No. 16-3238

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

United States of America,

Plaintiff-Appellee,

vs.

Funds in the Amount of One Hundred Thousand One Hundred Twenty Dollars in United States Currency, **Defendant,**

Nicholas P. Marrocco and Vincent Fallon,

Claimants-Appellants.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, No. 03 CV 3644 The Hon. Elaine E. Bucklo, District Judge, and The Hon. John J. Tharp, Jr., District Judge, presiding.

APPELLANTS' BRIEF AND SHORT APPENDIX

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 16-3238
Short Caption: United States v. $100,120.00 in U.S. Currency

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement stating the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3):
Nicholas Marrocco,
Vincent Fallon

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
Komie and Associates
Richard M. Beuke & Associates
Law Offices of Terry O'Donnell

(3) If the party or amicus is a corporation:
i) Identify all its parent corporations, if any; and
N/A
ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:
N/A

Attorney's Signature: /s/ Stephen M. Komie Date: 09.29.17

Attorney's Printed Name: Stephen M. Komie

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes X No ____.

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N/A

Attorney's Signature: /s/ Brian E. King Date: 09.29.17

Attorney's Printed Name: Brian E. King

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ____ No X .

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18 U.S.C.A. § 983

§ 983. General rules for civil forfeiture proceedings

* * *

(c) Burden of proof.--In a suit or action brought under any civil forfeiture statute for the civil forfeiture of any property--

(1) the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture;

(2) the Government may use evidence gathered after the filing of a complaint for forfeiture to establish, by a preponderance of the evidence, that property is subject to forfeiture; and

(3) if the Government's theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a substantial connection between the property and the offense.

(d) Innocent owner defense.--

(1) An innocent owner's interest in property shall not be forfeited under any civil forfeiture statute. The claimant shall have the burden of proving that the claimant is an innocent owner by a preponderance of the evidence.

(2)(A) With respect to a property interest in existence at the time the illegal conduct giving rise to forfeiture took place, the term "innocent owner" means an owner who--

(I) did not know of the conduct giving rise to forfeiture; or

(ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.

* * *

(g) Proportionality.--

(1) The claimant under subsection (a)(4) may petition the court to determine whether the forfeiture was constitutionally excessive.

(2) In making this determination, the court shall compare the forfeiture to the gravity of the offense giving rise to the forfeiture.

(3) The claimant shall have the burden of establishing that the forfeiture is grossly disproportional by a preponderance of the evidence at a hearing conducted by the court without a jury.

(4) If the court finds that the forfeiture is grossly disproportional to the offense it shall reduce or eliminate the forfeiture as necessary to avoid a violation of the Excessive Fines Clause of the Eighth Amendment of the Constitution.

Statement of Jurisdiction

The district court has jurisdiction over this civil forfeiture pursuant to Title 28, United States Code, Sections 1345 and 1355. (R. 1.)

On January 25, 2016, the district court commenced a jury trial; on January 29, 2016, the jury returned a verdict for Plaintiff and Final Judgment was entered. (R. 303; 307; 308.) On February 10, 2016, a forfeiture decree was entered. (R. 316.)

On February 29, 2016, Claimants filed timely post-trial motions for (1) judgment notwithstanding the verdict; (2) a new trial; and (3) a motion to determine the forfeiture was constitutionally excessive. (R. 319; 320; 321.) The district court denied all post-trial motions on June 24, 2016. (R. 339.)

On August 22, 2016, Claimants filed a timely notice of appeal. (R. 340; Fed. R. App. 4(a)(l)(B).) This Court has jurisdiction to review the final judgment pursuant to Title 28, United States Code, Section 1291.

Issues Presented For Review

1. Whether the cumulative effect of improper jury instructions resulted in a fundamentally unfair trial for Claimants.

A. Whether refusing to give a spoliation jury instruction when Plaintiff destroyed evidence was prejudicial to Claimants' case.

B. Whether the jury instructions misstated the law due to reliance upon pre-CAFRA case law which confused and misinformed the Jury.

C. Whether the district court's answer to a jury note during deliberations was unfairly prejudicial to Claimant's case.

2. Whether the district court erred in denying Claimants' Rule 50(a) Motion for a Directed Verdict when Plaintiff produced zero evidence of a drug transaction.

3. Whether the forfeiture of over $100,000.00 violated the Excessive Fines Clause of the Eighth Amendment when Plaintiff produced zero evidence of a drug transaction.

4. Whether the district court erred in not enforcing a remedy for the unconstitutional search and seizure, when the seizing officers have a pecuniary interest in the outcome of the forfeiture.

Statement of the Case

On May 28, 2003, the United States filed a verified complaint alleging the defendant funds were furnished or intended to be furnished in exchange for a controlled substance, were the proceeds from the sale of a controlled substance, or were used or intended to be used to facilitate a violation of the Controlled Substance Act, and were therefore, subject to forfeiture pursuant to 21 U.S.C. § 881(a)(6). (R. 1.) A jury trial eventually ensued, which is the subject of this appeal. (R. 307; 340.) This is the third in a trilogy of appeals.

Marrocco I

Claimants filed a motion to suppress evidence, which was granted. (R. 39; 43-44; 51-52.) Thereafter, the government filed a motion to reconsider, which was denied. (R. 54; 86.)

Next, Claimants filed a motion for determination of ownership. (R. 100; 102; 106.) The district court found the only evidence potentially linking the currency to narcotics was an alleged dog sniff; however, because the district court had suppressed the currency, the dog sniff could not be considered. (R. 109 at 8, 13.) Consequently, it found Claimant Marrocco was the lawful owner of the defendant funds. (R. 108-109.) Final judgment was entered; and Plaintiff appealed. (R. 110; 116.)

On appeal, this Court held, although officer Romano conducted an unconstitutional search without probable cause, Romano would have inevitably discovered the contents of Claimant Fallon's briefcase. (*United States v. Marrocco*, 578 F.3d 627, 637-38 (7th Cir.2009)). Thus, this Court reversed the district court's suppression of the fruits of the unconstitutional search. (*Id.* at 642.)

Marrocco II

On Remand, Claimants filed (1) a motion for a *Daubert* Hearing; (2) a motion in *limine* to exclude statements made during custodial interrogation; and (3) a motion in *limine* to exclude any evidence concerning the alleged dog sniff of the Defendant *Res* pursuant to Federal Rule of Evidence 403, or in the alternative, due to Spoliation (R. 150; 152; 154.) The district court reserved ruling on the motion to exclude statements and denied the other two pre-trial motions. (R. 165-67.)

The government filed its second summary judgment motion. (R. 169; 170-71; 175; 187-88.) And it was denied "with leave to file a renewed motion supported by expert evidence relating to the dog sniff . . ." (R. 191.)

The government took a third bite at the apple but failed to support it with any expert evidence. (R. 198-200.) Nevertheless, the district court

granted the government's motion for summary judgment and entered judgment on October 4, 2011. (R. 210-11; 213-14; 216; 218-220.)

On the second appeal, this Court reversed the district court again in *United States v. $100,120.00 in U.S.C.*, 730 F.3d 711 (7th Cir.2013).

***Marrocco III* (the instant appeal)**

On Remand, the case was transferred to District Judge John J. Tharp, Jr. (R. 235.) He conducted pre-trial proceedings and a jury trial. (R. 239; 265.) The Jury returned a verdict for Plaintiff. (R. 303; 307.) Post trial motions were denied. (R. 339.) A timely notice of appeal was filed and this appeal ensues. (R. 340.)

I. Introductory Facts

A. The Stop and Seizure

On December 6, 2002, Amtrak Officer Eric Romano searched its reservation computer for any passengers scheduled to depart Chicago's Union Station under "suspicious" circumstances. He discovered Mr. Vincent Fallon had paid cash for a one-way ticket to Seattle less than 72 hours before departure. Romano concluded Fallon's purchase seemed "strange," and notified his partner, CPD Officer Sterling Terry. (R. 351 at 71-75.)

Neither Romano, nor Terry, had ever met Fallon, did not have any other information about Fallon, and did not know what Fallon looked

like. Romano did not attempt any further investigation based on the details he had. A sleeping car attendant, working with the officers, identified Fallon, who arrived about twenty minutes before departure. (R. 351 at 77; R. 352 at 129.)

Romano and Terry approached his compartment, identified themselves, and showed Fallon their badges. At Romano's request, Fallon gave the officers his identification and ticket. He initially told them he was traveling to Seattle to visit a girlfriend. Romano asked Fallon whether he was carrying any drugs, weapons, or large sums of money; Fallon denied that he was. (R. 351 at 78-93.)

Romano noticed two bags (a duffel bag and briefcase) in the compartment and asked Fallon if they were his bags; Fallon said, yes. Romano asked to search the duffel bag; he said Fallon kicked the bag toward Terry or handed it to Terry. Terry found nothing of interest in the duffel bag - just clothes. (*Id.* at 93-94.)

When Romano asked about the briefcase, Fallon said it contained personal items. Upon further questioning, Romano claimed Fallon said he had about $50,000.00 in the briefcase, which he might use as a down payment for a house. (*Id.* at 95-96.)

Romano told Fallon he was going to seize the bag for further investigation. Romano testified Fallon said he wanted to go with the bag to the DEA office, so Romano frisked him. (*Id.* at 103-04.)

At the office, Romano opened the briefcase with some instrument and discovered it contained bundles of U.S.C. He then shut the briefcase. Terry called for a police dog to conduct a sniff search of the briefcase. (R. 351 at 108; R. 352 at 163-68.)

CPD Officer King and his canine "Deny" (pronounced Denny) responded and was asked to do a sniff test of suspected narcotics money. He told Romano to hide the money in a room at the DEA office and retrieved his drug sniffer dog from his car. (R. 352 at 309-12.)

King had used the same room in the DEA office to conduct sniff tests on prior occasions; he and Deny knew Romano. He neither took steps to ascertain whether the room had recently contained narcotics nor did he take steps to ensure the room was clean prior to the search. Romano did not either. (R. 352 at 169-70; R. 353 at 329-30, 334-35.)

With Romano standing in the doorway, King told Deny to search the room for "dope." Deny started searching the perimeter of the room before making his way over to the briefcase. King claimed Deny began pulling and scratching at the briefcase. On direct, King testified the briefcase was secreted in a cabinet so he could not see it when he first entered the

room. King stated Deny's reaction to the bag was an alert to the briefcase, which he told Romano. (R. 352 at 313-14, 318; R. 353 at 335.)

After the sniffer dog allegedly alerted to the briefcase, the currency inside was removed, sealed into evidence bags, and sent to a bank to be counted. The currency delivered to the bank totaled $100,120.00. (R. 352 at 109, 115-17.)

