must be rejected if the Sixth Circuit is right when it wrote Abernathy must prove he had lawful possession before he can challenge the Government's seizure of this property by contending it was illegally seized at the Sixth Circuit. It must also be right when it resolved the *$31,000.00 in U.S. Currency* and the *$99,500.00 in U.S. Currency* cases which the Court below relied on.

Viewed from another angle, if the Sixth Circuit is right, then clearly they are saying the Government has a statutory right to query claimants who defend against these forfeiture actions by literally requiring them to deal with the Hobson Choice foisted on them by these Special Interrogatories. So postured, the question then in this situation, that is posed for the Court, is quite simple. Can the Government's right to ask the questions in Special Interrogatories trump

Abernathy's Fourth and Fifth Amendment rights? We think that would be wrong. And, we agree with what the Court said in *Simmons*, that it would be "intolerable that one constitutional right should have been surrendered in order to assert another." *Id.* at 390.

In the cited cases the Sixth Circuit granted the Government's Motion for Summary Judgment and dismissed the case after expressly refusing to address Motions to Suppress and for the Return of Illegally Seized Property that was pending in both cases.

STATEMENT OF THE FACTS

Given *United States v. $506,231.00 in U.S. Currency,* 125 F.3d 442, 452-454 (7th Cir. 1997), the 7th Circuit Court made it clear that despite the fact that "the government may not seize people's money . . . based on the bare assumption that most people do not have huge sums of money lying about, and if they do they must be drug dealers. Yet, despite the fact, which is clear enough, it seems the Court below held, indeed despite the fact that there was prohibition against unreasonable searches and seizures and the Exclusionary Rule applies to forfeiture proceedings. See *One 1858 Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 U.S. 693, 702 (1965).

Indeed, granted this Court once believed, as we still do, that "absent probable cause at the time of the seizure . . . [this] failure to establish probable cause on the forfeiture issue will preclude forfeiture of the property altogether." At least that is what is said in *United States v. One 1974 Learjet 24D), etc.*, 191 F.3d

668, 673 (6th Cir. 1999). With that thesis, one would have thought, especially since the Supreme Court was emphatic when it made it so clear that one does not have to surrender Constitutional right to assert another. Indeed, that is precisely what it said in *United States v. Simmons*, 390 U.S. 377 (1988). Well, it seems our District Court, like the old "Ford MotorCar Company" commercial, "has a better idea." For if it were otherwise, it never would have rejected this Court when it indicated, as it actually showed, one need not give up one right to assert another. *Id.* at 580.

Simply put then, if the District Court is right here, then we should also forget our Court once believed, as we still do, that a "forfeiture" action against certain specified property "can proceed [only] if the Government can show probable cause with untainted evidence." *United States v. One (1) 1987 Mercury Marquis,* 909 F.2d 167, 168 (6th Cir. 1990).

Obviously, if the above tenets were properly backgrounded and were the law of the land, as it is elsewhere, then clearly there is no way the Government should have been able to forfeit property that was illegally seized. Indeed, one would have thought from our reading of the law, as shown above, that illegally seized property (--that is, property that was impermissibly obtained by the Government), could not have been forfeited as this money was.

Given the fact this Claimant alleged an ownership interest in this money seized from his home, it cannot possibly be connected to any crimes whatsoever. Also, the Government cannot prove otherwise. It was in his *actual* possession and indeed under his dominion and

control, in his home, when it was seized. This provided him all the standing that was needed to challenge any forfeiture of his money.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

The law governing civil *in rem* forfeiture actions only gives the Government authority to seize items it has probable cause to believe were used in furtherance of criminal activity and to commence civil in rem proceedings against the property without charging the property's owner with a crime. *See United States v. $17,900.00 in U.S. Currency*, 859 F.3d 1085, 1087 (D.C. Cir. 2017) explaining the practice of civil forfeiture. *See also Leonard v. Texas*, 137 S. Ct. 847, at 848-849 (2017). Federal agents and entities have significant latitude to pursue these claims, from special discovery provisions written into the governing rules to a burden of proof that is lower than required in standard criminal cases.

