Tenth Circuit holds that a hearing on a pretrial challenge to seizure of assets is not barred just because the defendant has some unseized assets, since the test is whether the defendant lacks sufficient unseized assets to pay for the reasonable cost of counsel of choice. Kahn sought a district court hearing to challenge the seizure of assets he contended he needed to retain an attorney to represent him in his upcoming criminal trial. His only unseized assets were a $175,000 home encumbered by an $80,000 lien and a business that brought in less than $3,000 a month after taxes. He estimated that he would need at least $200,000 to pay counsel and that his total defense costs would be at least $450,000. The district court denied a hearing because he had some unseized assets with which to pay an attorney, declining to consider whether Kahn's unseized assets were sufficient to retain counsel of his choice. It thus did not consider whether the seized assets had been properly tied to his alleged offenses. Kahn filed an interlocutory appeal and obtained a stay of the proceedings. The appeals court reversed and remanded, holding that a hearing on a pretrial challenge to seizure of assets is not barred just because the defendant has some unseized assets, since the test is whether the defendant lacks sufficient unseized assets to pay for the reasonable cost of counsel of choice. It held that Kahn should be granted a hearing if he can 1) demonstrate to the district court's satisfaction that he has insufficient unseized assets to afford reasonable representation by counsel of his choice, and 2) make a prima facie showing of a bona fide reason to believe the grand jury erred in determining that the restrained assets constitute or are derived, directly or indirectly, from gross proceeds traceable to the commission of the offense. *United States v. Kahn*, No. 17-8035, 2018 WL 2248271 (10th Cir. May 17, 2018).

New Mexico district court holds that claim of ownership and undisputed evidence that the res was taken from the claimant's possession and control are together sufficient to confer constitutional standing. The government filed a complaint seeking forfeiture of $65,020.00 based on drug allegations. Claimant asserted an ownership interest only in the currency and that he "was in lawful possession of all of the U.S. Currency at the time of the seizure." He also filed an Answer in which he responded to a number of the government's assertions by invoking the "right provided under the state and federal constitutions to remain silent." The government served special interrogatories on Claimant to gather information bearing on his standing to bring a claim. In each response, Claimant asserted his Fifth Amendment right not to incriminate himself. The government moved to strike the verified claim and answer. The court held that a claim of ownership and undisputed evidence that the res was taken from the claimant's possession and control are together sufficient to confer constitutional standing. The government's motion to strike was not presented as either a motion for judgment on the pleadings or motion for summary judgment. Instead, it asked the court to exercise its discretion to strike the claim based upon his refusal to answer special interrogatories in favor of invoking his Fifth Amendment privilege. The court was troubled that the government moved to strike the entire claim and answer, not merely offending discovery responses. When a court strikes discovery responses, the claimant faces an evidentiary hurdle in civil forfeiture litigation, which they may or may not be able to overcome. While verified claims are evidence, they are also the proscribed manner by which a claimant contests the forfeiture of property. Had the government requested that Claimant's discovery responses be stricken in light of his invocation of the Fifth Amendment privilege in his answers to special interrogatories, the court would have been more inclined to grant such relief. Instead, the government sought striking of the verified claim and answer – the filings that constitute the only manner by which the claimant may contest forfeiture. Balancing

the government's interest in forfeiture against a claimant's privilege against self-incrimination, the interests weighed against striking the verified claim and answer based upon Claimant's invocation of his Fifth Amendment privilege, and denied the motion. *United States v. $65,020 United States Currency*, No. CV 17-0894 KBM/LF, 2018 WL 2023529 (D.N.M. May 1, 2018).

Seventh Circuit holds that disputes about the terms of a forfeiture specified in a criminal judgment must be raised on direct appeal or not at all. The judgment in Navarro's criminal case included a forfeiture of $9 million, which could be satisfied by seizing substitute assets. His initial appeal contested the length of his sentence but not the forfeiture provision. The appeals court remanded for resentencing. The district court reduced Navarro's time in prison but imposed the same forfeiture. Navarro appealed again, but now contended the forfeiture order was deficient because the district judge did not mention it at the time of sentencing. The court dismissed the appeal as frivolous since his plea agreement contained a waiver of the right to appeal and that none of the arguments was outside the scope of that waiver. While this second appeal was pending, Navarro filed in the district court a motion requesting an injunction against collection of the forfeiture from substitute assets, arguing that despite the language in the judgment, collection from substitute assets was proper only if the prosecutor first obtained a judicial order, separate from the judgment, finding that the requirements of 21 U.S.C. §853(p) were satisfied. The district judge denied that motion, concluding that the sort of arguments Navarro presented had to be raised on direct appeal and had been forfeited. The appeals court agreed. Disputes about the terms of a forfeiture specified in a criminal judgment must be raised on direct appeal or not at all. A district court lacks subject-matter jurisdiction to consider an argument omitted from the defendant's direct appeal. *United States v. Salvador Guadalupe Navarro*, No. 17-2613, 2018 WL 2446741 (7th Cir. May 31, 2018).