LaSalle Bank converted the currency into a cashier's check. The whereabouts of the currency are unknown. Romano testified that when he seized *suspected* narcotics, he would preserve the evidence and send it to the crime lab. Romano did not preserve the currency evidence; instead, he destroyed it. (R. 352 at 118-20.)

B. The Complaint

On May 28, 2003, Plaintiff filed a verified complaint alleging the defendant funds were furnished or intended to be furnished in exchange for a controlled substance, were the proceeds from the sale of a controlled substance, or were used or intended to be used to facilitate a violation of the Controlled Substance Act, 21 U.S.C. § 801, *et seq.*, and were, therefore, subject to forfeiture pursuant to 21 U.S.C. § 881(a)(6). (R. 1) During the events that followed, Fallon indicated the briefcase and its contents belonged to Mr. Nicholas Marrocco; Claimants asserted Marrocco had given Fallon the briefcase and funds and had instructed

Fallon to place the funds in a safe deposit box for Marrocco. (*See infra.*)

II. Pre-trial Procedures

A. Motion to Suppress (*Marrocco I*)

Claimants filed a motion to suppress the evidence based on Romano's unconstitutional search. (R. 39.) The motion was granted and the district court suppressed evidence of the briefcase and its contents. (R. 51-52.) The government appealed this ruling. (R. 116)

On appeal, this Court reversed. (*Marrocco*, 578 F.3d 627.) The basis of the reversal is not relevant to this appeal, except that this Court remanded the case for further proceedings. (*Id.* at 642.)

B. The Motions for Summary Judgment (*Marrocco II*)

On remand, as a pre-cursor to Plaintiff's motion for summary judgment, Claimants filed two, relevant pre-trial motions: (1) a motion *in limine* to exclude any evidence of the dog sniff pursuant to Federal Rule of Evidence 403 or, alternatively, due to "spoliation," and (2) a *Daubert* Hearing Motion. (R. 150; 154.)

In the dog motion, Claimants asked the district court to refuse to consider the dog sniff evidence. (R. 154.) The majority of that motion was based on Plaintiff's intended reliance on the dog handler (a lay witness) to attest to scientific facts (which are the purview of an expert). (*Id.* at 3-8.) However, Claimants provided an alternative basis for the motion

because Plaintiff destroyed the *Res*. (*Id*. at 9-11.) Claimants' urged they would be entitled to the Seventh Circuit Pattern Jury Instruction regarding spoliation. (*Id*.) Thus, in the alternative to barring the dog sniff evidence altogether, Claimants asked the district court to allow a spoliation instruction. (*Id*.)

Claimants' other motion requested a *Daubert* hearing on Plaintiff's claimed scientific theory concerning the probative value of dog sniffs. (R. 150.) The Motion to Bar, *supra*, incorporated the *Daubert* motion into its argument. (R. 154 at 1.) The *Daubert* motion also mirrored arguments raised in the Motion to Bar, such as, Plaintiff's spoliation of the currency evidence. (R. 150 at 9-10.)

The district court, with Judge Bucklo presiding, denied both motions. (R. 165; 166.) Her ruling combined the Motion to Bar and the *Daubert* motion, finding that "[a]lthough claimants articulate a nuanced distinction between the two motions, both ultimately seek to bar the government from presenting evidence that a drug detection dog alerted to a briefcase carried by claimant Fallon, which was later found to contain the defendant *res*." (R. 166.)

Plaintiff then filed its second motion for summary judgment. (R. 169.) Claimants countered with affidavits from Marrocco and various sniffer dog experts. (R. 175; 175-3-5; 175-6 at 10.) Plaintiff did not reply with

any expert testimony. (R. 177; 183.) The second motion for summary judgment was denied with the *caveat* that Plaintiff could file a third motion supported by expert testimony. (R. 183; 191-192.)

Indeed, Plaintiff filed a third motion for summary judgment, but it was devoid of any expert testimony. (R. 198-99; 200 at 15.) Claimants responded and added an additional affidavit from Dr. Lawrence Myers, the former director of Auburn University's Institute for Biological Detection Systems. (R. 210; 211-5.) Plaintiff did not rebut the experts' or Marrocco's affidavits. (R. 214; 216.)

Despite Plaintiff's evidentiary omissions, the district court granted the *third* motion for summary judgment and entered judgment against Claimants. (R. 218-20.) Claimants appealed and this Court reversed. (*United States v. $100,120.00*, 730 F.3d 711 (7th Cir.2013)). This Court held, weighing the evidence is left to the trier of fact; therefore, Marrocco's affidavit was sufficient to create a dispute of material fact. (*Id.* at 718-719.)

Concerning the expert testimony, this Court held the district court improperly foreclosed Claimants an opportunity to contest the training, reliability, and methodology of the purported dog sniff evidence. (*See generally id.* at 719-725.) In short, the Court found the expert affidavits created a material dispute as to whether the currency was recently in

contact with illegal drugs. (*Id.* at 727.) This Court then ordered a general reversal, stating, "we REVERSE the judgment of the district court, and REMAND this case for further proceedings consistent with this opinion." (*Id.*) [Emphases in original.]

C. Second Remand and the Second Round of Pre-trial Motions

On Remand, this case was re-assigned to the Honorable John J. Tharp, District Judge. (R. 232; 235.)

Claimants submitted three pre-trial motions: (1) Claimants' *Daubert* Objections; (2) a motion *in limine* to exclude testimony regarding the currency due to Rule 403 and spoliation; and (3) a motion to suppress statements. (R. 240; 242; 244.) Plaintiff filed (1) a motion to strike an expert witness, and (2) a discovery motion for production of tax returns. (R. 246; 248.)

The trial court (1) denied Claimants' motion for a *Daubert* hearing as moot; (2) denied Claimants' motion to exclude testimony concerning the currency; (3) granted Claimants' motion to suppress statements; (4) granted, in part, Plaintiffs' motion to strike expert witnesses; and (5) denied Plaintiff's untimely motion for production of tax returns. (R. 261 at 1.)

Crucial to this appeal are the rulings on Claimants' motions for a *Daubert* hearing and their motion to exclude evidence regarding the currency. (*Id.*) The trial court denied Claimants' *Daubert* motion as moot because it found Plaintiff had failed to disclose any expert witnesses in the eleven years the case had been pending. (R. 261 at 6.) Specifically, the expert issue here is whether a dog sniff of currency is probative of whether the currency was recently in contact with narcotics.[1] (See *Id.* at 3.) The trial court found Plaintiff had forfeited the opportunity to present expert testimony regarding its dog sniff theory; therefore, there was no need for a *Daubert* hearing as Plaintiff had no expert witnesses. (*Id.* at 7.)

The other motion - to exclude evidence of the currency - was based on Rule 403 and spoliation. (R. 242.) Plaintiff countered with a law of the case argument because a similar motion had been denied by Judge Bucklo. (R. 154; 165; 252 at 4-5.)

Judge Tharp noted he had "substantial questions" regarding the correctness of the prior ruling. (R. 261.) For example, Plaintiff argued (*sans* evidence) it was department policy to deposit the money (which effectively destroys it). (*Id.* at 8-9.) Judge Tharp disagreed, finding

[1] Although there is a subtle distinction between "controlled substances" and "narcotics," (*e.g.* controlled substances generally encompass more than just narcotics - such as marijuana) the terms were used interchangeably throughout the Record, and therefore, throughout this Brief to improve readability.

Plaintiff had not produced any policy mandating the destruction of "evidentiary" cash. (*Id.*) Second, Judge Tharp disagreed with Plaintiff *and* Judge Bucklo that the currency itself had no independent evidentiary value. Quoting this Court's opinion in *Marrocco II*, Judge Tharp found, by destroying and failing to preserve the currency, Plaintiff "deprived the claimants of the ability to discover whether the currency was actually contaminated by any drugs." (*Id.*)

Despite disagreeing with the entire basis of Judge Bucklo's previous ruling, Judge Tharp felt "constrained" to agree with Plaintiff's law-of-the-case argument and denied Claimants' motion. (R. 261 at 11.) Nevertheless, he wrote,

> Were the Court writing on a clean slate, however, it would grant the claimants' motion and bar the admission of the dog-alert evidence in this case based on the government's failure to preserve the seized currency. In this Court's view, the failure to preserve the currency seized in this case evinces utter indifference to the rights of the claimants. The government had a duty to preserve evidence potentially relevant to its forfeiture claim and the currency unquestionably constitutes such evidence. It should have been preserved.

(*Id.*)

Plaintiff filed a motion to reconsider asking the trial court to reconsider two aspects of its previous order: (1) the finding that Plaintiff had not "retained" an expert in this case, and (2) the granting of the

motion to suppress statements. (R. 266; 267 at 1-2.) Presumably in a *post-script* response to Judge Tharp's comments regarding spoliation, Plaintiff attached exhibits concerning the alleged Department of Justice policy of destruction of currency in forfeiture cases, which it had failed to do in the previously filed Response. (*Id.* at Fn. 1; *See also*, R. 261 at 8-9.)

The trial court denied the motion to reconsider after an exhaustive recount of the lengthy pre-trial history of this case. (*See generally*, R. 270). Germane to this appeal is the trial court's holding regarding Plaintiff's failure to preserve the currency and its late-attached DOJ policies. (R. 267 at Fn. 1; R. 270 at Fn. 1.) Judge Tharp completely rejected Plaintiff's argument, writing:

> Neither of the policies, however, purports to authorize the deposit of cash that has independent evidentiary value—as did the cash seized in this case. *See, e.g.*, Ex. A, Dkt. 267-1, at 2 ("Retention of currency ***will be permitted*** when retention of that currency, or a portion thereof, serves ***a significant independent, tangible, evidentiary purpose*** due to, for example, the presence of fingerprints, packaging in an incriminating fashion, ***or the existence of a traceable amount of narcotic residue on the bills***." (emphases added)); Ex. B, Dkt. 267-1, at 41 ("The Attorney General has established the following policy on the handling of seized cash: "Seized cash, ***except where it is to be used as evidence***, is to be deposited promptly in the Seized Asset Deposit Fund pending forfeiture." (emphasis added) (footnote omitted)). And to the extent that the government is suggesting that department policy could legitimize the destruction of material evidence, that suggestion is of course unfounded.

(*Id.* at Fn.1.) [Emphases in original.]