Still, with all that being so, and with all that aside, how can it be said that, as the Court below is saying, in a case where it cannot be the Claimant lacked the requisite standing they can nonetheless be required to not only prove lawful acquisition of the property, but to also surrender certain of his constitutional protections in order to do so? What this finding does is show the fact that clearly it seems to be the case that the Court seems so prone to credit, in the Government's favor, the legal and procedural maneuvers the Government seems to be employing, almost with impunity. Indeed, without even slowing down to tell us how the State lost its jurisdiction over this property, as though that really is

beside the point. It also ignores the fact of our belief, which we now express, that what the Court seems clearly to be saying that even the provisions of the Constitutions, and the due process clauses of the Fifth Amendment are no match to the force that is mustered here by the Government. This despite it is flawed to the hilt.

I. THE GRANT OF A MOTION FOR SUMMARY JUDGMENT, *IN* A FORFEITURE CASE, FOR THE LACK OF TITLE III STANDING, SOLELY BECAUSE THE CLAIMANT OPTED TO EXERCISE HIS FIFTH AMENDMENT RIGHTS WITH REFERENCE TO VARIOUS SPECIAL INTERROGATORIES, CANNOT BE DEFENDED IN LAW, LOGIC OR COMMONSENSE.

The Government will again be making the (asinine, in our judgment) argument that the invocation of Claimant's Fifth Amendment privilege leaves the Government's evidence unchallenged. And, as it further asserted, that the Court should draw an adverse inference from the assertion of the privilege, which the Court deemed dispositive. First off, the fact that the Claimant relies on his Fifth Amendment privilege does not really help the Government. This is so because the facts relied on in support of the Motion were insufficient to carry its burden of proof. Further, it cannot even be disputed that all reasonable inferences are to be construed in favor of the nonmoving party. Thus, this Court must assume that while the assertion of the Fifth Amendment privilege

may provide some support for the suspicion that that the Defendant currency came from an other than lawful source, the evidence (that was so) is insufficient to conclude it came from drugs.

Further, even this is not all. Surely, the Government is not entitled to any dispositive inference from the Claimant's assertion of his Fifth Amendment privilege. Here, as well, (once upon a time) our Court in *United States v. Real Property Known as Rural Route 1, Box 137- B. Cutler Ohio*, 24 F.3d 845 (6th Cir. 1994), clearly and soundly rejected the use of any adverse inference instruction in a civil forfeiture action. In doing so, it noted that: this Court's forfeiture ruling in *Austin v. United States*, 509 U.S. 602 (1993), should be viewed in the same light as a traditional forfeiture proceeding. Further, since this matter had yet to reach the trial level, the use of an adverse inference on this Summary Judgment Motion had to be inappropriate.

Additionally, as has been repeated a number of times throughout our pleadings, in a Summary Judgment Motion, all inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the Motion. *See Austin v. United States*, 509 U.S. 602 (1993), which makes that point for us. So postured, since the Courts below were inclined to reject our argument and find that an adverse inference is created by Claimant's assertion of his Fifth Amendment rights was appropriate, still the Court was required to draw those inferences that are favorable in the light most favorable to Claimant.

With that being so, let's be very clear, here. As we read Rule 26(b)(1) & (b)(5), it limits the scope of

discovery to matters "not privileged." This we read to mean there can be no provision in our Rules that authorize the Court to sanction a party for asserting a valid claim of privilege. The point that the Government misses, in its all-out zeal, to protect these agents from being held accountable for their misdeeds, we believe has really blinded them from reality. Simply put, the reality here is that "federal employees are informed by statutes . . . [and the like] as to what they can and cannot do in connection with their employment." *Scarbeck v. United States*, 317 F. 2d 546, 556 (D.C. Cir. 1962). The upshot of this unassailable point is that it shows the Government had no right to obtain information from the Claimant that was protected by his privilege against self- incrimination. With this being so, the Claimant did not violate any Discovery Rules when he asserted the Fifth Amendment in response to these Interrogatories. So postured then, surely it inexorably follows (in our judgment) the Court lacked any power to sanction him, as it did here, for his refusal to be badgered by the Government.

