

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1062

TITLE

UNITED STATES, Petitioner
v.

EIGHT THOUSAND EIGHT HUNDRED AND FIFTY DOLLARS
(\$8,850) IN UNITED STATES CURRENCY

PLACE

Washington, D. C.

DATE

January 18, 1983

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STATES, :

4 Petitioner :

5 v. : Case No. 81-1062

6 EIGHT THOUSAND EIGHT HUNDRED AND :

7 FIFTY DOLLARS (\$8,850) IN :

8 UNITED STATES CURRENCY :

8 - - - - -x

9 Washington, D.C.

10 Tuesday, January 18, 1983

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 10:56 a.m.

14 APPEARANCES:

15 ANDREW L. FREY, ESQ., Office of the Solicitor General,

16 Department of Justice, Washington, D.C.; on behalf of

16 the Petitioner.

17 VICTOR SHERMAN, ESQ., Los Angeles, California; on behalf

18 of the Respondent.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: I think you may proceed
3 whenever you're ready, Mr. Frey.

4 ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

5 ON BEHALF OF THE PETITIONER

6 MR. FREY: Thank you, Mr. Chief Justice, and
7 may it please the Court:

8 The claimant in this case arrived in Los
9 Angeles from Vancouver, Canada on September 10th, 1975.
10 On her Customs form was a question asking whether she
11 was carrying with her more than \$5,000 in currency.
12 That question was answered "No."

13 During the course of the Customs inspection
14 process she was three times further asked whether she
15 had on her person more than \$5,000 in currency and three
16 times denied it.

17 Because of suspicions of the Customs officers
18 she was searched, and the search revealed an envelope
19 concealed in her brassiere containing \$8,850 in United
20 States currency. It's quite clear that she knew that
21 this money was there, because when the Customs inspector
22 counted the money and erroneously said it's \$9,950, she
23 said I know it's less than that.

24 Now, the issue in this case is whether the
25 Government -- this money was seized, by the way -- and

1 the issue is whether the Government was required to
2 bring a judicial forfeiture action promptly following
3 the procedure without regard to the pendency of any
4 criminal investigation or prosecution, and without
5 regard to the pendency of an administrative proceeding
6 for possible remission or mitigation of the forfeiture.
7 And if there was some improper delay in bringing the
8 action, whether the remedy was to return the money to
9 the claimant despite the fact that she was not injured
10 in any way by the delay.

11 Now, in order to place this issue in context
12 for the Court I'd like to describe briefly the Customs
13 forfeiture procedures. After an item is seized, there
14 is a prompt post-seizure notice given to the -- any
15 person who Customs is aware has -- may have an interest
16 in the item. This notice advises them that they are
17 allowed 60 days to file an administrative petition with
18 the Secretary of the Treasury for remission or
19 mitigation.

20 QUESTION: Mr. Frey, may I just ask, in this
21 description are you describing the procedure under the
22 Bank Secrecy Act or other forfeitures as well?

23 MR. FREY: Well, Customs employs the -- the
24 Bank Secrecy Act itself has no procedural provisions,
25 and they employ the general Customs provisions for the

1 administrative remission process.

2 QUESTION: Is -- is -- is your position that
3 this case is typical of all forfeitures, or do we have a
4 special problem under the Bank Secrecy Act in this case?

5 MR. FREY: No. I think this case is
6 reflective of a general problem that we have had with
7 forfeitures being barred on account of alleged
8 unconstitutional delay. There are some attributes which
9 I'll get to later of the currency statute which make
10 this, I think, a particularly strong case for the
11 Government; but I will come to those.

12 QUESTION: But generally we could consider it
13 pretty much the same as say the seizure of a boat or an
14 automobile and a narcotic?

15 MR. FREY: I don't think there are any
16 material differences, yes.

17 Now, the claimants, as I say, are allowed 60
18 days to file a petition for remission or mitigation, and
19 it's quite clear from the statute that the decision
20 whether to grant remission or to mitigate the penalty
21 involved in a forfeiture is within the essentially
22 unfettered discretion of the Secretary of the Treasury or
23 his delagatee.

24 Now, if an administration petition is filed,
25 the practice is not to file a judicial forfeiture action

1 until the administrative petition is decided. If no
2 petition is filed, then the practice normally is to
3 refer the matter promptly to the United States Attorney
4 for judicial action.

5 Now, I should point out that under the current
6 statutes, the judicial action is required only where the
7 value of the object to be forfeited exceeds \$10,000. At
8 the time of this seizure it was \$5,000, I believe, or
9 \$2,500.

10 QUESTION: What justification was presented
11 for remission here?

12 MR. FREY: Well, in this case, as I understand
13 it, the claimant asserted that she was not aware of her
14 obligation to declare the money, because she believed
15 that only money that had been acquired abroad would have
16 to be declared. I think that was the main reason that
17 she gave.

18 QUESTION: That she had carried it from the
19 United States outside and then was bringing it back on
20 the way to Canada, is that --

21 MR. FREY: Yes.

22 QUESTION: That was the only justification?

23 MR. FREY: Well, I -- I -- actually the
24 appendix does not contain the letter, and I have not
25 read the letter of remission; so that is my

1 understanding as to what her principal justification
2 was. But my colleague can perhaps fill that in.

3 In any event, if the matter involved is worth
4 less than \$10,000, it's disposed of administratively
5 unless the claimant posts a bond for cost to obtain a
6 judicial proceeding. If it's worth more than \$10,000, a
7 judicial action is filed.

8 Now, also the pendency of a criminal
9 investigation or a criminal prosecution will ordinarily
10 delay both the decision on the remission petition and
11 the filing of the judicial forfeiture action.

12 Another point that I think is pertinent is
13 that once the case is referred to the United States
14 Attorney for civil in rem forfeiture proceedings, there
15 is no further processing or entertaining by Customs of
16 an application for remission or mitigation.

17 Now, in most cases the jurisdiction to
18 entertain such application shifts to the Department of
19 Justice, to the Attorney General; and under the
20 regulations, the Attorney General's standards for
21 granting relief are much stricter, he is much less
22 generous in granting relief than the Secretary of the
23 Treasury after there has been a judicial forfeiture
24 proceeding.

25 In the case of currency seizures it is not

1 absolutely clear and it is not settled whether the
2 Attorney General would have jurisdiction or whether it
3 would stay with the Secretary of Treasury for a
4 mitigation petition because of the wording of the
5 particular statute; but it's not material to this case.

6 Let me also say a word about the substantive
7 standards for currency forfeitures. 31 U.S.C. 1102 --
8 and I am told this has been recently recodified, and I
9 don't have the section number -- requires only two
10 things: that there has been transportation in or out of
11 the United States of currency or monetary instruments in
12 excess of \$5,000, and that they have not been declared.
13 Any currency so transported and not declared is
14 forfeitable.

15 There is no requirement for a civil forfeiture
16 that the person knew or understood that he or she was
17 under a duty to make this report. There may be a
18 requirement that they had to know that they were in fact
19 carrying the money on their person, but that's not in
20 question in this case.

21 Now, this is in contrast to the criminal
22 prosecution for this violation which would have an
23 element of willfulness which the lower courts have
24 construed to require knowledge of the reporting
25 requirement.

1 Let me go briefly through the procedural
2 chronology of this case. The seizure occurred on
3 September 10th. A remission petition was filed on
4 September 28th of 1975, and on October 20th the case was
5 assigned to a Customs agent for investigation.

6 Between October 1975 and April 1976 her
7 investigation largely focused on whether the money that
8 was being transported by the claimant and was not
9 declared was being used as part of some criminal
10 activity. This, I am told, is a standard practice in
11 currency seizure cases, and one of the reasons this,
12 apart from the fact that there is commonly such an
13 association and the discovery of the money may be a lead
14 to uncover other criminal activity, is that the decision
15 whether to prosecute as a misdemeanor or a felony may
16 depend on whether the money was being transported in
17 connection with some other criminal activity, in which
18 case a felony is involved.

