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Necessity of Conviction Before Forfeiture Under Missouri's Criminal Activity Forfeiture Act

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RECENT DEVELOPMENT

NECESSITY OF CONVICTION BEFORE FORFEITURE UNDER MISSOURI'S CRIMINAL ACTIVITY FORFEITURE ACT

I. INTRODUCTION

Asset forfeiture laws allow federal and state governments to confiscate property connected with illegal activity. These laws provide the government with valuable tools to punish criminals and ensure that they do not benefit from their crimes.[1] However, the government can apply these same laws in a shocking manner by seizing property from innocent individuals never even charged with a crime. Until recently, such seizures were possible in Missouri. In a decision issued in April, 1995,[2] the Missouri Court of Appeals acted to ensure that Missouri's asset forfeiture law is applied only against convicted criminals.

This Recent Development examines the rights of criminal defendants in forfeiture proceedings in Missouri. Part II begins with Missouri statutory law. Part III then considers how state courts apply this law by examining a recent decision of the Missouri Court of Appeals. Part IV explores federal forfeiture law and the constitutional limitations that may apply to state and federal forfeiture actions. Part V offers a brief conclusion.

II. CRIMINAL ACTIVITY FORFEITURE ACT

On March 17, 1986, Missouri enacted the Criminal Activity Forfeiture Act (CAFA).[3] This Act authorizes civil forfeiture[4] of any property

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1. In addition, asset forfeiture laws constitute a valuable source of funds that the government uses to help wage its war against crime.

2. State v. Residence Located at 5708 Paseo, Kansas City, Mo., 896 S.W.2d 532 (Mo. Ct. App. 1995).

3. MO. REV. STAT. §§ 513.600-513.653 (1994).

4. Courts define forfeiture as:

> the divestiture without compensation of property used in a manner contrary to the laws of the sovereign. Whenever a statute provides that upon the commission of a specified act, certain property used in or connected with that act shall be "forfeited," the forfeiture takes place immediately upon the commission of the act, and a conditional right to the property then vests in the government.

United States v. Eight Rhodesian Stone Statues, 449 F. Supp. 193, 195 n.1 (C.D. Cal. 1978).

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connected to criminal activity[5] and establishes a civil procedure for handling asset forfeiture actions.[6] CAFA is an extremely stringent asset forfeiture statute. It contains an expansive definition of what constitutes "criminal activity."[7] CAFA also contains a broad list of property subject to forfeiture under the Act, including "[a]ll property of every kind used or intended for use in the course of, derived from, or realized through criminal activity."[8]

Under CAFA, when forfeited property is abandoned or unclaimed, the prosecuting attorney or the attorney general's office may institute an in rem[9] proceeding by filing a petition.[10] In addition, they may bring an in personam[11] action for forfeiture by filing a separate petition.[12] The government may initiate both procedures either before or after seizure of the property.[13] This allows the government to, under certain circumstances, to appropriate physically an individual's property before a court has an opportunity to determine whether the property is connected to any criminal activity.[14]

In certain circumstances, even if the government commences a legal

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5. MO. REV. STAT. § 513.607.1 (1994). For definition of "criminal activity," see *infra* note 7.

6. *Id.* The Missouri rules of court and rules of civil procedure govern the civil forfeiture proceeding known as a CAFA forfeiture proceeding. MO. REV. STAT. § 513.607.2 (1994).

7. "Criminal activity" is defined by CAFA as "the commission, attempted commission, conspiracy to commit, or the solicitation, coercion or intimidation of another person to commit any crime which is chargeable by indictment or information under" sixteen chapters of Missouri statutes. MO. REV. STAT. § 513.605(3) (1994). Among those Missouri statutes listed is chapter 195, relating to drug regulations. MO. REV. STAT. § 513.605(3)(a) (1994).

8. MO. REV. STAT. § 513.607.1 (1994). CAFA also contains provisions prohibiting the transfer of seized assets to any federal agency. MO. REV. STAT. § 513.647.1 (1994). For a discussion of competition between state and federal agencies for forfeiture property, see Frans J. Von Kaenel, Recent Development, *Missouri Ups the Ante in the Drug Forfeiture "Race to the Res"*, 72 WASH. U. L.Q. 1469 (1994).