Arizona district court denies government's motion to dismiss ancillary petitions because statutory vesting of title does not relate back to before the commission of the act giving rise to forfeiture. After the defendant was convicted of being a felon in possession of ammunition and firearms, the government sought forfeiture of the property. The court entered a preliminary order of forfeiture, and the defendant's sons claimed an interest in some of the property they alleged their father gave them in 1994 and filed a petition for ancillary hearing pursuant to 21 U.S.C. §853(n) and Federal Rule of Criminal Procedure 32.2©. The government moved to dismiss on the ground that the petition failed to state a claim, contending that the defendant became a prohibited possessor in 1987 when he was convicted of a felony drug offense, and that as soon as he took possession of any firearms or ammunition they immediately vested with, and belonged to, the United States. The court denied the motion, holding that the vesting of title under §853© relates back only to the time of the commission of the act giving rise to the forfeiture, and no farther. The superseding indictment charged the defendant with being a felon in possession on or about May 20 and July 11, 2017, which were the crimes for which he was convicted. Nothing in the statute suggested that title vested earlier. The relevant inquiry in a forfeiture proceeding is whether the third party has established an interest in the property at the time of the commission of the crimes for which the defendant was convicted. Defendant's alleged transfers of property to his sons going back as far as 1994 could not have been fraudulent attempts to avoid the consequences of his conviction on those charges. The government cited no authority for the proposition that the firearm forfeiture statute extends back to ammunition and

firearms involved in earlier offenses to which the defendant did not plead guilty. *United States v. Riggin*, No. CR-17-08159-PCT-DGC, 2018 WL 2183927 (D. Ariz. May 11, 2018).

California district court denies motion to suppress because DEA had reasonable suspicion to temporarily detain the currency for a canine sniff and claimant's testimony was not credible. The court initially entered an order dismissing this case without prejudice for lack of probable cause. The government then amended its complaint to add 1) details about Claimant's inconsistent statements; 2) details on how the currency was found (in envelopes from a bank); and 3) different details on the canine alert, i.e., that it was sophisticated. The original complaint was unclear as to when and how the canine sniff occurred. Claimant next moved to suppress the canine alert. Law enforcement officers learned that Claimant would be arriving at LAX from Philadelphia on a one-way ticket purchased three days earlier, and that Gilding had a prior narcotics-related criminal offense, which occurred almost ten years ago. After Claimant deplaned at LAX, an officer approached him. Claimant agreed to speak with the officer, but failed to answer several questions about where he would be staying in Los Angeles and how he planned to leave the airport. Claimant said he was carrying $19,000 in his carry-on luggage, and gave permission to search it. Detectives found several envelopes in Claimant's bag that contained various denominations of currency that appeared to be loose and wrinkled, and a dog alerted to the currency. At the evidentiary hearing, the Court found that Claimant was not a credible witness. Claimant testified that he had come to Los Angeles to buy a truck because his friend told him that it was cheaper to buy a truck in Los Angeles than Philadelphia if he paid entirely in cash. But Claimant had brought only $22,800 with him, not enough to pay for the truck he claimed he was buying. The Court found that the seizure was brief and only requires a showing of reasonable suspicion. Less than an hour elapsed between the DEA's initial contact with Claimant and the canine alert. Claimant does not contest that he contested to the detention itself but only to the seizure of the currency. The currency's detention for the purpose of conducting the canine alert occurred in a matter of minutes, an amount of time less than to what other courts have held to be reasonable. The officers only needed reasonable suspicion to detain the currency. Claimant avoided answering several of the agent's questions, such as where he would be staying in Los Angeles and how he planned to leave the airport. He also could not credibly explain why he was in Los Angeles. The DEA initially flagged Claimant because that he was involved in drug crimes over ten years ago. The agents also reasonably relied on the fact that Claimant traveled to Los Angeles, a source city for drugs, from Philadelphia, a destination city for drugs. Moreover, currency in varying denominations can support a finding of reasonable suspicion. Based on these facts, DEA had the requisite reasonable suspicion to temporarily detain the currency for a canine sniff, and Claimant's motion to suppress was denied. United States v. 22,800.00 in U.S. Currency, No. 2:17-CV-04611-SVW -AS, 2018 WL 2077945 (C.D. Cal. May 1, 2018).