19 In May of 1976 the case was referred for
20 prosecution to the United States Attorney. An
21 indictment was returned on June 15th of 1976, and it
22 contained both a misdemeanor count charging the failure
23 to declare the currency and a felony count for false
24 statements to the Customs officer denying the possession
25 of \$5,000 during the interrogation.

1 The trial was held in December of 1976, and at
2 the conclusion of the trial the jury convicted
3 respondent or claimant of the false statement counts and
4 acquitted on the felony transportation -- on the
5 misdemeanor currency transportation count. Subsequently
6 on her appeal the false statement counts were reversed
7 because of inadvertent leaving of the court file in the
8 jury room.

9 QUESTION: What is the statute governing the
10 -- the statutory section governing the false statement
11 count?

12 MR. FREY: 1001, 18 U.S.C. 1001.

13 Now, following this, approximately three
14 months after the verdict in the criminal case the
15 remission petition was denied, and the case was referred
16 to the United States Attorney for a judicial forfeiture
17 action which was filed on March 22nd, 1977,
18 approximately 18 months after the original seizure.

19 In January of 1978 the district court entered
20 its judgment upholding the forfeiture and holding that
21 the delay in instituting the forfeiture proceeding was
22 reasonable under the circumstances.

23 Somewhat over three years later the Court of
24 Appeals decided the appeal, held that the Government
25 took too long in filing the judicial forfeiture action.

1 Their holding is summarized at page 4A of the appendix
2 to the petition for writ of certiorari. And the court
3 said, "The administrative or criminal investigations
4 cannot justify the Government's delay when the necessary
5 elements for a forfeiture were established at the time
6 of the seizure."

7 And then went on to hold that prejudice is
8 irrelevant to the claim, and without regard to prejudice
9 the claimant is entitled to a return of the property.

10 Now, in order to sustain the judgment of the
11 Court of Appeals, claimant must persuade the Court to
12 find in its favor on three issues, each of three issues.

13 QUESTION: Mr. Frey, before you get into your
14 main argument, may I ask one other procedural question?
15 In your brief you indicate that the Government prevails
16 in about 80 percent of these --

17 MR. FREY: Well --

18 QUESTION: -- Cases other than those where
19 there's delay involved. Well, whatever the figure is.

20 MR. FREY: I think it's considerably higher.

21 QUESTION: Say it's 90 percent. But take the
22 10 percent in which you don't prevail. Say on the
23 merits, not for reasons of delay, the person gets the
24 property back. Do they get any damages or any
25 compensation for the time that --

1 MR. FREY: Well, they have -- they have a --
2 they have a Bivens action possibly against the
3 collector of the property.

4 QUESTION: What I mean, is there any routine
5 statutory procedure for paying interest or anything else?

6 MR. FREY: No. No, I don't believe there is a
7 statute --

8 QUESTION: They may have a lawsuit is what
9 they --

10 MR. FREY: They may -- they may suffer an
11 injury as a result of the delay.

12 QUESTION: And may have a Bivens-type claim,
13 and that's -- that's --

14 MR. FREY: They may have a Bivens-type claim,
15 although that has its own difficulties.

16 QUESTION: Yeah.

17 MR. FREY: I should say that under --

18 QUESTION: How -- how about an action under
19 the Federal Tort Claims Act or under the Tucker Act?

20 MR. FREY: Well, Section 2680(c) of Title 28,
21 which is a Federal Tort Claims Act provision, seems to
22 bar any claim for delay -- for damages due to a delay in
23 connection with a Customs seizure. Congress decided as
24 a matter of policy not to permit it.

25 As far as the Tucker Act was concerned, that

1 was an issue that was involved in the Hatzlatch case.
2 The Court did not decide it, and I have serious doubts
3 whether there would be a Tucker Act action. It would
4 have to be based on some implied contract.

5 I should say that under the Department of
6 Justice's procedures, any adverse decision in one of
7 these forfeiture cases is supposed to be reported to the
8 Solicitor General's Office for a decision whether or not
9 to appeal. And I, apart from this delay issue that is
10 before the Court today, the due process issue, I don't
11 see more than half a dozen a year. Now, they may not
12 all be reported to me, but I think the incidence is
13 slight.

14 In any event, in order to sustain the judgment
15 of the Court of Appeals, the first thing that claimant
16 must convince you of is that there exists a general due
17 process requirement of prompt filing of a judicial
18 action following a seizure of goods for forfeiture.

19 Secondly, they must persuade you that due
20 process does not allow the Government to defer such a
21 filing on account of the pendency of a criminal
22 investigation or prosecution or an administrative
23 petition for remission or mitigation.

24 And thirdly, they must persuade you that the
25 proper remedy for any violation of due process involved

1 in failing to file promptly enough is automatic denial
2 of the forfeiture, wholly without regard to whether the
3 claimant suffered any injury whatsoever by virtue of the
4 impermissible delay.

5 I'd like to first make a couple of preliminary
6 observations. The first one is apparently a somewhat
7 old-fashioned idea that's gone out of favor with some of
8 the lower courts, and that is the statute of limitations
9 that Congress enacted governing the time within which
10 actions of this sort must be brought, which is five
11 years.

12 Now, the second thing, turning to this case in
13 particular --

14 QUESTION: Why do you say that's gone out of
15 favor with some of the lower courts?

16 MR. FREY: Well, it's been largely ignored in
17 numerous cases. I think not with this Court because in
18 the Lovasco case, for instance, the Court reminded that
19 the statute of limitations is the principal protection
20 with regard to delay in the institution of judicial
21 proceedings. But the Court of Appeals --

22 QUESTION: Yes, but if the Government has
23 already seized the property and is holding it --

24 MR. FREY: Well, the statute of limitations --

25 QUESTION: -- And so you've -- it's sort of

1 like you've started the case, in a sense. You've got
2 the money, and you just aren't give it back. And you
3 think you could wait five years.

4 QUESTION: Well, Congress has said you could
5 wait five years.

6 MR. FREY: That is correct.

7 QUESTION: Well, you could wait five years to
8 start your action, but that doesn't say you can wait
9 five years to seize the property.

10 MR. FREY: Well, you could wait -- it's clear
11 that the statute of limitations contemplates the
12 possibility or the likelihood that the property will
13 have been seized because it's five years from the date
14 of discovery of the offense.

15 QUESTION: Well, for example --

16 MR. FREY: I don't --

17 QUESTION: -- There's a statute of limitations
18 in criminal cases, too, but you can't -- can't arrest a
19 person and then just wait five years to prosecute.

20 MR. FREY: Well, if -- we -- we make the point
21 in our brief that if you were to analogize the seizure
22 to the arrest of the person and apply the speedy trial
23 analysis -- which I assume if you could meet the speedy
24 trial test you would also comply with due process
25 requirements -- that the claimant would not prevail in

1 this case under the four factor speedy trial analysis;
2 because while the length of the delay arguably would
3 satisfy the requirements, she could not -- there are
4 good reasons for the delay.

5 QUESTION: Right.

6 MR. FREY: There is no prejudice; and there
7 never was a demand for the filing of a judicial
8 proceeding.

9 QUESTION: Well, that's part of your argument.

10 MR. FREY: That is part of our argument.

11 QUESTION: Well, Mr. Frey --

12 MR. FREY: I'm going to try to work it on in
13 response to questions.

14 QUESTION: Now you know the best way you can.

15 QUESTION: You do concede that due process
16 rights are triggered by a Government seizure of
17 someone's property, I suppose; to have a hearing on the
18 seizure at, what, a meaningful or reasonable time, is
19 that right?

20 MR. FREY: Well, that's -- we -- we do concede
21 that there -- that the claimant, even though
22 retrospectively title passed to the Government, at least
23 at the time of the seizure, in our view, we do concede
24 that in approaching this case the Court should recognize
25 the existence of a property interest that requires some

1 due process.

2 QUESTION: A property interest that was seized
3 that triggers some due process right to a hearing at
4 some reasonable or meaningful time.