9. An in rem action is an action "instituted against the thing." BLACK'S LAW DICTIONARY 793 (6th ed. 1990). In a recent Supreme Court case, Justice Scalia defined in rem forfeitures as "confiscations of property rights based on improper use of the property, regardless of whether the owner has violated the law." Austin v. United States, 113 S. Ct. 2801, 2813 (1993) (Scalia, J., concurring).

10. MO. REV. STAT. § 513.607.3 (1994).

11. Justice Scalia defined in personam forfeitures as "assessments, whether monetary or in-kind, to punish the property owner's criminal conduct." *Austin*, 113 S. Ct. at 2813.

12. MO. REV. STAT. § 513.607.4 (1994).

13. MO. REV. STAT. §§ 513.607.3 & 513.607.4 (1994).

14. CAFA authorizes seizure of property without a court order if the seizure is made "incident to a lawful arrest, search, or inspection and the officer has probable cause to believe the property is subject to forfeiture and will be lost or destroyed if not seized." MO. REV. STAT. § 513.607.5(2) (1994). In those cases, the law enforcement officer who made the seizure must notify the prosecuting attorney within four days, and the prosecuting attorney then has ten days to file a petition for forfeiture. *Id.*

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proceeding before the property is seized, CAFA authorizes seizure without notice to the property owner.[15] After the prosecuting attorney or attorney general files a petition for forfeiture, the judge makes an ex parte determination of the situation.[16] If there is reasonable cause to think that the property is subject to forfeiture and that notice of seizure would cause loss or destruction of the property, the judge can issue a writ of seizure directing a law enforcement official to seize the assets without any further notice.[17] Otherwise, the government must serve all persons known to have an interest in the property.[18] Once notice is provided, a hearing is held on whether a writ of seizure should issue.[19]

Under CAFA, if a person did not have knowledge that his property was used in the course of criminal activity, his interest in the property is not subject to forfeiture.[20] However, lack of knowledge, provides little protection because the person seeking to avoid forfeiture must prove that he is an "innocent party."[21] This is contrary to the fundamental tenet of the American justice system that every person is innocent until proven guilty. Furthermore, it is difficult for a person to prove that he is an innocent party.[22]

CAFA also provides that the owner of seized property may move the court to retain possession of the property until the hearing.[23] However, the

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15. MO. REV. STAT. § 513.607.5(1) (1994).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* In any case, after both the petition is filed and seizure is effected, the government must serve a copy of the petition and a notice of seizure to every person who has an interest in the property, provided service has not already been made. MO. REV. STAT. § 513.607.6 (1994).

20. MO. REV. STAT. § 513.615 (1994). This section states:

> The interest of an innocent party in the property shall not be subject to forfeiture. An "innocent party" is one who did not have actual knowledge that the property was used or intended for use in the course of, derived from or realized through a criminal activity. Any innocent party shall have a right or claim to forfeited property or to the proceeds derived therefrom superior to any right or claim the state or the county has in the same property or proceeds.

Id.

21. *Id.* CAFA mandates: "To enforce such a claim, the innocent party must intervene in the forfeiture proceeding prior to its final disposition." MO. REV. STAT. § 513.615 (1994).

22. *See, e.g.*, State v. Beaird, 914 S.W.2d 374, 378 (Mo. Ct. App. 1996) (stating that "Claimant's interest is not subject to forfeiture provided that he could show that he was an 'innocent party.'"); State v. 1973 Fleetwood Mobil Home, 802 S.W.2d 582 (Mo. Ct. App. 1991) (holding that persons seeking to avoid forfeiture have the burden of proving their status as innocent parties).

23. MO. REV. STAT. § 513.610.1 (1994).

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owner must post a bond equal to the property's value.[24] If the motion is denied, the court has broad power to dispose of the seized property in any manner "provided by the laws of this state which is in the interest of justice."[25]

Law enforcement agencies can be overzealous in their use of CAFA.[26] Because the court's power to dispose of the property includes the power to award it to a state agency[27] the forfeited proceeds may go to the law enforcement agency itself. This provides a strong incentive for law enforcement agencies to seize property.

