Oklahoma district court holds that Eighth Amendment excessiveness test for criminal forfeitures focuses on foreseeability, disproportionality, and deprivation of the ability to earn a livelihood; exclusionary rule does not apply to criminal forfeitures since it is the sentencing stage; and clean funds commingled with illicit funds may be forfeited if the account was used nearly exclusively for illicit purposes. The government moved for preliminary orders of forfeiture of specific assets as well as a forfeiture money judgment in the amount of $231,432,686.73 against several defendants. The original indictment alleged a ten-year conspiracy regarding an illegal gambling business. Defendants sought to limit forfeiture based on the Eighth Amendment's prohibition against excessive fines. The court first noted that many other courts have held that forfeitures of criminal proceeds are not subject to an excessive fines clause analysis, e.g., that as a matter of law forfeiture of drug proceeds pursuant to §881(a)(6) can never be constitutionally excessive. They concluded that because the amount of proceeds produced by an individual drug trafficker is always roughly equivalent to the costs that drug trafficker has imposed on society, the forfeiture of those proceeds can never be constitutionally excessive. The court disagreed, holding that civil forfeiture cases decided since the Supreme Court's *Bajakajian* case suggest the Tenth Circuit Court of Appeals would recognize that Eighth Amendment arguments apply. Next, in determining the criteria the court should use to decide whether a particular proposed forfeiture is grossly disproportionate to the gravity of the defendant's offense, it stated that the test is applied in an individualized manner, because it requires comparing the amount of the forfeiture to the gravity of the defendant's offense. Also, *Bajakajian* rejected the government's argument that forfeiture of the entire amount of cash that had not been reported when it was transported out of the country was a "perfectly calibrated" forfeiture. The Court rejected this "inherent proportionality" argument. Further, the court said it is worth noting that in hierarchical organizations in general (and in large gambling organizations in particular), there will be substantial differences among the defendants in terms of their roles in the criminal activity. Thus, im a RICO prosecution involving a large gambling enterprise, an individual defendant's role in the organization is relevant to the proportionality analysis. Moreover, at least two circuits have expressly held that deprivation of a defendant's future ability to earn a living should be considered, although a forfeiture that destroys a defendant's livelihood may nevertheless be constitutional, depending on defendant's culpability and other circumstances. Therefore, the court said it would screen out (disallow) a requested forfeiture to the extent that the forfeiture would be grossly disproportionate to the gravity of the defendant's offense as determined under the list of factors described above. Second, the court will screen out (disallow) a requested forfeiture to the extent that the forfeiture would be so onerous as to be potentially ruinous to the defendant's ability to earn a living. Thus, looking at the day of sentencing as Day 1 of the rest of the defendant's financial life, forfeiture may render the defendant a pauper on Day 1. But as for Day 2 and thereafter, the court clearly has the authority to consider the impact of the forfeiture sought by the government on the defendant's ability to make a living. In this case, measured by the joint and several $231,432,686.73 forfeiture money judgment it sought, the government's objective, if realized, would have sentenced the defendants to life terms of impoverishment or living off the books, or both. To summarize, the Eighth Amendment's Excessive Fines Clause requires the court to consider, first, the *Bajakajian* factors (supplemented by other factors which may be relevant) to determine whether the forfeiture in question is grossly disproportionate to the defendant's offense. Second, the court considers whether the forfeiture in question would be so ruinous to the defendant's future ability to provide

a livelihood as to be unconstitutional for that reason. Accordingly, the forfeitures the government seeks will be tested for foreseeability, disproportionality, and deprivation of the ability to earn a livelihood. The court also considered a defense argument that since the exclusionary rule applies in civil forfeiture proceedings, which are quasi-criminal, then it must apply in criminal forfeiture proceedings which are *actually* criminal in nature. However, the exclusionary rule is a prudential doctrine, and is not a personal constitutional right, nor is it designed to redress the injury occasioned by an unconstitutional search; the sole purpose is to deter fourth amendment violations. Where suppression fails to yield appreciable deterrence, exclusion is clearly unwarranted. Thus, applying the exclusionary rule at the sentencing stage of a criminal trial would, in the ordinary case, have a minimal deterrent effect on law enforcement's conduct. Thus, despite the inadmissibility of certain documents during the trial, the documents were not excluded in the criminal forfeiture proceedings. Finally, the court held that commingling of illicit funds with clean ones will not stand in the way of forfeiture of the latter if the account was used exclusively, or nearly so, for illicit purposes (or, by the same token, if the hard asset in question was acquired or financed exclusively, or nearly so, with illicit money). But if the commingling problem is not cured by proof of facilitation, significant commingling can present a significant obstacle to forfeiture. *United States v. King*, No. CR 13-63-F, 2017 WL 895748 (W.D. Okla. Mar. 6, 2017).