5 MR. FREY: In a meaningful time. And --

6 QUESTION: And it's your argument that the
7 statute of limitations provides for the meaningful time,
8 is that right?

9 MR. FREY: Well, it is our argument that in
10 general if their delay in instituting the action is not
11 motivated by some invidious attempt to gain a tactical
12 advantage that due process is satisfied by a hearing
13 within the statute of limitations, taking into account
14 the other remedies that are available to a person whose
15 property has been seized if they wish to secure an
16 earlier hearing on certain aspects of the matter.

17 QUESTION: Mr. Frey, isn't there a sort of a
18 piece of paper that could be filed at the same time that
19 the person is taken into custody which would protect the
20 Government?

21 MR. FREY: Well, we think that is a very bad
22 idea that is --

23 QUESTION: But it is possible, isn't it?

24 MR. FREY: It would be possible in most of
25 these cases to file a complaint rather rapidly, but

1 there are a lot of costs associated with that -- a lot
2 of costs, in our view.

3 QUESTION: Well, I know of one case in which
4 all they did, they just filed a jeopardy assessment
5 against the guy. He was going out of the country.

6 MR. FREY: Well, now you're -- you're in an
7 area that I don't know very much about which is tax
8 liens.

9 QUESTION: But I mean I'm just wondering about
10 if you seize contraband, that's one thing, but this is
11 good, solid money and it's not contraband.

12 MR. FREY: Right. Not contraband per se.

13 QUESTION: Except that it's over \$5,000.

14 MR. FREY: Yes.

15 QUESTION: And I'm wondering if the
16 Government, accepting all of your -- what you say as
17 being true, and it is -- why there couldn't be some kind
18 of thing -- if you needed Congress, Congress could give
19 it -- of filing a piece of paper that would block this
20 off.

21 MR. FREY: Well, we do provide -- I'm not sure
22 in terms of filing something in court for the reasons
23 that I will get into in my argument. I think you're
24 talking about approximately 50,000 noncontraband
25 seizures by Customs alone very year. That's not

1 counting DEA and ATF and IRS.

2 QUESTION: That's money. I'm just talking
3 about money now.

4 MR. FREY: Well, but the same rules I think
5 would apply if we seized an automobile or if we seized
6 merchandise that's being brought into the country and
7 there's some Customs violation.

8 QUESTION: Well, there's a lot of difference
9 when you seize an automobile because of dope. The
10 automobile wasn't the dope, but the money is the money.

11 MR. FREY: No.

12 QUESTION: The money is the crime itself.

13 MR. FREY: Well, the non -- the nondeclaration
14 of the money is the forfeitable act. But I'm not sure
15 that I understand the difference in terms of -- the same
16 claim has been made in cases, not just in currency cases
17 but --

18 QUESTION: Well, I know I don't understand --

19 MR. FREY: -- In cases where automobiles have
20 been seized or other merchandise that's been brought in
21 and improperly declared has been seized. And -- and you
22 are talking about a -- a true inundation in the courts
23 of what we say are essentially meaningless action if all
24 you're going to do is file the suit but nothing is going
25 to happen with it because there has to be more

1 investigation and because there's a criminal case
2 possibly pending in some portion of these matters.

3 You will also cut off the only right that is
4 useful or important to 99.9 percent of people who are
5 involved with one of these seizures, which is the right
6 to petition for administrative relief from the
7 Secretary, because once we file in court, the
8 administrative relief is no longer available.

9 The whole system is designed to try to channel
10 these claims into the administrative process if
11 possible, and only if that fails to produce a settlement
12 that's satisfactory to the parties is the judicial
13 action --

14 QUESTION: Was there a statutory restriction
15 on you're continuing to make the administrative remedy
16 available after this suit was filed, or is that a matter
17 of administrative policy?

18 MR. FREY: I don't believe there has been a
19 statutory restriction, but it is an administrative
20 policy which I think reflects --

21 QUESTION: Which -- which could be changed, I
22 suppose, then.

23 MR. FREY: Hmmm?

24 QUESTION: That could be changed then if --

25 MR. FREY: It could be changed, but -- but --

1 you see, what happens under the Court of Appeals
2 decision is that Customs can't afford to conduct the
3 administrative proceedings prior to the judicial
4 proceeding, so it will have to go forward right away
5 with the judicial suit. And the whole part of the
6 purpose of Congress in having the administrative remedy
7 is to settle these cases, and something like
8 three-quarters of the cases are settled with a remission
9 or mitigation that's acceptable to the claimant.

10 QUESTION: Mr. Frey, when we get into this
11 subject of alternative remedies, what if -- what if the
12 Government let the statute of limitations run, say five
13 years, in a case in which they had probable cause to
14 believe they were entitled to the money or whatever
15 might be seized, so there would be no Rule 41 remedy?

16 Does the former property owner have any remedy
17 to get his property back? He has no tort claims
18 remedy? Can the Government just keep the money?

19 MR. FREY: Well, no. Our position is that a
20 forfeiture action must be brought within the statute of
21 limitations.

22 QUESTION: But, supposing they don't? I'm
23 saying supposing they don't bring it within the five
24 years, can they just keep it?

25 MR. FREY: I can't -- this has never happened,

1 but I --

2 QUESTION: I can't conceive of it happening,
3 but does the citizen have a remedy if that should happen?

4 MR. FREY: I am certain -- I am certain that
5 they would have a remedy in that situation.

6 QUESTION: What - what would it be?

7 MR. FREY: Well, they have a remedy even
8 before the five years if there's an unreasonable delay
9 in bringing the forfeiture action, which is the
10 equitable action under Slocum against Mayberry.

11 QUESTION: Which is an action requiring them
12 to institute a forfeiture proceeding. And if the
13 statute of limitations has run, that remedy wouldn't be
14 available, would it?

15 MR. FREY: Well, it would because the
16 forfeiture proceeding would be instituted and judgment
17 would be rendered for the claimant.

18 QUESTION: After the statute had run?

19 MR. FREY: Yes. On the grounds of the statute
20 of limitations. And the property would be ordered
21 returned.

22 I have no doubt that if the property was held
23 for five years and no judicial action -- no settlement
24 was reached and no judicial action was filed that the
25 claimant would be able to -- upon establishing their

1 standing they're entitled to the property that --

2 QUESTION: I have in mind the Treasure Salvors
3 case last year. We had a problem of sovereign
4 immunity. Of course, there's it's Eleventh Amendment.
5 I think the Government has the same right to claim
6 sovereign immunity, doesn't it?

7 MR. FREY: Well, I -- I --

8 QUESTION: Where the initial seizure was
9 supported by probable cause. I don't know why you just
10 can't keep the property.

11 MR. FREY: Well, I'm not sure what the answer
12 is. I'm sure we can't, and I'm sure that there would be
13 a due process objection. Whether there would be a
14 sovereign immunity problem in terms of a remedy I just
15 don't know the answer to that. But that's pretty far --
16 I don't see that as a factor that ought to influence the
17 decision on this case.

18 Now, let me point out that the claimant in
19 this case has never asked to have a judicial proceeding
20 brought, and she had good reasons for not asking because
21 the judicial proceeding would have been an open and
22 shut, cut and dried case. She would have lost; she had
23 no defense. Her explanations, her excuses for her
24 behavior are things that could be considered in the
25 administrative remission proceeding, but would not avail

1 her in the least in court.

2 Now, this is generally true in all of these
3 forfeiture delay cases that I have seen. The last thing
4 the claimant wants is the prompt filing of a judicial
5 action. They just want to complain after the -- if
6 remission has been denied that the action hasn't been
7 prompt enough at a point where the filing of the action
8 can no longer hurt them or it's actually occurred.

9 I wanted to clarify one other point before I
10 got into more substantive matters, and that is there's
11 been some discussion about the difference in the meaning
12 of forfeiture statutes that say "shall be forfeited" and
13 "subject to forfeiture."

