

New York district court held that it could accelerate defendant's restitution payments and direct his prospective personal injury settlement fund towards his outstanding criminal judgment. The court noted that it could adjust the payment schedule for a forfeiture or restitution judgment, or even accelerate payments or require immediate payment in full, as the interests of justice may require, pursuant to 18 U.S.C. § 3664(k). If a defendant receives a substantial resource from any source, including settlement or judgment, he is required to apply its value to any judgment still owed under §3664(n). In this case, the court said that once defendant's personal injury settlement was finalized, he would have immediate access to \$250,000. This sudden "windfall" constituted a material change in his financial circumstance and warranted a modification in his \$360,000 restitution payment plan. His financial circumstances had seismically shifted, and he now had the financial means to make immediate court-ordered restitution. The court ordered the defendant to show cause why it should not accelerate defendant's restitution payments and direct the prospective settlement fund towards his outstanding restitution obligation. *United States v. Gioeli*, No. 08-CR-240 (BMC), 2019 WL 6173421 (E.D.N.Y. Nov. 20, 2019).

Second Circuit holds that the government generally must demonstrate procedures reasonably calculated to ensure that a prisoner receives notice of the forfeiture action. An officer seized \$21,019 in cash from Brome's pockets, which the DEA adopted and proceeded with a federal forfeiture action. The DEA mailed notice to Brome's last known home address, but the mail was returned unopened. Notice of the cash seizure was also published in the Wall Street Journal three times in three consecutive weeks that same month. Ten days after the seizure, the DEA arrested Brome on state narcotics charges, and he was detained in the Wayne County jail facility. That same day, the DEA sent notice of the forfeiture again to Brome's home address. A month after the arrest, it sent notice by certified mail to Brome in the jail where he was actually located. The notice mailed to the jail incorrectly listed the date of seizure as October 7, 2010, rather than the actual seizure date of September 12, 2010. By February 22, 2011, Brome had not filed a claim for the seized cash, so the DEA administratively forfeited it. The district court denied Brome's Rule 41(g) motion for the return of the seized cash. The appellate court stated that the overriding constitutional question was whether notice of the forfeiture comported with the Due Process Clause of the Fifth Amendment. The court held that the government does not need to provide actual notice, but it is enough that it attempt to provide actual notice. A split in the courts of appeals existed, however, regarding what constitutes adequate notice to prisoners, i.e., whether a presumption exists that notice sent by mail to the institution in which the addressee-prisoner is housed is reasonably calculated to apprise an incarcerated petitioner of the forfeiture action. The First, Sixth, Seventh and Tenth Circuits have held that such a presumption exists when the notice is by certified mail to the proper prison facility. The Third and Fourth Circuits have declined to apply any presumption. Instead, they place the onus squarely on the government to show that the correctional facility's internal procedures for delivering mail are reasonably calculated to notify the prisoner. The Eighth Circuit, meanwhile, rejects the concept of an "irrebuttable presumption" that a prison's mail delivery procedures are adequate, and instead places the burden on the prisoner to demonstrate the inadequacy of the procedures. Joining the Third and Fourth Circuits, the Second Circuit held that the government generally must demonstrate the existence of procedures reasonably calculated to ensure that a prisoner receives notice of the forfeiture action. It is not obliged to prove actual notice, such as a signed

receipt from the served prisoner, but only to attempt to provide such notice. It will ordinarily suffice if the government demonstrates that it sent notice by certified return receipt to the correctional facility where the prisoner is detained, and that the facility's mail distribution procedures are reasonably calculated to deliver the mail to the prisoner. The court said it would not simply presume that the government satisfies its burden by representing that it sent notice by direct mail. Instead, whether a particular method of notice is reasonable depends on the particular circumstances. The court therefore held that the notice to the Wayne County jail where Brome was detained was reasonably calculated to apprise Brome of the pendency of the cash forfeiture, specifically the jail's use of a mail room "logbook" and the distribution of mail during a mail call. The mail was accepted for delivery by an employee at the jail, who signed for it. Written notice was also sent by first class mail, received at the facility, and entered into the incoming mail log. affirm the court's dismissal of Brome's challenge to the adequacy of the Government's notice. *United States v. Brome*, No. 18-1199-CR(CON), 2019 WL 5792851 (2d Cir. Nov. 7, 2019).