Ninth Circuit holds that statute requiring service of notice within 60 days of seizure does not apply to nonjudicial forfeitures over $500,000 since owner can file Rule 41(g) motion to obtain judicial review if there is a delay. Under 18 U.S.C. §983(a)(1)(A), when the federal government seizes certain types of property, it must generally provide notice of the seizure to interested parties no later than 60 days after the seizure occurs. After receiving notice, a person with an interest in the property may file a claim with the relevant agency, and then the government must file a civil or criminal forfeiture action within 90 days, unless a court extends the deadline. In this case, in connection with an ongoing criminal investigation, the government obtained warrants authorizing it to seize roughly $100 million from bank accounts controlled by the appellants, who alleged that although they learned of the seizure shortly after it occurred, the government did not provide the notice within 60 days of the seizure. As a consequence of that failure, they contended the government had to return the seized funds under §983(a)(1)(F). The district court denied the appellants' motion on the ground that §983(a)(1)(A) did not apply in this case. The court of appeals agreed, holding that the applicability of the 60–day notice deadline is limited to "nonjudicial" civil forfeiture proceedings, whereas this case involved judicial forfeiture proceedings, The appellants contended that reading of the statute leads to an apparent anomaly, since owners of personal property worth less than $500,000 are generally entitled to notice within 60 days of the seizure of their property, and by promptly filing a claim, they can force the government to initiate court proceedings within 90 days, however owners of personal property worth more than $500,000 are not entitled to the same procedural protections. The government may seize their property and delay initiating judicial forfeiture proceedings for a lengthy period of time, subject only to the limits imposed by the Due Process Clause, which is at odds, with CAFRA's objective of ensuring timely access to the courts for those who seek to contest the seizure of their property. The court stated, however, that owners of personal property worth more than $500,000 can file a Rule 41(g) motion to obtain judicial review, treated as a petition for civil equitable relief. Although the claimant bears the burden of proof in a Rule

41(g) proceeding, such owners of personal property worth more than $500,000 are not deprived of timely access to the courts altogether if they seek to challenge the government's seizure of their property. *Omidi v. United States*, 2017 WL 957207 (9th Cir. March 13, 2017).

U.S. Supreme Court, in denying certiorari because argument was not raised below, opines that criminal due process considerations should apply to civil forfeiture proceedings since modern civil forfeiture statutes are plainly designed to punish the owner of property used for criminal purposes. The U.S. Supreme Court denied a petition for a writ of certiorari, however Justice Thomas' statement regarding that denial is instructive. He first wrote that the petition asked an important question: whether modern civil-forfeiture statutes can be squared with the Due Process Clause and our Nation's history. In 2013 a police officer stopped James Leonard for a traffic infraction along a known drug corridor. During a search of the vehicle, the officer found a safe in the trunk. Leonard and his passenger gave conflicting stories about the contents of the safe, with Leonard at one point indicating that it belonged to his mother, who was the petitioner here. The officer obtained a search warrant and discovered that the safe contained $201,100 and a bill of sale for a Pennsylvania home. The State initiated civil forfeiture proceedings against the $201,100 on the ground that it was substantially connected to narcotics sales. The trial court issued a forfeiture order, and petitioner appealed. Citing the suspicious circumstances of the stop and the contradictory stories provided by Leonard and Kane, the appeals court affirmed the trial court's conclusion that the government had shown by a preponderance of the evidence that the money was either the proceeds of a drug sale or intended to be used in such a sale. It also affirmed the trial court's rejection of petitioner's innocent-owner defense that the money came from a home she had recently sold in Pennsylvania. The court deemed this testimony insufficient to establish that she was in fact an innocent owner. Thomas observed that modern civil forfeiture statutes are plainly designed, at least in part, to punish the owner of property used for criminal purposes. *In rem* proceedings often enable the government to seize the property without any predeprivation judicial process and to obtain forfeiture of the property even when the owner is personally innocent (though some statutes, including the one here, provide for an innocent-owner defense). Civil proceedings thus often lack certain procedural protections that accompany criminal proceedings, such as the right to a jury trial and a heightened standard of proof. Partially as a result, civil forfeiture has in recent decades become widespread and highly profitable, and because the law enforcement entity responsible for seizing the property often keeps it, these entities have strong incentives to pursue forfeiture (the Federal Government and many States permit 100 percent of forfeiture proceeds to flow directly to law enforcement). This system has led to egregious and well-chronicled abuses, frequently targeting the poor and other groups least able to defend their interests in forfeiture proceedings. These people are more likely to use cash than alternative forms of payment, like credit cards, which may be less susceptible to forfeiture, and to suffer in their daily lives while they litigate for the return of a critical item of property, such as a car or a home. Although the Constitution presumably would require the Court to align its distinct doctrine governing civil forfeiture with its doctrines governing other forms of punitive state action and property deprivation, Thomas wrote that he is skeptical that this practice is capable of sustaining, as a constitutional matter, the contours of modern practice, for two reasons. First, historical forfeiture laws were narrower in most respects than modern ones; they were limited to a few specific subject matters, such as customs and piracy. Proceeding *in rem* in those cases was often justified by necessity, because

