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Constitutional Issues in North Dakota Asset Forfeiture Law after Austin v. United States, Alexander v. United States, and United States v. Good Real Property

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CONSTITUTIONAL ISSUES IN NORTH DAKOTA ASSET FORFEITURE LAW AFTER *AUSTIN V. UNITED STATES*, *ALEXANDER V. UNITED STATES*, AND *UNITED STATES V. GOOD REAL PROPERTY*

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I. INTRODUCTION

Forfeiture of property that has been used for unlawful purposes is a remedy with ancient beginnings.

> The conceptual underpinnings of civil forfeiture can be traced back to ancient Roman and medieval English law, both of which made objects used to violate the law subject to forfeiture to the sovereign. Our laws providing for official seizure of property used in criminal activity perpetuate the legal fiction that "property used in violation of law was itself the wrongdoer that must be held to account for the harms it had caused." Because the property, or res, is considered the wrongdoer, it is regarded as the actual party to in rem forfeiture proceedings.[1]

Today, asset forfeitures are one of the most effective weapons available to law enforcement in the battle against organized crime and the war on drugs. The federal asset forfeiture statutes, as well as North Dakota's statutes, allow forfeiture of the proceeds of criminal activity or the instrumentalities of crime without conviction of the underlying crime.[2]

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1. United States v. Daccarett, 6 F.3d 37, 45 (2d Cir. 1993) (citations omitted).

2. N.D. CENT. CODE § 29-31.1-04 (1991) (stating that "[f]orfeiture is a civil proceeding not dependent upon a prosecution for, or a conviction of, a criminal offense. . . ."); *see also* One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 233-235 (1972) (holding that forfeiture was not barred by either collateral estoppel or double jeopardy when the claimant has been acquitted of the underlying criminal charges); State v. One Chevrolet Pickup, No. 940066 (N.D. Oct. 27, 1994) (stating that because the burden of proof for forfeiture of property is different from the burden of proof for a crime, "neither a criminal charge nor a criminal conviction of a felony is a prerequisite to civil

An asset forfeiture is a civil, rather than a criminal proceeding.[3] However, some courts describe forfeiture actions as a quasi-criminal action.[4] Once the government has established probable cause[5] that the asset is forfeitable, the burden shifts to the claimant to prove by a preponderance of evidence[6] that the property should not be forfeited.[7] This standard of proof is a departure from the "innocent until proven guilty" and "beyond a reasonable doubt" concepts of traditional criminal law. Because of this lower level of proof for the government, and because forfeitures are usually directed against high profit crimes such

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forfeiture").

3. N.D. CENT. CODE § 29-31.1-04 (1991); *see also* State v. Ronngren, 356 N.W.2d 903, 906 (N.D. 1984) (forfeitures are considered civil in nature).

4. United States v. $7,850.00 in U.S. Currency, 7 F.3d 1355, 1357 (8th Cir. 1993); United States v. Lot 7 and Lot 8, Block 14, 876 F.2d 1362, 1369 (8th Cir. 1989).

5. *See* United States v. 508 Depot Street, 964 F.2d 814, 816 (8th Cir. 1992) (stating that in forfeiture proceedings, the burden of establishing probable cause by the government requires only a showing that reasonable grounds exist to believe that the property was used or is intended to be used for prohibited purposes). *See also* United States v. Daccarett, 6 F.3d 37, 47 (2d Cir. 1993) (stating that the complaint need not "meet the ultimate trial burden of showing probable cause for forfeiture; it simply needs to establish a 'reasonable belief that the government can show probable cause for forfeiture at trial'") (quoting United States v. U.S. Currency in the Amount of $150,660.00, 980 F.2d 1200, 1204-05 (8th Cir. 1992)). *See also infra* notes 87-88 and accompanying text (discussing the division between circuits over whether a "substantial connection" to criminal activity is required or only a "nexus").

"Whether probable cause exists is a question of law." State v. Birk, 484 N.W.2d 834, 837 (N.D. 1992) (citations omitted). "Probable cause is only a minimal, threshhold burden . . . [,] greater than mere suspicion, but . . . less than that needed to convict for the suspected crime." State v. One 1990 Chevrolet Pickup, No. 940066, slip op. at 8-9 (N.D. Oct 27, 1994). The probable cause required to institute forfeiture is the same requirement that applies to seizure warrants. United States v. $149,442.43 in United States Currency, 965 F.2d 868, 876 (10th Cir. 1992). North Dakota adopted the "totality of the circumstances" test for determining probable cause. State v. Ringquist, 433 N.W.2d 207, 211 (N.D. 1988). This test is satisfied "when facts and circumstances within a police officer's knowledge and of which he has reasonable, trustworthy information are sufficient to warrant men of reasonable caution in believing that an offense has been or is being committed." State v. Bauder, 433 N.W.2d 552, 553 (N.D. Ct. App. 1988); *see also* United States v. Property at 255 Broadway, Hanover, 9 F.3d 1000, 1004 (1st Cir. 1993); *Birk*, 484 N.W.2d at 837, 839-40. In evaluating a probable cause determination, the North Dakota Supreme Court does not weigh the evidence, but ascertains "whether there was some relevant evidence to support the finding of probable cause." Hinkel v. Racek, 514 N.W.2d 382, 383 (N.D. 1994). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.*

6. *See* State v. One 1990 Chevrolet Pickup, No. 940066, slip op. at 9 (N.D. Oct. 27, 1994). *See also* United States v. 508 Depot Street, 964 F.2d at 816 (stating that once the government has met its burden of showing probable cause, the burden shifts to the claimant to show that the property is not forfeitable). "The claimant cannot meet this burden by simply resting on his or her pleadings; instead, the claimant 'must set forth specific facts by affidavits or otherwise showing that there is a genuine issue for trial' . . . '[i]f unrebutted, a showing of probable cause alone will support forfeiture.'" *Id.* (citations omitted).

7. *See, e.g.*, United States v. 508 Depot Street, 964 F.2d 814, 816 (8th Cir. 1992); State v. $2585.00 United States Currency, Civ. No. 16,249, Burleigh County Dist. Ct. Order (N.D. July 9, 1992) (stating that once the state has established probable cause for forfeiture, the burden shifts to those claiming the property to prove that the property is not subject to forfeiture).

as drug dealing, asset forfeitures elicit controversy.[8] The controversy has led some appellate courts to comment adversely on the government's use of forfeitures and to urge lower courts to analyze forfeitures for due process compliance.[9] The controversy has also caused frequent appeals and has led to rapidly changing case law.

This article will address the constitutional issues affecting asset forfeitures following the several forfeiture decisions of the United States Supreme Court during 1993. Accordingly, it will analyze possible challenges to forfeitures based upon double jeopardy, excessiveness, and due process.

The United States Supreme Court decided three important forfeiture cases in 1993: *Austin v. United States*,[10] *Alexander v. United States*,[11] and *United States v. Good Real Property*.[12] In *Austin*, the Court addressed the applicability of the excessive fines clause of the Eighth Amendment in an *in rem* asset forfeiture.[13] In *Alexander*, the Court addressed excessive fines as applied to an *in personam* asset forfeiture and whether forfeiture of pornographic materials constitutes a prior restraint on a defendant's First Amendment right to freedom of speech.[14] In *Good Real Property*, the Court addressed two due process issues relating to the seizure and forfeiture of real property: ex parte seizure of real property, and the requirement for prompt initiation of forfeiture actions after the seizure.[15] This article will analyze the constitutional issues addressed in these cases and identify the tests for evaluation of each of the issues. Because the United States Supreme Court decisions

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8. *See, e.g.*, United States v. Daccarett, 6 F.3d 37, 46 (2d Cir. 1993) (noting that civil forfeiture is "'one of the most potent weapons in the judicial armamentarium'" and "the favored method for imposing significant economic sanctions against narcotics traffickers." but also noting that "the ease with which the government can seize property and the potential hardships caused to innocent owners who seek to recover their property once the government has seized it have elicited concern from courts and commentators alike" (quoting United States v. 384-390 West Broadway, 964 F.2d 1244, 1248 (1st Cir. 1992))).

9. *See id.* at 57 (cautioning "[w]e therefore stress the need for courts to ensure that what little due process is provided for in the statutory scheme is preserved in practice"); *see also* United States v. All Assets of Statewide Auto Parts, 971 F.2d 896, 905 (2d Cir. 1992) (stating "[w]e continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes").

10. 113 S. Ct. 2801 (1993).

11. 113 S. Ct. 2766 (1993).

12. 114 S. Ct. 492 (1993).

13. Austin v. United States, 113 S. Ct. 2801, 2804 (1993). *In rem* forfeitures are directed at the property itself as the defendant, rather than at the owner. *Id.* For a discussion of the history and theory of *in rem* forfeitures, see *id.* at 2808-2810.

14. Alexander v. United States, 113 S. Ct. 2766, 2769-70. *In personam* forfeitures are directed at the owner of the property, rather than at the property itself. *See* United States v. Busher, 817 F.2d 1409, 1414 n.4 (9th Cir. 1987).