Fifth Circuit holds that counterclaims can be determined in in rem proceedings, although the Federal Tort Claims Act's immunity waiver does not extend to Fourth and Fifth Amendment damages claims. The Fifth Circuit Court of Appeals addressed whether a claimant in a civil forfeiture proceeding may counterclaim for constitutional tort damages against the United States. The district court held a claimant may never file counterclaims of any kind. It adopted the First Circuit's reasoning that, because a forfeiture is an in rem proceeding against property, there is no "claim" against a claimant that he may "counter." Although this reasoning had been adopted by several district courts and recently by the Sixth Circuit, the Fifth Circuit declined to adopt it. The court nonetheless affirmed the district court's judgment dismissing the counterclaims for a different reason. The counterclaims here sought damages based on alleged Fourth and Fifth Amendment violations arising from the property seizure, however the United States has not waived sovereign immunity for either claim. Examining the issue as one of first impression, the court rejected the First Circuit's broad rationale for barring counterclaims in in rem civil forfeiture proceedings. First, the fact that a forfeiture proceeding is "in rem, not in personam" does not determine a claimant's rights in the proceeding. The forfeiture rules allow a claimant to take numerous actions respecting the seized property, even though the proceeding is "in rem." A claimant may "file a claim" to protect his interests in the property, and also may file: (1) an answer; (2) a Rule 12 motion; (3) objections to government interrogatories; (4) a motion to suppress use of the seized property as evidence; and (5) a motion raising a defense under the Excessive Fines Clause of the Eighth Amendment. The civil forfeiture statute lets claimants do other things, such as: (1) raise and prove an "innocent owner" defense; (2) move to set aside the forfeiture for lack of notice; and (3) seek immediate release of seized property. If a claimant can do all this in in rem forfeiture proceedings, it cannot be that he is barred from filing counterclaims simply because forfeitures are in rem and not in personam. Second, Rule 24 allows intervention of right to "anyone" who claims an interest relating to the property that is the subject of the action. Fed. R. Civ. P. 24(a)(2). That sounds quite like the position of a claimant in a forfeiture proceeding; indeed, the forfeiture rules treat a claimant in precisely those terms. Moreover, cases have described "claimants" in forfeiture proceedings as "intervenor." Third and finally, this position would conflict with practice in admiralty cases, which have long entertained counterclaims (or their equivalents) in in rem proceedings. Moreover, the modern

procedural rules applicable to admiralty and maritime claims plainly foresee counterclaims in in rem and quasi in rem proceedings. For instance, Supplemental Rule E(7) – which applies to “actions in rem and quasi in rem” – sets forth the circumstances under which a plaintiff must furnish “security” for damages demanded in a “counterclaim.” Given those textual cues in the Supplemental Rules, it would be anomalous to say that counterclaims are always out-of-bounds in in rem proceedings. The Federal Tort Claims Act’s immunity waiver, however, does not extend to “constitutional torts” like the Fourth and Fifth Amendment damages claims pled in the counterclaims. *United States v. \$4,480,466.16 in Funds Seized from Bank of Am. Account Ending in 2653*, No. 18-10801, 2019 WL 5704523 (5th Cir. Nov. 5, 2019).

Ninth Circuit holds that a reporting violation causes significant harm when currency that otherwise would have gone undetected was more likely than not connected to drug trafficking, and thus does not violate Eighth Amendment. Singh appealed from a \$1,955,521 order of forfeiture imposed on him following his conviction for structuring currency transactions to evade reporting requirements. The sole question presented on appeal was whether the forfeiture amount was so grossly disproportional to his offense that it contravened the Eighth Amendment. The court considered the nature of the crime, wary that isolated reporting offenses do not often constitute serious crimes. Significantly, although he did not plead guilty to drug trafficking, Singh did not dispute that his structuring activity was related to illicit drug proceeds, and thus the totality of his related conduct evidenced serious criminality. Determination of the severity of an offender’s criminal culpability for forfeiture purposes requires consideration of other authorized penalties for the crime of conviction, as reflected in the applicable maximum guidelines penalties, because those guidelines reflect legislative judgment as to the appropriateness of punishment and because they take into account the specific culpability of the offender. Singh’s crime carried maximum guidelines punishments of 71 months of imprisonment and a \$100,000 fine. Although the forfeiture exceeded the maximum guidelines fine by a factor of almost 20, a 71-month maximum term of imprisonment was strong evidence of the severity of Singh’s culpability. Also, a reporting violation causes significant harm when the currency that would have otherwise gone undetected was, more likely than not, connected to drug trafficking. That every structured dollar, or even a majority of the structured funds, was not directly traceable to Singh’s drug shipments was of little consequence, for the scheme as a whole perpetuated drug trafficking. As a final matter, Singh asked the court to consider financial hardship, however because the four factors weighed so heavily in favor of the forfeiture amount, any finding that Singh might suffer some financial hardship, which is a reality in almost every case, did not tip the scales in his favor. *United States v. Singh*, 783 F. App’x 765 (9th Cir. 2019).

