

North Carolina district court agrees to use permissive adverse inference jury instruction for government's failure to preserve currency for testing, but declines to exclude evidence of dog sniff or expert testimony. This case concerned whether \$307,970.00 in currency seized from claimant during a traffic stop was related to drugs. Pretrial, the court denied claimants' motion to exclude expert testimony that a dog alerted to drugs recently in contact with defendant currency, and to exclude evidence regarding the currency based on spoilation. The DEA had photographed the currency for evidence, held it in an overnight high value storage safe, and converted it into a cashier's check. The government's deposit of the currency was plainly intentional, according to DOJ regulations and guidance pursuant to 28 C.F.R. §8.5(b)(mandating prompt deposit of currency). Also, the government should have known that the currency was potentially relevant evidence for testing contamination, and officers observed the drug dog sniff of the car and the dash camera recorded the purported drug dog sniff, which should have put the government on notice that contamination was a relevant issue, and testing of the currency relevant to an innocent contamination defense. However, the reports of investigation indicated that the DEA agents responsible for depositing the currency did not know that contamination of the currency was an issue in this case. Under these circumstances, the court said that a permissive adverse inference instruction was a remedy fair to both the government and claimants. The instruction left ultimate determination of the facts to the jury to base their assessment of the parties' contamination theories. The court, however, declined to exclude the government's evidence of the dog sniff and expert testimony, or alternatively for a mandatory adverse inference instruction, since Claimants were still able to effectively raise their innocent contamination defense by cross-examination and rely on their own expert witnesses to attack the reliability of the alleged alert. *United States v. \$307,970.00 in U.S. Currency*, No. 4:12-CV-136-FL, 2019 WL 4409705 (E.D.N.C. Sept. 13, 2019).

Sixth Circuit holds that cumulative effect of evidence presented was sufficient to satisfy government's burden of showing substantial connection between property and the underlying criminal activity. The court acknowledged that direct tracing can be a valuable tool for the government in meeting its burden of proof to establish the requisite substantial connection to illegal activity. In civil forfeiture cases under 21 U.S.C. § 881(a)(6), however, the government may also meet its burden with circumstantial evidence of the substantial connection between the subject property and illegal drug sales. Also, the totality of circumstances test still applies under the government's more stringent preponderance of the evidence burden of proof imposed by CAFRA. Each fact-specific case thus requires the court to assess whether the government's cumulation of evidence is strong enough to make its explanation more probable than not. such as the presence of cash, signs of drug activity, and misleading of authorities. Additional circumstantial evidence may include evidence of legitimate income that is insufficient to explain the large amount of property seized, unrebutted by any evidence pointing to any other source of legitimate income or any evidence indicating innocent ownership. Though the claimant in this case acknowledged that evidence of a minimal legitimate income is persuasive in some cases, he argued that in a closer case, where the claimant's legitimate income could feasibly cover the purchase of the subject property, the government must provide more direct evidence of the substantial connection to meet its burden. He cited Congress's policy statement on 21 U.S.C. §881(a)(6), which he argued required in cases involving significant legitimate income commingled with illegitimate income, that the government use direct tracing methods to