14 And just yesterday it came to my attention
15 that there is a House and a Senate report that you
16 should look at which explain the view of Congress in
17 1935 at least, that the "subject to forfeiture" language
18 means the title vests in the United States for the
19 purposes of this relation back doctrine at the time of
20 the seizure, whereas "shall be forfeited" means that
21 title vests at the time of the offense. In either case
22 there would be no difference for this purpose of the
23 present case. This is H.R. Report 868, 74th Congress,
24 First Session, page 11; and Senate Report 1036, 74th
25 Congress, First Session, page 15.

1 I see my time is running short. I just want
2 to make the point that due process requires an
3 opportunity to be heard in a meaningful time, and in
4 deciding whether the prompt filing of a judicial action
5 is necessary to provide such an opportunity, you do have
6 to look at what the options are that are available to
7 the rare claimant who might actually want the prompt
8 filing of a judicial action.

9 First of all, he cannot file or withdraw his
10 administrative remission petition which will normally
11 produce the prompt judicial filing. Secondly, if he
12 claims that the seizure itself was unlawful, the Rule
13 41(e) remedy for return of property is available.

14 Now, this is significant because the class of
15 cases that we're talking about here in terms of
16 assessing the risk of error in determining what process
17 is due is the class of cases in which the items were
18 seized with probable cause to believe that they were
19 subject to forfeiture.

20 In that class of cases the risk of error is
21 very slight. This is especially true in these currency
22 cases, because all you need to prove is events that
23 happened right there in front of the Customs inspector:
24 the discovery of the money and the fact of
25 nondeclaration. So the risk of error in this class of

1 cases is very small. Finally, there is the equitable
2 action.

3 I think I should reserve the balance of my
4 time for rebuttal, if I may.

5 CHIEF JUSTICE BURGER: Very well.

6 Mr. Kroft.

7 ORAL ARGUMENT OF VICTOR SHERMAN, ESQ.,

8 ON BEHALF OF THE RESPONDENT

9 MR. SHERMAN: Mr. Chief Justice, may it please
10 the Court:

11 The first question, as to whether or not the
12 due process clause requires a prompt post-seizure
13 hearing and as to whether or not the statute of
14 limitation is the only limitation of the Government,
15 first of all, 19 U.S.C. Section 1621, which is the
16 applicable statute of limitations, says that the action
17 must be instituted within five years after the time when
18 the alleged offense was discovered.

19 Obviously, if the Government believes that a
20 crime has occurred or that a forfeiture is appropriate
21 and they do not seize the person's property, they have
22 five years within to bring an action. That's the normal
23 statute of limitations. However, when they have seized
24 the property -- and this Court has already indicated in
25 the Pierson Yacht case in 1974 that once an item has

1 been seized under a forfeiture proceeding, there is an
2 emergency reason not to comply with the normal rule that
3 before seizure you are to give a person notice and a
4 hearing.

5 It's only in the rare instance where because
6 of other governmental interest such as in the Pierson
7 Yacht case or potentially in this case that you can
8 seize the property and merely postpone the hearing. And
9 once the event has happened, there is no reason to delay
10 the hearing beyond the requirement of the due process
11 prompt hearing requirement.

12 And I believe the Government has cited no
13 cases, and there are no cases, either at the District
14 Court, Court of Appeals, or Supreme Court that says the
15 Government has up to the statute of limitations. The
16 rule has always been that once the property is seized,
17 you are required to give a prompt post-seizure hearing.

18 The Government has --

19 QUESTION: Well, is that a constitutional rule?

20 MR. SHERMAN: Certainly, first of all, since
21 the Government concedes that the remission petitions are
22 to be decided under 19 U.S.C., Sections 1602, 1603 and
23 1604 have been interpreted by the various courts to
24 apply to this situation. 1602 talks about once a
25 seizure has occurred the seizing officer is to

1 immediately make a report to the appropriate Custom
2 officer; there's to be an immediate investigation and an
3 appraisal of the property under 1603, and then the
4 matter referred to the United States Attorney's Office;
5 and 1604 to be a filing of the action forthwith.

6 The Court has indicated in the First Amendment
7 area in the Thirty-Seven Photographs case that in order
8 to save the facial constitutionality of the section in
9 that particular case, it read into this statute certain
10 time limitations -- 14 days for a preliminary hearing as
11 to whether or not the particular film in question --

12 QUESTION: Well, you're not suggesting that
13 any First Amendment interest is involved in a certain
14 amount of money, are you?

15 MR. SHERMAN: No. What I am suggesting is
16 that in other areas the Court has said that promptitude
17 or promptness is required. And I'm saying in this
18 particular area the due process clause also is
19 applicable.

20 Although this is a Fifth Amendment area and
21 not a First Amendment area, and potentially the time
22 restraints may be somewhat different depending upon the
23 interest involved, certainly the principle that
24 something has to be done within a prompt period of time
25 and that the due process clause has a role to play in

1 that determination is applicable in this case.

2 And I believe that any argument that says that
3 once the Government seizes an individual's property and
4 can sit on it for five years and has to do nothing is
5 foreign to every single court from the Magna Carta
6 onward who has even discussed this point. And the
7 reason the Government is unable to cite any cases that
8 says they can wait five years is because there are no
9 cases because everybody assumes --

10 QUESTION: Well, I suppose we don't have to
11 decide that to resolve this case, do we, because the
12 Government didn't wait that long, and you don't have to
13 resolve that. What you have to resolve here is whether
14 the delay, which involved waiting for the resolution of
15 the criminal action, in effect, did amount to a
16 meaningful time for the provision of the judicial
17 proceeding.

18 MR. SHERMAN: And this is where the facts
19 become extremely important, and that's why the
20 Government's continued assertion that the petitioner did
21 not want a prompt hearing is totally belied by the
22 record.

23 First of all, if the Court will note that the
24 day after the seizure occurred, I wrote a letter on
25 behalf of the claimant indicating the reason the funds

1 were not reported and the mistake of fact which the
2 petitioner or the claimant was under due to the
3 confusing Customs form given to her on the airplane; and
4 that we wanted a prompt hearing of the matter; and that
5 we wanted to know the reasons if there was to be a
6 denial of the petition, and the standard under which the
7 Secretary was making the decision. And consistently
8 thereafter I wrote letters to Customs asking for reasons
9 if there was going to be denial and to handle the matter
10 promptly.

11 Now, at all times Customs agent Janet Pompeo,
12 in this case, related to me that this was a civil
13 forfeiture proceeding and never gave any indication
14 whatsoever there was going to be a criminal case. And
15 this is where the bad faith of the Government comes in.
16 Not only did she indicate to me that --

17 QUESTION: Well, where do we find that in the
18 record, counsel?

19 MR. SHERMAN: It's in the Appendix, Your
20 Honor. At the civil trial Janet Pompeo testified that
21 she went so far as to obtain an interview of my client
22 under the guise of a petition for remission when she had
23 already made the decision in October within a few days
24 after receiving the information regarding the seizure
25 that she was going to file a criminal case. And the

1 only reason there was delay in this case was not to
2 investigate the remission petition, but it was to try to
3 gather further information under the guise of
4 investigating the remission petition to file the more
5 serious felony of 1059.

6 QUESTION: Well, why can't they investigate
7 both at the same time?

8 MR. SHERMAN: Well, I'm not saying that
9 Customs cannot investigate both at the same --

10 QUESTION: You say it's bad faith to do it?

11 MR. SHERMAN: I'm not saying -- it's bad faith
12 to tell the attorney for a claimant that you are
13 seriously considering a remission petition, get an
14 interview of the claimant, when at the same time all
15 you're trying to do is getting -- is get an
16 incriminating statement against the claimant to use in a
17 criminal proceeding, and also induce the claimant not to
18 ask for the forfeiture, judicial forfeiture proceedings
19 because you're telling the claimant we are honestly
20 going to consider your remission petition.