It is not hard to imagine a worst case scenario under CAFA. For example, a friend comes to your house, but unknown to you, he is carrying illegal drugs. The police, who have been investigating this friend, follow him to your house. They arrest your friend with the drugs, and because the drugs were found at your house, the government initiates a civil in rem forfeiture proceeding to take your home.[28] Your property is seized without any notice because it is incident to a lawful arrest. If you want possession of your house until the forfeiture hearing, you must pay to have it returned. Throughout the whole procedure, you must prove that you had no knowledge of the drugs. You have not even been charged with a crime, much less been convicted of one, yet, the government can take possession of your home unless and until you can prove that you are innocent.

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24. *Id.*

25. MO. REV. STAT. § 513.610.3 (1994).

26. *See, e.g.*, United States v. Decker, 956 F.2d 773 (8th Cir. 1992). In *Decker*, police searched the home of a couple arrested on drug charges. The search warrant authorized only the seizure of a UPS package. However, the search lasted two days and officers seized over 300 items on the orders of the state prosecutor, who thought the items were subject to seizure under CAFA. *Id.* at 775-76. Among the items seized were:

> a bible, a typewriter, a calculator, three telephones, a computer, a cable television box, stereo equipment, two video cassette recorders, two televisions, two sets of headphones, a camera, binoculars, a clock radio, two lamps, a dresser, a sewing machine, several desks and stands, a bed, a mirror, a buffet, a microwave oven, a blanket, a saddle, a rug, two cordless drills, two vacuums, silverware, four car jacks, a hydraulic engine hoist, a tool cabinet, assorted manual tools, miscellaneous magazines, welding helmets, a weed eater, a generator, a drill press and vise, a chain saw, a router, a power skill saw, a jig saw, an electric sander, a battery charger, a barbecue grill, a lawn mower, a flashlight, a "for sale" sign, an ice scraper mitt, a fishing rod, transmission fluid, a gas can, two spare tires, greeting cards, two answering machines, a first-aid kit, a rain coat, sunglasses, jumper cables, and a pair of rubber boots.

Id. at 775 n.2. The CAFA petition was later dismissed because the prosecutor had failed to file it within the five day period then allowed under the statute. *Id.* at 776 n.3.

27. Op. Mo. Att'y. Gen. 26-89 (1989). Although MO. REV. STAT. § 513.623 (1994) requires money to be paid into the Missouri state general revenue, that applies only to money received from a judicial sale of property. Op. Mo. Atty. Gen. 26-89 (1989).

28. Essentially, these are the facts of State v. Residence Located at 5708 Paseo, Kansas City, Mo., 896 S.W.2d 532 (Mo. Ct. App. 1995). For a complete discussion of the case, see *infra* section III.

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III. MISSOURI CASE LAW

That was the state of the law in Missouri until the Missouri Court of Appeals for the Western Division decided *State v. Residence Located at 5708 Paseo, Kansas City, Mo.*[29] In *5708 Paseo*, the Court of Appeals held that, although not explicitly required by CAFA, the state must not only charge the property owner with criminal activity, but obtain a conviction or guilty plea before seizing any property.[30]

In 1991, Richard Elbert and Chandra Mercer purchased a house at 5708 Paseo ("the House").[31] To solicit donations for two corporations he owned,[32] Mr. Elbert threw parties at the House and sold alcohol. However, he had never obtained a liquor license.[33] On August 15, 1992, police officers went to the House in response to complaints about noise. Mr. Elbert relinquished to the police a .9 millimeter pistol he had in his pocket.[34] The police did not arrest Mr. Elbert on that occasion.[35]

Subsequently, the Kansas City Police Department's Drug Enforcement Unit conducted an undercover drug operation involving Cray Parris, Mr. Elbert's half brother.[36] Mr. Parris had set up a drug sale with a DEA informant at a location other than Mr. Gibert's house, but the sale was never completed.[37] Instead, Mr. Parris went to the House owned by Mr. Elbert. Police officers followed Mr. Parris there and searched the house without a warrant after Mr. Elbert voluntarily signed a consent form.[38] The police seized 1837 grams of crack cocaine and $7000 from a purse in the house.[39] Mr. Parris was arrested for possession of a controlled substance and later convicted.[40] Mr. Elbert claimed that he did not know

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29. 896 S.W.2d 532 (Mo. Ct. App. 1995).

