FIFTH AMENDMENT — DOUBLE JEOPARDY CLAUSE — GOVERNMENT MAY BRING PARALLEL CRIMINAL PROSECUTION AND *IN REM* FORFEITURE ACTIONS WITHOUT VIOLATING THE DOUBLE JEOPARDY CLAUSE — *United States v. Ursery*, 64 U.S.L.W. 4565 (U.S. June 24, 1996).

In an opinion with far-reaching consequences, the Supreme Court of the United States recently held that a civil *in rem* forfeiture proceeding does not constitute punishment with respect to the Double Jeopardy Clause of the Fifth Amendment. *United States v. Ursery*, 64 U.S.L.W. 4565 (U.S. June 24, 1996). In an 8-1 decision, the Court reasoned that civil forfeitures are remedial proceedings which do not serve the same punitive goals as criminal prosecutions. *Id.* at 4572. In its decision, the Supreme Court not only validated previous asset forfeitures by the United States, but paved the way for an increase in the number of forfeiture proceedings instituted by the government in the future.

In *Ursery*, the Supreme Court consolidated two cases to determine whether a civil forfeiture action, in addition to a criminal prosecution for the same offense, violated the Fifth Amendment's Double Jeopardy Clause. *Id.* at 4566. In the first case, the government instituted a forfeiture proceeding under 21 U.S.C. § 881(a)(7) against the home of the defendant, Guy Ursery, which Ursery had used to further illegal drug transactions. *Id.* Shortly before Ursery settled the forfeiture claim, a jury convicted him of illegally manufacturing marijuana, for which he received a prison sentence of 63 months. *Id.*

Ursery appealed his conviction to the Court of Appeals for the Sixth Circuit. *Id.* The appellate court reversed, holding that the conviction, when combined with the forfeiture proceeding, violated the Double Jeopardy Clause. *Id.* (citing *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995)).

In the second case, a jury convicted Charles Wesley Arlt and James Wren for money laundering and conspiring to aid in the manufacture of methamphetamine. *Id.* The district court sentenced each defendant to life imprisonment, as well as different terms of supervised release. *Id.* Additionally, the court fined Arlt $250,000. *Id.* Prior to the criminal trial, the United States government filed a civil complaint demanding the forfeiture of property belonging to both defendants and a corporation which Arlt controlled. *Id.* While the court delayed the forfeiture action until the resolution of the criminal trial, the district court ultimately granted the government's summary judgment motion as to the forfeiture proceedings. *Id.* at 4567.

Subsequently, Arlt and Wren appealed the trial court's grant of summary judgment. *Id.* Like the Sixth Circuit, the Court of Appeals for the Ninth Circuit reversed, finding that the secondary forfeiture action constituted an additional punishment in violation of the Double Jeopardy

Clause. *Id.* (citing *United States v. $405,089.23 in United States Currency*, 33 F.3d 1210 (9th Cir. 1994)).

In both *Ursery* and *$405,089.23*, the Supreme Court granted the government's petitions for *certiorari* and reversed the decisions of the appellate courts. *Id.* The Court held that a civil forfeiture proceeding may be brought in conjunction with a criminal trial without violating the Double Jeopardy Clause. *Id.*

Writing for the majority, Chief Justice Rehnquist began by stressing that the Court has consistently held that the Double Jeopardy Clause does not apply to civil *in rem* forfeiture proceedings, because they are not punitive by nature. *Id.* (citing *Various Items of Personal Property v. United States*, 282 U.S. 577 (1931); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984)). In determining that the civil *in rem* proceedings at issue were non-punitive, the majority applied a two-part test delineated in *89 Firearms*. *Id.* Chief Justice Rehnquist first determined Congress' intent in enacting the forfeiture statute; second, the Chief Justice determined whether the purpose and effect of the forfeiture proceedings were punitive to a degree that would negate Congress's intent. *Id.* at 4568.

In addressing Congress's intent in enacting the forfeiture statute, the Chief Justice discussed in detail three recent Supreme Court cases: *United States v. Halper* 490 U.S. 435 (1989), holding that a civil fine, if sufficiently disproportionate to the offense, could violate the Double Jeopardy Clause as a second punishment; *Austin v. United States*, 509 U.S. 602 (1993), determining that a civil forfeiture could violate the Eighth Amendment's Excessive Fines Clause; and *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994) finding that certain taxes could be so punitive in nature that they would constitute a successive criminal prosecution in violation of the Double Jeopardy Clause. *Id.* at 4568-71.

The Court distinguished *Halper* and *Kurth Ranch*, rationalizing that neither involved civil forfeiture proceedings. *Id.* at 4570. Reasoning that civil penalties roughly represent liquidated damages for the government's harm, and taxes allow the government to recover its prosecution costs, the Chief Justice determined that neither effectuated the same purpose of a civil forfeiture proceeding. *Id.* at 4570. The Court also distinguished *Austin*, explaining that the case involved a violation of the Excessive Fines Clause of the Eighth Amendment, a clause completely unrelated to the Double Jeopardy Clause. *Id.* at 4571. Accordingly, the majority concluded that Congress intended to structure forfeiture proceedings to be remedial civil sanctions which discourage illegal activities and disgorge the offenders of the fruits of their illegal conduct. *Id.* at 4570.