D. The Final Pre-trial Order and Jury Instructions

On December 18, 2015, the trial court conducted a final pre-trial conference and ruled on the pending motions *in limine*. (R. 294) Both Plaintiff and Claimants filed a number of pre-trial motions *in limine.* (R. 275-79.) The relevant motions are as follows:

(1) The trial court granted Plaintiff's motion *in limine*, which moved to preclude Claimants "from presenting evidence, cross-examination, or argument before the jury concerning missing evidence or the 'destruction' of evidence, specifically arguing or suggesting that depositing of the defendant funds into a commercial bank was inappropriate or done with the intent to destroy evidence or to prejudice claimants." (R. 349 at 12.)

(2.) The trial court granted Plaintiff's motion *in limine*, which moved to preclude Claimants from presenting any "evidence, cross-examination and argument referring to any 'Draconian' effects of the forfeiture laws or similar arguments." (R. 349 at 16.)

Both parties filed proposed jury instructions and objections thereto. (R. 273; 280; 292; 293; 295.) The trial court conducted a number of jury instruction conferences both pre-trial and during the trial. (R. 349 at 3-11; 350 at 34-62; 354 at 764-815; 819-822.) There are three relevant

jury instructions to this appeal, which are described herein as: (1) the issues instruction, (2) the transaction instruction, and the offense instruction. (*See infra*, pp. 49-50; A-45; R. 311 at 6.) Claimants objected to the transaction and offense instructions. (R. 293 at 8-10.)

III. The Jury Trial

The Jury Trial began on January 25, 2016. (R. 303.)

A. Plaintiff's Witnesses:

1. Eric Romano: Officer Romano's testimony was largely set forth at the beginning of this statement of facts as an introduction to the case.

Additionally, according to Romano, the only "narcotic" evidence was the dog sniff of the money. Romano never requested the money be sent to the crime lab for testing or preserved as evidence. Romano never investigated any of Fallon's information before, or after, the initial search, such as his address or his cell phone number. Romano testified that he had no information about any drug deal involving the currency at all. (R. 352 at 120, 181-84.)

2. Michael Decker: Retired CPD Officer Michael Decker had worked in various jobs eventually working as a dog trainer for CPD. In 1995, Decker received training as a dog *handler* and in 2000 he received

training at an outside agency in Indiana to be a dog *trainer*.[2] Decker received a trainer certificate from the Indiana Law Enforcement Board but had no Illinois or Chicago certifications as a dog trainer. (R. 352 at 189-94.)

Although Decker did not receive his trainer job until 2000, he claimed that training procedures were substantially similar between 1995 and 2000. However, on cross examination, Decker admitted that he did not know what the standards were when Deny was trained and deployed in 1998. (R. 352 at 212, 238.)

Decker also explained various general concepts and definitions used in the dog training field, such as dual purpose dog (a canine trained to do building search and narcotics detection) or passive vs. aggressive alert (a dog sitting when it finds an object vs. scratching at the object.) Decker also explained the keeping of a "dog log" for each handler/canine team; the document is a log book kept by the handler which is supposed to contain all of the training and field assignments for the dog. Decker had no personal knowledge of Deny's initial training and deployment in 1998. (R. 352 at 212-17, 228, 233, 238, 247-48.)

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[2] Claimants objected to Decker's testimony as the dog in question, "Deny," received his training in 1998, almost two years prior to Decker's certification as a dog trainer. Thus, Decker had no personal knowledge of Deny's training. (See. R. 352 at 195-96.)

Decker admitted that residual or lingering odors of narcotics, can be a problem in training. He suggested the best practice was to sweep the room with a certified dog to insure there were no contaminants in the room prior to training exercises with a dog handler team. But Decker admitted that he had no idea how long the odor of narcotics lingered, as he was "not a chemist." (*Id*. at 241-244.)

3. Richard King: Officer King is a retired Chicago Police Officer. King was the responding canine officer; his dog's name was "Deny."[3] Deny was a "tactical" dog; he was trained in "everything that a dog is trained to do except for bombs," including patrol, apprehension, narcotics, and death scent. (R. 352 at 251, 254, 257, 309.)

Deny and King's trainers at the academy were Tom Ciraulo and Mike Roche. King provided a narrative of the training process of Deny. Although, King could neither recall the CPD Syllabus for the canine training course nor was he aware of the concept of "proofing." Deny and King were certified as a patrol and narcotics dog team on July 22, 1998. (*Id*. at 258-262, 268; R. 353 at 345, 349.)

Officer King also testified as to the facts of the actual sniff in this case, which was described *supra* at pages 7-8.

4. Nicholas Marrocco: Nick is the Claimant of the Defendant

[3] Pronounced "Denny."

Res. Nick testified that he was the owner of the *Res*, which he had accumulated through employment. Due to his financial irresponsibility in college, Nick was unable to open a bank account. Thus, he stored his cash savings in his home. (R. 353 at 370, 374-76.)

At some point approximately late 2002, Nick decided to take his savings to the West Coast and invest the money in a business venture (possibly a bar or restaurant.) Having no bank account, Nick needed to physically transport the cash to Seattle. He discussed his plan with his friend, Vincent Fallon. Originally he and Vince were going to go to Seattle together, but shortly before the trip, the plan changed. (*Id.* at 377-79.)

On December 5, 2002, Nick packaged the money and placed it in Nick's locked briefcase. He then gave the money and the case to Vince to transport to Seattle. The money and the case was later seized by Officers Romano and Terry. (*Id.* at 370, 382-85.)

5. Timothy Marrocco: Timothy, a retired Chief of the Bloomingdale Fire Department, is Nick's father. Nick lived at home with his parents throughout his childhood, and for about six years after he attended college. Nick did not pay rent nor did he pay for his board. Throughout Nick's childhood and early adulthood, he worked many jobs, often for cash. (R. 353 at 416-17, 429-33.)

Timothy related that during that time, Nick also had problems with credit and banking. As his father, he assisted him by helping him purchase a car and obtain a lease on an apartment. He was aware that Nick was a collector and had an extensive baseball card and coin collection. Nick also re-built a motorcycle, a Harley [Davidson], and later sold it. Tim valued the motorcycle at about $50,000.00. (R. 353 at 419, 422, 424-27.)

Tim stated that officers Romano and Evans had "ambushed" him at his office and asked about the $100,000 Defendant *Res*, but stated that they did not ask any questions about whether he was supporting Nick. Tim did tell the officers about the motorcycle, however. He also told the officers that he had discussed investing in a restaurant with his son in approximately 2003. And Tim said that he did not have any knowledge of Nick's involvement with drugs or drug trafficking. (R. 353 at 419-420; 422-23, 425, 433.)

B. Claimants' Motion for a Directed Verdict

Subsequent to the close of Plaintiff's case, Claimant moved for a directed verdict pursuant to Rule 50. (R. 353 at 462.) Claimants argued that there was zero evidence of any drug transaction (whether specific or general) or any narcotics trafficking at all in Plaintiff's case. (*Id.* at 462-465.)

The district court denied the motion. It admitted that there was no evidence of any transaction or trafficking. But found that the dog alert to briefcase was enough evidence to pass the question to the Jury. (*Id*. at 467-69.)

C. Claimants' Witnesses:

1. Dr. Lawrence Myers: Dr. Myers was offered as an expert in canine olfaction and training. Myers is veterinarian and holds a Ph.D. in neurophysiology. Myers is retired, but was a professor of veterinarian medicine, physiology, pharmacology, and anatomy at Auburn University. Myers was the founder and director of the Institute of Biological Detection Systems at Auburn. At the time, the institute was the largest research institute concerning detector dog handler teams and biosensors. (R. 353 at 470-486.)

Myers had reviewed the documentary evidence concerning Deny and the dog alert to the briefcase. Myers opined that he had grave concerns about the methodology of the sniff search and the lack of evidence of Deny's training with contaminated currency; therefore, he concluded that Deny could not be shown to be reliable. Further that the alert cannot be taken as proof that there was significant drug contamination of the currency. Moreover, he opined that it is impossible to confirm or

deny the validity of Deny's alert because the currency was destroyed. (R. 353 at 486-92.)

Myers expounded on his opinion of zero reliability by explaining several concepts, where in his opinion, Deny and his handler did not pass muster, including, but not limited to: (1) the potential for cuing (*Id.* at 493-96; 509-12; 521-22); (2) the failure to proof Deny off alerts to currency (*Id.* at 496-98; 514-21); (3) the lack of evidence of standards for Deny's training (*Id*. at 499-503), (4) the improper training of Deny to alert to multiple odors (narcotics, article search, and human remains.) (*Id*. at 503-06.), the failure of Deny's training to reflect his real world deployment (*Id*. at 507-09); and (5) the potential for contamination at the site of the dog sniff search. (*Id*. at 522-27.)

Cuing is the potential for a canine to pick up signals from its human handler and counterparts which can induce a false alert. Proofing is the concept where a dog is "proved" to be reliable by only rewarding the dog for target behaviors. As example, Myer's explained that Deny should have been proofed off of general circulation currency to ensure that he had not learned to alert to the smell of the currency's ink. (R. 353 at 493-98.)

Ultimately, Myers opined:

> . . . there is not any sufficient evidence to show that the dog was properly trained for this purpose, that it was proofed off of general currency, that the test run in that room on the

> briefcase was conducted in a fashion that's appropriate. It was neither double blind, nor was there any comparative target in there for Deny to discriminate against. And there was, in my opinion, a high probability of cuing by either the handler and/or Romano.

(*Id*. at 527.)

2. David Kroyer: Mr. David Kroyer was called as an expert witness in canine specific odor detection; he is a dog trainer. He has generally trained thousands of dogs and testified that he has trained about fifty dogs for narcotics work. He typically works in the local market in Texas, where his facility is located. (R. 354 at 608-27.)

Kroyer testified that in his opinion, Deny's alert is not reliable. (*Id*. at 627; 690.) His opinion was based on: (1) Lack of Proofing (*Id*. at 627-34); (2) Deny's purported in-house certification (*Id*. at 635-38); (3) problems with search methodology such as the potential for contamination (*Id*. at 638-42); (4) problems with search methodology such as the potential for cuing (*Id*. at 642-44); (5) problems with search methodology such as the failure to sweep the room with Deny without any target object present (*Id*. at 644-45); (6) problems with the adequacy of Deny's training relating to multiple disciplines, *i.e.*, article, cadaver, and narcotics searches (*Id*. 645-49); (7) problems with Deny's reward schedule in the field may have reinforced false alerts to currency (*Id*. at 649-54); and (8) lack of adequate maintenance training for Deny (*Id*. at 654-59).

3. Nicholas Marrocco: Nick was re-called as a witness in Claimants' case as Plaintiff had only called Nick for the limited purpose of establishing how the money was given to Fallon. *See infra*.