30. *Id.* at 538.

31. *Id.* at 534. A third party, Carl I. Brown & Company, held a mortgage on the house, but all parties stipulated that it qualified as an "innocent party" under CAFA. *Id.* at 534 n.2. For a definition of innocent parties, see *supra* note 20.

32. 896 S.W.2d at 534. The corporations were Hope Incorporated and Nightlife Incorporated. *Id.* Nightlife Incorporated raised money for Hope Incorporated to use in promoting community development and financing drug alternative programs. *Id.*

33. *Id.*

34. *Id.* at 535.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

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there were drugs in the House.[41] Approximately one month later, police began an undercover investigation of potentially illegal liquor sales at the House.[42] Over the course of a year, the police made numerous visits to the House, at which times they claimed to have purchased liquor.[43]

The State then filed an in rem forfeiture suit against the House owned by Mr. Elbert and Ms. Mercer, even though neither of them had ever been arrested, charged, or convicted of any crime.[44] To support the forfeiture, the State claimed that the House was either used to perpetrate a crime or was purchased with money obtained from illegal activity.[45] At the trial's conclusion, the court denied the State's request for forfeiture, finding that the State had failed to prove by a preponderance of the evidence that criminal activity, as required by CAFA, had taken place at the House.[46] However, the trial court explicitly stated that CAFA "does not require a finding of criminal responsibility to sustain an order of forfeiture."[47]

On appeal, the Missouri Court of Appeals for the Western District undertook an extensive examination of the statute.[48] Quoting from section

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41. 896 S.W.2d at 535. In addition, Mr. Elbert testified that Ms. Mercer, who had moved out after she and Mr. Elbert broke up, had no knowledge of the drugs.

42. *Id.*

43. *Id.* at 535-36.

44. *Id.* Mr. Elbert was arrested and charged for the illegal sale of alcoholic beverages on November 7, 1992. However, Mr. Elbert was acquitted after pleading not guilty.

The State's forfeiture petition included an allegation of criminal activity on November 7, 1992, but the State presented no evidence to support the allegation. *Id.* at 536 n.5.

45. *Id.* at 536. At trial on December 20, 1993, the State abandoned the claim that the House was obtained or paid for through criminal activity. *Id.* The petition alleged illegal activity on four dates: Mr. Elbert's possession of a .9 millimeter pistol while creating a disturbance on August 15, 1992; storage and distribution of 1837 grams of crack cocaine at the House on September 17, 1992; illegal sale and distribution of alcoholic beverages without a state or local license on November 7, 1992; and promotion of illegal gambling and illegal sale of alcoholic beverages at the House on April 10, 1993. *Id.* The petition also alleged that the House was "continually" used for illegal gambling and sale of alcoholic beverages. *Id.*

46. *Id.* at 535-36.

47. *Id.* at 536 (quoting the trial court's opinion).

48. *See id.* at 537-40. The amount of criminal activity necessary to sustain a forfeiture under CAFA was a matter of first impression. *Id.* at 537. The court started from the premise that in Missouri, forfeitures are not favored and "are administered only when they advance the letter and spirit of the law." *Id.* at 536 (quoting State v. Eberenz, 805 S.W.2d 359, 360 (Mo. Ct. App. 1991)). The court also stated that forfeiture statutes are "strictly construed against the state and every word, clause, sentence and provision of such statutes is presumed to have been intended by the legislature to have effect and be operative." *Id.* (quoting *Eberenz*, 805 S.W.2d 359 at 360). *See also* State v. Hampton, 817 S.W.2d 470, 472 (Mo. Ct. App. 1991) (citing United States v. One 1936 Model Ford V-8, 307 U.S. 219 (1939)) ("Since the law abhors a forfeiture, before a petition is sustained and forfeiture enforced both the letter and the spirit of the law authorizing the forfeiture must be complied with strictly."