the party responsible for the crime was frequently located overseas and thus beyond the personal jurisdiction of United States courts. Second, it is unclear whether courts historically permitted forfeiture actions to proceed civilly in all respects, since some of the Court's early cases suggested that forfeiture actions were in the nature of criminal proceedings. Whether forfeiture is characterized as civil or criminal carries important implications for a variety of procedural protections, including the right to a jury trial and the proper standard of proof. Unfortunately, in this case, the petitioner raised her due process arguments for the first time in the Supreme Court. As a result, the Texas Court of Appeals lacked the opportunity to address them in the first instance, and Thomas therefore concurred in the denial of certiorari. Nevertheless, he opined that whether the Court's treatment of the broad modern forfeiture practice can be justified by the narrow historical one is worthy of consideration in greater detail. *Leonard v. Texas*, 137 S. Ct. 847, (Mem)–850 (2017).

Delaware district court equitably tolls late filing of civil forfeiture complaint where DEA in good faith rejected claimant's first administrative claim. The Drug Enforcement Administration seized $614,338.00 during a traffic stop and initiated an administrative forfeiture action pursuant to18 U.S.C. §983. Baker submitted a claim of ownership, which was received by the DEA on August 31, 2015, swearing under penalty of perjury that he was "the lawful owner of said Property and/or possessed the Property with the knowledge and consent of another person." The DEA, however, notified Baker by letter dated September 21, 2015, that his claim was defective for failing to properly state his interest in the property. The letter indicated that a "[c]laimant may not state his/her interest in the alternative," and provided Baker twenty days to cure the noted deficiency. On October 12, 2015, Baker submitted a revised claim, which removed the and/or language and stated that he "owned and obtained and possessed the Property with the knowledge and consent of another person." Baker also commented that his "submission of a revised claim form ... is not an admission by Claimant that the initial claim filed by him on August 26, 2015 ... was legally defective." Baker maintained that his earlier claim "comports with the law, specifically 18 U.S.C. §983(a)(2)(C)(ii), and [the DEA] has failed to provide legal authority to state otherwise." But Baker nevertheless supplied the revised documents "to expedite the processing of this claim." The DEA received the claim on October 13, 2015. The government filed a civil forfeiture complaint within the 90–day period starting from the date of Baker's second claim, which Baker moved to dismiss, contending that the relevant date from which to measure 90 days was August 31, 2015, the date the DEA received his first claim, which the DEA deemed defective. The court first noted that if the first claim was operative, it was undisputed that the complaint was filed after 90 days, but if the second claim was the effective one, then the complaint was timely filed. Baker contended his first claim included all of the statutorily-required elements, making it a valid claim that triggered the 90–day clock. The court said it was not persuaded that Mr. Baker's initial claim failed to state his interest in the property, especially in light of the claim the DEA deemed valid. The government argued it was unclear whether Claimant was asserting he was actually the owner of the property, simply possessing someone else's property, or perhaps some of each, however, it did not argue that either of these property interests independently was insufficient to bring a claim. That the DEA accepted the second claim suggested that the first claim also sufficiently stated Baker's interest. Accordingly, the court agreed Baker's first claim triggered the 90–day deadline. Nevertheless, the court held that equitable tolling of the 90–day deadline was warranted because the government acted

diligently and in good faith in pursuing forfeiture. Under the DEA's view that Baker's first claim was inadequate, the government's complaint complied with the 90–day deadline, starting from the receipt of Baker's second claim. That the government took steps not required by the statute to ensure that Baker was aware of its view of the claim's deficiency supported a finding of good faith. As a result of tolling the 90–day deadline, Baker would experience a minor delay in the adjudication of his claim, so tolling would not be inequitable. The government filed the complaint in the present action 106 days after the DEA received Baker's initial claim. *United States v. Six Hundred Fourteen Thousand Three Hundred Thirty–Eight Dollars & no Cents ($614,338.00) In United States Currency*, No. CV 15-1190-LPS, 2017 WL 899887 (D. Del. Mar. 7, 2017).