15. United States v. Good Real Property, 114 S. Ct. 492, 497 (1993). Note that different due process considerations come into play during each step of a seizure/forfeiture.

articulate basic constitutional protections, and because of the parallels between North Dakota and federal statutory and constitutional provisions, a similar analysis for state and federal forfeitures is appropriate.[16]

II. NORTH DAKOTA'S ASSET FORFEITURE STATUTES

North Dakota has a number of asset forfeiture statutes.[17] But, because two statutes are similar to the federal statute in substance and purpose, those two statutes, the controlled substances forfeiture statute[18] and the criminal forfeiture statute,[19] are central to this article. Chapter 29-31.1 of the North Dakota Century Code applies to the forfeiture of property associated with any criminal activity; chapter 19-03.1 is the Uniform Controlled Substances Act, containing the forfeiture provisions for property associated with violations of that act.[20] Forfeitures under both statutes are conducted according to the procedures provided for in chapter 19-03.1.[21]

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16. The North Dakota Supreme Court recently decided State v. One Black 1989 Cadillac, No. 930352 (N.D. Oct. 3, 1994), and State v. One 1990 Chevrolet Pickup, No. 940066 (N.D. Oct. 27, 1994), and applied federal interpretations in analyzing the cases.

17. *See, e.g.*, N.D. CENT. CODE § 39-30-03 (Supp. 1993) (authorizing the forfeiture of property used or possessed in connection with an automobile chop shop); *see also id.* § 20.1-10-01 (1991) (authorizing forfeiture of property associated with the violation of game and fish laws).

18. N.D. CENT. CODE §§ 19-03.1-36 to -38 (1991 & Supp. 1993).

19. N.D. CENT. CODE §§ 29-31.1-01 to -10 (1991).

20. *Id.* § 19-03.1-36. Forfeitable property is defined by sections 19-03.1-36(1) and 29-31.1-01(1) of the North Dakota Century Code. These statutes provide that all controlled substances are forfeitable, and all products and equipment used to manufacture any controlled substance are forfeitable. *Id.* § 19-03.1-36(1)(a), (c). In addition, all property used or intended for use as a container for a controlled substance is subject to forfeiture. *Id.* § 19-03.1-36(1)(d). Vehicles, vessels, and aircraft used to transport or facilitate the sale of controlled substances are also subject to forfeiture. *Id.* § 19-03.1-36(1)(e). Under the criminal forfeiture statute, property that is contraband, property that is used to facilitate a crime, property that is used to induce a crime or is proceeds of a crime, or a vehicle used in the commission of a felony is forfeitable. *Id.* § 29-31.1-01(1)(a) - (e). Under this statute, however, the general provision allowing forfeiture of property used to facilitate a crime does not apply to vehicles, which are forfeitable only if the underlying crime is a felony. State v. One 1990 Chevrolet Pickup, No. 940066, slip op. at 5 (N.D. Oct. 27, 1994). This restriction does not apply to vehicles used in association with drug trafficking. Vehicles are forfeitable if "used, or intended for use, to transport, or in any manner to facilitate the transportation, for the purpose of sale or receipt of [controlled substances]." N.D. CENT. CODE § 19-03.1-36 (1991).

21. Subsection 29-31.1-04(2) requires that proceedings brought under chapter 29-31.1 follow the procedures established in sections 19-03.1-36.1 to -36.7. The procedures include a requirement that a summons and complaint be filed in the district court for the county in which the property was seized, N.D. CENT. CODE § 19-03.1-36.3; that the action be brought in the name of the state, *id.* § 19-03.1-36.3; that notice be given to any person having an interest in the property, *id.* § 19-03.1-36.3, and that the complaint list the property to be forfeited, any party with a legal interset in the property, and the underlying criminal activity, *id.* § 19-03.1-36.3. Chapter 19-03.1 also establishes the burden of proof for each party, the hearing procedures, *id.* § 19-03.1-36.6, the establishment of security interests in property to be forfeited, *id.* § 19-03.1-36.7, and qualified immunity for those performing their official duties with respect to the chapter, *id.* § 19-03.1-37(3).

The Uniform Controlled Substances Act allows seizure of forfeitable property without prior notice and a hearing.[22] A seizure of property may be made without process when the seizure is incident to an arrest, incident to a search under warrant, or the law enforcement agency has probable cause to believe that the property has been used or will be used in violation of the Uniform Controlled Substances Act.[23] The criminal forfeiture statute allows seizure without process "whenever and wherever the [forfeitable] property is found within this state . . . by taking custody of the property."[24] Forfeiture proceedings may also begin "by serving upon the person in possession of the property a notice of forfeiture and seizure."[25] When the underlying crime involves the sale of a controlled substance, property may be forfeited under either chapter 19-03.1 or chapter 29-31.1, since the property has been used to violate the Uniform Controlled Substances Act, and the property has also been used to "facilitate the commission of a criminal offense."[26]

III. CONSTITUTIONAL CONTROVERSIES

A. THE EIGHTH AMENDMENT PROHIBITIONS ON CRUEL AND UNUSUAL PUNISHMENT AND EXCESSIVE FINES

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed nor

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22. N.D. CENT. CODE § 19-03.1-36(2) provides:

> Property subject to forfeiture under this chapter, except conveyances, may be seized by the board upon process issued by any district court having jurisdiction over the property. A conveyance subject to forfeiture under this chapter may be seized by a state, county, or city law enforcement agency upon process issued by any district court having jurisdiction over the conveyance. Seizure without process may be made if:
> a. The seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant.
> b. The property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceedings based upon this chapter.
> c. The board or a law enforcement agency has probable cause to believe that the property is directly or indirectly dangerous to health or safety.
> d. The board or a law enforcement agency has probable cause to believe that the property was used or is intended to be used in violation of this chapter.

Id.

23. *Id.*

24. *Id.* § 29-31.1-03 (1991). Forfeitable property is defined at section 29-31.1-01 of the North Dakota Century Code. *See supra* note 20 and accompanying text.

25. N.D. CENT. CODE § 29-31.1-03 (1991). If the court finds that forfeiture is warranted, the property must then be delivered to the seizing agency. *Id.*

26. *See* United States v. 3639 2nd St. N.E., 869 F.2d 1093, 1096 (8th Cir. 1989) (defining "facilitate" as an activity "making the prohibited conduct less difficult or 'more or less free from obstruction or hindrance'") (quoting United States v. One 1977 Lincoln Mark V Coupe, 643 F.2d 154, 157 (3rd Cir. 1981)). *See generally* State v. One 1990 Chevrolet Pickup, No. 940066 (N.D. Oct. 27, 1994) (discussing facilitation).

cruel and unusual punishments inflicted."[27] These same words appear in article I, section 11 of the North Dakota Constitution. Thus, analogies between federal and North Dakota constitutional interpretations are facilitated.[28] Analogies are appropriate, however, only when statutes are similar.

The Eighth Amendment contains two distinct prohibitions against punishments: a prohibition against cruel and unusual punishments and a prohibition against excessive fines.[29] After the Supreme Court's decision in *Austin*, the prohibition against excessive fines is applicable to forfeitures.[30] Because there are two distinct prohibitions against punishment, however, some courts have concluded that two separate constitutional tests are required for forfeitures. The first test determines whether the forfeiture violates the prohibition against cruel and unusual punishment; the second test determines whether the punishment constitutes an excessive fine.[31] Of the cases decided in 1993, *Austin* is the most significant for North Dakota and other states with asset forfeiture statutes because it requires an excessive fines test[32] that most courts did not believe was required prior to the *Austin* decision.

1. *Austin v. United States*

Richard Lyle Austin, the claimant in *Austin*, owned a co-located auto body shop and mobile home in South Dakota.[33] From this property, he made a two gram cocaine sale to an undercover agent.[34] After the state obtained a conviction on the drug charges in state court, the federal government initiated action to forfeit Austin's home and shop

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27. U.S. CONST. Amend. VIII.

28. State v. Goetz, 312 N.W.2d 1, 12 (N.D. 1981). The *Goetz* court stated:

> [g]enerally, where the Legislature [has] adopted a federal statute there is a presumption the Legislature intended to accomplish purposes and objectives similar to those of the Congress which enacted the law[;] [a]lso, where the statute has been construed by the federal courts before the Legislature adopted the statute it is presumed that the Legislature adopted the statute with the construction placed upon it by the federal courts.

Id. Compare N.D. CENT. CODE § 19-03.1-36 (1991) *with* 21 U.S.C. § 881 (1988) (using virtually identical language to list property subject to forfeiture and property subject to seizure without process).

29. U.S. CONST. Amend. VIII.

30. Austin v. United States, 113 S. Ct. 2801, 2812 (1993). Central to the Supreme Court's holding in *Austin* is its conclusion that a forfeiture is punishment. *Id.*

31. *See, e.g.*, United States v. 38 Whalers Cove Drive, 954 F.2d 38, 39 (2d Cir. 1992) [hereinafter *Whalers Cove*] (evaluating proportionality under the cruel and unusual punishments clause, but evaluating excessiveness under the excessive fines clause); *see also* United States v. RR 1 Box 224, 14 F.3d 864, 874 n.10 (3rd Cir. 1994) [hereinafter *Winslow*] (discussing the difference between the excessiveness analysis and that for cruel and unusual punishments).

32. *Austin*, 113 S. Ct. at 2812.

33. *Id.* at 2803.