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513.605(3) of CAFA, the court noted that the action upon which forfeiture is based must be chargeable by indictment or information.[49] However, the statute does not explicitly require the government to file any charges.[50] Despite no explicit requirement that the State bring charges against the owner resulting in a guilty plea or a conviction, the court held that these were implied prerequisites to forfeiture under CAFA.[51]

The court based its decision on provisions that were added to CAFA in 1993. Section 513.617.1 provides that if a person is arrested, detained, or apprehended, but not charged with any crime, that person's property is not subject to forfeiture.[52] If the State chooses to file criminal charges after arrest, detention, or apprehension, the forfeiture proceeding must be stayed until the criminal proceedings are finished.[53] Then, only if the person is convicted or found guilty can the person's property be forfeited.[54] The court noted that a literal reading of this section seemed to allow the State to seek forfeiture without a conviction or a guilty plea as long as the State did not arrest, detain, or apprehend the individual. The court, however, recognized that this would be an irrational result.[55] Therefore, the court rejected that construction of the statute and held that a conviction or guilty

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49. 896 S.W.2d at 537.

50. *Id.* at 537. Furthermore, the court noted that § 513.630 requires the running of the statute of limitations for forfeiture to be tolled "[i]f a criminal prosecution or civil action is brought by the state relating to the conduct which would constitute criminal activity." *Id.* The court relied on the use of the word "if" to indicate that the legislature knew that criminal prosecution or a civil action may not always be brought by the state in cases of asset forfeiture. *Id.* at 537-38.

51. *Id.* at 538.

52. *Id.*

53. Section 513.617.1 states:

> In the event criminal charges arising from the same activity giving rise to the CAFA proceeding are filed against any individual claiming an interest in the property subject to the CAFA proceeding, such CAFA proceeding shall be stayed by the court until the disposition of the criminal charges. In such cases, no property shall be forfeited unless the person charged is found guilty of or pleads guilty to a felony offense substantially related to the forfeiture. The property of persons arrested, detained or apprehended and not subsequently charged is not subject to forfeiture for that arrest, detention or apprehension. The rights of an innocent owner of property are superior to any right or claim of the state or county, and such rights shall be enforced pursuant to the provisions of sections 513.610 to 513.620.

MO. REV. STAT. § 513.617.1 (1994).

54. *Id.*

55. The court stated:

> Reading section 513.617.1 literally, one could determine that CAFA forfeitures are permissible in situations wherein the state has not arrested, detained, apprehended or charged an individual with the underlying criminal activity—in essence, where the State has done nothing whatsoever to pursue criminal punishment. Such an interpretation of CAFA would create an illogical result, however.

896 S.W.2d at 538.

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plea was a prerequisite to forfeiture. The court found that section 513.617.1 was evidence of the legislature's intent to impose a condition of criminal conviction or a guilty plea in all cases before the government could seek forfeiture.[56] The court concluded that "the legislature intended to require a guilty plea or conviction not only when one named in a CAFA action is arrested, detained or apprehended, but also in situations where the State has done little or nothing to pursue criminal prosecution."[57]

IV. FEDERAL FORFEITURE LAW

The federal government also has an asset forfeiture law, the Comprehensive Drug Abuse Prevention and Control Act ("the Act").[58] This law was enacted by Congress in 1970 to provide the federal government both criminal and civil forfeiture powers. Section 881 of this act is a special provision authorizing the civil forfeiture of assets used to facilitate illegal drug transactions or to acquire the proceeds of such criminal activity.[59] The federal statute contains an expansive list of property subject to forfeiture.[60] Like CAFA, the federal statute provides that certain property is exempt from forfeiture if the property is owned by a person who had no

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56. *Id.* at 538. The court concluded "that the legislature meant to require a guilty plea or criminal conviction in forfeiture matters after the 1993 statute went into effect." *Id.*

57. *Id.* The court also addressed the amount of involvement required between the owner's criminal activity and the property in order to trigger CAFA. *Id.* at 538-41. Because CAFA exempts the property of an innocent person from forfeiture, MO. REV. STAT. § 513.615 (1994), the court held that some involvement by the property owner is required before forfeiture is proper. 896 S.W.2d at 539.