Nick is the president of Gateway Development Partners, a commercial and residential real estate development firm. Nick presented his entire work history; most of his jobs paid him in cash. He also recounted his collecting habits: coins and baseball cards, which he also sold for cash. Meanwhile, his parents paid for most of his expenses. (R. 354 at 701-13.)

In college he made mistakes with a credit card; "I forgot about the whole thing that you're supposed to pay them [back.]" (*Id*. at 711.) Later, when he tried to open up a bank account, he was denied multiple times. Without a bank account at his disposal, Nick testified that he kept his money at home. (*Id*. at 711-12, 719-20.)

After his short stint at college, he moved back home and lived with his parents, *circa* 1990. While still working at bars and restaurants, he was hired by GE Capital in their finance department. He had a second job with the Barn of Barrington as a bartender, mostly for cash tips. He also worked various jobs and events (for cash) at local area country clubs. (R. 354 at 712-19.)

In 1994, Nick took a job with Bloomingdale Pizza, which was part of the Rosati's pizza chain. The gross revenues of Bloomingdale were

approximately 1.2 - 1.8 million by the time Nick left employment in 2002. From 1994 through 1998, Nick was paid a combination of salary plus cash tips. Subsequent to that, Nick had an arrangement to buy into the Bloomingdale Pizza corporation, which was never consummated due to the (marital) divorce of the owners. (R. 354 at 720-28.)

After leaving Bloomingdale's, Nick developed a plan for a restaurant concept on the West Coast - a Chicago themed pizzeria and bar. His primary location choice was Seattle, Washington. He investigated some areas, and was targeting the Pike Street Market area in Seattle. In furtherance of his plan, he had several discussions with his friend, Vincent Fallon. (R. 354 at 738-40.)

On December 5, 2002, the day prior to the seizure, Nick met Vince at his apartment and gave him the Defendant *Res* in the briefcase to take to Seattle. Nick planned to use the money for his business venture in Seattle. (R. 354 at 738-45.)

Concerning the Defendant *Res*, Nick testified that:

(1) none of the money was obtained as a result of an exchange for a controlled substance;

(2) none of the money was intended to be furnished for a controlled substance;

(3) none of the money was to be used in connection with a controlled

substance transaction;

(4) none of the money was traceable to a controlled substance transaction; and

(5) none of the money was used or intended to be used to facilitate unlawful narcotics trafficking.

(*Id*. at 745-46.)

Plaintiff did not offer a rebuttal case to refute or impeach Nick's testimony.

C. Jury Instructions and Deliberations

The Jury Charge can be found at R. 355, pages 855 through 866.

Several hours into deliberations, the Jury returned a Note to the Court. The Note read:

> Did the CPD and Amtrak police follow "the proper procedures" (in 2002) related to a drug related confiscation? Or were they required to send suspected items to a crime lab?

(R. 355 at 945.)

The district court gave the following additional jury instruction:

> The question of whether "the CPD and Amtrak police follow[ed] 'proper procedures' (in 2002) related to a drug related-confiscation" is a legal issue that is not relevant to your determination of whether the funds are subject to forfeiture. As to whether they were "required to send suspected items to a crime lab?" you have received all of the evidence in this case. You must decide this case based upon the evidence heard in Court.

(R. 337; 355 at 955-56.) Claimant objected to the additional instruction and offered their own instruction. (R. 355 at 952, 956; R. 338.)

A few hours later, the Jury returned a verdict for Plaintiff. (R. 313.) Subsequent to the verdict, the trial court entered Judgment forfeiting the funds in the amount of $100,120.00 in United States Currency to the United States. (R. 307; 308.) A Decree of Forfeiture was entered of Record on February 10, 2016. (R. 315; 316.)

IV. Post-trial Motions

On February 26, 2016, Claimants filed timely post-trial motions consisting of: (1) a renewed motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50; (2) a motion for a new trial pursuant to Federal Rule of Civil Procedure 59; (3) motion to determine whether forfeiture was constitutionally excessive pursuant to the Eighth Amendment to the United States Constitution; and a comprehensive memorandum in support of said motions. (R. 319-22.)

Claimants' motion for judgment as a matter of law renewed their motion for a directed verdict at the close of Plaintiff's case. (R. 319.) The motion noted that the jury instructions required the jury to first find a substantial connection with a controlled substance transaction. (*Id.* at 2-3.) Yet Plaintiff never introduced any testimony concerning any controlled substance transaction at all. (*Id.* at 3.)

Claimants' motion for a new trial focused on the jury instructions. It claimed error as to (1) the initial jury instructions being confusing and contradictory, (2) the failure to give a spoliation instruction, (3) the failure to submit special interrogatories despite Plaintiff's reliance on three different theories, and (4) the additional jury instructions given in response to a jury note during deliberations. (R. 320.)

Finally, Claimants' motion to determine whether the forfeiture was constitutionally excessive was grounded upon 18 U.S.C. § 983 (g), which Claimants argued mandated the trial court to weigh whether the forfeiture was proportional irrespective of the jury verdict. (R. 321.)

The motions were fully briefed and on June 24, 2016, the trial court entered a comprehensive Memorandum Opinion and Order denying the post-trial motions. (R. 328-30; 334-36; 339.)

A timely notice of appeal was filed on August 22, 2016. (R. 340.)

Summary of Argument

I. Claimants first assignment of error concern four legal mistakes in the jury instructions, which cumulatively resulted in an unfair trial.

First, Plaintiff claims the currency was tainted with drugs, which resulted in a drug sniffer dog alerting to the currency. But we do not know whether the currency was, in fact, tainted with drugs because Plaintiff destroyed the (currency) evidence. Thus, the currency is gone.

Claimants asked for, and were denied, a spoliation jury instruction. Even though the trial judge "adamantly" disagreed with a prior district judge's evidentiary ruling, he held the law-of-the-case doctrine applied and denied the instruction. Claimants contend the trial judge was free to revisit the ruling because the law-of-the-case doctrine does not apply to evidentiary rulings. (*Menzer v. United States*, 200 F.3d 1000, 1004 (7th Cir.2000.))

Second, the trial court erred in giving confusing and contradictory jury instructions. (R. 311 at 6.) The primary issues instruction required the jury to find a substantial connection between the currency and a narcotics transaction. (18 U.S.C. 983 (c)(3).) However, Plaintiff invited the trial court to give two additional instructions, which were based on pre-CAFRA law and essentially cut this instruction off at the knees. The additional instructions misstated the law and confused the Jury. (*E.g., cf.*

18 U.S.C. § 983 (d) "Innocent Owner Defense" and R. 273 at 32, R. 311 at 6.)

Third, the substantial connection requirement was not the only complication in the instructions. The trial court instructed the jury on Plaintiff's three different theories for forfeiture of the *Res*. (R. 311 at 6.) Claimants urged the trial court to issue special interrogatories to the Jury given the complicated instructions which required at least one contingency (the substantial connection requirement) and three separate theories (*e.g.*, commission, proceeds, or facilitation.) (Fed. R. Civ. Proc. 49.) The trial court denied Claimants' request for jury interrogatories.

Fourth, during jury deliberations, the jury sent a note to the court. Claimants urged the trial court to simply respond (paraphrasing), "you have received all the evidence and must decide the case based on that evidence." (R. 338.) Instead, the trial court gave an expanded additional instruction, which Claimants argue virtually directed a verdict for Plaintiff. (R. 337.) Moreover, the subject of the jury note highlighted that the destruction of the evidence (spoliation) was a critical issue in jury deliberations.

Cumulatively, these four errors resulted in an unfair trial for Claimants. This Court should reverse the final judgment and remand with instructions clarifying proper jury instructions in this case.

II. In a civil forfeiture plaintiff must prove by a preponderance of the evidence a substantial connection between the defendant currency and a drug transaction. (18 U.S.C. § 983(c)(3)). Yet Plaintiff did not introduce any evidence of a drug transaction or narcotics trafficking - at all. Therefore, subsequent to Plaintiff resting, Claimants moved for a directed verdict arguing that Plaintiff failed to produce any evidence of a narcotics transaction.

The trial court agreed - that there was no evidence of a drug transaction in the case. But the trial court denied the motion because it held the dog sniff provided enough evidence to give the case to the Jury. Claimants disagree.

This Court should not be the first court in the nation to hold a dog sniff can establish a substantial connection between money and a narcotics transaction - without any other evidence of an actual transaction. *Ergo*, this Court should reverse and remand with instructions to enter judgment in favor of Claimants.

III. Even if the Court finds no error with the pre-trial and trial proceedings, the trial court erred in refusing to grant Claimants a post-trial hearing to determine whether the forfeiture of the entire *Res* was constitutional pursuant to the Eighth Amendment. The federal constitution proscribes excessive fines. (US. Const. Amend. VIII.) 18

U.S.C. § 983(g) specifically provides for a hearing before a judge to determine whether the forfeiture is proportional to the claimed offense.[4]

Here, the district court denied Claimants a hearing, which was requested in their post-trial motions. Moreover, the district court's pre-trial evidentiary rulings (motions *in limine*) prohibited evidence or argument concerning the unfairness of the forfeiture. Therefore, this Court should reverse the district court and remand this matter with instructions to conduct a post-trial, Section 983(g) hearing concerning the proportionality of the forfeiture.

IV. Finally, Claimants preserve their objection to the decision in *Marrocco I*, which resulted in reversal of the district court's suppression of the Defendant *Res*. Claimants have maintained an objection to this ruling throughout the proceedings for potential Supreme Court review, and maintain that objection herein.

[4] "The claimant shall have the burden of establishing that the forfeiture is grossly disproportional by a preponderance of the evidence at a hearing conducted by the court without a jury." 18 U.S.C. § 983(g)(3).

Argument

I. The cumulative effect of the improper jury instructions resulted in a fundamentally unfair trial for Claimants

A. The district court's refusal to give a Spoliation Jury Instruction based on the Law-of-the-Case Doctrine was prejudicial error.

1. Standard of Review: When a trial court bases its decision on whether to give a jury instruction on a question of law (here, "law-of-the-case"), review is *de novo*. (*Highmark, Inc. v. Allcare Health Management System, Inc.*, 134 S.Ct. 1744, 1747 (2014), quoting *Pierce v. Underwood*, 487 U.S. 552, 558 (1988); *See also, U.S. v. Macedo*, 406 F.3d 778, 787 (7th Cir.2005), citing *U.S. v. Smith*, 308 F.3d 726, 741 (7th Cir.2002) ("We review a district court's choice of jury instruction *de novo* when the underlying assignment of error implicates a question of law.")