34. *Id.*

as instrumentalities of crime.[35] This action was successful in district court. Austin appealed to the Eighth Circuit, arguing that the forfeiture of his home and business was an excessive fine under the Eighth Amendment, and that the forfeiture was not proportional[36] to the seriousness of the crime he committed.[37] The Eighth Circuit upheld the forfeiture,[38] and Austin applied for, and was granted, certiorari in the United States Supreme Court.[39] The Supreme Court reversed and remanded the case to the Eighth Circuit to evaluate the excessiveness of the forfeiture in relation to the crime and to develop a test for excessiveness.[40] The Eighth Circuit has not yet reached its decision in the case.

2. *Alexander v. United States*

The Supreme Court announced its decision in *Alexander v. United States* at the same time as *Austin*.[41] The Court also addressed excessiveness in *Alexander*.[42] After a four-month jury trial, Alexander was convicted of seventeen obscenity offenses and three Racketeer Influenced and Corrupt Organizations Act (RICO) offenses.[43] He was sentenced to six years in prison, fined $100,000, and ordered to pay prosecution costs and other related expenses.[44] In addition, he was ordered to forfeit wholesale and retail businesses (which included ten pieces of real estate and thirty-one current or former businesses), the assets from those businesses, and nearly nine million dollars obtained from his racketeering activities.[45]

On appeal, the Eighth Circuit upheld the forfeiture order,[46] holding that the application of the RICO[47] forfeiture provisions did not constitute a prior restraint on speech,[48] and that the order did not violate the Eighth

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35. *Id.*

36. For a discussion of the application of proportionality in determining whether a forfeiture violates the excessive fines clause, *see Winslow*, 14 F.3d at 873-875. *See also infra* part III.A.3 (discussing the proper proportionality test to determine excessiveness).

37. *Id.* at 875.

38. United States v. 508 Depot Street, 964 F.2d 814, 818 (8th Cir. 1992).

39. Austin v. United States, 113 S.Ct. 1036 (1993).

40. *Austin*, 113 S. Ct. at 2812.

41. *Alexander*, 113 S. Ct. 2766 (1993).

42. *Id.*

43. *Id.* at 2769-70.

44. *Id.* at 2770.

45. *Id.*

46. Alexander v. Thornburgh, 943 F.2d 825 (8th Cir. 1991).

47. RICO is the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (1988). The forfeiture provisions are included in 18 U.S.C. § 1963 (1988). The statute provides that all property used in the criminal activity, as well as any interest in such property, as well as property which is the proceeds or profits from the criminal activity may be forfeited. United States v. Busher, 817 F.2d 1409, 1413 (1987).

48. *Alexander*, 953 F.2d at 834.

Amendment's prohibition against "cruel and unusual punishments" and "excessive fines."[49] The court refused to consider, however, whether the forfeiture was "grossly disproportionate or excessive" in violation of the Eighth Amendment.[50]

The Supreme Court concluded that the forfeiture order was not a prior restraint on free speech,[51] but was a "punishment for past criminal conduct."[52] Although the Court held that the RICO forfeiture provisions did not violate the First Amendment, the Court remanded the case to the Eighth Circuit for its determination of whether the penalty was "excessive."[53] The Supreme Court also noted that the analysis employed by the lower court did not distinguish between Alexander's arguments that the forfeiture order was either a "cruel and unusual punishment" or an "excessive fine."[54] The Court explained that although a proportionality review is not required for duration and conditions for confinement other than a life sentence without possibility of parole, that logic did not apply to the need for an evaluation for excessiveness of forfeitures.[55] Because "[t]he Excessive Fines Clause limits the Government's power to extract payment, whether in cash or in kind, as punishment for some offense," and the forfeiture order is "clearly a form of monetary punishment," the Court concluded that the *in personam* forfeiture at issue in *Alexander* must be analyzed under the Excessive Fines Clause.[56]

The clear mandate from *Austin* and *Alexander* is that forfeitures of property imposed by statute for associated criminal activity are subject to review for excessiveness under the Eighth Amendment, whether *in rem* or *in personam*.

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49. *Id.* at 835.

50. *Id.* The Eighth Circuit Court of Appeals concluded that such an examination was not required by reasoning that the Eighth Amendment "'does not require a proportionality review of any sentence less than life imprisonment without the possibility of parole.'" *Id.* at 836 (quoting State v. Pryba, 900 F.2d 748 (4th Cir.), *cert. denied*, 111 S. Ct. 305 (1990)).

51. *Id.* at 2772. Although the First Amendment issues considered in *Alexander* are beyond the scope of this article, the Court's holding was based on the logic that Alexander could open another store to sell printed materials and that no advance determination was being made whether the materials sold at a new store were prohibited. *Id.*

52. *Id.* The *Alexander* Court also noted that it previously rejected First Amendment challenges to stringent prison sentences and fines. *Id.* at 2773. The Court rejected the argument that the RICO forfeiture provisions were overbroad. *Id.* at 2774-75.

53. *Id.* at 2776.

54. *Alexander*, 113 S. Ct. at 2775.

55. *Id.*

56. *Id.* at 2775-76. The court did note, however, that Alexander created and managed an "enormous racketeering enterprise" for a substantial period of time and stated "[i]t is in the light of the extensive criminal activities which petitioner apparently conducted through this racketeering enterprise over a substantial period of time that the question of whether or not the forfeiture was 'excessive' must be considered." *Id.* at 2776.

3. *Application of the Eighth Amendment in the Courts of Appeals*

Prior to *Austin* and *Alexander*, there was a split in the circuits over the need for an excessiveness evaluation of forfeitures.[57] The Second Circuit required an excessiveness test for *in rem* forfeitures, but none of the other circuits did.[58] There was also a split in the circuits over the need for an excessiveness examination of *in personam* forfeitures.[59] The Supreme Court reconciled this split by remanding *Austin* and *Alexander* to the Eighth Circuit for the development of a test for excessiveness.[60] The Court also noted in *Austin* that the Second Circuit currently imposed such a test for *in rem* forfeitures.[61] The Second Circuit has retained the test it developed previous to *Austin*.[62] A decision by the Eighth Circuit in *Austin* should establish the excessiveness test for this circuit. However, because the Second Circuit had an Eighth Amendment test in place prior to *Austin* which it continues to use, and because other circuits now look to the Second Circuit for authority on excessiveness,[63] there is a reasonable possibility that the test developed in the Eighth Circuit will be similar.[64]

The Eighth Amendment forfeiture analysis performed by the Second Circuit is a two-step evaluation to determine first whether the punishment violates the Cruel and Unusual Punishments Clause, and second whether the punishment violates the Excessive Fines Clause.[65] Prior to *Austin* there was no guidance concerning the appropriate analysis for excessiveness,[66] and very little guidance was offered in *Austin* itself, other than to resolve the split between circuits as to the

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57. *Austin*, 113 S. Ct. at 2804.

58. *Compare Whalers Cove*, 954 F.2d 38, 39 (2d Cir. 1992) (applying an excessiveness test to a forfeiture of real property) *with* United States v. 508 Depot Street, 964 F.2d 814, 816 (8th Cir. 1992) (holding that proportionality analysis is not appropriate in civil forfeitures); *see also Winslow*, 14 F.3d 864, 873 (3d Cir. 1994) (noting that the Second Circuit was the only circuit imposing a test for excessiveness before *Austin*).

59. *See* United States v. Sarbello, 985 F.2d 716, 722 (3d Cir. 1993) (discussing the split among the circuits over the need for an excessiveness evaluation of *in personam* forfeitures).

60. *Austin*, 113 S. Ct. at 2812; *Alexander*, 113 S. Ct. at 2776.

61. *Austin*, 113 S. Ct. at 2804.

62. United States v. 835 Seventh St., 832 F. Supp. 43, 48 (N.D.N.Y. 1993) (stating that *Whalers Cove* still controls).

63. *Winslow*, 14 F.3d at 874 (using *Whalers Cove* as the beginning point for its discussion of excessiveness).

64. *See Austin*, 113 S. Ct. at 2804 (citing *Whalers Cove*, 954 F.2d at 35, 38-39, as an example of the split between circuits over the applicability of the Eighth Amendment to *in rem* forfeitures).

65. *Whalers Cove*, 954 F.2d at 38, 39.

66. *See id.* at 39 (lamenting the fact that "the Supreme Court has provided no guidance, except to observe that fines must be closely scrutinized because they benefit the government").

necessity for any Eighth Amendment analysis.[67] Since *Austin*, further discussion has arisen concerning the proper test for excessiveness. One of the more extensive appellate interpretations of *Austin* is found in a Third Circuit case, *United States v. R.R.1 Box 224 (Winslow)*.[68]

The direction offered to district courts by the Third Circuit in *Winslow*[69] suggests a combination of tests from the Second Circuit's *Whalers Cove*,[70] the Supreme Court's *Solem v. Helm*,[71] and its own analysis articulated in *United States v. Sarbello*.[72] In *Whalers Cove*, the Second Circuit indicated it would impose a test for excessiveness similar to the one it imposed for proportionality, which is the three-part test from *Solem v. Helm*.[73] Although the *Solem* analysis has been questioned in later cases,[74] it remains the only widely accepted test for proportionality.[75] To be in violation of the Cruel and Unusual Punishments Clause, under *Solem v. Helm*, the punishment must be "grossly disproportionate" to the crime committed.[76] The three factors to be considered to determine whether a punishment is disproportionate are "(1) the inherent gravity of the offense; (2) the sentences imposed for similarly grave offenses in the same jurisdiction; and (3) sentences imposed for the same crime in other jurisdictions."[77]

A possible indicator of the future direction for courts in Eighth Amendment excessiveness analysis may also be found in the analysis currently used for *in personam* forfeitures.[78] Partially because the requirement for proportionality review of RICO forfeitures was required by statute, and also because the proportionality review of *in personam* forfeitures was more clearly required by the Eighth Amendment, the

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67. *See Austin*, 113 S. Ct. at 2812 (declining the invitation by Austin to establish a test for excessiveness and directing the lower courts to formulate such a test).