In State v. Washington, 902 S.W.2d 893 (Mo. Ct. App. 1995), the State brought a forfeiture action to seize Reba Washington's car after she was charged with carrying a concealed weapon in violation of MO. REV. STAT. § 571.030.1(1) (1993). *Id.* at 892. The Missouri Court of Appeals affirmed the lower court's grant of directed verdict for Washington, stating that forfeiture of Washington's car was not appropriate because the state could not show criminal activity. *Id.* at 894. On the criminal charges, the trial court found the State's witnesses not credible and granted defendant's motion to suppress the gun. *Id.*

58. 21 U.S.C. §§ 801-971 (1994). Federal laws authorize criminal forfeiture under 18 U.S.C. § 982 and 21 U.S.C. § 853 and civil forfeiture under 18 U.S.C. § 981 in cases involving money laundering, currency transaction reporting violations, or banking law violations, and 21 U.S.C. § 881 in cases involving drug law violations.

59. The procedure for a federal forfeiture action is very similar to that of a state forfeiture action.

60. Property subject to forfeiture under the Act includes controlled substances, 21 U.S.C. §§ 881(a)(1) & (a)(8), materials and equipment used to produce controlled substances, 21 U.S.C. § 881(a)(2), containers used for controlled substances or chemicals, 21 U.S.C. § 881(a)(3), conveyances used for the transportation of drugs, 21 U.S.C. § 881(a)(4), records, 21 U.S.C. § 881(a)(5), money, 21 U.S.C. § 881(a)(6), real property, 21 U.S.C. § 881(a)(7), firearms, 21 U.S.C. § 881(a)(11), and drug paraphernalia, 21 U.S.C. § 881(a)(10).

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knowledge or did not consent to the illegal act committed on the property.[61] Notwithstanding this exception, asset forfeiture under federal law is particularly harsh, stripping an individual of property for no apparent reason.[62]

The federal statute is also similar to CAFA because the filing of information or an indictment can result in a stay of the forfeiture proceeding.[63] However, the statute does not expressly require the government to bring any charges and, to date, the United States Supreme court has not taken action comparable to that in *5708 Paseo*,[64] requiring that an owner must always be charged and convicted before forfeiting his property. Under federal law the government may seize a person's property regardless of whether the person was charged or convicted of a crime. Therefore, under federal law, a person in Missouri may still have his property forfeited to the federal government without being charged or convicted of any crime, even though the state government is not allowed to do the same thing under Missouri's forfeiture law. There are, however, constitutional limitations on forfeiture.

The Supreme Court has recognized three constitutional limitations on the application of forfeiture statutes. These limitations apply to both federal forfeiture statutes and Missouri's CAFA.[65]

In *Austin v. United States*,[66] the Supreme Court held that the Eighth Amendment's Excessive Fines Clause[67] limits the amount of forfeiture

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61. This exception applies only to money, 21 U.S.C. § 881(a)(6), real property, 21 U.S.C. § 881(a)(7), and conveyances used for the transportation of drugs, 21 U.S.C. 881(a)(4)(C).

Furthermore, the exception applies only where stated explicitly in the statute. For a discussion of cases holding that the innocence of the owner is not a common law defense to forfeiture, see Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

62. The Eighth Circuit has summarized:

> First, courts, including the United States Supreme Court, have held that the United States may adopt a seizure even when the person who seized the property had no authority to seize the property, or the initial seizure was constitutionally tainted. . . . Second, no preseizure notice or hearing is required before a federal agency may seize personal property subject to forfeiture for violation of federal drug laws.

Madewell v. Downs, Grootens and Prine, 68 F.3d 1030, 1038 (8th Cir. 1995) (citations omitted).

63. 21 U.S.C. § 881(i) (1994).

64. 896 S.W.2d 532 (Mo. Ct. App. 1995).

65. These limitations apply to the states as well, because most of the first eight Amendments have been incorporated to the states through the Fourteenth Amendment.