Continuing, the Court addressed the second part of *89 Firearms* test, finding little evidence, much less clear proof, that forfeiture proceedings are

so punitive in nature as to negate Congress's intent and render them criminal. *Id.* at 4572. Chief Justice Rehnquist emphasized that the statute encouraged owners to protect their property from misuse and prevent offenders from profiting from illegal acts. *Id.*

Finally, the majority concluded by recognizing that a number of other considerations supported the determination that forfeiture proceedings are civil actions. *Id.* First, the Court reasoned, the proceedings have historically been treated as civil in nature. *Id.* Second, the Court emphasized that, in contrast to criminal proceedings, in a forfeiture action the government requires the forfeiture of assets regardless of scienter (although an "innocent owner" exception does exist). *Id.* Third, while forfeiture proceedings do serve a criminal purpose, i.e., deterring criminal conduct, the Court cited a long history acknowledging that this is also a civil goal. *Id.* Finally, the Chief Justice opined that while both criminal and forfeiture proceedings result from criminal activity, this fact is insufficient to render a forfeiture proceeding punitive. *Id.* Therefore, the Court resolved, civil *in rem* forfeiture proceedings do not constitute "punishment" for Double Jeopardy Clause purposes. *Id.*

Justice Kennedy, who joined with the majority, wrote a separate concurring opinion explaining that a civil forfeiture proceeding does not punish an offender for his criminal conduct. *Id.* at 4573 (Kennedy, J., concurring). In fact, Justice Kennedy reasoned, the proceeding is designed to deter owners from allowing the misuse of their property, regardless of whether they are the actual offender. *Id.* The concurring Justice distinguished between *in personam* penalties, which constitute a second punishment of the actual offender, and *in rem* penalties, which simply affect the property owner, regardless of culpability. *Id.* In so distinguishing, Justice Kennedy stressed that the property is not being punished in an *in rem* action; rather, the owner "feels the pain and receives the stigma of the forfeiture." *Id.* (citing *United States v. United States Coin & Currency*, 401 U.S. 715, 718 (1971)). Acknowledging that the two-part test employed in *89 Firearms* was legal precedent consistent with *Various Items*, Justice Kennedy joined in the majority's opinion. *Id.* at 4574 (Kennedy, J., concurring).

Justice Scalia also agreed with the majority, but wrote a brief concurring opinion which Justice Thomas joined. *Id.* at 4574 (Scalia, J., concurring). The Justice explained that the Double Jeopardy Clause does not prohibit successive punishment, but only successive prosecution. *Id.* Because a civil forfeiture proceeding is not a criminal prosecution, the Justice reasoned, it does not violate the Double Jeopardy Clause. *Id.*

Justice Stevens concurred in part and dissented in part, agreeing that the forfeiture of contraband and proceeds of criminal activity does not constitute a second punishment for purposes of the Double Jeopardy Clause.

Id. at 4574 (Stevens, J., concurring in part and dissenting in part). Justice Stevens, however, sharply criticized the majority for allowing the forfeiture of a person's home which neither was purchased with the proceeds of criminal activity nor was contraband itself. *Id.* Therefore, Justice Stevens concluded, the forfeiture in *$405,089.23* should be upheld, while the forfeiture of Ursery's home should be reversed. *Id.* at 4581 (Stevens, J., concurring in part and dissenting in part).

Justice Stevens began by restating each of the government's four arguments supporting forfeiture despite the Double Jeopardy Clause, only the first of which was considered by the majority. *Id.* at 4574 (Stevens, J., concurring in part and dissenting in part). First, the Justice condemned the majority's reliance on *Various Items* as justifying that civil forfeiture proceedings have been traditional tools of the government, stating that the Court cited the case only twice in almost 67 years. *Id.* at 4575 (Stevens, J., concurring in part and dissenting in part). In fact, the Justice concluded, case law such as *89 Firearms*, on which the majority also based its decision, specifically rejected the constitutionality of *all* civil *in rem* forfeitures. *Id.* Instead, the Justice noted, such case law recognized that any forfeiture which could not be characterized as remedial "might constitute 'an additional penalty for the commission of a criminal act.'" *Id.* (quoting *89 Firearms*, 465 U.S. at 366).

Moreover, the dissent argued that the majority misread the three most recent Supreme Court cases, *Halper*, *Austin*, and *Kurth Ranch*. *Id.* at 4576 (Stevens, J., concurring in part and dissenting in part). Justice Stevens painstakingly explained each case, reasoning that all three are related decisions condemning the use of civil sanctions which are not wholly remedial in purpose. *Id.* at 4575-78 (Stevens, J., concurring in part and dissenting in part). The Justice asserted that precedent shows that any sanction which serves either retributive or deterrent purposes, even if it also serves a remedial purpose, is punishment with respect to the Double Jeopardy Clause. *Id.* at 4578 (Stevens, J., concurring in part and dissenting in part) (citing *Halper*, 490 U.S. at 448).