Fifth Circuit reverses district court's offset of restitution with forfeited property where there was no private victim because both are mandatory features of criminal sentencing that a district court does not have authority to offset. The government's sole issue on appeal in this case concerned the district court's decision to offset defendants' restitution obligations with any amount collected pursuant to the forfeiture order. The district court thought it proper to do so because there was no private victim, meaning the government would receive both the restitution amount and any forfeited proceeds. The appeals court held this was error. Although it had yet to consider whether a district court may offset restitution orders with forfeited funds, it previously rejected a defendant's challenge to a district judge who refused to do so. Restitution and forfeiture serve distinct purposes. Restitution is remedial in nature; its goal is to make the victim whole. Criminal forfeiture is punitive; it seeks to disgorge any profits or property an offender obtains from illicit activity. Both are mandatory features of criminal sentencing that a district court does not have authority to offset. The court had difficulty seeing why amounts the Department of Justice collected through forfeiture should not be transferred to the victim agency. And that appeared to be DOJ policy, and Congress left it to the executive branch to decide whether to follow through on that sensible policy. The court thus modified the restitution and forfeiture orders to eliminate the offset. *United States v. Sanjar*, No. 15-20025, 2017 WL 1162166 (5th Cir. Mar. 27, 2017).

Fifth Circuit allows forfeiture of wife's community property interest in annuities because there was no written evidence that assets were not joint management community property under Texas law. After the government filed a civil forfeiture action against assets owned by a husband and wife, the husband pled guilty in a related criminal case and agreed to forfeit two annuities. When the government moved for entry of judgment, the wife objected to forfeiture of her community interest in the annuities. The district court granted summary judgment for the government. On appeal, the court held the government was entitled to enforce the husband's plea agreement to forfeit the annuities without his wife's consent, under Texas law, even though the annuities were community property. Texas Fam. Code Ann. §3.102 distinguishes between joint management community property and sole management community property, providing that a spouse's sole management community property includes his or her personal earnings, revenue from separate property, recoveries from personal injuries, and the increase and mutations of, and the revenue from, all property subject to the spouse's sole management, control and disposition. All other community property is joint management community property, unless the spouses have provided otherwise by power of attorney or other written agreement, and is subject to the joint

management, control, and disposition of the spouses. To effect a valid conveyance of joint management community property, Texas law requires both spouses to join in the transaction. Conversely, Texas law provides that each spouse has the power to convey his or her sole management community property without approval of the other spouse, even though both spouses have an undivided one-half interest in the property. Because property that appears to be subject to sole management may, in fact, be subject to joint management – and thus require joinder of both spouses to affect a valid conveyance – third parties that enter into transactions involving community property might be placed in a precarious position. Section 3.104 of the Texas Family Code, however, provides that property held in one spouse's name is presumed to be sole management community property, and if the named spouse conveys such property to a third party, the third party is entitled to rely upon the authority of that spouse to convey the property if the third party does not have actual or constructive notice of the spouse's lack of authority to deal with the property. The wife argued the government knew of the husband's lack of authority from the joint claim and answer filed in the forfeiture proceeding that referred to the annuities as "community property" and stated their objection to forfeiture. The court held, however, that the joint claim and answer did nothing to suggest that the annuities were joint management community property that he could not transfer without her consent. Instead, the government had good reason to believe he did have authority to transfer the annuities without his wife's consent since she was represented in the forfeiture proceeding by the same attorney who was negotiating the plea agreement in the husband's criminal proceeding, she was present at his plea hearing at which he confirmed his understanding of the plea agreement, and she never brought the lack of his authority to the attention of her attorney or the government. *United States v. Tracts 31A, Lots 31 and 32, Lafitte's Landing Phase Two, Port Arthur, Jefferson County, Texas*, No. 16-40588, 2017 WL 970467 (5th Cir. March 9, 2017).