Among the other issues that are yet to be resolved (hence barred Summary Judgment here) include: (a) whether the forfeiture sought would violate the excessive fines clause of the Eighth Amendment and the taking clause of the Fifth Amendment; (b) whether the various seizures were lawfully made; (c) whether any of these monies can be connected to an offense -- indeed a drug offense; (d) whether the forfeiture was justified in the absence of any proof, whatsoever, that any of these monies were connected, even slightly, or otherwise, to any drug offense. Here, as well, the Court is constrained to put the Government to its proof. This

follows given the Sixth Circuit had already ruled (with reference to these same monies) that the Claimant had the Title III standing required;[1] and (e) we know that whether the original seizure made here was by the DEA, as distinguished from the State officers, was never determined.

Indeed, we contended it was made in the name of the State, when we filed in State Court under the laws of the State. As to this, we know that implicit in the Government's removal of this case to Federal Court it had to be a concession that was illegal and unfair. See *Abernathy v. Kral*, 2018 WL 4075875, which shows the ease with which that case was bulldozed into Federal Court over our objection. This because, as is often the case, we could not overcome the confirmatory basis, in our judgment, that was at work in our case.

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[1] *United States v. $99,500.00 in U.S. Currency*, 699 Fed. Appx 542 (6th Cir. 2017).

II. GIVEN THE SUPREME COURT HAS COMPELLINGLY NOTED IT WOULD SURELY BE AN ". . . INTOLERABLE THING THAT ONE CONSTITUTIONAL RIGHT [IF THE FOURTH AMENDMENT] SHOULD HAVE TO BE SURRENDERED IN ORDER TO ASSERT ANOTHER [*I.E.*, HIS FOURTH AMENDMENT]," SURELY THEN SOMETHING IS WRONG WITH THAT PICTURE.

Distilled, the facts here show, that despite the fact that the Government in all of its previous filings in the various federal Courts (and indeed in the State Court from which this case was wrongfully moved which was necessary because this seizure had no chance in the State Court), there has never been any doubt that all of the seizure here was from Abernathy. Indeed, in its Appellate Brief, counsel's effort in doing so, while it did clutter the Record in our judgment, was misdirected, as it will be here. This follows because on the question of standing, which does not turn on when and how Abernathy acquired these assets, the law is clear. The Government cannot seize private property and then require the person found in possession to prove lawful possession. *See United States v. The Residence and Attached Garage of Anthony Accardo*, 603 F.2d 1231 (7th Cir. 1979), and *United States v. $506,231.00 in U.S. Currency*, 125 F.3d 442 (7th Cir. 1997).

So postured, our belief is that, at least at the pleading stage, where we surely are, the person from whom the property was seized, especially when no other possible claimant could even exist, the assertion

of the Fifth Amendment should be with impunity. Arguably, we suppose if that were done at the trial stage, perhaps a negative inference may be feasible. *See Baxter v. Palmigiano*, 425 U.S. 308, 317-318 (1976). The point here being made, at least hopefully, is that the evidentiary stage and the pleading stage are different. *See also United States v. U.S. Currency*, 626 F.2d 11, 16 (6th Cir. 1980). So postured by these cases, and there are others, it follows this Court should reverse and require the lower Court to try this case.

As an aspect of the contentions here, our belief is we had every right to assert the Fifth Amendment. Do understand, from our perspective, there are no contentions even possible, none whatsoever (not even any unrealistic ones), that someone other than Abernathy would ever claim this property. Nor can it be said his claims are not genuine. Also, and this is a fact, the District Court seems clearly to have ignored the fact that the statutes, which the Government relied on in crafting these Interrogatories, cannot possibly do what no mere statutes could ever do - - that is, literally trump a constitutional amendment. Yet, this is what they would be doing if they could compel a claimant, in a forfeiture case, to deal with what would be the "Hobson Choice" Abernathy faced. Simply put, can he be asked, with impunity, to choose between asserting his Fifth Amendment privileges against self-incrimination or forego his right to challenge the lawfulness of the arrest and seizures here?