68. 14 F.3d at 873 (questioning the excessiveness analysis in *Whalers Cove* in light of the Supreme Court's holding in *Austin*).

69. *Winslow*, 14 F.3d at 873-875.

70. 954 F.3d 38 (2d Cir. 1992).

71. 463 U.S. 277 (1983).

72. 985 F.2d 716 (3d Cir. 1993).

73. *See Whalers Cove*, 954 F.2d at 39 (declining to decide at what level a forfeiture becomes excessive, but indicating that excessiveness would be determined by comparing the value of the forfeiture to the fine imposed for the crime in the federal penal system and in the various states).

74. Harmelin v. Michigan, 111 S. Ct. 2680, 2705 (1991); *see also*, Neal v. Grammer, 975 F.2d 463, 465 (8th Cir. 1992) (holding that in light of Harmelin v. Michigan, the Eighth Circuit would only review a sentence to determine if it is "grossly 'disproportioned' to the crime").

75. *Winslow*, 14 F.3d at 874 n.10 (distinguishing *Harmelin* as addressing the cruel and unusual punishments clause, rather than the excessive fines clause).

76. *Whalers Cove*, 954 F.2d at 38 (*quoting* Solem v. Helm, 463 U.S. 277, 290-92 (1983)).

77. *Id.*

78. *See, Winslow*, 14 F.3d 864, 875 (3d Cir. 1994) (suggesting that district courts look to an *in personam* decision, United States v. Sarbello, 985 F.2d 716 (3d Cir. 1993), for direction in performing a proportionality analysis for excessive fines).

case law imposing such a test is more abundantly available.[79] The test adopted by those circuits which have adopted an excessiveness test for *in personam* forfeitures is a combination of the *Solem v. Helm* three-part proportionality test with the statutory RICO test of the relationship of the property to the crime.[80] This combination test may well be applied to *in rem* forfeitures as well if lower courts interpret *Austin* with a view toward Justice Scalia's concurring opinion.[81]

In his concurrence in *Austin*, Justice Scalia maintained that the only appropriate excessive fines analysis to be performed in an *in rem* asset forfeiture is a measure of the relationship of the property to the crime.[82] In Scalia's opinion, the value of the asset is not important: "[s]cales used to measure out unlawful drug sales, for example, are confiscable whether made of the purest gold or of the basest metal."[83] Although the majority would not go so far as to endorse the relationship between property and offense as the only criteria for an excessive fines analysis, they agreed that it could be a factor.[84] The connection of the property to the crime is also the initial test to determine whether property is forfeitable,[85] and is part of the proportionality analysis required by statute for an *in personam* RICO forfeiture.[86] Because of the availability of the test, and because of Justice Scalia's concurring opinion, it is highly likely that criminal taint of the property, or a nexus between the property and the crime will be part of any proportionality test developed.

The Second Circuit had adopted a nexus test to establish probable cause, the initial burden for the government in a forfeiture, prior to *Austin*.[87] Unfortunately, the circuits do not agree as to the proper test for the relationship of the property to the crime.[88] Some circuits require

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79. *See, e.g., Sarbello*, 985 F.2d at 724; *see also* United States v. Busher, 817 F.2d 1409, 1415 (9th Cir. 1987). Both cases held that the Eighth Amendment's excessive fines clause applies to RICO forfeitures.

80. *Busher*, 817 F.2d at 1415-16; *see also Sarbello*, 985 F.2d at 721-24.

81. Austin v. United States, 113 S. Ct. 2801, 2815 (1993) (Scalia, J., concurring).

82. *Id.*

83. *Id.*

84. *Id.* at 2812 n.15.

85. United States v. 4492 Livonia Rd., 889 F.2d 1258, 1268-69 (2d Cir. 1989).

86. *Sarbello*, 985 F.2d at 724; *Busher*, 817 F.2d at 1416. Both cases held that forfeiture of a partially legitimate enterprise is proportional only to the extent of the approximate criminal taint of the enterprise.

87. *See 4492 Livonia Rd.*, 889 F.2d at 1269 (rejecting the argument that forfeiture requires a "substantial connection" between the crime and the property and holding that a "nexus" between drug activity and the property is sufficient); *see also Whalers Cove*, 954 F.2d at 33 (affirming that "nexus" is sufficient); United States v. Daccarett, 6 F.3d 37, 56 (2d Cir. 1993) (defining the "nexus" standard as "reasonable grounds" amounting to "more than mere suspicion" but less than "prima facie proof").

88. *See* United States v. 427 and 429 Hall Street, 842 F. Supp. 1421, 1426 n.10 (M.D. Ala. 1994) (discussing the division between circuits over the proper test for establishment of probable cause).

only a nexus, others require a "substantial connection," and others have not decided the issue.[89] If "substantial connection" were used as the initial burden to be met by the government in a forfeiture, it would appear that Justice Scalia's test for excessivenness would be satisfied, and further analysis for excessiveness would be unnecessary unless the forfeiture is financially "grossly" or "overwhelmingly" excessive. The Second Circuit now favors this test.[90]

If the initial probable cause determination is used as the relationship test for excessiveness, it may greatly simplify a trial court's determination of forfeitability.[91] This may not be acceptable in some instances, however, depending upon the appellate requirements of independent evaluation of the probable cause and excessiveness tests.[92] An example of the use of the initial probable cause determination as the sole relationship test for excessiveness and how it may simplify a trial court's determination of forfeitability is seen in *United States v. 427 and 429 Hall Street*.[93] In *Hall Street*, the Alabama district court adopted Justice Scalia's nexus test, finding that a grocery store which had been used extensively for illegal drug transactions was sufficiently related to the crime to render the grocery store forfeitable without comparison of the value of the property to the severity of the offense.[94]

In a more careful interpretation of *Austin*, the District Court for the Northern District of Illinois decided that an excessiveness evaluation is required for an instrumentality of crime, but is not required for contraband.[95] The court used an expanded definition of contraband, finding that the proceeds of drug sales were contraband, but that money intended to be used for drug purchases was an instrumentality, and hence subject to an excessiveness test.[96] The District Court for the Eastern District of Illinois used a different logic to reach the same conclusion: that proceeds are forfeitable without regard to proportionali-

89. *Id.*

90. *Whalers Cove*, 954 F.2d at 38-39.

91. *See* United States v. 427 & 429 Hall Street, 842 F. Supp. 1421, 1429 (M.D. Ala. 1994) (finding that the initial probable cause showing by the government was also sufficient to fulfill Justice Scalia's relationship test for excessiveness).

92. *See, e.g., Winslow*, 14 F.3d at 873 (suggesting that district courts should avoid combining the Eighth Amendment inquiry with the nexus requirement, even though the two tests share some characteristics).

93. 842 F. Supp. 1421, 1430 (M.D. Ala. 1994) (finding that the property was an instrumentality of crime, that the property was "substantially connected" to the sale of drugs, and hence was forfeitable).

94. United States v. 427 & 429 Hall Street, 842 F. Supp. 1421, 1430 (M.D. Ala. 1994).

95. United States v. $45,140.00 Currency, 839 F. Supp 556, 558 (N.D. Ill. 1993).

96. *Id.*

ty, but that an instrumentality must be analyzed for compliance.[97] The Eastern District used the "relation back doctrine," which vests the government's interest in property at the time that the crime is committed.[98] Under this doctrine, the district court was able to state that "[i]f an item is a proceed of an illegal drug transaction, its forfeiture is exclusively remedial, as it cannot be considered punishment to take away something the claimant never legitimately owned."[99] Under the logic developed by these federal district courts in Illinois and Alabama, proceeds of criminal activity are forfeitable without regard to proportionality, but an instrumentality must be analyzed. That analysis must at least in part take into account the association of the property with the crime committed.[100]

While much division remains on the tests to be applied, some procedural steps in an Eighth Amendment challenge of an asset forfeiture appear to be widely accepted. As an initial matter, it appears that the burden is on the claimant to show that the forfeiture is excessive,[101] or grossly disproportionate, to the seriousness of the crime.[102] Once this burden has been met, "the district court must make a determination . . . that the interest ordered forfeited is not so grossly disproportionate to the offense committed as to violate the [E]ighth [A]mendment."[103] The determination by the district court should be made using the three factor test from *Solem v. Helm*.[104] When performing the test from *Solem v. Helm*, it is important that the court include the total punishment imposed for the offense, including both the forfeiture and the criminal punishments such as fines or incarceration.[105]

Asset forfeitures promise to be the subject of widespread litigation as trial and appellate courts struggle with the implications of *Austin* and *Alexander* with little guidance from the Supreme Court and a division between circuits. The one premise on which all courts will now be bound, however, is that forfeitures which are "grossly disproportionate" to the crime committed will be analyzed for violation of the Eighth

97. United States v. Assets of West Side Bldg. Corp., 843 F. Supp. 377, 385 (N.D. Ill. 1994).

98. *Id.*

99. *Id.* at 383 (citing Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624-28 (1989)).