21 If Janet Pompeo would have told me I am
22 investigating a criminal case --

23 QUESTION: Well, now, is this all in the
24 record?

25 MR. SHERMAN: Yes, it is all in the record.

1 QUESTION: Do you cite appropriate places in
2 your brief?

3 MR. SHERMAN: Yes, we did.

4 QUESTION: Do you have a record citation? Did
5 you say it's in the Appendix?

6 MR. SHERMAN: The entire civil forfeiture
7 matter is in the Appendix.

8 QUESTION: Do you have a page citation to the
9 testimony that you're relying on?

10 MR. SHERMAN: I believe it's at pages 53 to --
11 59 to 61 and 63 to 64 in the Appendix.

12 QUESTION: Thank you.

13 QUESTION: Mr. Sherman --

14 QUESTION: Mr. Sherman, all this time you were
15 writing letters could you have filed any legal action?

16 MR. SHERMAN: Could I have?

17 QUESTION: Yes.

18 MR. SHERMAN: Well, first of all, the
19 Government makes a big point of --

20 QUESTION: That's a very simple -- could you
21 or could you not?

22 MR. SHERMAN: If I wanted to go to the expense
23 of filing an action to force them to file a forfeiture
24 action.

25 QUESTION: Most legal action costs money. My

1 question was could you have filed a legal action of any
2 kind?

3 MR. SHERMAN: Under that broad question the
4 answer is yes.

5 QUESTION: Did you?

6 MR. SHERMAN: No, I did not.

7 QUESTION: Well, how do you explain that?

8 MR. SHERMAN: Because --

9 QUESTION: They said you delayed. Well,
10 didn't you?

11 MR. SHERMAN: No, I did not.

12 QUESTION: Weren't you getting the -- trying
13 to get the Customs people to decide your case --

14 MR. SHERMAN: What I was --

15 QUESTION: -- Without spending any money?

16 MR. SHERMAN: What I was trying to do --

17 QUESTION: Without litigating.

18 MR. SHERMAN: What I was trying to do was take
19 advantage of what the Government was offering me and
20 telling me they were going to treat in good faith; that
21 is, the remission procedure. The remission procedures
22 are intended to settle these matters fast and
23 efficiently --

24 QUESTION: They lulled you -- they lulled you
25 into giving up your rights.

1 MR. SHERMAN: More than lulled. They
2 affirmatively made representation --

3 QUESTION: But didn't you go to law school to
4 prevent people from lulling you?

5 MR. SHERMAN: I also learned in law school and
6 -- that if the Government tells you something that they
7 are doing that you supposedly can rely upon what they're
8 telling you, and if they're lying to you that you have a
9 recourse afterwards.

10 QUESTION: If the Government says they're
11 going to do your work for you, you don't have to do it.

12 MR. SHERMAN: I'm not saying that they were
13 telling me they were doing their work for me. They were
14 telling me if you submit a petition for remission in
15 good faith, we will consider it in good faith; and I
16 relied upon that representation to me.

17 QUESTION: Mr. Sherman, you appealed the
18 felony conviction and won a reversal.

19 MR. SHERMAN: That's correct.

20 QUESTION: Has she ever been retried?

21 MR. SHERMAN: No.

22 QUESTION: Do you know why?

23 MR. SHERMAN: Well, the Government dismissed
24 -- it was on the Government motion that the criminal
25 case was dismissed.

1 By the way --

2 QUESTION: Mr. Sherman, neither the District
3 Court nor the Court of Appeals found bad faith on the
4 part of the Government, did they?

5 MR. SHERMAN: Well, I believe that although
6 the words "bad faith" were not used, the Court of
7 Appeals found that there was absolutely no justification
8 for the Government delaying in this case.

9 QUESTION: They found that the failure was
10 unjustified but did not find bad faith, isn't that
11 correct?

12 MR. SHERMAN: Well, again, Justice O'Connor,
13 they did not use the word "bad faith," but I believe the
14 Court of Appeals was saying that an 18-month delay in
15 filing the forfeiture action without any valid
16 justification whatsoever certainly be read --

17 QUESTION: They just found it was too long,
18 that's all, not bad faith, isn't that right?

19 MR. SHERMAN: Again, they did not use the
20 words "bad faith."

21 Justice Marshall, as far as bringing another
22 type of action, the Government claims that we could have
23 filed a 41(e) action in order to test the legality or
24 the propriety of the seizure.

25 First of all, that would not go to whether or

1 not the money should be forfeited, but also there's
2 federal criminal rule procedure 54(b)(5) which states
3 that you may not use a 41(e) action in a forfeiture
4 case. So there's another section that specifically says
5 we can't even file a 41(e) motion.

6 Also, under the Snidiak --

7 QUESTION: Well, then I amend my question.
8 Did you try to file any legal action?

9 MR. SHERMAN: No, I did not try to file any
10 legal action.

11 Also, under Snidiak and Fuentes the Court has
12 specifically held and indicated that it's not up to the
13 persons whose property has been seized in order to go to
14 court to try to file or force the issue; it's the person
15 who has seized the property that has the primary
16 responsibility in the action.

17 In this particular case it's the Government
18 that seizes an individual's property. They set up a
19 procedure which says if you can show that there's been
20 an innocent mistake of fact, which we tried to show in
21 this case, makes it available to the claimant, as they
22 made it available in this case, and we take advantage of
23 that procedure. And then rather than considering the
24 petition -- at no time was this petition ever considered
25 as part of the remission procedures. Janet Pompeo had

1 made the decision within a day or two of investigating
2 the matter that she was going to file a criminal case,
3 and she never intended to consider the remission
4 petition.

5 All she did is delay for this period of what
6 turned out to be 18 months for the purpose of proceeding
7 with the criminal case. And then she told the district
8 director don't decide the remission petition until after
9 the criminal case is over, because that would have a
10 bearing on whether or not there should be a forfeiture
11 to see if we can get a conviction under 1102. And this
12 is where the Government attempted to take advantage,
13 tactical advantage, which is mentioned in Footnote 17 of
14 Lovasco, because if they would have gotten a criminal
15 conviction under 1101 -- excuse me -- they would have
16 utilized that as a forfeiture under 1102, and then the
17 person was acquitted.

18 QUESTION: Mr. Sherman, it sounds to me as
19 though it's pretty logical for the Government agents,
20 for the Treasury Department to investigate in connection
21 with a remission petition whether there's some
22 underlying criminal activity afoot; that that's an
23 appropriate thing to do in deciding whether some
24 administrative petition to return the money is
25 appropriate to grant.

1 In this case the Government decided this woman
2 had violated the law, had committed felonies, and
3 ultimately decided to prosecute. Now, why is that
4 unreasonable?

5 MR. SHERMAN: Your -- Justice O'Connor, the
6 Government concedes that if I would have filed no
7 petition whatsoever within a 60-day period that very
8 soon thereafter they would have been required to file a
9 judicial forfeiture action. So if I would have done
10 nothing, if I would have sat back rather than writing
11 the letter the day after and filing the petition some 10
12 days later, and done nothing, some 60 days and a little
13 --

14 QUESTION: I didn't understand that to be a
15 Government concession.

16 MR. SHERMAN: Yes. It is -- it's stated in
17 their brief that if no petition --

18 QUESTION: Show me where in the brief that's
19 stated.

20 MR. SHERMAN: May I have my associate look for
21 it while I --

22 QUESTION: Surely.

23 MR. SHERMAN: The -- if you file no petition
24 for remission, then Customs has nothing to consider, so
25 all they do is have the money. The next step in the

1 process would be the filing of the judicial forfeiture
2 action. So it's only the filing of the forfeiture
3 petition --

4 QUESTION: Well, maybe the next step would be
5 the filing of a criminal prosecution.

6 MR. SHERMAN: First of all, the criminal
7 prosecution took place -- the indictment was returned
8 some nine months after the seizure of the funds, so
9 there might be a question right there: Is nine months
10 considered prompt?