Additionally, Justice Stevens attacked the majority's argument that the lack of a scienter requirement proves that the statute is not punitive. *Id.* Rather, the Justice asserted that the innocent owner exception requires the government to prove culpability on behalf of the owner of the property. *Id.* The dissenting Justice also used *Austin* as evidence that Congress intended forfeiture proceedings to be at least somewhat punitive because of its decision to tie forfeiture directly to the criminal offense. *Id.* (citing *Austin*, 509 U.S. at 620).

Finally, the dissent rejected the majority's conclusion that there is any difference between an *in rem* and an *in personam* proceeding. *Id.* at 4579 (Stevens, J., concurring in part and dissenting in part). Citing overwhelming

precedent, the Justice surmised that the Court has consistently held that a man who forfeits money he has used in illegal activity is the same as a man who pays a criminal fine as a result of the same conduct. *Id.* (citations omitted). Justice Stevens emphasized that no rational basis existed for characterizing the forfeiture of a home as anything but punishment for criminal activity, as the forfeiture had no connection to society's damages or the government's cost of enforcing the law. *Id.*

Continuing, Justice Stevens also found fault with the government's definition of "jeopardy" as including only criminal proceedings. *Id.* The Justice argued that both *Halper* and *Kurth Ranch* held that a *civil* sanction could be a "punishment" within the meaning of the Double Jeopardy Clause. *Id.* Accordingly, the Justice concluded, the government's argument failed to follow well-established precedent. *Id.*

Further, the dissent criticized the government's reasoning that a forfeiture proceeding does not involve the same offense as a criminal proceeding. *Id.* at 4579-80 (Stevens, J., concurring in part and dissenting in part). Because the government's forfeiture case could be proven by resorting to the same elements used in the criminal offense, the Justice determined that the criminal charge constituted a lesser offense of the forfeiture proceeding and therefore was the equivalent of a second jeopardy. *Id.* at 4580. (Stevens, J., concurring in part and dissenting in part).

Finally, Justice Stevens concluded by flatly rejecting the government's assertion that, because both the forfeiture and criminal actions were commenced before a final judgment in either, the two should be treated as one proceeding. *Id.* The Justice argued that the forfeiture and criminal charge could be considered as one proceeding only if the government brought them together, and the court issued a single judgment. *Id.* Accordingly, the dissent concluded that the majority should have followed the three most recent double jeopardy decisions, *Halper*, *Austin* and *Kurth Ranch*, which correctly decided that a civil sanction, if it served retributive or deterrent purposes, can constitute a punishment within the meaning of the Double Jeopardy Clause. *Id.*

Analysis

Over the past few years, the number of civil forfeiture proceedings brought by the government has decreased because of the fear of double jeopardy implications. Despite those fears, the government has selectively forced the forfeiture of certain assets, mostly those which were the products of illegal activity. *Ursery*, while validating previous asset forfeiture proceedings brought by the government, is likely to allow an abuse of future forfeitures which include property that has very little connection with criminal activity.

The majority appropriately notes that a forfeiture serves many remedial purposes, including disgorgement of the fruits of illegal activity. *Id.* at 4570. Relying on cases dating back to Prohibition which imply that the property itself is the criminal actor, the majority concluded that civil forfeitures, both prior and subsequent to a criminal trial, do not trigger double jeopardy clause implications. *Id.* at 4572.

In concurring, Justice Kennedy asserted that the reader should not infer that the property is being punished, but rather that the government is deterring the property owner from allowing the property to be used for unlawful activity. *Id.* at 4573 (Kennedy, J., concurring). Justice Kennedy's assertion lacks a firm footing, however, because the cases relied upon maintain that the property itself is the wrongdoer.

In his dissent, Justice Stevens thoughtfully distinguishes a forfeiture of contraband and property obtained through unlawful activity from the forfeiture of property which has little connection, if any, to the crime. *Id.* at 4574 (Stevens, J., concurring in part and dissenting in part). Notably, the majority states that forfeiture proceedings compensate society and the government, confiscate property used for violating the law, and ensure that the offender not receive the fruits of illegal conduct. *Id.* at 4570. However, as Justice Stevens emphasizes, the forfeiture of a home which had been legally obtained and only fractionally used in a criminal activity serves none of these purposes. *Id.* at 4574. (Stevens, J., concurring in part and dissenting in part). Rather, the forfeiture punishes an offender for his or her crime. Even the majority acknowledges that the purpose is to deter criminal activity. *Id.* at 4572.

While a different result in *Ursery* would generate mass *habeas corpus* proceedings by prisoners who would argue that they were wrongfully imprisoned in violation of the Double Jeopardy Clause, the Court's reasoning is somewhat difficult to follow in light of Justice Stevens' dissent. Certainly, it is more rational and just to confiscate only property which is used or received in connection with a crime, or which is criminal to possess in itself. The Supreme Court's failure to follow precedent, as well as the Court's creation of imperceptible distinctions between three leading double jeopardy cases, creates a weak precedent. Perhaps the best way to ensure the validity of a forfeiture proceeding would be to follow Justice Stevens' recommendation — include the forfeiture in the judgment of conviction.

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