100. *Hall Street*, 842 F.Supp. at 1429 (adopting Justice Scalia's logic of relationship to the crime as the exclusive test); *see also West Side Bldg.*, 843 F. Supp. at 385-86. (stating that in order to perform a proportionality analysis, the court must know the crime committed as well as the nature and value of the property sought to be forfeited).

101. *Busher*, 817 F.2d at 1415.

102. *Sarbello*, 985 F.2d at 724.

103. *Busher*, 817 F.2d at 1415.

104. 463 U.S. at 290-92; *see also Busher*, 817 F.2d at 1415.

105. *Busher*, 817 F.2d at 1415 n.10.

Amendment's Excessive Fines Clause. A closely related analysis is brought to bear for possible violations of the Double Jeopardy Clause.

B. THE FIFTH AMENDMENT PROTECTION AGAINST DOUBLE JEOPARDY

The Double Jeopardy Clause of the Fifth Amendment "protects against three abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense."[106]

As an initial matter, double jeopardy is not invoked when the second penalty or prosecution is not pursued by the same sovereign,[107] unless one sovereign is shown to be acting as the tool of the other.[108] This is particularly significant when controlled substances are involved, since joint state and federal task forces are frequently used for drug investigations.[109] The result of this cooperation may be a sharing of forfeited property by the two sovereigns.[110] This sharing of property, however, is not sufficient to show that one sovereign is acting as the tool or agent of the other.[111] In order to invoke double jeopardy, the defendant must show either that the second prosecution was pursued as a "cover" or "sham," for the other sovereign, or that one sovereign acted as a "tool" of the other.[112] Defendants seldom prevail on a double jeopardy claim based on the "tool" or "sham" logic.[113]

Although the *Austin* decision addressed excessive fines, the *Austin* Court referred to *United States v. Halper*,[114] a double jeopardy case, as precedent for the principle that punishment "'cuts across the division between the civil and the criminal law.'"[115] Because the Court spoke in terms of punishment, defense attorneys are now raising the issue of double jeopardy when a forfeiture is imposed at a proceeding separate

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106. United States v. Halper, 490 U.S. 435, 440 (1989) (construing U.S. CONST. Amend. IV.).

107. Heath v. Alabama, 474 U.S. 82, 88 (1985).

108. *Whalers Cove*, 954 F.2d at 38.

109. *See, e.g., id.* (discussing the effect of cooperative agency investigation). Double jeopardy is discussed in cases of cooperation between state and federal law enforcement agencies). United States v. Aboumoussallem, 726 F.2d 906, 909 (2d Cir. 1984); United States v. Russotti, 717 F.2d 27, 31 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1273 (1984); United States v. Bartlett, 856 F.2d 1071, 1074 (8th Cir. 1988); United States v. Bernhardt, 831 F.2d 181, 182-83 (9th Cir. 1987).

110. *See* 21 U.S.C. § 881(e)(1)(A) (1988) (allowing the Attorney General of the United States to transfer forfeited property to a cooperating law enforcement agency).

111. *Whalers Cove*, 954 F.2d at 38.

112. *Aboumoussallem*, 726 F.2d at 910.

113. *Id.* For a discussion of *almost* prevailing on such a double jeopardy claim, see *Bernhardt*, 831 F.2d at 182-83. The district court had approved the Bernhardts' double jeopardy claim, but the Ninth Circuit Court of Appeals remanded for further factual determinations.

114. 490 U.S. 436 (1989).

115. *Austin*, 113 S. Ct. at 2805 (quoting *Halper*, 490 U.S. at 447-48).

from the criminal trial.[116] There are some hints in *Austin* that the Court may be leaning toward such a position,[117] but case law before and after *Austin* indicates otherwise.[118]

For double jeopardy analysis of asset forfeitures, the question becomes, not whether the forfeiture is punishment, but whether it is a criminal punishment. If the punishment is criminal, then it becomes subject to the double jeopardy prohibition of the Fifth Amendment. An early case reaching this conclusion, and distinguishing between civil and criminal punishments for double jeopardy purposes is *Helvering v. Mitchell*.[119] In *Mitchell*, the Court stated that the "double jeopardy clause prohibits merely punishing twice, or attempting to punish a second time *criminally*, for the same offense."[120]

The test used to determine whether a civil forfeiture constitutes criminal punishment for Fifth Amendment purposes was set forth by the United States Supreme Court in *United States v. One Assortment of 89 Firearms*.[121] Two steps are required under the test: first, whether the legislature, in establishing the penalizing mechanism, intended that the sanction be criminal or civil in nature, and second, if the legislature intended that the forfeiture be a civil penalty, whether the sanction imposed is so punitive in nature as to negate the intent of the legislature.[122] To determine whether the legislature intended to impose a civil penalty or criminal punishment, the court looks to the statute itself and the manner in which it was enacted.[123] Relevant factors in determining the character of the forfeiture are whether the civil and criminal sanctions are included in the same act and are "separate and distinct."[124] These factors, when applied to the North Dakota statutes, indicate a legislative intent to enact both civil and criminal penalties for criminal conduct.

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116. *See, e.g.*, Defendant's Brief at 3-4, State of North Dakota v. $1900 of United States Currency, (Ward County Dist. Ct. 1993)(No. 90-1271).

117. *See id.*, 113 S. Ct. at 2806 n.6 (stating that "in this case we deal only with the question whether the Eighth Amendment's Excessive Fines Clause applies[,]" and declining to utilize tests traditionally used for Fifth Amendment analysis); *see also id.* at 2805 n.4 (stating that the double jeopardy clause has been held to not apply to forfeitures, but only where the forfeiture can be characterized as remedial).

118. *See Halper*, 490 U.S. at 450-51 (stating that purpose of the multiple punishments provision of the Fifth Amendment is to insure that the total punishment imposed by a court does not exceed that authorized by the legislature).

119. 303 U.S. 391 (1938).

120. Helvering v. Mitchell, 303 U.S. 391, 399 (1938) (emphasis added).

121. 465 U.S. 354, 362-63 (1984) (quoting United States v. Ward, 448 U.S. 242, 248 (1980)).

122. *Id.*

123. One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 236 (1972).

124. *Id.*

Both the controlled substances forfeiture provisions[125] and the criminal penalties[126] are included in the Uniform Controlled Substances Act. Both provisions were enacted by the 1971 session of the North Dakota Legislature.[127] The criminal forfeiture statute[128] specifically provides that forfeiture is a "separate and distinct" proceeding.[129] It would be difficult to argue successfully that the legislature did not intend to enact both civil and criminal penalties.

The second part of the double jeopardy analysis requires an evaluation of whether the sanction imposed is so punitive in effect or purpose as to negate the intention of the legislature.[130] That proposition is illustrated by the Supreme Court's decision in *One Lot Emerald Cut Stones v. United States*,[131] where, after the owner of the allegedly smuggled jewels was acquitted of criminal charges, the government initiated a civil forfeiture against the jewels.[132] The owner asserted a defense of double jeopardy.[133] In arriving at its decision that the forfeiture action was not barred by double jeopardy, the Court said, "If for no other reason, the forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments."[134] The Court continued:

> Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforcible by civil proceedings. . . . In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions.[135]

In a later case, *United States v. Halper*, the Court qualified this statement, holding that a civil sanction may take on criminal characteristics, and hence be subject to Fifth Amendment analysis, if the civil sanction "may not be characterized as remedial, but only as deterrent or retribution."[136] Because civil asset forfeitures are brought in a separate

125. N.D. CENT. CODE § 19-03.1-36 (Supp. 1993).
126. *Id.* § 19-03.1-23.
127. 1971 N.D. Laws ch. 235.
128. N.D. CENT. CODE §§. 29-31.1-01 to -10 (1991).
129. *Id.* § 29-31.1-04.
130. United States v. One Assortment of 89 Firearms, 465 U.S. 354, 362-63 (1984).
131. 409 U.S. 232, 237 (1972).
132. *Emerald Cut Stones*, 409 U.S. at 232, 33.
133. *Id.* at 235-36.
134. *Id.* at 235.
135. *Id.* at 237 (quoting *Mitchell*, 303 U.S. at 400).
136. United States v. Halper, 490 U.S. 435, 449 (1989).

action, and frequently at a different time, it is significant that the Court in *Halper* limited its holding to instances in which the government seeks to impose a fixed civil penalty at a separate proceeding, after punishment has been imposed criminally.[137]

What constitutes a remedial sanction after the interpretation of *Halper* by the present Court in *Austin* is not clear.[138] An indication of the shift in thinking after *Austin* may be found, however, in the Fourth Circuit's rehearing of *United States v. Borromeo*.[139] The appeal in *Borromeo* was first decided in the Fourth Circuit while *Austin* was pending in the United States Supreme Court.[140] The court had decided that neither instrumentalities nor proceeds of criminal conduct would be subject to proportionality analysis under the Double Jeopardy Clause.[141] However, because of the pending decision in *Austin*, the Fourth Circuit allowed an extension of time for Borromeo, and eventually reheard his appeal.[142] On rehearing after *Austin*, the court concluded that although instrumentalities would be subject to proportionality analysis for double jeopardy violations, proceeds might be exempt from such an analysis.[143] To explain its post-*Austin* rehearing decision, the Fourth Circuit said, "[i]t is arguable that there is little justification for the position that one who successfully parlays his tainted dollar into a fortune should be permitted to enjoy a windfall–a result which a strict focus upon proportionality might bring about in a given case with regard to the proceeds of crime."[144] This distinction agrees with the logic applied by the District Court for the Northern District of Illinois in *United States v. All Assets and Equipment of West Side Building Corp.*,[145] where the court observed,