11 And if the purpose of waiting nine months to
12 file the forfeiture action -- in the particular
13 indictment in this case the Government indicted Mary
14 Vasquez on 1001 and 1101 and also asked for the
15 forfeiture of the funds. So if you want to consider the
16 indictment an attempt to forfeit the funds, they asked
17 for the forfeiture of the funds which the person was
18 acquitted on that particular charge.

19 Now, when the matter ended up going to the
20 jury, the Government realized that they could not
21 actually get forfeiture in the criminal proceedings and
22 would have to wait for the civil action. But by
23 originally putting in the indictment that they were
24 attempting to forfeit the funds and then losing on that
25 issue --

1 QUESTION: Well, what was she convicted of?

2 MR. SHERMAN: She was convicted of 1001 which
3 eventually was overturned on the appeal.

4 QUESTION: A more serious offense, right?

5 QUESTION: A false statement.

6 MR. SHERMAN: Yes, but --

7 QUESTION: The jury was satisfied of her guilt
8 on that, I take it.

9 MR. SHERMAN: Well, yes, because the court
10 file which showed a prior criminal record was put into
11 the jury room, and so the Court of Appeals held that
12 they were obviously influenced by extrinsic matters, and
13 so they reversed the conviction. So you can't very well
14 say that the jury found her guilty based upon
15 appropriate evidence, and now since they didn't retry
16 her say that they were convinced of her guilt.

17 QUESTION: Well, they -- they didn't really
18 give her a clean bill of health either.

19 MR. SHERMAN: Well, they acquitted her. Well,
20 Your Honor, I think that's an unfair comment in a sense
21 to make under the facts of this case, but if we want to
22 carry it one step further, they did give her a clean
23 bill of health as to whether or not she filed the 1101
24 reporting form. They acquitted her.

25 QUESTION: Well, they didn't give her a clean

1 bill of health as being guilty of making a material
2 false statement to the Government.

3 MR. SHERMAN: Well, if you want to say that
4 they did not give a clean bill of health because they
5 were influenced by improper evidence put into the jury
6 room, no, they did not give her a clean bill of health.
7 But if the Government is waiting until a jury makes a
8 decision as to whether or not the appropriate form was
9 filed, and they give her a clean bill of health and say
10 not guilty, and the Government has used as a tactical
11 advantage this time period in which to try to get a jury
12 to make that determination, then they lose and they say
13 well, it's totally irrelevant to us and then bring a
14 forfeiture action, they are taking two bites of the
15 apple, heads, we win, tails, you lose. If we get a
16 conviction of 1101, we'll forfeit the money; and if we
17 don't, we'll just do it another way. And that was the
18 tactical advantage referred to in Lovasco that we're
19 referring to.

20 I would also like to point out that there's
21 another section. One of the major arguments the
22 Government makes in this case, well, if we rule in favor
23 of the claimant in this matter, we're out of luck;
24 there's nothing we can do. That is totally not true.

25 There's a Section 31, U.S.C. Section 1103, and

1 also the recent Ninth Circuit case decided in October of
2 1982, which is 295 Ivory Carvings, that says besides
3 forfeiting the item, another alternative is for the
4 Secretary to assess a fine against the offender and
5 assess that fine giving credit for any amount of -- the
6 amount of the forfeited item.

7 So if, for instance, the Government delays in
8 bringing the forfeiture action and loses the ability to
9 forfeit that particular item, they can obtain the same
10 result by filing an action under 31 U.S.C. 1103 getting
11 a judgment for the amount that they believe is owed to
12 the Government and collect that way. And that only has
13 to be done within the five year statute of limitations.

14 But if the Court permits or reverses the Court
15 of Appeals judgment in this case, they're going to say
16 to the Government you can take somebody's property, they
17 can deal with you in an honest fashion, they can ask for
18 prompt action within the remission procedures, they can
19 rely upon your representation the remission procedures
20 are what you are considering, they can hold that
21 property for an indefinite period up to five years, and
22 there's nothing you can do to complain about it, unless
23 you want to take the expense of filing, which seems to
24 be the only potential remedy, an action against the
25 Government saying file a forfeiture action against me.

1 And why at that time the Government would then make the
2 same arguments: well, we don't have to file a
3 forfeiture action against you because there's a pending
4 criminal matter.

5 I would doubt very much if any members of this
6 audience, or as obviously by the opinions of the Court
7 of Appeals, would countenance the ability of the
8 Government to seize somebody's property and hold it for
9 five years and give them no relief. And that's exactly
10 the position that the Government is arguing in this
11 particular matter.

12 QUESTION: How long did they hold it here?

13 MR. SHERMAN: Eighteen months.

14 QUESTION: That's quite a ways off from five
15 years, isn't it?

16 MR. SHERMAN: It's also a lot of a ways off
17 from a common understanding of the word "promptly."

18 QUESTION: How about Lovasco?

19 MR. SHERMAN: Lovasco, I think as Justice
20 White --

21 QUESTION: It was 17 1/2 months, wasn't it?

22 MR. SHERMAN: Lovasco was a pre-indictment
23 situation, and the Court, to give a little summary, has
24 basically said nobody has a right to be arrested or
25 indicted; that basically it's a prosecutorial

1 discretionary decision as to when to proceed with a
2 criminal case. And since nobody is under any
3 deprivation of any kind, we can't say that you have to
4 file a case within a particular period of time. And in
5 order to show a violation under Lovasco, you must show
6 actual prejudice, because until you can show actual
7 prejudice, the Government has done nothing to deprive
8 you of anything.

9 If we were going to use an analogy to any of
10 the prior decisions, obviously the Barker case, Barker
11 v. Wingo, is more applicable because we can analogize
12 the seizure of property to the seizure of a person. In
13 actuality, forfeiture sections are considered in rem
14 proceedings, so it's an arrest of the property as an
15 arrest of the person. So once there's been a
16 deprivation, as in this case, now the mechanism similar
17 to a speedy trial application in Barker takes place.

18 And in Barker there were four specific tests
19 to determine whether or not something was speedy, which
20 is the same kind of determination on an ad hoc basis
21 that should be made as to whether something is prompt --
22 a balancing of factors. And the court in the Ninth
23 Circuit has balanced those factors and said, for
24 instance -- and the Government again concedes in its
25 brief that the 18-month period -- and I believe I can

1 give you the page citation -- is on its face not prompt
2 or sufficiently stale to trigger the other decisions or
3 the other factors in Barker v. Wingo.

4 So the first factor, of course, is the length
5 of delay. The second factor is whether or not there is
6 any reason for the delay. In this particular case the
7 Court of Appeals found as a matter of law that there
8 were no reasons for the delay because the delay had
9 nothing to do with the ostensible purpose for seizing
10 the funds which was the forfeiture action, the remission
11 petition procedure.

12 QUESTION: You think you had no obligation to
13 show prejudice?

14 MR. SHERMAN: I'm not saying that I have no
15 obligation to know prejudice. First of all, I think
16 that it's very important -- and that's why I mention
17 1103, this prejudice question. The reason prejudice is
18 so important in the criminal area is because if the
19 Government loses, it's the end of the matter; the person
20 is free.

21 Now, first we have the higher potential
22 society responsibility to prosecute criminals, and when
23 we start letting people that may have committed crimes
24 go, we want to be very careful that there's been a
25 substantial violation of constitutional right before we

1 do that.

2 Second of all, as I've already indicated, in
3 the criminal area if the Government loses, it loses.
4 There's nothing further they can do. In the forfeiture
5 area if the Government loses under this procedure, they
6 haven't -- they have other remedies. They can bring a
7 criminal action, which they did in this case, or they
8 can sue under 1103.

9 So their prejudice, if we're balancing
10 prejudice to the Government versus prejudice to the
11 claimant, the Government suffers almost no prejudice
12 whatsoever if they don't bring the forfeiture action
13 promptly because they have another alternative.