66. 113 S. Ct. 2801 (1993).

67. The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

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imposed as punishment.[68] In an opinion written by Justice Blackmun, the Supreme Court noted that the Eighth Amendment is not limited to criminal cases but applies to civil proceedings as well.[69] Because the purpose of the Eighth Amendment is to limit the government's power to punish, the question was whether forfeiture under sections 881(a)(4) and (a)(7) should be considered punishment.[70] The Court undertook an extensive evaluation of prior cases and determined that "forfeiture generally and statutory in rem forfeiture in particular historically have been understood, at least in part, as punishment."[71] Finding these provisions punitive in nature, the Court held that[72] the statute was subject to the Excessive Fines Clause of the Eighth Amendment.[73]

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68. In *Austin*, the defendant was indicted for violation of federal drug laws in South Dakota and pled guilty to possession of cocaine with intent to distribute. 113 S. Ct. at 2803. Approximately one month later, the federal government filed an in rem forfeiture action for his mobile home and auto body shop. The government brought this action under 21 U.S.C. § 881(a)(4) and (a)(7). The United States then moved for summary judgment. In opposition to that motion, Austin claimed that forfeiture of the property would violate the Eighth Amendment to the Constitution. The district court granted summary judgment for the government and the Eighth Circuit affirmed. United States v. One Parcel of Property, 964 F.2d 814, 817 (8th Cir. 1992). The Supreme Court then granted certiorari to resolve a conflict that had arisen on this issue between the Second and Eighth Circuits. 113 S. Ct. at 2804.

69. The Court cited prior cases holding that various provisions in the Bill of Rights applied to forfeiture proceedings, but that other provisions did not. 113 S. Ct. at 2805 n.4.

70. Section 881 states:

(a) Subject property

> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
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> . . .
>
> (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), . . .
>
> (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of any owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C. § 881 (1994).

71. 113 S. Ct. at 2810.

72. *Id.* The fact that both provisions exempted the property of innocent owners from forfeiture was evidence that these sections were designed as punishment. *Id.* Furthermore, the Court relied in part on the legislative history of § 881 to determine that the purpose of this forfeiture statute was to punish criminals. *Id.* at 2811 (quoting S. REP. NO. 225, 98th Cong., 1st Sess. 191 (1983)).

73. The Court remanded for determination whether the forfeiture in this case was constitutionally excessive. *Id.* at 2812. The Court specifically refused to establish a test to determine whether a particular forfeiture is excessive. *Id.*

Contrary to *Austin*, in a subsequent case, the Missouri Court of Appeals held that "[f]orfeiture of

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In *United States v. James Daniel Good Real Property*,[74] the Supreme Court held that the due process clause of the Fifth Amendment[75] requires the government to give notice and meaningful opportunity to be heard before it may seize real property through civil forfeiture proceedings, unless there are exigent circumstances.[76] Applying a three part test,[77] the Court held that due process requires a hearing before seizure in in rem forfeiture proceedings.[78] In addition, the Court held that the defendant's right to maintain control over his property is an important private interest.[79] Ex parte seizures create a large risk of an erroneous deprivation with little protection for an innocent party.[80] Finally, the government could implement other procedures that would safeguard the property without putting a large burden on the government.[81]

The Fifth Amendment also provides protection against multiple

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the proceeds of the sale of contraband drugs is not a fine. Thus, such forfeiture is not punitive and the Eighth Amendment is inapplicable." State v. Meister, 866 S.W.2d 485 (Mo. Ct. App. 1993). That case involved MO. REV. STAT. § 195.140.2(2), which provides that money found in close proximity to illegal drugs is presumed to be forfeitable as the proceeds of illegal activity. The court stated:

> When the subject matter of a forfeiture proceeding is more than the proceeds of the illegal activity, assuming arguendo that the Excessive Fines Clause applies to the states, an examination of whether the forfeiture is punitive and then whether the forfeiture is excessive is required by the Eighth Amendment. However, when the property to be forfeited is found to be the proceeds of illegal activity, either by unrebutted statutory presumption or by a trier of fact, the forfeiture is not punitive because one who commits a crime has no greater interest in the fruits of the crime than the state, and the Eighth Amendment is not applicable.