> *Austin* does not require a proportionality analysis for property acquired as proceeds of illegal drug transactions. If an item is a proceed of an illegal drug transaction, its forfeiture is exclusively remedial, as it cannot be considered punishment to take away something the claimant never owned . . . . *Austin*

137. *Id.* at 448-450.
138. *Austin*, 113 S. Ct. at 2804-05 n.4.
139. 995 F.2d 23 (4th Cir. 1993).
140. United States v. Borromeo, 1 F.3d 219, 220 (4th Cir. 1993) [hereinafter *Borromeo II*].
141. *Borromeo*, 995 F.2d at 27.
142. *Borromeo II*, 1 F.3d at 220.
143. *Id.* at 221.
144. *Id.*
145. 843 F. Supp. 377 (N.D. Ill. 1993).

does apply to property used to facilitate illegal drug activities.[146]

The Fifth Circuit Court of Appeals recently held that *Austin* did not apply to a case involving the forfeiture of $650,000 in personal property because the property was proceeds from a large drug-trafficking operation.[147] The court concluded double jeopardy would not prohibit making drug traffickers "cough up" all their proceeds.[148] The court reasoned that a person who possesses proceeds from illegal activity cannot have a reasonable expectation that the law will allow that person to keep the property.[149] The court also analogized that forfeiting monetary proceeds of illegal activity is like confiscating stolen money from a robber, which is not considered "punishment."[150]

Although the double jeopardy proportionality test is the same test as that applied for Eighth Amendment purposes, the theoretical basis for the test is different and the test results are used differently. When proportionality is applied under the Eighth Amendment, the test determines whether the punishment imposed is excessive, cruel, or unusual. When proportionality is evaluated for double jeopardy purposes, a violation of proportionality results in a determination that criminal punishment has occurred. If criminal punishment was imposed by a procedure separate from the criminal prosecution, a violation of the Double Jeopardy Clause may be found.[151] Because of the Supreme Court's holding in *Halper*, the remedial nature of a civil penalty is the focal point of the double jeopardy proportionality test.[152]

To determine what may be considered remedial in a forfeiture, courts look to the cost of the criminal activity to the government,[153] and possibly to the cost to others.[154] Specifically includible as remedial assessments are the costs of investigation, enforcement, and direct damages to the government.[155] This computation of costs must be an individualized accounting of the direct costs of the defendant's conduct,

146. United States v. West Side Bldg. Corp., 843 F. Supp. 377, 383 (N.D. Ill. 1993).

147. United States v. Tilley, 18 F.3d 295 (5th Cir. 1994).

148. *Id.* at 298-99.

149. *Id.* at 300.

150. *Id.* at 297.

151. For a discussion of what constitutes a single proceeding, see United States v. Millan, 2 F.3d 17, 19-20 (2d Cir. 1993).

152. United States v. Halper, 490 U.S. 435, 449 (1989).

153. *Id.*; *Whalers Cove*, 954 F.2d 29, 37 (2d Cir. 1992).

154. United States v. Busher, 817 F.2d 1409, 1415 (9th Cir. 1987) (including in the cost of the defendant's conduct such items as the loss caused; physical harm to others which is inflicted, risked, or threatened; and collateral consequences of the defendant's conduct).

155. *Whalers Cove*, 954 F.2d at 36.

proportional to the defendant's offense, but may include a "reasonable allocation of more generalized enforcement costs."[156] In making this accounting, "the government is entitled to rough remedial justice[;]" the "sanction [may not be] overwhelmingly disproportionate to the damages [the defendant] has caused."[157]

In summary, the trend appears to be toward a qualified acceptance of the Scalia test for proportionality in both excessive fines analysis and double jeopardy analysis: if the property is used to facilitate a crime, then its relationship to the crime is a factor to be used in a proportionality analysis. If the relationship between property and crime is not direct and intimate, then the value of the forfeited property is compared to the magnitude of the crime, first deducting the portion of the property value that may be attributed to government costs and damages. Once the remedial costs are deducted, an asset forfeiture violates double jeopardy under the current interpretation if (1) the forfeiture is imposed by the same sovereign which conducted the criminal prosecution, (2) at a procedure separate from the criminal prosecution, and (3) the value of the property is grossly in excess of an amount which could be characterized as remedial.

C. THE FIFTH AND FOURTEENTH AMENDMENTS' PROTECTION AGAINST DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS

In addition to Eighth Amendment and double jeopardy issues, an asset forfeiture raises substantive and procedural due process concerns. Among these concerns are the forfeiture of property to the government in a proceeding at which the claimant of the property has the burden of proof.[158] Innocent owner provisions, which require consent, knowledge, or willful blindness on the part of owners of property, have been added to most forfeiture statutes.[159] Under these statutes, however, the claimant must prove a defense rather than the government proving the owner's involvement with criminal activity.[160] In addition, the initial seizure of

156. *Id.* at 37.

157. *Halper*, 490 U.S. at 446-49.

158. United States v. Daccarett, 6 F.3d 37, 57 (2d Cir. 1993) (questioning the fairness of requiring the claimant to prove the "innocence" of the property, and stating, "'[w]e continue to be enormously troubled by the government's increasing and virtually unchecked use of civil forfeiture statutes and the disregard for due process that is buried in these statutes'" (quoting United States v. All Assets of Statewide Auto Parts, 971 F.2d 896, 905 (2d Cir. 1992))).

159. *See*, N.D. CENT. CODE § 19-03.1-36(e)(2) (1991) (protecting the innocent owner of a conveyance); § 29-31.1-07 (protecting innocent owners, but requiring a reasonable inquiry); 21 U.S.C. §§ 881(a)(4)(C) (a)(7) (requiring knowledge or consent of the owner, or "willful blindness" in the case of a conveyance).

160. United States v. 890 Noyac Road, 945 F.2d 1252, 1255 (2d Cir. 1991); *see also* United States v. 141st Street Corp., 911 F.2d 870, 878 (2d Cir. 1990).

property frequently takes place without a hearing.[161] Although most forfeiture statutes contain a requirement for promptly initiating a forfeiture action and allowing the claimant a hearing,[162] courts have widely varying interpretations of what "promptly" means, as well as the result of the government's failure to act promptly.[163]

1. *Real Property vs. Personal Property*

In *United States v. Good Real Property*,[164] its most recent forfeiture decision, the Supreme Court distinguished between the due process protections afforded the owners of real property and those afforded the owners of personal property.[165] Because, unlike personal property, real property can neither be removed from the jurisdiction of the court nor be easily destroyed, the Court held that a pre-hearing seizure of real property violates a claimant's due process rights, except in very rare circumstances.[166] Limiting its decision to real property, the Court in *Good Real Property* applied the three-part inquiry from *Mathews v. Eldridge*[167] to balance the due process rights of the claimant against the needs of the government in a forfeiture.[168] The Court held that absent exigent circumstances, the due process clause requires notice and a meaningful opportunity to be heard before real property may be seized by the government.[169]

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161. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 677 (1973) (agreeing that seizure for purposes of forfeiture is one of those "'extraordinary situations' that justify postponing notice and opportunity for a hearing" (quoting Fuentes v. Shevin, 407 U.S. 67, 90 (1972))).

162. *See* N.D. CENT. CODE § 19-03.1-36(3) (1991) (requiring that proceedings be initiated promptly when property is seized without process); *see also* 19 U.S.C. §§ 1602-1604 (1988) (requiring the Attorney General to immediately and forthwith bring a forfeiture action if one is warranted).

163. *Compare* Haina v. Commonwealth, 369 S.E.2d 401 (Va. 1988) (holding that failure by the state to bring an action within the 60 days required by statute resulted in a loss of jurisdiction over the forfeiture) *with* Lamar v. Universal Supply Co., Inc., 479 So. 2d 109, 110 (Fla. 1985) (holding that failure by the state to institute action promptly triggers an analysis similar to that in Barker v. Wingo, 407 U.S. 514, 530 (1972)). Some courts have held that failure to initiate forfeiture within a specified time after seizure may result in a loss of jurisdiction. Haina v. Commonwealth, 369 S.E.2d 401 (Va. 1988). It is important to note, however, that the statute being interpreted when loss of jurisdictiuon was found specified that the action must be initiated within 60 days, rather than "promptly." *Id.* The North Dakota forfeiture statute requires prompt initiation after *ex parte* seizure. N.D. CENT. CODE § 19-03.1-36(3) (1991).

164. 114 S. Ct. 492 (1993).

165. United States v. Good Real Property, 114 S. Ct. 492, 502-03 (1993).

166. *Id.*

167. 424 U.S. 319 (1976); The *Mathews v. Eldridge* test involves a balancing of the private interest affected by the action, the risk of an erroneous deprivation of that interest through the procedures used, the probable value of additional safeguards, the government's interest, and the administrative burden that additional safeguards would impose on the government. *Id.* at 332-35.