2. Plaintiff destroyed the critical currency evidence by depositing it in a bank.

As identified early in this saga, the primary evidence *was* the destroyed currency. According to Plaintiff, no matter, because the dog alert furnishes the purported link between the money and drugs. *Ergo*, the dog alerted to the money because the money was tainted with drugs. But Plaintiff prevented Claimants from testing this theory because immediately after the seizure, and without permission from Claimants or

any court, Plaintiff destroyed the evidence by depositing the money into a bank.

From there, this so-called tainted currency was re-injected into the federal reserve system to (presumably) further contaminate the rest of our money supply. And this nonsensical process is repeated in nearly every money forfeiture in the United States, *i.e.*, currency purportedly tainted with narcotics is seized and re-injected into the money supply. (R. 252 at 12.) Perhaps, the only thing more incredible than a policy of destroying evidence is the reason Plaintiff offered in the trial court: "[t]his was done pursuant to department policy . . . presumably, in part, **because cash has a tendency to disappear**." (R. 252 at 13.) [Emphasis added.] In other words, Plaintiff claims that the evidence is destroyed because *its employees* cannot be entrusted with cash.

This policy is absurd and offensive. First, it serves to contaminate the entire money supply; so-called "innocent" currency, ATM machines, cash registers, and even the rollers at the federal reserve, all become contaminated with the trace narcotics on the allegedly tainted currency. (R. 211-3 at 6.) Second, the policy serves to deprive claimants of their only means of proving the currency is not tainted with narcotics - scientific testing of the currency. (*See $100,120.00 in U.S.C.*, 730 F.3d 720 n. 9 ("By failing to perform such testing (and failing to preserve the

Funds until the conclusion of this proceeding), the government eliminated laboratory testing as a source of evidence.”))

Here, just as in nearly every drugless, currency forfeiture case, we only have the claimed dog alert *to the currency* because Plaintiff destroys the money right after it seizes it. Due to this intentional evidence destruction, Claimants urged the district court to completely bar the evidence or, at a minimum, give a spoliation jury instruction. (R. 242 at 21; R. 280 at 34.)[5] The district court refused, holding law-of-the-case precluded the jury instruction even though there had been no pre-trial jury instruction conference, no proofs, and no trial. (R. 261 at 11.)

3. The district court erroneously found the law of the case doctrine precluded a spoliation jury instruction.

Prior to *Marrocco II*, Claimants had filed a series of motions in preparation for Plaintiff’s *first* motion for summary judgment. The motions objected to certain evidentiary claims by Plaintiff and urged the

[5] Seventh Circuit Pattern Spoliation Jury Instruction: “Claimants contend that the Plaintiff at one time possessed $100,120.00 of United States Currency which it destroyed by depositing it in a Bank. Thus, it could not be tested by a laboratory. However, Plaintiff contends that the $100,120.00 of United States Currency was not destroyed and the loss of evidence was pursuant to its policy to place all money seized in a Bank. You may assume that such evidence would have been unfavorable to Plaintiff only if you find by a preponderance of the evidence that: (1) Plaintiff intentionally destroyed the evidence or caused the evidence to be destroyed; and (2) Plaintiff destroyed the evidence or caused the evidence to be destroyed in bad faith.”

district court to disregard this evidence for the purposes of summary judgment.

One such motion was a motion to bar evidence of the dog sniff. (R. 154.) The motion asked the district court to refuse to consider the dog sniff evidence. The majority of that motion was based on Plaintiff's intended reliance on the dog handler (a lay witness) to attest to scientific facts. Alternatively, Claimants cited Plaintiff's destruction of the *Res* as a basis for the motion. At trial, Claimants should have been entitled to the Seventh Circuit Pattern Jury Instruction regarding spoliation. Thus, in the alternative to barring the dog sniff evidence, Claimants asked the district court to allow a spoliation instruction. At that time, Judge Bucklo denied the motion to bar. (R. 165; 166.)

Plaintiff then filed its second motion for summary judgment, which was denied by the district court. Undeterred, Plaintiff filed a third motion for summary judgment, which was granted. The time period between the denial of the motion to bar the dog sniff and the ruling on the third motion for summary judgment was nearly 18 months. (*Cf.* R. 165; 218)

As explained *supra*, Claimants appealed the summary judgment ruling, resulting in *Marrocco II.* In briefing that appeal, the interlocutory ruling on the motion to bar was not substantively raised. Although this Court did comment on the destruction of the *Res*; "[b]y failing to perform

such testing (and failing to preserve the Funds until the conclusion of this proceeding), the government eliminated laboratory testing as a source of evidence." (730 F.3d at 720, n. 9.) Ultimately, this Court reversed the trial court's summary judgment ruling and remanded the case. (*Id.* at 727.)

On remand, the case was reassigned to Judge Tharp. After examining the record, Judge Tharp concluded that since the spoliation issue (an evidentiary ruling) could have been appealed in *Marrocco II*, the failure to do so rendered it the "law-of-the-case." (R. 261 at 11.) Claimants disagree and urge this Court to reverse the district court's ruling.

Law-of-the-case is a discretionary doctrine which should be applied with flexibility and not as a "straight jacket." (*Menzer v. U.S.*, 200 F.3d 1000, 1004-05 (7th Cir.2000)). In *Menzer*, this Court stated:

> The law of the case doctrine does not bar a trial court from revisiting **its own evidentiary rulings**. We recently explained in *Monfils v. Taylor*:
>
> > The law of the case doctrine is a flexible rule, which "merely expresses the practice of courts **generally** to refuse to reopen what has been decided ...."; it is "not a limit on their power." . . . the "presumption that a ruling made at one stage of the proceedings will be adhered to throughout the suit" was one "**whose strength varies with the circumstances; it is not a straight jacket.**" [T]he most compelling application of the doctrine occurs when a court of appeals has decided an issue.

Id. [Citations omitted.] [Emphases added.]

The reasons to review this issue are uniquely compelling in this case. Because (1) the issue here was an evidentiary ruling - not a substantive ruling in the case; (2) it was raised in a motion to bar the dog sniff as an *alternative* basis for the motion[6] (R. 154); and (3) the basis for finding that the ruling was the law of the case was premised on Claimants' appeal of the trial court's ruling on summary judgment. (R. 218-20.) Importantly, the spoliation ruling was not an integral part of the summary judgment decision and was made some 18 months prior to the summary judgment ruling. (*Cf.* R. 166; 218-220.)

In *Menzer*, the appellate court stated the law of case doctrine's "most compelling" reason occurs when a court of appeals has decided an issue. (*Menzer*, 200 F.3d at 1005.) But that did not occur in *Menzer*, so the appellate court held,"[b]ecause the Government did not appeal the **evidentiary** ruling excluding Menzer's prior conviction, the trial judge was free to revisit this ruling in Menzer's second trial." (*Id.*) [Emphasis added.] Thus, the appellate court held the law of the case doctrine did not apply.

[6] And not to belabor this point, but the motion itself was a motion to exclude evidence - it was specifically asking the court to **completely bar** the introduction of the dog sniff evidence - a basis of which was the destruction of the evidence or spoliation.

And this is the exact scenario here. The district court applied the law of the case doctrine to an evidentiary ruling. Just as in *Menzer*, the district court was free to revisit this issue after the second appeal because this Court never decided the issue. And many other courts have noted the inapplicability of law-of-the-case to evidentiary rulings; some have even stated the doctrine is non-existent in regards to evidentiary rulings. (*See e.g.*, *Tang v. Rhode Island*, 163 F.3d 7, 11 (1st Cir.1998); *United States v. Akers*, 702 F.2d 1145, 1147–48 (D.C. Cir.1983); *United States v. Williams*, 205 F.3d 23, 34 (2d Cir.2000); *United States v. Todd*, 920 F.2d 399, 403 (6th Cir.1990); *United States v. Birney*, 686 F.2d 102, 107 (2d Cir.1982).)

Although this Court commented at footnote nine concerning the destruction of the *Res,* it made no affirmative ruling concerning the spoliation issue. Indeed, if anything can be determined from the tone of the footnote, it is that this Court found the destruction of the evidence to be improper. (*See* 730 F.3d 720 at n.9.)

As discussed *ante*, the law of the case doctrine is discretionary; another reason the trial court should have abstained from applying this doctrine is when it would result in manifest injustice. The Supreme Court has noted that "under law of the case doctrine, as now most commonly understood, it is not improper for a court to depart from a

prior holding if convinced that it is **clearly erroneous** and **would work a manifest injustice**." (*Arizona v. California*, 460 U.S. 605, 618 n. 8 (1983), citing *White v. Murtha*, 377 F.2d 428, 431–432 (5th Cir.1967) [Emphases added.])

There is an abundant record confirming the trial judge *adamantly* believed the prior ruling on the motion to bar was clearly erroneous. Indeed, there can be no question here because Judge Tharp stated he would not have just allowed a spoliation instruction, he would have barred the dog sniff evidence altogether. The district court opined,

> And to the extent that Judge Bucklo accepted the government's argument that the currency seized in this case had no independent evidentiary value, this Court respectfully, but adamantly, disagrees.
>
> * * *
>
> **Were the Court writing on a clean slate, however, it would grant the claimants' motion and bar the admission of the dog-alert evidence in this case based on the government's failure to preserve the seized currency.** In this Court's view, the failure to preserve the currency seized in this case evinces utter indifference to the rights of the claimants. The government had a duty to preserve evidence potentially relevant to its forfeiture claim and the currency unquestionably constitutes such evidence. It should have been preserved.

(*United States v. $100,120.00*, 127 F.3d 879, 890 (N.D. Ill. 2015) [Emphasis added.])

Moreover, the ruling is a manifest injustice. As the district court noted throughout the proceedings, the only evidence linking the money to drugs is the purported dog alert. Thus, this evidence was pivotal to establish a substantial connection. However, when Plaintiff destroyed this evidence it deprived Claimants an opportunity to rebut this evidence in at least two ways.

The obvious reason is the lack of scientific testing. Claimants were unable to have independent testing of the currency accomplished in order to challenge the government's theory of the case. And we know this is an important issue because the Jury's note tells us so. Thus, the Jury's note establishes there was great prejudice to Claimant's case.