Meister, 866 S.W.2d at 491.

74. 114 S. Ct. 492 (1993).

75. The Fifth Amendment provides in part that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V.

76. In *Good*, James Daniel Good pled guilty to a Hawaii drug charge. 114 S. Ct. at 497. More than four years later, the United States filed an in rem action for forfeiture of Good's house and real property, alleging that it had been used to commit a federal drug crime. *Id.* The United States sought forfeiture under 21 U.S.C. § 881(a)(7). A judge issued an ex parte order to seize the property and the seizure was conducted three days later without prior notice to Good. *Id.* Good claimed the seizure deprived him of his property without due process of law. *Id.* at 498. The district court, however, granted summary judgment to the government, but the Court of Appeals for the Ninth Circuit reversed in part, holding that the seizure without notice was a violation of due process. *Id.*

77. The three part test originated in Mathews v. Eldridge, 424 U.S. 319 (1976).

78. The Court distinguished its previous holding in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), that seizure of personal property without a prior hearing did not violate due process.

79. *Id.*

80. *Id.* at 502.

81. "Because real property cannot abscond, the court's jurisdiction can be preserved without prior seizure." *Id.* at 503.

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punishments for the same offense.[82] In *United States v. Halper*,[83] the Supreme Court held that the Double Jeopardy Clause prohibits the government from bringing a separate civil action after already criminally punishing a defendant for the same offense, unless the civil action could be fairly characterized as remedial.[84] The Court noted that the Double Jeopardy Clause would not apply in a case in which the government seeks compensation for its costs[85] or where there are multiple punishments sought in the same action.[86] However, when a second sanction is clearly a deterrent or retribution, it is a punishment forbidden by the Fifth Amendment.[87]

V. CONCLUSION

Under both Missouri's CAFA and the Federal Comprehensive Drug Abuse Prevention and Control Act, there is a strong potential for government abuse. Absent the constitutional limitations recognized by the Supreme Court,[88] defendants have little protection in asset forfeiture actions. Because no corresponding charge of criminal activity is required, individuals may have their property confiscated with little opportunity to prove their innocence. If the state never charges the individual with a crime, the person's only hope of vindicating himself is at a forfeiture hearing where he has the burden of proof and the evidence is already stacked against him.

In *5708 Paseo*, the Missouri Court of Appeals corrected the potential for

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82. The Fifth Amendment provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb. . . ." U.S. CONST. amend. V.

83. 490 U.S. 435 (1989).

84. *Id.* at 448-49. The defendant in *Halper* was previously sentenced to federal prison and fined $5,000 for violating the criminal false-claims statute, 18 U.S.C. § 287 (1994). *Id.* at 437. The government then brought action for violating the Civil False Claims Act, 31 U.S.C. §§ 3729-31 (1994). The District Court for the Southern District of New York held for the government but limited damages to $1,170 plus costs, less then the asked for $130,000. 660 F. Supp. 531 (S.D.N.Y.), *or reh'g*, 664 F. Supp. 852 (S.D.N.Y. 1987). The government appealed directly to the Supreme Court. 490 U.S. at 440.

85. *Id.* at 449.

86. *Id.* at 450-51.

87. *Id.* at 449. The Court is currently reviewing a Third circuit Court of Appeals decision which holds that forfeiture of proceeds from drug trafficking is always proportional to the harm and thus does not constitute a punishment under the Double Jeopardy Clause. United States v. $184,505.01 in U.S. Currency, 72 F.3d 1160 (1995), *cert. granted sub nom.* McGlory v. United States, 64 U.S.L.W. 40 (U.S. Apr. 23, 1996) (No. 95-1575).

88. *See supra* notes 65-87 and accompanying text.

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abuse in asset forfeiture cases by requiring the state to obtain a conviction or guilty plea before seizing property.[89]

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89. State v. Residence Located at 5708 Paseo, Kansas City, Mo., 896 S.W.2d 532 (Mo. Ct. App. 1995).

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