168. *Good Real Property*, 114 S. Ct. at 501.

169. *Id.*

The significance of the Court's decision in *Good Real Property* is evident when viewed from the perspective of *Calero-Toledo v. Pearson Yacht Leasing Co.*,[170] a case the Court had decided two decades earlier. In *Calero-Toledo*, the Court found in favor of the government in its pre-hearing seizure of a yacht, holding that the *ex parte* seizure did not violate due process.[171] In distinguishing *Calero-Toledo* from *Good Real Property*, however, the Court said, "[c]entral to our analysis in *Calero-Toledo*, was the fact that a yacht was the 'sort [of property] that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given.'"[172]

Since the Court did not overrule *Calero-Toledo* and took great care to distinguish *Good Real Property*,[173] *Calero-Toledo* still provides the constitutional justification for pre-notice and hearing seizure of personal property.[174] The three-part test articulated in *Calero-Toledo* applies to personal property and asks three questions: (1) does the seizure serve significant governmental interests, (2) would a pre-seizure notice and hearing frustrate the interests served by the statutes, and (3) is the seizure initiated by self-interested parties.[175] A claimant might find support today asserting that the government's interest in certain types of personal property would not be diminished if pre-seizure notice and hearing were given, or by asserting that self-interest is served by some seizures, since proceeds from forfeitures contribute substantial portions to some law enforcement budgets. Central to the government's case, on the other hand, is the powerful argument that personal property associated with criminal activity, particularly drug trafficking, will likely be removed, destroyed, or concealed if advance warning is given.

2. *Promptness in Bringing the Forfeiture Action vs. Promptness in Providing a Hearing After Seizure*

There is a significant difference between the government failing to initiate a forfeiture promptly after the commission of the underlying crime and failing to initiate action promptly after seizing the property.[176]

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170. 416 U.S. 663 (1974).

171. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679-80 (1974).

172. *Good Real Property*, 114 S. Ct. at 500 (quoting *Calero-Toledo*, 416 U.S. at 679).

173. *Id.*

174. *Id.*

175. *Calero-Toledo*, 416 U.S. at 679; *see also* State v. One Black 1989 Cadillac, No. 930352, slip op. (N.D. Oct. 3, 1994) (analyzing the due process considerations and citing *Good Real Property* and *Calero-Toledo*, but declining to determine whether exigent circumstances were present in the seizure of a vehicle because the claimant did not raise the issue).

176. *See Good Real Property*, 114 S. Ct. at 507 (explaining that all that is necessary to comply with the promptly requirement for initiation of an action is to comply with the statue of limitations).

If the government does not seize the property and complies with the statute of limitations in initiating a forfeiture, but fails to comply with other statutory requirements for action, such as "prompt" or "immediate" reporting, "federal courts will not in the ordinary course impose their own coercive sanction."[177] The Supreme Court's position here is grounded in the belief that if Congress wished dimissal of the forfeiture action for failure to comply with requirements other than the statute of limitations, Congress would have indicated that intent.[178] The remedy for failure to comply with what is labeled "internal timing requirements" is thus left to those administering the forfeiture statute.[179]

Prompt initiation of an action after seizure of property without a warrant or pre-seizure notice and hearing is, however, an entirely different matter. The requirement of prompt initiation after seizure is included in forfeiture statutes to assure compliance with due process.[180] When the government uses the warrantless seizure provisions of forfeiture law to prevent the escape of the property from the jurisdiction of the court, it must initiate forfeiture proceedings promptly,[181] because failure to do so denies the owner the use of the property for an extended period without due process.[182] The current trend by the courts is to interpret the "promptly" requirement strictly. If the government seizes property without process, and a forfeiture proceeding is not initiated within several weeks, the delay may be fatal to the forfeiture unless a reasonable justification is offered.

Most courts agree that the proper test to evaluate promptness in this context is the *Barker v. Wingo*[183] test, adapted from criminal law.[184] Although the *Barker* Court was addressing the Sixth Amendment right to a speedy trial rather than the Fifth Amendment right against deprivation of property without due process, the balancing test from *Barker* nonetheless provides an appropriate means to analyze the delay between seizure and hearing in asset forfeitures.[185] Factors included in the *Barker* test are the length of the delay, the reason for the delay, the

177. *Good Real Property*, 114 S. Ct. at 506.

178. *Id.*

179. *Id. But see Haina*, 369 S.E.2d at 401.

180. *In Re* Forfeiture of $7,750.00, 546 So. 2d 1128, 1130 (Fla. Dist. Ct. App. 1989); State v. One Black 1989 Cadillac, No. 930352 (N.D. Oct. 3, 1994).

181. United States v. $8850, 461 U.S. 555, 563 (1982).

182. *Id.*

183. 407 U.S. 514 (1972).

184. *$8850*, 461 U.S. at 564. *See also* United States v. $18,500.10, 739 F.2d 354, 356 (8th Cir. 1984) (applying *Barker* test); United States v. One 1987 Ford F-350 4x4 Pickup, 739 F. Supp. 554, 560-61 (D. Kan. 1990); State v. One 1984 Chevrolet Corvette, 818 P. 2d 800, 804 (Kan. App. 1991) (applying *Barker* test to state forfeiture of a vehicle); *1989 Cadillac*, No. 930352 Slip op. at 7-8..

185. *$8,850*, 461 U.S. at 564. *See also $18,505.10*, 739 F.2d at 356.

defendant's assertion of his or her rights, and any prejudice to the defendant resulting from the seizure and delay in the hearing.[186] The *Barker* analysis essentially views "the circumstances as a whole" in each case.[187]

In *United States v. $8,850*,[188] the Supreme Court also held that the balancing of these factors in determining reasonableness of delay is a fact-based determination and will depend "heavily on the context of the particular situation . . . ."[189] Using the *Barker* analysis and the *$8850* fact-based determination, courts have found delays varying from fifty-nine days[190] to eighteen months[191] to be reasonable and not a violation of due process.[192]

For example, a delay of five months and one week was not improper where the state used the property to be forfeited as evidence in a criminal proceeding, the claimant never requested a judicial hearing, and there was no evidence that the claimant was prejudiced.[193] In *United States v. One 1978 Cadillac Sedan DeVille*,[194] the court surveyed numerous decisions to determine whether the four and one-half month delay in that case was unreasonable.[195] The court observed that delays found to be unreasonable greatly exceeded the four and one half months at issue in *1978 Cadillac*.[196] The court noted that delays for up

186. *Barker*, 407 U.S. at 530.

187. State v. $435,000, 842 S.W.2d 642, 644 (Tex. 1992).

188. 461 U.S. 555 (1983).

189. *Id.* at 565 n.14.

190. *Corvette*, 818 P.2d at 804.

191. *$8,850*, 461 U.S. at 569.

192. *See also* United States v. Turner, 933 F.2d 240 (4th Cir. 1991) (16-month delay did not violate due process where government believed the asset was forfeited under state law and initiated proceedings immediately upon learning of error); United States v. Land at 2 Burditt Street, 924 F.2d 383 (1st Cir. 1991) (ten-month delay not improper); United States v. One 1985 Cadillac Seville, 866 F.2d 1142 (9th Cir. 1989) (four and one-half month delay on warrantless seizure acceptable when owner did not seek return and the vehicle was subject to IRS lien); United States v. $160,916.25, 750 F.2d 900 (11th Cir. 1985) (14-month delay did not violate due process where delay was "attributable to Government's massive criminal investigation and prosecution of very criminal activity that generated funds"); United States v. $18,505.10, 739 F.2d 354 (8th Cir. 1984) (26-month delay acceptable where property used as evidence, claimants did not assert rights and did not show prejudice); United States v. F-350 4x4 Pickup, 739 F. Supp. at 554 (D. Kan. 1990) (holding four and one-half month delay not unreasonable); *see generally* Ana Kéllia Ramares, Annotation, *Timeliness of Institution of Proceedings for Forfeiture Under Uniform Controlled Substances Act or Similar Statute*, 90 A.L.R. 493 (1991).

193. State v. One 1986 Subaru, 576 A.2d 859 (N.J. 1990).

194. 490 F. Supp. 725 (S.D.N.Y. 1980).