14 QUESTION: Well, do you suggest that there was
15 any prejudice other than being deprived of the use of
16 the money?

17 MR. SHERMAN: I am not suggesting that there
18 was prejudice in the sense of being able to put on the
19 defense of the case. I would say that --

20 QUESTION: On this record there was no
21 defense, was there?

22 MR. SHERMAN: Yes, there was a defense. The
23 defense in this particular case -- and I think it was
24 the first question Your Honor asked -- was whether or
25 not at a forfeiture trial there would have been any

1 defense, and the defense in this particular case was
2 that the form that Mary Vasquez was required to fill out
3 upon the return into the United States mentioned
4 property acquired abroad, and she --

5 QUESTION: Well, I'm talking about -- I'm
6 talking about the physical evidence. The fact of
7 concealment negates all that, doesn't it?

8 MR. SHERMAN: Not at all. Mary Vasquez has
9 testified that the reason, this was just a safe hiding
10 place for the funds rather than carrying it in her
11 pocket or her purse where it could be taken by some
12 third party. She had nothing to hide. The form said
13 property acquired abroad. She understood it to mean
14 that in order to be required to -- to -- to report the
15 funds, you had to acquire the property abroad.

16 QUESTION: Well, Mr. -- Mr. --

17 MR. SHERMAN: Sherman.

18 QUESTION: Sherman, 19(a) where the -- Judge
19 Curtis' findings of law, he says, "The claimant violated
20 13 U.S.C. 1101(a) when she executed a Customs form
21 stating that she was not carrying currency.
22 Furthermore, she repeatedly failed to make a proper
23 declaration during a primary oral examination."

24 Now, were those contested issues at the trial
25 of the forfeiture action?

1 MR. SHERMAN: By way of stipulated testimony
2 as to what claimant would say, yes. But again, it's not
3 after the fact that Judge Curtis happened to have made
4 that particular determination. The question was did she
5 have anything to litigate, and the fact that Judge
6 Curtis did not believe her did not mean that she did not
7 have something to litigate.

8 QUESTION: Well, she had nothing to gain by
9 being tried earlier. She just would have lost earlier.

10 MR. SHERMAN: Well, Your Honor, I would quote
11 back to this Court many cases that say that to one who
12 protests against the taking of his property without due
13 process of law it is no answer to say in his particular
14 case due process of law would have led to the same
15 result because he had no defense upon the merits.

16 That's basically what Your Honor is saying is
17 if you can't win, what difference does it make if your
18 due process violations are violated? Let's apply that
19 to the criminal area.

20 QUESTION: Well, when you come right down --
21 when you come right down to it, what difference does it
22 make?

23 MR. SHERMAN: Well, then why -- then why have
24 Fourth Amendment, Fifth Amendment, Sixth Amendment? If
25 the person is guilty and along the way we can convict

1 him any way we want and it doesn't matter, then what's
2 the point of the procedure of due process?

3 QUESTION: Well, I'm not saying any way we
4 want. There's no suggestion that you were prejudiced in
5 your effort to prepare your case for the forfeiture
6 proceeding before Judge Curtis. You're saying that just
7 in the abstract without any showing of prejudice the
8 fact that it came to trial maybe six, eight, ten months
9 after you think it should have should mean the
10 Government just gives up the forfeiture. Now, that
11 doesn't make any sense to me.

12 MR. SHERMAN: Not gives up -- Your Honor, if
13 I'm sitting in this courtroom and one of your marshall
14 comes over to me and takes my wallet under some theory,
15 and takes my wallet and takes it into his office and
16 holds it for five years, and you're saying to me I have
17 no rights to try to get that property back.

18 QUESTION: Well, I'm not really addressing
19 that situation. I'm addressing the kind of situation
20 where your client was on a plane from Vancouver to Los
21 Angeles carrying concealed currency on her person, fails
22 to declare it. I think that puts the case in a little
23 bit different light than your example.

24 MR. SHERMAN: Well, you're accepting the fact
25 that she had no justifiable belief in what she was doing.

1 QUESTION: I am accepting Judge Curtis'
2 findings of fact made after a full evidentiary hearing,
3 I take it.

4 MR. SHERMAN: Well, again, I would just quote
5 to you that the end result is not the determining factor
6 as to whether or not there's been a violation of due
7 process. And I think what Your Honor is saying is that
8 if there's been, let's say, a Miranda violation, what
9 difference does it make if the person is guilty. That's
10 why we have procedural due process rules.

11 QUESTION: Counsel, may I ask a question? As
12 I read the findings of fact, it -- it's stated on page
13 15A that it is further stipulated that during the
14 questioning, Inspector McCulloch asked your client if
15 she were carrying more than \$5,000. She replied in the
16 negative, and that question was repeated three times.

17 MR. SHERMAN: That's correct.

18 QUESTION: Did you -- did you prepare the
19 stipulation? Did you agree to it?

20 MR. SHERMAN: Yes. That was an undisputed
21 fact.

22 QUESTION: Right. And -- and do you compare
23 that with somebody coming up and seizing your wallet
24 here in court?

25 MR. SHERMAN: No. What I am saying, first of

1 all, the forfeiture in this case was not based upon a
2 1001 violation.

3 QUESTION: But it was based upon an absolutely
4 false statement made to a Customs officer.

5 MR. SHERMAN: No. You can make the false
6 statement to the Customs officer, and then if she would
7 have -- if she would have been given the form and filled
8 out the form, they could not forfeit these funds. It's
9 the failure to follow the reporting form which triggers
10 the forfeiture, not the false statement.

11 But second of all --

12 QUESTION: You're saying lying to a Customs
13 officer is -- is perfectly appropriate and --

14 MR. SHERMAN: No.

15 QUESTION: -- Therefore there was no -- no one
16 -- that therefore the conduct of the Government was
17 unlawful at that time?

18 MR. SHERMAN: If you lie to a Custom officer
19 and fill out the forfeiture form, they can't -- and I
20 mean, excuse me, fill out the appropriate reporting
21 form, they can't forfeit your property. That's the
22 statutory scheme.

23 There is no statutory scheme that if you lie
24 to a Customs officer they can take all of your property,
25 whatever you have on you. It's the -- the Bank

1 Reporting Act is not -- it's not illegal to bring in
2 more than \$5,000. The only illegality is failure to
3 file the form.

4 QUESTION: Oh, I understand the forfeiture is
5 a different question, but we were talking about whether
6 or not --

7 MR. SHERMAN: But -- but, Your Honor --

8 QUESTION: -- The initial seizure was valid by
9 the Government -- Government.

10 MR. SHERMAN: That's not a question as to
11 whether the seizure --

12 QUESTION: Well, that -- that's the question I
13 was addressing.

14 MR. SHERMAN: I'm sorry.

15 But, again, the reason she reported it that
16 way, because she had already been informed through the
17 Customs declaration form that she understood it to mean
18 that she only had to tell them she had more than \$5,000
19 if she acquired the money abroad.

20 QUESTION: Well, wouldn't that have been --
21 shouldn't that have been her answer? Yes, I have more
22 than \$5,000, but I --

23 MR. SHERMAN: Well, that's what -- you know,
24 Your Honor, that's why people make mistakes, because
25 they don't understand certain Customs forms, and in

1 fact, she was acquitted on that very charge.

2 QUESTION: I didn't say anything about the
3 Customs form.

4 MR. SHERMAN: Yes, that should have been her
5 answer.

6 QUESTION: I said that she should have said --
7 you know, it's to answer the truth, the whole truth.

8 MR. SHERMAN: Well, she believed that she was
9 answering truthfully.

10 QUESTION: And she was answering the whole
11 truth.

12 MR. SHERMAN: That's what she believed.

13 QUESTION: That's what she believed.

14 MR. SHERMAN: That's what she believed.

15 QUESTION: And that's what you believe.

16 MR. SHERMAN: Well, that's what the jury
17 believed.

18 QUESTION: That's not what I asked.

19 QUESTION: Counsel, but really the issues
20 before us don't concern her guilt or innocence, do
21 they? We accept the fact that she's been -- it doesn't
22 really matter, does it, on the forfeiture issue? She's
23 going to lose on the merits in the forfeiture issue.
24 You accept that, but you say for procedural reasons --

25 MR. SHERMAN: No, I don't -- I don't accept --

1 I accept that she did in fact lose --

2 QUESTION: Yeah.

3 MR. SHERMAN: -- On the merits issue, but I'm
4 saying --

5 QUESTION: And you're not asking us to review
6 -- to review that determination.

7 MR. SHERMAN: Well, I'm asking you to review
8 it in the sense that if we assume that the remission
9 petition are subject to due process requirements, which
10 I believe they are, that -- and no reason was given in
11 the remission --

12 QUESTION: Well, aren't you just arguing even
13 a guilty person is entitled to a fair trial? That's all
14 you're arguing.