establish how much of the value of the funds to purchase the property came from untainted sources and how much came from tainted sources. The court said although some cases of commingled income may require direct tracing evidence, it declined to establish a rule as to when that becomes necessary. Here, the presence of significant legitimate income and relatively modest personal expenses required a close review of the evidence presented at trial. First, although a drug trafficking conviction alone cannot justify forfeiture, the claimant pleaded guilty to participating in drug trafficking and conceded he made and spent drug trafficking proceeds. Thus, it was undisputed he could have used legitimate income or contemporaneously earned drug proceeds to purchase the defendant property. Second, the claimant withheld information from the government by not revealing his interest in the property to the district court's pretrial services and probation departments. Third, at the summary judgment proceedings, the claimant substantially misrepresented his legitimate income for the year in which he purchased the property. His 2012 tax return revealed that he made only \$16,243, not the \$150,000 of legitimate income that he claimed at summary judgment. Winston agreed to purchase the property for \$36,500, and in fact paid \$26,500, a sum appreciably exceeding his 2012 legitimate income. Finally, he earned \$169,132 in legitimate income but spent \$227,371. Although the calculations regarding the claimant's expenses and his legitimate income cannot independently indicate which items he purchased with legitimate income or drug proceeds, they reveal he purchased something with drug money. The cumulative effect of the evidence presented therefore was sufficient to satisfy the government's burden to show that a substantial connection between the property and the underlying criminal activity was more likely than not. *United States v. Real Prop. 10338 Marcy Rd. Nw., Canal Winchester, Ohio*, No. 18-3347, 2019 WL 4310033 (6th Cir. Sept. 12, 2019).

North Carolina district court denies motion to strike paragraphs from complaint since the allegations put Claimants on notice of evidentiary avenues in which the government might seek to connect currency to drug activities. Claimants filed a motion pursuant to Rule 12(f) of the Federal Rules of Civil Procedure to strike paragraphs 21(a), 21(b), 22, 23, and 24 of the government's complaint as immaterial, impertinent, and scandalous. Paragraphs 21(a) and 21(b) alleged that claimant previously had some connection to two drug-related incidents. Claimants argued these paragraphs had no other purpose than to prejudice the court and the trier of fact and were immaterial. The court noted that a claimant's record of drug activity is a highly probative factor in the forfeiture calculus, and a person's history of involvement with illegal drugs or their contemporaneous affiliation with known drug traffickers can serve as evidence in a forfeiture proceeding. Thus, it held that the allegations put Claimants on notice of evidentiary avenues in which the government might seek to connect Claimants to drug activities. Paragraph 22 alleged that law enforcement had not found information related to Claimant's detailing business that suggested he had any legitimate income. Claimants argued this consisted of "innuendo and insult" and represented "Orwellian allegations" that were "immortal and impudent" and made "for one purpose: to create prejudice." The court said that a person's reported income and work history can help determine if currency implicated in a forfeiture proceeding is connected to drug activities, and these allegations put Claimants on notice of evidence showing the currency was connected to drug activities rather than Claimant's legitimate business. Paragraph 23 listed Claimant's prior drug charges and paragraph 24 listed a single conviction for marijuana possession. Claimants argued those paragraphs failed to mention that most of the charges were dismissed and that the district court previously ruled in another non-forfeiture case that the

inclusion of a criminal record “is immaterial, impertinent and prejudicial. The court stated that the complaint alleged facts regarding drug charges that had been brought against Claimant, and that the government did not have to include that some of those charges were dismissed because the complaint is not required to include every fact that Claimants deemed relevant or contextual. Moreover, Claimants failed to show that denial of their motion would cause some form of significant prejudice to one or more of the parties to the action. While it could be questionable as to whether evidence of prior convictions may be admissible at trial, there was a possibility that they would be, since a history of involvement with illegal drugs is relevant in a forfeiture proceeding. Finally, the court said the allegations in paragraph 23 were more problematic. They simply set forth that Claimant had previously been accused of drug activities. Although it was unlikely that the mere fact of his arrest would be relevant to prove his participation in drug activities, or that such evidence would be admissible at trial, to the extent that the allegations were merely a short-hand manner of giving notice of the facts that may have prompted such charges, this paragraph was not immaterial, impertinent or scandalous. Therefore, none of the paragraphs were stricken. The court added, however, that in the future the government’s counsel was encouraged not to plead the basis for forfeiture in such an imprecise manner. *United States v. Approximately \$13,205.54 in U.S. Currency seized from Rahkim Franklin on August 21, 2018 in Rutherford County, North Carolina*, No. 1:19-CV-00007-MR, 2019 WL 4859041 (W.D.N.C. Sept. 30, 2019).