195. United States v. One 1978 Cadillac Sedan DeVille, 490 F. Supp. 725, 732-33 (S.D.N.Y. 1980).

196. The court in *1978 Cadillac* relied upon:

United States v. One 1970 Ford Pickup, 564 F.2d 864 (9th Cir. 1977) (eleven-month delay unreasonable); United States v. One Motor Yacht Named Mercury, 527 F.2d 1112 (1st Cir. 1975) (twelve-and-one-half-month delay unreasonable); Sarkisian v. United States, 472 F.2d 468 (10th Cir. 1973) (fourteen-month delay unreasonable); United States v. Eight (8) Rhodesian Stone Statues, 449 F. Supp. 193 (C.D. Cal. 1978) (sixteen-month

to six months were not unreasonable.[197] Delays that federal courts have found objectionable generally exceed six months or longer, depending upon the reasons for the delay.[198]

Taking a slightly different approach, the Eleventh Circuit in a recent case held that the application of *Barker* is a mixed question of fact and law.[199] The court relied upon the rationale in *$8,850*, and noted that pending criminal proceedings present a "weighty" justification for delay because the civil proceeding could hamper the criminal proceeding.[200] The court also noted that diligent pursuit of criminal proceedings indicates that the reasons for delay were substantial.[201] Finally, the question of prejudice to the claimant should focus on whether the delay has hampered presenting a defense on the merits, such as losing a witness or other important evidence.[202]

The North Dakota Supreme Court adopted the *Barker* analysis in *State v. One Black 1989 Cadillac*.[203] In *1989 Cadillac* the owner of the vehicle submitted a motion to dismiss claiming that the 174-day lapse between seizure and service of the forfeiture complaint was an undue delay that divested the court of jurisdiction.[204] The state resisted the motion to dismiss.[205] The state argued that delay did not result in loss of jurisdiction; rather, an allegation of undue delay required application of the *Barker* analysis.[206] To that end, the state submitted evidence that a narcotics agent had participated in negotiations with the owner of the vehicle which involved the owner's purchase of controlled substances as part of a continuing criminal investigation.[207] The state argued that the confidential nature of the ongoing criminal investigation was the reason for the delay.[208] The owner agreed that he participated in negotiations

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delay unreasonable); United States v. One (1) Douglas A-26B Aircraft, 436 F. Supp. 1292 (S. D. Ga. 1977) (eleven-month delay unreasonable); United States v. A Quantity of Gold Jewelry, 379 F. Supp. 283 (C.D.Cal. 1974) (twenty-two-month delay unreasonable); United States v. One 1971 Opel G.T., 360 F. Supp. 638 (C.D.Cal. 1973) (twelve-and-one-half-month delay unreasonable). *But see* United States v. One 1972 Wood Custom Boat, 501 F.2d 1327 (5th Cir. 1974) (ten-month delay not unreasonable because investigation continuing).

490 F. Supp. at 732-33.

197. *Id.*

198. *In re* 1975 Chevrolet Corvette, Two-Door Auto., 424 So. 2d 152, 153 (Fla. Dist. Ct. App. 1982) ("The cases in which federal courts have found an unreasonable delay have generally involved greater delays than the six-month total period here" (citations omitted)).

199. United States v. Premises Located at Route 13, 946 F.2d 749, 755 (11th Cir. 1991).

200. *Id.* (citing *$8,850*, 461 U.S. 555,567).

201. *Id.*

202. *Id.*

203. No. 930352, slip op. (N.D. Oct. 3, 1994).

204. State v. One Black 1989 Cadillac, No. 930352, slip op. at 2 (N.D. Oct. 3 1994).

205. *Id.*

206. *Id.* at 7.

207. *Id.* at 12-13.

208. *Id.* at 13.

for the criminal investigation, but also asserted that the narcotics agent had made it clear that the forfeiture was not negotiable.[209]

In applying *Barker*, the court considered the first factor, the length of the delay, to be the "overarching factor."[210] The court found the 174-day delay a "significant" lapse of time.[211] The reason for the delay, the second factor, is a question of fact.[212] Although the court purported to construe the evidence in a light most favorable to the state, it concluded that there was no genuine dispute as to any material fact.[213] The court wrote: "The State's affidavits do not explain why the delay was a necessary component of the negotiations, or if the negotiations were the reason for the delay in instituting the proceedings."[214]

This conclusion ignores the fact that the affidavits were submitted in response to a motion[215] in which the only issues were delay and whether the reasons submitted by the state, via its affidavits, justified the delay. It also ignores the principle that when construing evidence in a light most favorable to a non-moving party in a summary judgment motion, the court will draw reasonable inferences from the facts.[216] In this instance, it is reasonable to infer that a private citizen's negotiations with a narcotics agent concerning the purchase of controlled substances as part of a criminal investigation must be kept confidential and that the public filing of a forfeiture case or criminal charges involving that individual would likely compromise the investigation. The court concluded that these inferences were assertions of fact which were not part of the affidavit and therefore could not be considered as justification for the delay. The court's unwillingness to draw any reasonable inferences from uncontroverted facts illustrates the tendency of the judiciary to strictly construe forfeiture statutes against the government.

Although the court applied the third prong of the *Barker* test, whether the claimant asserted his right to property,[217] the court modified the test. The North Dakota Supreme Court concluded that because the statute did not require the claimant to assert any rights, any failure to do

209. *1989 Cadillac*, No. 930352, slip op. at 13 (N.D. Oct. 3, 1994).
210. *Id.* at 12 (quoting *$8,850*, 461 U.S. at 565).
211. *Id.*
212. *Id.*
213. *Id.* at 13.
214. *1989 Cadillac*, No. 930352, slip op. at 13. *But see* United States v. $160,916.25, 750 F.2d 900 (11th Cir. 1985) (14-month delay did not violate due process where delay was attributable to massive criminal investigation).
215. The owner of the vehicle submitted a motion to dismiss with a supporting affidavit. The state responded with affidavits. As such, the motion is properly treated as one for summary judgment.
216. Livingood v. Meece, 477 N.W.2d 183, 187 (N.D. 1991).
217. *See $8,850*, 461 U.S. at 564.

so would not be held against the claimant; rather, the state would be held to its affirmative duty to proceed promptly.[218] The court reasoned that the property owner's action is relevant only if he acts to vindicate his right to the property or if he consents to the delay.[219]

The final prong of the *Barker* test, prejudice to the claimant, was similarly strictly construed against the state. The owner of the 1989 Cadillac admitted that the delay did not prejudice his ability to present a defense.[220] Notwithstanding this admission, the court supplied its own reasons for prejudice.[221] The court found that the owner was prejudiced because he was deprived of the use and enjoyment and the right of sale of the automobile.[222] Further prejudice was found because a vehicle is a wasting asset.[223] Finally, the court concluded that the owner's due process rights were prejudiced by the fact that the seizure was accomplished without "*any* prior process."[224] The court suggested that "pre-seizure, ex parte process in the form a warrant issued by a detached magistrate" would help "ensure the probable validity of the State's claim."[225] Although the statute does not require this procedure, in order to facilitate successful forfeiture actions, law enforcement should consider obtaining an *ex parte* warrant whenever circumstances permit.[226] The court supplied factors of prejudice which illustrate the tendency to strictly construe forfeiture statutes.[227] The court thus concluded that, as a matter of law, the forfeiture was not prompt.[228]

When interpreting a statute similar to North Dakota's, the majority of courts have held that the failure to initiate action promptly does not divest the court of jurisdiction, but merely triggers an evaluation by the court under the *Barker* balancing test described above.[229] Some states with specific time restrictions, such as that evaluated in *Haina v. Commonwealth*, have also held that a failure to comply with a statutory deadline does not divest the court of jurisdiction.[230]

When the time limit is interpreted as directory in nature, it provides the defendant with a means to force action by the state by bringing a

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218. *1989 Cadillac*, No. 930352, slip op. at 14-15.
219. *Id.* at 15.
220. *Id.*
221. *Id.*
222. *Id.*
223. *1989 Cadillac*, No. 930352, slip op. at 15.
224. *Id.* at 16.
225. *Id.*
226. *Id.*
227. *Id.*
228. *1989 Cadillac*, No. 930352, slip op. at 16.
229. *See e.g.*, Lamar v. Universal Supply Co., Inc., 479 So. 2d 109, 110-111 (Fla. 1985).
230. Matter of Sopoci, 467 N.W.2d 799, 800 (Iowa 1991).

motion before the court.[231] This interpretation fits well with the *Barker* test: if the defendant wishes to assert his or her right to an early hearing, the state must provide one; if no assertion of that right is made, the defendant's acquiescence may be weighed in favor of the state in a *Barker* analysis.

A successful due process challenge to an asset forfeiture must then be made under one of two theories: 1) the property was seized *ex parte* without any threat to jurisdiction or the property, or 2) the defendant was not granted a hearing "promptly" after *ex parte* seizure.

IV. CONCLUSION

The usual asset forfeiture in North Dakota involves either cash or a vehicle seized in connection with a controlled substance arrest. As a rule, challenging these forfeitures on proportionality grounds will not be fruitful. Cash seized will most frequently be a combination of proceeds and money intended to be used for drug purchases, making it subject to partial exemption from proportionality analysis. The basic costs of an investigation and arrest are ordinarily far in excess of the value of the property seized, making the forfeiture entirely remedial. The most questionable seizures are those of real estate and the more valuable vehicles which cannot be tied to extensive use in drug transactions. These would not ordinarily qualify as instrumentalities under the Scalia logic, their value could be in excess of the amount considered remedial, and hence their forfeiture would be considered disproportionate to the crime and violative of the Excessive Fines Clause. If the vehicle or real estate is forfeited at a proceeding separate from the criminal action, double jeopardy may also be invoked.

An additional concern is the length of time which elapses between a warrantless seizure and the forfeiture hearing. The lapse of time here is the time during which the claimant has been deprived of property without a hearing. If the state has not filed its complaint, and there is no good reason for the delay, such as an ongoing criminal prosecution or investigation, a period beyond several weeks could be excessive.

Although successful challenges to asset forfeitures after *Austin* will continue to be limited, the forfeitures which pose a clear opportunity to prevail will be those which meet the obvious constitutional violations outlined above: those grossly disproportionate to the crime committed, and seizures without process and without opportunity to reclaim the property for extended periods.

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231. *Lamar*, 479 So. 2d at 110.