III. "PROPERTY OF PRIVATE CITIZENS SIMPLY CANNOT BE SEIZED AND HELD IN AN EFFORT TO COMPEL THE POSSESSOR TO 'PROVE LAWFUL POSSESSION."[2]

A

Granted the assertion of the Fifth Amendment under oath regarding the sources and origin of the Defendant currency, is a factor the Court can consider in ruling on Plaintiff's Motion. However, as has been observed in *United States v. $141,770.00 in U.S. Currency*, 157 F.3d 600 (8th Cir. 1998), in a forfeiture action under section 881, the United States bears the burden of establishing probable cause to connect the property to drug trafficking. *See United States v. $39,873.00*, 80 F.3d 317, 318 (8th Cir. 1996). Establishing a connection with their informant, etc., is simply not enough. *United States v. $191,000.00 in U.S. Currency*, 16 F.3d 1051, 1071-72 (9th Cir. 1994). No one disputes that thesis or would dare do so.

Thus, drawing all reasonable inferences in favor of the non-moving party, no reasonable trier of fact could possibly find that while the Defendant currency may (we suppose) not have a lawful basis, still for the Government to prevail here, it nevertheless would have to establish it came from drug trafficking and not from some type, or kind, of legal activity.

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[2] *United States v. One Residence and Attached Garage of Anthony J. Accardo*, 603 F. 2d 1231, at 1234 (7th Cir. 1979). *See also United States v. $506,231.00 in U.S. Currency*, 125 F. 3d 442 (7th Cir. 1997).

B

For sure, various of the critical factors are, both, present and absent in this case. First off, plaintiff's evidence simply does not compel the conclusion that the Defendant currency came from or could be related to a drug transaction. Simply put, no reasonable trier of fact could find otherwise. With that being so, plaintiff's arguments here translate into the naked and unclad assertions that the invocation of the Claimants' Fifth Amendment privilege not only leaves the Government's evidence unchallenged, it further suggests the Court should draw a factual inference (against the Claimant) from the assertion of the privilege that is dispositive of any and all rights they might otherwise have - - even those given and granted them by our Constitution, if you can believe that as well.

So, let's be very clear, here. First off, the fact the Claimant relied on this Fifth Amendment privilege does not help plaintiff. This because the "facts" it has relied on in support of its Motion are insufficient to carry its ultimate burden of proof. Further, as shown elsewhere, and known to be the law, all reasonable inferences are to be construed in favor of the non-moving party. Thus, the Court has assumed the trier of fact may conclude that while the assertion of the Fifth Amendment privilege may have provided some support for the concession that the Defendant currency came from an other than lawful source, that evidence or surmise was insufficient for any fair minded person to conclude it came from drugs.

Further, given plaintiff is only entitled to an adverse inference from Claimant's assertion of his Fifth Amendment privilege. Still, indeed in *United States v. Real Property Known as Rural Route 1, etc., et al.*, 24 F.3d 845 (6th Cir. 1994), our Circuit soundly rejected the use of an adverse inference in a civil forfeiture action. In so doing, it was noted by the Supreme Court, indeed in *Austin v. United States*, 509 U.S. 602 (1993), determined that forfeitures can be a form of punishment as it was, here. This very real idea undercuts the Government's belief that a civil forfeiture action should be viewed in the same light as a traditional forfeiture proceeding.

For sure then, since this matter had yet to reach the trial stage, the use of an adverse inference on the summary judgment motion would be inappropriate. Simply put, the Court must reckon with not only the Fourth and Fifth Amendment issues involved, but also any due process issues that are worthy of consideration. And, given the fact that nowhere is it written that counsel must first prove he lawfully obtained property taken from his client before he can compel them to prove they were not first victimized by the search.

Additionally, it is worth repeating, in dealing with a Summary Judgment Motion, all inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *See Matsushita Elec. Industries Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). With that being so, even if the Court was inclined to reject Claimant's argument that an adverse inference from his assertion of the Fifth

Amendment rights simply was not appropriate, then the Court should draw only those inferences that are most favorable to the Claimant. And here, there are a myriad of alternate sources (such as we have here) that should automatically inure to the Claimant's benefit.