A second reason became obvious during the trial. Marrocco testified that he had saved the money for years. (R. 738-743.) Plaintiff disputed this claim and asserted the money was related to drug dealing. Had the government preserved the evidence we would have known if Marrocco's testimony was corroborated by simple inspection of the money. As we all know, currency has serial numbers and dates of production. And it has been observed that the average life of a bill is quite short. (*U.S. v. $1,074,900.00*, 932 F.Supp.2d 1053, 1062-63 (D. NE. 2013)). In other words, Marrocco's claim of saving this currency over the course of a decade could have been verified by simple inspection of the serial

numbers and dates of printing. As one court recently observed in a civil, currency forfeiture:

> The court is also troubled by the fact that the seized bills are not available for inspection. The claimant alleges that she saved this currency for many years. She testified how she secured the bills on the job and how she converted small denomination bills to larger denominations for deposit over the years. Paper money is printed and recirculated on a regular short-term basis. Had even the serial numbers of the bills been preserved, the claimant's assertion could have been verified.

(*$1,074,900.00*, 932 F.Supp.2d at 1062-63.) This is precisely the issue raised in this case. Thus, Plaintiff's destruction of the evidence deprived Claimants a due process opportunity to test their testimony and rebut Plaintiff's case with facts and science. (U.S. Const. Amend V.) Therefore, a clear violation of Claimants' due process rights by the government. (*Id.*)

Prior to the trial, there may have been speculation as to the prejudice, but the trial emphasized the damage to Claimants' case the destruction of the currency has done. Claimants could not scientifically rebut the government's claim that the money was tainted with narcotics - which the government claims caused the dog alert - which in turn it claims linked the money to narcotics. Second, Claimant could not corroborate his own testimony that the currency was the result of a decade of saving because Plaintiff destroyed the evidence. In practice, this results in a fundamental due process violation. (*Id.*)

To put this in perspective, Plaintiff seized the money and created its dog sniff evidence which unilaterally favored its case. It then unilaterally destroyed the currency (evidence) and prevented Claimants an equal opportunity to rebut Plaintiff's allegations. For example, it is impossible for Claimants to inspect the money and obtain scientific opinions that the money was not contaminated, *ergo*, the dog alert was false. Instead, Claimants are limited to attacking the dog alert directly without any ability to test the currency upon while the dog supposedly alerted. In short, this is not a level playing field; the government has stacked the deck.

The district court provided a compelling opinion that the destruction of the currency was wrong. However, Judge Tharp felt handcuffed to blindly follow a ruling he *adamantly* stated was clearly erroneous. In other words, Judge Tharp treated the law of the case doctrine as a straitjacket that prevented him from deviating from the prior evidentiary ruling no matter how erroneous he found it. (*Cf. Menzer*, 200 F.3d at 1004.) This ruling was a fundamental error and due process violation resulting in an unfair trial. Judge Tharp should have revisited the issue and either barred the dog sniff evidence altogether, or, at a minimum, allowed the Jury to hear the Spoliation Instruction.

4. Judge Bucklo's evidentiary ruling was a fundamental mistake of law which is manifestly erroneous.

Another reason Judge Tharp should have declined to follow Judge Bucklo's prior evidentiary ruling is because Judge Bucklo fundamentally misapprehended the law. Judge Bucklo grounded her ruling on two theories: (1) Claimants did not demonstrate *to her* that Plaintiff acted in bad faith because Plaintiff claimed it was department policy to deposit the currency, and (2) she relied on Plaintiff's claimed "Furton theory" regarding dog sniffs of allegedly drug contaminated currency.

Taking the second point first, the appeal in *Marrocco II* eviscerated the district court's reliance on the so-called "Furton theory" *vis-a-vis United States v. $30,670.00*, 403 F.3d 448 (7th Cir.2005). In *Marrocco II*, this Court reversed the district court for foreclosing Claimants the opportunity to challenge the holding in *$30,670.00*, as the holding was limited to the facts present in that case. (*$100,120.00*, 730 F.3d at 720.)

Here, the Record proved the opposite. There is zero evidence of the Furton theory in this case because Plaintiff was barred from presenting any evidence of the theory at trial. Thus, there is no evidence in the Record to support the arbitrary and capricious decision to accept Plaintiff's view of the *potential* evidence.

Returning to the first point, the trial judge also accepted Plaintiff's claim of "departmental policy" without any evidence in the Record; Plaintiffs' response did not provide any proof of a departmental policy concerning currency seizures other than Plaintiff's say-so. (R. 157.)

Moreover, Judge Bucklo misapplied the law. Judge Bucklo claimed that Claimants did not **convince her** that Plaintiff acted in bad faith, but that is not the standard for jury instructions. The standard is whether the evidentiary record *at trial* supports the giving of the instruction.

And this point is particularly acute when one reviews this Court's pattern instruction. (*See* footnote 5, *supra*.) The instruction states **the Jury** is to determine (by a preponderance) whether (1) the proponent destroyed the evidence, and (2) whether the destruction was done in bad faith. (*Id*.) Thus, when Judge Bucklo ruled that Claimants did not convince her that they were entitled to a spoliation instruction, she (1) misapplied the law, (2) prejudiced the proofs without an evidentiary record, and (3) usurped the province of the Jury as the finder of fact.

Returning to *Menzer*, perhaps this is why the Court held that law-of-the-case does not bar a trial court from revisiting its own evidentiary rulings. (*Menzer*, 200 F.3d at 1004.) By their nature, evidentiary rulings are "highly contextual" and depend on the evidence in the record at that time. (*See e.g., United States v. Boyd*, 208 F.3d 638, 643 (7th Cir.2000),

citing, *Coal Resources, Inc. v. Gulf & Western Industries, Inc.*, 954 F.2d 1263, 1265–66 (6th Cir.1992), *rev'd* on other grounds, *Boyd v. United States*, 531 U.S. 1135 (2001).)

Here, Judge Bucklo's decision to pre-judge the proofs without any evidentiary record - let alone - a jury trial record (which would not occur until nearly six years later) - cannot stand muster; it is a fundamental and manifest error. This Court should hold that law-of-the-case does not apply to this ruling and reverse the district court's rulings.

Finally, as discussed *infra*, Claimants can easily demonstrate prejudice from this ruling. The Jury note virtually telegraphed that the Jury was hung at some point during their deliberations concerning the destruction of the currency. Clearly, had the Jury been instructed with the Spoliation Instruction, they likely would have come to a different verdict. This Court should cure this fundamental error and manifest injustice by reversing the trial court's ruling.

* * *

On a final note, Claimants wish to point out the policy issue at stake is not unique to this case. Nearly every currency forfeiture results in the exact same pattern; the currency is always deposited, hence, destroyed. This policy prejudices every potential claimant. The government is free to collect its evidence, and then destroys the very evidence which would

allow a litigant to contest it. It is outrageously unfair. No law enforcement agency would destroy critical evidence such as the narcotics or money in a criminal drug case. Why then should the government be allowed to destroy the critical evidence in a civil forfeiture? Respectfully, this Court should vacate the final judgment and reverse the trial court's ruling.

B. The Jury Instructions were confusing, contradictory, and misstated the law, which unfairly prejudiced Claimants' case.

1. Standard of Review: Whether jury instructions fairly and accurately state the law is reviewed *de novo*. (*Paldo Sign and Display Company v. Wagener Equities, Incorporated*, 825 F.3d 793, 796 (7th Cir. 2016); *Macedo*, 406 F.3d at 787.)

2. The contradictory jury instructions confused the Jury and misstated the law

The district court gave at least three instructions which were contradictory on their face and confused the Jury. The three relevant instructions are as follows:

The first instruction will be referred to as the "issues" instruction;" it stated:

> Plaintiff alleges that the defendant currency is forfeitable as money involved or intended to be involved in unlawful drug trafficking. To succeed in this claim, plaintiff must prove each of two propositions by a preponderance of the evidence.
>
> First, that there is a substantial connection between the funds and an unlawful controlled substance offense; and

> Second, that the funds were:
>
> > (a) furnished or intended to be furnished in exchange for a controlled substance;
> >
> > (b) proceeds traceable to an unlawful exchange for a controlled substance; or
> >
> > (c) money used or intended to be used to facilitate unlawful narcotics trafficking.
>
> As to this second proposition, the plaintiff need not prove that all three of these things are true about the funds; they are alternatives and you need conclude only that one of these three alternatives has been proved by a preponderance of the evidence.
>
> If you find that plaintiff has proved both of these propositions (that is, the first proposition and one of the three alternatives that the second proposition ,includes) by a preponderance of the evidence, then you must find for the plaintiff. However, if you find that the plaintiff did not prove one or both of these propositions by a preponderance of the evidence, then you must find for the claimants.

(A-45; R. 311 at 6.)

The second instruction will be referred to as the "transaction instruction;" it stated:

> To prevail in a civil forfeiture action, the plaintiff is not required to establish a substantial connection to a specific unlawful controlled substance transaction that occurred at a particular place and time. Rather, the plaintiff is required to prove by a preponderance of the evidence that there is a substantial connection to some unlawful controlled substance transaction.

[*Id.*]

The third instruction will be referred to as the "offense instruction;" it stated:

> To prevail in a civil forfeiture action, the plaintiff is not required to prove the claimant committed a controlled substance offense. The fact the claimant did not directly participate in any illegal activity involving any of the defendant properties is not a defense to the forfeiture of the defendant properties.

[*Id.*]

The *issues* instruction correctly instructed the Jury that they must find Plaintiff proved a substantial connection between the *Res* **and** a controlled substance offense. This first instruction came directly from 18 U.S.C. § 983(c), which sets forth the burden of proof and the substantial requirement, and 21 U.S.C. § 881(a)(6), which sets forth Plaintiffs' three theories of forfeitability.

The problem results from the second and third instructions which purport to remove this substantial connection requirement. For example, the *transaction* instruction absolves Plaintiff from proving a substantial connection to a specific transaction and claims it is enough if Plaintiff establishes a substantial connection to "some" nebulous transaction. It is difficult to imagine how Plaintiff could ever establish a "substantial connection" to a transaction which it does not have to prove. In other words, how does one establish the concept of "some" unlawful controlled

substance transaction? And moreover, how does one establish a substantial connection to this nebulous transaction?

The concept is totally contradictory and confusing to an average juror. The average person would have such a difficult time determining the meaning of these conflicting statements, they would ignore the substantial connection requirement entirely.

The *offense* instruction only exacerbates this confusion. First, it claims Plaintiff is now absolved from proving the existence of any narcotics offense whatsoever. Second, it misstates the law when it instructs the Jury that even if they find claimant did not participate in **any** narcotics offense, it is no defense to the forfeiture. This jury instruction is not only confusing and contradictory, but it is also a misstatement of law.