Eighth Circuit holds that when a district court conducting a Rule 41 proceeding learns that the government no longer possesses the seized property, the court should grant the movant an opportunity to assert an alternative claim for money damages, such as under the Tucker Act or Federal Tort Claims Act. Federal inmate Reed appealed the denial of his pro se motion for return of property under Federal Rule of Criminal Procedure 41(g). The court ruled that the district court correctly denied the motion as to items that were forfeited as part of Reed’s criminal sentence. It concluded, however, that as to items that were not forfeited but were no longer in the government’s possession, the district court should have afforded Reed an opportunity to assert an alternative claim for damages. Sovereign immunity bars money damages

for destroyed property under Rule 41 but the proceeding is not moot. When a district court conducting a Rule 41 proceeding learns that the government no longer possesses the seized property, the court should grant the movant an opportunity to assert an alternative claim for money damages such as under the Tucker Act or Federal Tort Claims Act. A district court abuses its discretion if it dismisses a Rule 41(g) motion and requires the movant to initiate a separate damages action. *United States v. Reed*, 782 F. App'x 522, 523 (8th Cir. 2019).

Colorado district court in limine allows evidence regarding the manner in which officers executed the search warrant and their financial incentive for forfeiture, excludes evidence of errors in search warrant affidavit and issues regarding marijuana policy, and admits evidence of presence of firearms. The government and Claimant filed motions in limine to preclude evidence from being admitted at trial or request that the court rule in advance on the admissibility of certain statements. Although the court already determined the search of Claimant's property was lawful, Claimant asserted that if the government introduced statements Claimant made during the search, information regarding the manner in which officers executed the search would be relevant to Claimant's theory that his statements were made because he felt intimidated. Claimant also asserted information regarding errors made by the officer whose affidavit supported the search warrant was relevant to attack the credibility of that officer's observations during the search itself. Evidence regarding the manner in which officers executed the search warrant was relevant. At issue is whether the defendant currency constitutes proceeds of drug trafficking. If Claimant made statements during the search of his property that suggest that the defendant currency did constitute such proceeds, Claimant could reasonably pursue the theory that he made the statements because he felt intimidated and not because they were true. If the statements were not true, the jury could determine it would be less likely that the defendant currency constituted proceeds of drug trafficking. Importantly, even if Claimant made the statements because he subjectively felt intimidated, that would not raise a significant risk that the jury would reach the conclusion that the search was unlawful. By contrast, there was a substantial danger that the jury could mistakenly reach the conclusion that the search was somehow invalid if Claimant presented evidence regarding errors in the affidavit underlying the warrant. Therefore, the court granted the motion only to the extent that it sought to preclude evidence regarding errors in the search warrant. Claimant also argued that the disposition of the currency was relevant because some of the officers involved in this case had a financial interest in the outcome. Such an interest could theoretically motivate an officer's conduct, so the motion was denied. The court further held that arguments related to state law, Department of Justice policy regarding marijuana prosecutions, or differences between state and federal law were irrelevant to whether the defendant currency is subject to forfeiture under federal law, so the court excluded issues regarding marijuana policy. Claimant sought exclusion of evidence of his firearms and ammunition, discovered but not seized during the search of his property. The court, however, said the ultimate question was whether the defendant currency constitutes proceeds of drug trafficking. The presence of "tools of the trade," such as firearms, increased the likelihood that the defendant currency was associated with drug trafficking, so the firearms were relevant evidence. *United States v. \$114,700.00 in United States Currency*, No. 17-CV-00452-CMA-GPG, 2019 WL 6130804 (D. Colo. Nov. 19, 2019).