Thus, it follows in light of the Government's sparse evidence (related to ancient convictions and tax filing failures), the Court must nonetheless draw the inference most favorable to the Claimant in ruling on the Summary Judgment Motion. Given then that there may well have been a source for Claimant's funds other than drug trafficking, it follows the Government did not sustain its burden. This follows all the more so because, simply put, such proof does not exist. Here, the facts speak for themselves. It really is that simple. As to this being so, one need not look past the cliché: "the proof is in the pudding."

IV. THE IMPOSITION OF THE SANCTION OF DISMISSAL OF A CLAIM MADE IN A FORFEITURE CASE SOLELY BECAUSE THE CLAIMANT EXERCISED HIS FIFTH AMENDMENT PRIVILEGE AND FAILED TO PROVE LAWFUL POSSESSION OF THE "RES," CANNOT BE DEFENDED IN LAW, LOGIC OR COMMONSENSE.

Here, we rely on the insuperable, impervious, constitutional tenet that, if the initial seizure is invalid under fourth amendment principles, then any subsequent search and/or arrest is also invalid in any practical sense. This is so, in our belief, regardless of the quality of the Government's evidence that the illegal stop and/or search produced, however sound the

search might have been, on the basis of the evidence found. The search is still illegal if that evidence was found on the basis of, or in the wake of, a fourth amendment violation.

If the above contention made here is viable (as we believe it is), then there is no way it should be the law that even before a person (here the Claimant) can contest the seizure of their property, they must first prove lawful possession. This, of course, is what we are being told in the Court's Opinion, the one being challenged, here. In our view, given *Baxter v. Palmigiano*, 425 U.S. 308 (1976), a case we also rely on, although the inferences based on the assertion of one's Fifth Amendment privilege is, the inference supplied there when pitted against the final judgment of dismissal, without regard to the other "evidence" exceeded constitutional bounds. This because it would unduly penalize and resort to the privilege. Here, the point being, as the District Court recognizes, or should, the issue as to the lawfulness of the seizures made here is in dispute. And for sure, it cannot be resolved without any testimony being heard.

Let's be very clear, here. The "Fifth Amendment provides that "no person shall be compelled" in any . . . case to be a witness against himself . . . [indeed] the privilege protects the individual from being compelled to answer questions put to him in any proceedings . . . where . . . the answer might incriminate him. *See LaSalle Bank Lakeview v. Seguban*, 54 F.3d 387 (7th Cir. 1995). The upshot of this reality then is what it shows. It shows, indeed mightily so, that the warped beliefs of the law enforcement officers in this case, and

that of the DEA investigators (as they are labeled in their agency) to the contrary, as appears to be the case, notwithstanding, it simply is not a fact that the Abernathy's of the world, because they have records for drug convictions are not cloaked with probable cause.

Also, and let's be very clear, here: we do concede that discovery, not unlike cross-examination, does minimize the possibility that a judgment will be predicated on incomplete, misleading, or arguably false and fabricated evidence. We concede that needs to be protected against. But that only comes into play once the Government survives a Motion to Suppress and For the Return of Illegally Seized Property, and at least tentatively proves the "res" is forfeitable. *Cf*., *Taylor v. Illinois*, 484 U.S 400, at 411-412 (1988). In citing Taylor, we believe as the Supreme Court did when it credited the idea that it was plain enough that absent evidence of unlawful conduct, criminal sanctions may not be imposed. *Taylor v. Louisiana*, 370 U.S. 154 (1962).

CONCLUSION

Because the Claimant's response to certain Discovery requests, this by asserting the Claimant's Fifth Amendment rights, the Court, solely on that basis, summarily dismissed his claims. And, awarded these monies to the government. We contend, that cannot possibly be right. Thus, we have this case which cannot possibly result in an affirmance for the Government.

This follows all the more so because in so doing, the Court is telling the Abernathys of the world, the expression of the Fifth Amendment by them is no match for the government's greed.

Respectfully submitted,

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