The *offense* instruction directly contradicts the innocent owner defense. (*See* 18 U.S.C. § 983(d)). Take for example a claimant who was merely in possession of currency which at some time prior had come in contact with narcotics. According to the strict terms of this third instruction, the Jury must find for Plaintiff. This is a misstatement of the law, which virtually directs a verdict for Plaintiff.

But more confusing, after this third instruction, the Jury is left to consider three instructions which all state different legal standards: the

issues instruction states that Plaintiff must prove a substantial connection **with** an offense; the *transaction* instruction states that Plaintiff does not need to prove the details of a specific offense, but rather must show a substantial connection to "some" offense; and the *offense* instruction tells the Jury that Plaintiff is not required to prove any offense whatsoever because even if they find that claimant did not participate in **any** offense, the money is still forfeitable.

The combined result of these three instructions is they essentially eliminated the substantial connection requirement such that the Jury ignored the requirement altogether. Thus, the combination of the three instructions was a misstatement of law. (*Paldo Sign*, 825 F.3d at 796.)

And these instructions were the primary instructions in the case upon which the Jury would determine whether Plaintiff proved the *Res* is forfeitable. This Court looks to the instructions in their entirety to determine if they so misguided the jury as to prejudice a litigant. (*United States v. Quintero*, 618 F.3d 746, 753 (7th Cir.2010)). Here the three instructions are contradictory on their face and did result in confusion for the jury. The likelihood that the Jury would virtually ignore the *required* substantial connection (to a narcotics transaction) is invited by the *transaction* instruction and assured by the *offense* instruction.

The substantial connection requirement, placed as it is in the burden of proof upon plaintiff, is no less a requirement for a forfeiture as the necessity to find the property guilty of a forfeitable offense (here, an alleged violation of 881(a)(6). Moreover, the contradictory instructions raise the concern that the Jury will not hold Plaintiff to the same standard (here, by a preponderance) on this primary issue. This is analogous to jury instructions which purport to alleviate the government from proving a defendant guilty beyond a reasonable doubt because it, just as in the criminal case, results in a deprivation of due process. (*See e.g., United States v. Birbal*, 62 F.3d 456, 460-61 (2nd Cir.1995).)

Therefore, the contradictory instructions were not only a misstatement of the law, they were grossly prejudicial to Claimants. They encouraged the Jury to find for Plaintiff without holding Plaintiff to the legal requirement of a substantial connection. (18 U.S.C. § 983(c).)

3. The failure of to give Claimants' Special Interrogatories was error due to the confusing nature of the Issues Instruction

Claimants submitted two special interrogatories for the Jury which were outright rejected by the district court. The decision to submit special interrogatories is within the sound discretion of the court. (Fed.

R. Civ. Proc. Rule 49.)[7] The error of providing contradictory jury instructions was only exacerbated by failing to give the special interrogatories. This is so because the interrogatories would have crystallized the issues to be decided in this complex case. Therefore, the district court erred in refusing to give the special interrogatories.

Here, the jury instructions required the Jury to find two specific and independent factual questions. First, the Jury was required to find Plaintiff had proven by a preponderance of the evidence that a substantial connection existed between the Defendant *Res* and a controlled substance violation. (R. 311 at 6.)

Second, the Jury was to determine whether Plaintiff had proven its case by a preponderance that the Defendant *Res* was (1) furnished or intended to be furnished in exchange for a controlled substance, (2) proceeds traceable to such an exchange, or (3) money used or intended to be used to facilitate narcotics trafficking. (*Id.*)

The parties and the district court discussed these questions at several lengthy jury instruction conferences, both pre-trial and during the trial. There were extended discussions concerning the meaning of the forfeiture statutes, CAFRA, and at least two briefings on the matter. In

[7] Claimants acknowledge this decision is subject to an abuse of discretion standard of review. (*Paldo Sign*, 825 F.3d at 796.)

other words, even for seasoned lawyers, intense debate was possible as to precisely what the law meant.

For example, what precisely is a "substantial connection" with a narcotics offense? And if one must find a substantial connection, what was the Jury to make of the other instruction telling them that the Plaintiff need not even submit evidence of a controlled substance offense? (See Argument II.B.2, *supra*.)

Claimants were very concerned the Jury would confuse the issues given the confusing nature of the law and instructions. Therefore, Claimants proposed special interrogatories focusing the jury on the two primary factual questions for decision: (1) whether a substantial connection had been proved, and (2) whether the second prong (furnished, proceeds, or facilitation) had also been proved.

We now know that the Jury debated the first question at length because the Jury note told us so. See Argument II.C, *infra*. Thus, it was especially important on the particular facts of this case to provide the Jury with these special interrogatories for verdict.

* * *

The interrogatories would have properly focused the Jury on the two primary, factual issues to be decided. They would have served to emphasize that the substantial connection requirement was necessary in

order to find for Plaintiff and not merely surplusage to be skipped over. Here, given the Jury feedback from the note, it proved to be especially important to emphasize this fact. Therefore, Claimants submit the combination of the contradictory jury instructions and the failure to provide the special interrogatories was a grave prejudicial error which deprived Claimants of a fair trial.

C. The Court's additional Jury Instruction during deliberations unfairly prejudiced Claimants' case.

1. Standard of Review: Whether to give a particular jury instruction is reviewed under an abuse of discretion standard; while whether an instruction properly stated the law is reviewed *de novo*. (*Paldo Sign*, 825 F.3d at 796.) Here, the trial court's additional instruction misstated the law and misled the jury.

2. The Jury Note emphasized the Jury's concern over the destruction of the Currency Evidence.

Critically, after the Jury had been deliberating for about two hours, it asked:

> Did the CPD and Amtrak police follow "the proper procedures" (in 2002) related to a drug related confiscation? **Or** were they required to send suspected items to a crime lab?

(R. 355 at 945.) [Emphasis added.]

Plaintiff argued the note concerned the search of Fallon and directed the trial court's attention to the appellate history of the case. According

to Plaintiff, there were two questions contained in the note. Claimants submit this was an erroneous interpretation for at least two reasons.

First, the legal procedure of Fallon's seizure was not mentioned during the trial. Thus, the Jury was not asking about *Fallon's* seizure; it was clearly asking about the *money's* seizure.

Second, it is obvious the Jury was *really* asking just one question because of semantics. The Jury used the connector "or," not the word "and." (See *id.*) To find in favor of Plaintiff's reading of the note defies the grammar contained in the note.

The only logical reading is that the Jury was asking one question with the second sentence acting as a qualifier to the first sentence. The Jury was not asking whether Fallon's seizure was proper; it was focusing on the procedures relating to the *seizure of the money*.

To illustrate, the Jury was asking whether "the CPD and Amtrak police follow[ed] "the proper procedures" (in 2002) related to a drug related confiscation [**by seizing and depositing the money in a bank]?** Or were they required to send suspected items to a crime lab?"

The addition of the bold-faced language makes it obvious the second question only makes sense if the Jury was asking about the money. The second sentence makes the subject matter of the first sentence abundantly clear. "Or were they required **to send suspected items** to a

crime lab" only makes sense if the first question only pertained to the money's "confiscation."

Thus, it is clear from the language used by the Jury that their question was basically, did the CPD or Amtrak Police have to send the money to a crime lab? In other words, did the officers follow the proper procedures by depositing the money or do their procedures require them to retain the evidence.

At first, the trial court cited *U.S. v. Paul*, 213 F.3d 627 (2nd Cir.2000), and was inclined to give a terse, supplemental instruction that simply instructed the Jury that they need to decide the case based on the evidence in the record - which is what Claimant had argued and proposed. (R. 338.)

But then, the trial court changed its mind and opined the note contained two questions; it then gave the following additional instruction:

> The question of whether "the CPD and Amtrak police followed proper procedures in 2002 related to a drug related confiscation" is a legal issue that is not relevant to your determination of whether the funds are subject to forfeiture. As to whether they were "required to send suspected items to a crime lab," you have received all of the evidence in this case, and you must decide this case based upon the evidence heard in court.

(R. 355 at 955-56.)

The problem with this supplemental instruction is multi-faceted. First, assuming the Jury was asking just one question, the answer to the note

essentially directs a verdict for the government. It tells the Jury that whether the CPD should or should have not retained the evidence was irrelevant to whether the funds are forfeitable. However, a significant argument raised by Claimants was that the only way to know if the money was actually contaminated with narcotics was through scientific testing. The answer to the note completely undercuts this argument. (R. 337.)

We know the Jury was in significant disagreement over whether the money was tainted with narcotics and/or whether the scientific testing would have answered this question. The note's very existence tells us this was a critical issue.

We also know that the Jury consisted of lay people. And as the trial court prudently commented in the beginning of the "Note" debate,

> the problem there is, you know, I don't know that the jury can parse very well the difference between the evidentiary question of the question of what procedures were followed or what was done versus, you know, the legal question of whether what was done was legally proper or not.

(R. 355 at 948.)

The trial court had nailed the problem right there: the Jury **was** unable to discern the nuances of lawyers debating legal versus evidentiary questions. The danger is the Jury could infer from the answer telling them a legal issue (which they do not understand) was

irrelevant, was that the evidentiary issue they were debating was also irrelevant.

Second, the answer to the note was prejudicial. The answer essentially told the Jury that the core issue was not relevant to their deliberations. However, the answer was at the crux of this case and was highly relevant. The only connection to narcotics offered by Plaintiff was the dog sniff of the money. Thus, this issue was extremely relevant. Leading the Jury to believe that the issue was irrelevant, essentially relieved Plaintiff from its burden of proof as to the substantial connection requirement.

The second portion, stating the Jury must decide the case on the evidence does not save the instruction. The first portion telling the Jury the issue was irrelevant essentially directed a verdict for the Plaintiff. The answer completely destroyed Claimants' closing arguments concerning the reliability of the dog, the failure of the Plaintiff to preserve the evidence, and inherent unfairness of the procedure of destroying the evidence. And it should not be lost that Plaintiff - who had the burden - never sought to introduce any evidence that so-called proper procedures were in fact followed. This is the penultimate irony because the additional instruction essentially relieved Plaintiff of its failure to introduce this evidence in its case.

Finally, the existence of the note also emphasizes the points raised in Argument I and II, *supra*. The portion of the instructions that Claimants allege were confusing and contradictory concern the subject matter of a substantial connection. The Jury note, ironically, concerns the dog alert/lack of testing of the currency - which is the only alleged evidence of a connection to narcotics. Of course, this subject matter also concerns the spoliation instruction discussed as well. Thus, we can confirm that the confusion of the jury instructions was not harmless. The confusing instructions went to the heart of this case: the substantial connection. And the jury's note also concerned the heart of the matter: the substantial connection. Claimants suggest that considering both issues together demonstrates the prejudice inflicted to Claimants' case.