15 MR. SHERMAN: Exactly.

16 QUESTION: So you can assume for purposes of
17 that argument that she's "guilty" in the sense that she
18 loses on the merits in the forfeiture case.

19 MR. SHERMAN: Yes. I'm asking that even a
20 guilty person is entitled to procedural due process.
21 And I would hope that the Court would agree with that,
22 as I'm sure they do.

23 QUESTION: Yes, but you're also -- you're
24 saying more than that. Entitled to due process, but if
25 they don't get it, the entire proceeding must fail.

1 MR. SHERMAN: Well, Barker v. Wingo says that
2 even though it may be a harsh result for purposes of the
3 Government to dismiss the action, that's the only
4 remedy. And I will quote from Barker. It says, "Such a
5 remedy is more exclusionary than an exclusionary rule or
6 reversal for a new trial, but it is the only possible
7 remedy."

8 Right from this Court's own mouth that is the
9 only possible remedy.

10 CHIEF JUSTICE BURGER: Thank you, Mr. Sherman.

11 Do you have anything further, Mr. Frey?

12 ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

13 ON BEHALF OF THE PETITIONER -- REBUTTAL

14 MR. FREY: Yes, I do, Mr. Chief Justice.

15 First of all, on this question of remedy, not
16 even Fuentes v. Shevin on which my colleague relies,
17 even though it's quite distinguishable, provides that
18 the creditor's rights are extinguished.

19 QUESTION: What about Barker?

20 MR. FREY: Well, I'm not sure that -- I'm not
21 sure that Barker is -- is an analogous situation for
22 purposes of remedy. I mean it's --

23 QUESTION: Well, are you arguing that even if
24 there was unreasonable delay, the proceeding should not
25 have been -- the forfeiture proceeding should not have

1 been dismissed?

2 MR. FREY: Yes, definitely.

3 QUESTION: Well, what about Barker?

4 MR. FREY: Well, I don't think there -- I
5 think there the proper analogy is to Carey v. Piphus.
6 That is, prejudice is an element except in the Barker
7 situation where there is an explicit constitutional
8 provision on the speedy -- on speedy trial. Here we're
9 talking about due process, and the Court has said that
10 in the absence of prejudice, you may be entitled to
11 nominal damages because there is a desire and there is
12 an interest in adhering to fair process even if you're
13 not prejudiced by it.

14 But it's crystal clear in this case. In fact,
15 this remedy is exactly backwards. It's a little bit
16 like the exclusionary rule. For people whose property
17 should not be forfeited -- that is, people who -- who've
18 been injured by the delay, they get nothing out of this
19 remedy because they're going to get their property back
20 anyway. The only people who get anything out of this
21 remedy are people to whom the delay made no difference
22 except to defer the date on which title to property was
23 quieted in the United States. Now, this doesn't make
24 very much sense to me.

25 Now, with respect to Section 1103 which my

1 colleague mentioned for the first time today, I am
2 advised that that section is a section that deals with
3 the situation where the discovery of the illegal
4 transportation of the currency occurs after it's too
5 late to seize it, but that in cases where the currency
6 is seized, that section has no application.

7 QUESTION: What about Rule 41? The suggestion
8 was that it was wholly --

9 MR. FREY: Oh, oh, yes. His suggestion about
10 Rule 54(b), which is something else that has not been
11 briefed, and I have not looked at the rule; but I will
12 say that I think that applies only where there is a
13 forfeiture action, and we are talking about a case of --

14 QUESTION: Well, 54(b) says that these rules
15 do not apply to a civil forfeiture proceeding.

16 MR. FREY: Well, this is not -- the Rule 41(e)
17 motion is not a civil forfeiture proceeding.

18 QUESTION: Right.

19 MR. FREY: The Rule 41(e) motion is brought to
20 the time. That is, in the case in which the marshall
21 walks up and takes his wallet from him would be no --

22 QUESTION: Yes. But you would be filing --
23 the motion would be filed in a civil forfeiture
24 proceeding --

25 MR. FREY: Not at all. The motion --

1 QUESTION: It would be in a criminal case, is
2 that it?

3 MR. FREY: No. The motion is a motion that is
4 filed under the rules. It is not part of either -- it
5 is not part of any other case. If there -- a criminal
6 case --

7 QUESTION: It's a proceeding in itself?

8 MR. FREY: Hmmm?

9 QUESTION: It's a proceeding in itself?

10 MR. FREY: It's an independent proceeding, I
11 believe.

12 QUESTION: Yes, but you only prevail on that
13 if there's no probable cause, don't you? I mean most of
14 these cases at least there'll be probable cause to make
15 the seizure so --

16 MR. FREY: Well, that's why -- that's why the
17 need for a prompt judicial filing, which is in fact
18 suicidal for the interests of the claimant, is very much
19 reduced because there is probable cause in these cases.

20 QUESTION: Well, if -- I don't understand.
21 The probable cause means you will win every 41(e) motion.

22 MR. FREY: If there's probable cause.

23 QUESTION: And assume there is. Then I would
24 think in --

25 MR. FREY: So the class of -- when we -- when

1 we are making the due process inquiry, whether a
2 meaningful -- what the risk of error is in failing to
3 provide a prompt judicial forfeiture action as opposed
4 to a deferred one, we must --

5 QUESTION: It's the risk measured by the
6 difference between probable cause and perponderance,
7 whatever that is.

8 MR. FREY: By the -- yes. Or the possible --

9 QUESTION: A clear and convincing --

10 MR. FREY: -- Existence of an affirmative
11 defense. But we're talking about a class of cases in
12 which the risk is inherently very low that the seizure
13 has been improper or the forfeit --

14 QUESTION: We're talking about that small
15 percentage in which you ultimately lose, which you say
16 in your brief is 20 percent but on reflection you think
17 is significantly less. But we're talking about maybe 10
18 percent or 5 percent of the forfeitures, and there are
19 50,000 of them; so we're talking about 4,000 or 5,000
20 cases --

21 MR. FREY: No, no, no, no. No. It's not 10
22 or 5 percent of 50,000. It's 10 or 5 -- it --

23 QUESTION: Of the litigated cases.

24 MR. FREY: Of the 25,000 cases, about
25 two-thirds are settled. Of the remaining 6,000 or

1 7,000, the vast majority are defaulted when we file
2 them. So that 80 percent figure related to some number
3 --

4 QUESTION: It's the litigated cases.

5 MR. FREY: -- Of a few hundred litigated
6 cases. And I think it's more like one-tenth of one
7 percent.

8 CHIEF JUSTICE BURGER: Thank you, gentlemen.

9 The case is submitted.

10 (Whereupon, at 11:57 a.m., the case in the
11 above-entitled matter was submitted.)

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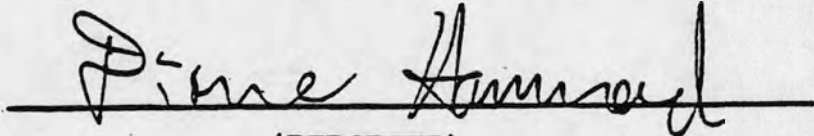
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A handwritten signature in cursive script, appearing to read "P. H. Anderson", is written over a horizontal line.

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