Ohio district court strikes claims since claimants should not be permitted to use Fifth Amendment to frustrate government's attempt to determine the nature of their asserted ownership interest. Claimants Wiggins and Allison were at the Cleveland Hopkins International Airport for a flight to Orange County, California. According to the government's verified complaint, the DEA was aware of their itineraries, that each had previous felony drug convictions, and that Wiggins was a significant drug dealer in Cleveland. The DEA observed

them at the airport engaging in conversation as they walked together toward the security checkpoint. After passing through security, Wiggins spoke voluntarily with a DEA agent who asked him if he was traveling with any bulk currency. Wiggins said he had $2,000 in a shoe in his bag, and a search revealed $31,000 hidden behind the lining of his suitcase. Wiggins claimed that the money was earnings from his company Wiggins Cleaning. He could not name any businesses that his company provided services to other than "Mike & Mike." Allison was stopped and agreed to speak to a DEA agent and consented to a search of his carry-on luggage. The agent found $10,000 in currency in a sock. Allison said he had won the money at a casino but could not provide the name of the casino or the date when he had won the money. He also stated that his employer was "Jay's Cleaning Service," that he earned $35,000 annually, and that he filed taxes annually. A canine alerted to the odor of narcotics on each of the defendant currencies. The government filed an in rem forfeiture complaint stating that the DEA could not locate business filings for Jay's Cleaning, Wiggins Cleaning, or Mike and Mike, and that neither claimant filed state income tax returns for 2011–2015. Wiggins and Allison filed verified claims and answers. The government eventually served special interrogatories pursuant to Supplement Rule G(6)(a) seeking information about the source of the money, legitimate income sources, the purpose and nature of the claimant's travel, and the relationships between the claimants and with another individual involved in a separate seizure that occurred the same day and involved the same scheduled flight. Claimants filed affidavits stating they were exercising their Fifth Amendment right to not respond to the special interrogatories. The government also deposed both claimants, who invoked the Fifth Amendment in response to nearly all questions regarding the circumstances surrounding their acquisition of the seized currency, including the date, manner, and source of the currency. They did not answer any questions regarding their employment, their past criminal record, their relationships with each other, whether the currency was drug trafficking proceeds and/or facilitating property, the details of their intended air travel, or whether they were transporting the currencies on behalf of, or at the direction of, another person. In fact, claimants refused to answer whether they were the owners of the currency or even that they were in possession of the currency at the time it was seized. Claimants also exercised their Fifth Amendment privilege in response to the request to provide documentation. The government then moved for summary judgment. The only issue was whether claimants could carry their burden of establishing Article III standing at this stage of the proceedings. Much of their response was devoted to arguing that the searches at the airport were unlawful. The court held that the claimants should not be permitted to use the Fifth Amendment as a way of frustrating the government's attempt to determine the nature of their asserted ownership interest. By repeatedly invoking the Fifth Amendment, the claimants obstructed the discovery process and made it impossible for the government to use special interrogatories or any other type of discovery to test the truthfulness of their naked assertions of ownership. Because claimants' claim of privilege "raises the core concern" that their testimony could furnish them with what may be false evidence and prejudice the government by depriving it of any means of detecting the falsity, the Court struck their assertions of ownership in their verified claims, which left the record devoid of any claim of ownership to the seized currency. This left the claimants unable to meet their burden of establishing standing at the summary judgment stage, and the motion was granted. *United States of Am., Plaintiff, v. $31,000 in U.S. Currency, et al Defendants. Additional Party Names: Dalante Allison, Taiwan Wiggins*, No. 1:16 CV 1581, 2018 WL 2336814 (N.D. Ohio May 23, 2018).

Texas district court holds that government cannot use unsealed affidavit attached to complaint containing no facts to support its claims, but grants government leave to file amended complaint. The government seized funds from the bank accounts of Accel International, Inc., United IT Solutions, and SparkPro Solutions, Inc. and initiated this civil forfeiture proceeding by filing. The claimants each moved to dismiss the complaint, contending it lacked factual allegations to support the government's claims. Although the complaint alleged no facts to support the claims, the government attached to its complaint a detailed affidavit setting out facts supporting its complaint. The affidavit, however, was sealed; no claimant could view it. The claimants therefore asked the court either to dismiss the complaint or unseal the affidavit. The government responded that the sealed affidavit contained enough facts to make its claims plausible, but was sealed to protect an ongoing criminal investigation and that the government's interest outweighed the claimants' interests in protecting their rights to the seized property. The court disagreed. The government may not maintain a civil-forfeiture action with a complaint that gives the claimants no notice of the facts underlying the claim. The complaint contained no factual allegations supporting its claims, and the sealed affidavit did not make up for the complaint's shortcomings. The government failed to point to any case, and the court found none, that supports the court's consideration of a sealed affidavit that a claimant is unable to challenge – as opposed to a publicly-filed affidavit – when determining whether the complaint meets the pleading standards of Rule 8 and Supp. R. G(2). However, the court declined to dismiss the case or unseal the affidavit. Rather, it granted the government leave to file an amended complaint that stated sufficiently detailed facts to support a reasonable belief that the government would be able to meet its burden of proof at trial. *United States v. $73,947.35 in United States Currency From JP Morgan Chase Bank Acount X1558, in the Name of Am. Info, Inc.*, No. 3:18-CV-213-B, 2018 WL 2088390 (N.D. Tex. May 4, 2018).

Texas district court denies hardship petition to release luxury vehicles for use in HVAC and realtor businesses. Claimants Davis and Richey moved under 18 U.S.C. § 983(f) for the hardship release of a 2016 Dodge Ram 2500, 2017 Mercedes-Benz AMG S63, and a 2017 Bentley Continental GT V8. Davis stated a possessory interest in the first two cars, and claimed sufficient ties to the community– he resided in Dallas for 20 years and had no plans to move, and was working to start a new business in the Dallas area – to provide assurance that the property would be available at the time of trial. He said he needed the vehicles released so that he could operate and work for his new HVAC business, he was financing the new business and his living expenses through debt and needed to work to generate income, and would not be able to support himself during the pendency of this case without the cars, He offered to insure the vehicles on any terms the court deemed necessary, including allowing the government to place a lien on the property. Richey made similar claims, and also that she needed the Bentley to operate her realtor business and work to support herself and her eight-year-old daughter. The government argued the would be at great risk of depreciation and loss if they were released, and that Davis failed to show he could not use financing to purchase a different, more economical vehicle, or how the Mercedes-Benz would serve in an HVAC business or why he needed two vehicles. Also, it argued Richey did not show why she needed to drive the $260,000 Bentley over purchasing transportation on her own behalf. The court agreed that Davis and Richey failed to satisfy their burden to show that the continued possession by the government pending the final disposition of forfeiture proceedings would cause substantial hardship to the claimants. The Mercedes-Benz

and the Bentley were luxury vehicles whose purchase prices exceeded $200,000 and $260,000, respectively, at the time of purchase, and the Dodge Ram was purchased for $61,000. Neither Davis nor Richey explains why he or she required these specific vehicles, rather than purchasing or leasing more economical vehicles Moreover, there was a real risk to the government that the value of the vehicles, particularly the luxury vehicles, would decrease substantially if released, especially, for example, if they are used in connection with an HVAC business. Therefore, the court denied the motions to release property. *United States v. $4,480,466.16 in Funds Seized From Bank of Am. Account Ending in 2653*, No. 3:17-CV-2989-D, 2018 WL 2184500 (N.D. Tex. May 11, 2018).

Ohio district court denies motion to strike claim and answer but warns claimant of possible consequences for invoking blanket Fifth Amendment privilege to all discovery requests. The government served interrogatories and requests for production of documents on Claimant Primm, who did not respond and instead filed an "Opposition" in which he implied he was not required to respond to the discovery requests until the government survived his motion to suppress and proved the property at issue was subject to forfeiture. He also filed an affidavit stating that he was asserting his Fifth Amendment right in response to discovery but implying he was reserving the right to supplement his discovery responses after the court ruled on the motion to suppress and determined forfeitability of the seized property. The court issued an order explaining that the law did not support Claimant's assertion and that discovery would proceed as scheduled but, because it was not clear if Claimant was asserting a blanket Fifth Amendment privilege to the discovery requests, the court ordered Claimant to clarify whether he was doing so or if he instead intended to respond to the outstanding requests. Claimant stated that he would respond to any question that would not tend to incriminate him. The court granted the government's motion to compel discovery, explaining that there was no authority for Claimant's position that he need not respond to any discovery requests until the government showed that the property was lawfully seized and was subject to forfeiture. When Claimant did not file any responses by the date ordered, the government moved to strike Claimant's verified claim and answer as a discovery sanction for failing to respond to discovery. The court said Claimant's filings did not make clear that he intended to assert a blanket Fifth Amendment privilege in response to discovery. Out of an abundance of caution, the court construed Claimant's response as a response to the Government's discovery requests. In it, he finally made sufficiently clear that he had asserted the Fifth Amendment in response to all of the government's discovery requests. Of course, discovery was now closed, and Claimant must bear the consequences of having invoked the Fifth Amendment rather than respond to discovery requests. Striking his claim and answer would have been too harsh of a sanction in these circumstances, so the government's motion was denied. *United States v. $99,500 in U.S. Currency Seized on Mar. 20, 2016, et al.*, No. 1:16 CV 2422, 2018 WL 2336909 (N.D. Ohio May 23, 2018).