* * *

Claimants assert the supplemental instruction was improper and vastly prejudicial to Claimants. It directed a verdict in favor of Plaintiff and resulted in a patently unfair trial. Instead, the trial court should have followed, *U.S. v. Paul*, 213 F.3d 627, and accepted Claimants offered additional jury instruction. (R. 338.)

II. The district court erred in denying Claimants' oral Motion for a Directed Verdict after the close of Plaintiff's case pursuant to Federal Rule of Civil Procedure 50(a).

A. Standard of Review: The standard of review for a directed verdict

motion is *de novo*. (Fed.R. Civ. Proc. R. 50(a)*; See Hossack v. Floor Covering Associates of Joliet, Inc.*, 492 F.3d 853, 859 (7th Cir.2007); *Walker v. Board of Regents of University of Wisconsin System*, 410 F.3d 387, 393 (7th Cir.2005).) The appellate court examines "the record as a whole to determine whether the evidence presented, combined with all reasonable inferences permissibly drawn therefrom, was sufficient to support the jury's verdict." (*Id.*, quoting *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1173 (7th Cir.2002)). However, a "mere scintilla" of evidence is not sufficient to support a jury's verdict. (*Id.*)

B. Plaintiff never offered any evidence of a controlled substance *offense*.

At the close Plaintiff's case-in-chief, Claimants moved for a directed finding pursuant to Rule 50(a). (R. 353 at 462.) The trial court denied the motion. (*Id.* at 469.) At the close of the proofs, Claimants again moved for a directed finding, which was denied. (R. 355 at 867.) Finally, Claimants preserved this issue in their post-trial motions. (R. 319.)

The Jury Instructions required the Jury to find by a preponderance of the evidence (1) "a substantial connection between the funds and an unlawful controlled substance offense;" and (2) the funds were furnished (or intended to be furnished) in, proceeds of, or used to "facilitate" a drug transaction. (R. 311 at 6; R. 355 at 863-64.)

Thus, the Jury was required to first find a substantial connection between the funds **and an unlawful controlled substance offense**. Yet Plaintiff never offered any evidence of an unlawful controlled substance **offense**.

Absent was evidence of any criminal history, past drug offenses, or past drug use. Missing was evidence of any wire-taps or investigations of suspicious cell-phone numbers, phone calls, or beepers. Totally nonextant was evidence of any drug paraphernalia or usage. There was no evidence of any of those things that we commonly hear in drug cases throughout this Circuit. (*See e.g., United States v. $271,080.00 in U.S.C.*, 816 F.3d 903, 909 (7th Cir.2016) ("It is also telling that the government has presented virtually no evidence that the [claimants] are involved in drug trafficking . . .")

In *$271,080.00*, this Court emphasized that the government must offer evidence **connecting** the money **to narcotics trafficking**. (*Id.*, quoting *United States v. $506,231.00 in U.S.C.*, 125 F.3d 442, 452-54 (7th Cir.1997)). And in *$506,231.00*, a case decided on the lesser probable cause standard, this Court held that evidence of a "large amount of currency was 'unusually' stored at pizzeria[8], drug dog had alerted to

[8] "The money was found inside a forty-four-gallon barrel which was located inside either a boarded-up elevator or a dumbwaiter shaft." (*$506,231.00*, 125 F.3d at 444.)

currency, and informant had reported that cocaine was delivered to pizzeria. . . **could not establish probable cause** to believe that money was connected to drug trafficking." (*Id.*, citing *$506,231.00*, 125 F.3d at 452-54.)[Emphasis added.] (See also, *United States v. $10,700.00 in U.S.C.*, 258 F.3d 215, 227-33 (3d Cir.2001) (Government did not establish *probable cause* for forfeiture where drug dog had alerted to, *and* chemical tests showed, drug residue on large amounts of currency found in bundled stacks in car rented by men *with drug convictions* because no drugs were found in car, *government had submitted no evidence that men currently were involved in drug trafficking*, and government had not submitted comparative evidence of drug dog and chemical test reactions to currency in general); *United States v. $5,000.00 in U.S.C.*, 40 F.3d 846, 848-49 (6th Cir.1994) (Government had not established probable cause for forfeiture "when two men, one matching informant's description of drug dealer and the other having prior convictions for drug trafficking, were found with large amount of bundled currency, drug dog had alerted to currency, and men had flown to New York for single day.")

It is remarkable to note that the last three cases cited were all decided on the far lesser standard of probable cause prior to CAFRA's reform requiring the preponderance of the evidence standard. Yet in all of these cases, the holding is clear: the government cannot forfeit property based

upon a purely theoretical and speculative connection with narcotics trafficking; it must be an "**actual connection**." (*$10,700.00*, 258 F.3d at 225 [Emphasis added]; *$5,000.00*, 40 F.3d at 849; *$506,231.00 in U.S.C.*, 125 F.3d at 451-54.) If this burden could not be met under a probable cause standard with far greater evidence, *a fortiori*, it cannot be met under the preponderance standard in this case.

And theoretical speculation and conjecture is just what we have here. The only alleged evidence Plaintiff offered of a connection to any controlled substance was the dog alert. Indeed, in denying the motion, the trial court opined as much, stating,

> There's no question there's not evidence, Mr. Komie, of a specific drug transaction . . . **the evidence of connection [sic] to drug trafficking is, as offered in the government's case, is the dog sniff.**
>
> * * *
>
> **This case is about the probative value of the dog sniff.**
>
> * * *
>
> . . . it's a question for the jury ultimately as to whether the conflicting evidence about the probative value of this dog sniff is **sufficient to warrant a conclusion that these funds had been in close proximity with unlawful drugs**. And that is the critical question.
>
> If there is a basis to draw that inference and a dog sniff does provide some probative weight toward that question, then there is a basis to infer a substantial connection between the funds and drug trafficking.

(R. 353 at 467-68.)[Emphases added.]

Claimants disagree. First, the question of whether a dog sniff is probative is a Rule 403 evidentiary question for the courts - not juries. And often this question is related to probable cause - not whether a dog sniff's limited probative value reaches the level of proof by a preponderance necessary to forfeit a person's property. (*See e.g., Florida v. Harris*, 133 S.Ct. 1050 (2013). And certainly not whether a dog sniff provides evidence to *infer* a "substantial connection" to a controlled substance transaction; Congress mandated that the substantial connection must be *proven* by a preponderance of the evidence - not inferred by a hunch. (18 U.S.C. § 983 (c)).

Second, the pretrial rulings prohibited Plaintiff's witnesses from testifying to their opinion on what the dog may have alerted to - at all. (R. 261 at 7.) Thus, there is no evidence in the record that the dog sniff meant the money "had been in close proximity with unlawful drugs" - as the trial court stated during the trial.[9] Moreover, the dog never sniffed the money in whole or bill by bill. Therefore, the record is silent as to the

[9] It is noteworthy that the trial court made this statement inasmuch as the trial judge was aware of Plaintiff's theory of the dog sniff; however, the Jury was not. The trial court **barred** Plaintiff from presenting expert evidence on this theory in the pre-trial rulings. (R. 261; 269.) Therefore, the Jury never heard any expert testimony as to Plaintiff's theory of why the dog may have alerted to the currency.

reason why the dog alerted to the briefcase, let alone the currency; hence there is no evidence that Deny alerted to the briefcase because he smelled drugs on the money - or even drugs on the briefcase.

The trial court suggested the jury could *infer* the dog alerted to the briefcase because it smelled drugs on the briefcase without any evidence in the record stating as much.[10] From that inference, it could *infer* the money was connected to - not just *the odor of narcotics* - but narcotics trafficking. And finally from those inferences, it could then *infer* the dog sniff provided proof beyond a preponderance of a substantial connection to an actual - yet heretofore unknown - narcotics transaction. This piling inference upon inference upon inference is all built on a scintilla of evidence: a dog sniff. And it is precisely what this Court found impermissible in *Sanchez* and *Robinson*. *Sanchez*, 615 F.3d at 845, quoting *Robinson*, 161 F.3d at 472 (" '[W]e must insure that the verdict does not rest solely on the piling of inference upon inference. . . ' ")

This Court's eloquence two decades ago is particularly apt here:

> We reiterate that the government may not seize money, even half a million dollars, based on its bare assumption that most people do not have huge sums of money lying about, and if they do, they must be involved in narcotics trafficking

[10] *But see, United States v. Sanchez*, 615 F.3d 836, 845 (7th Cir.2010) (Appellate Court vacates portion of verdict relying upon inference and "speculation."), quoting *United States v. Robinson*, 161 F.3d 463, 472 (7th Cir.1998).

> or some other sinister activity. Moreover, the government may not require explanations for the existence of large quantities of money absent its ability to establish a valid narcotics-nexus . . . An owner does not have to prove where he obtained money until the government demonstrates that it has probable cause to believe the money is forfeitable. As we said in a much more notorious case than the one at bar, albeit not in the forfeiture context, "Property of private citizens simply cannot be seized and held in an effort to compel the possessor to 'prove lawful possession.' " *United States v. One Residence and Attached Garage of Anthony J. Accardo*, 603 F.2d 1231, 1234 (7th Cir.1979).

(*$506,231.00*, 125 F.3d at 454.)

Claimants recognize that the standards were different in 1997, but this provides no quarter for the trial court's decision. Pre-CAFRA, the government need only show probable cause in order to push the burden on a claimant to prove the property was not forfeitable. In *$506,231.00*, this Court held the shifting never took place even with a Record involving testimony of alleged drug transactions - not imaginary and speculative ones. (*Id.*) But now, the burden on the government is the much higher standard of "by a preponderance." Hence, Claimants assert that the trial court erred in not directing the verdict because Plaintiff's case failed as a matter of law.

* * *

Congress granted district judges the authority to direct entry of a judgment as a matter of law when the evidentiary record would not

support the jury's verdict. Claimants contend that a dog sniff does not prove by a preponderance that the Defendant *Res* was substantially connected to a narcotics transaction. Thus, Plaintiff failed to provide any evidence on a necessary element of its case. This Court should reverse the trial court's ruling and remand with instructions to enter judgment in favor of Claimants.

III. The forfeiture violates the Excessive Fines Clause of the United States Constitution.

A. Standard of Review: The interpretation of the constitution and statutes are questions of law, which are reviewed *de novo*. (*See United States v. Rosenbohm*, 564 F.3d 820, 821 (7th Cir.2009), citing *United States v. Thornton*, 539 F.3d 741, 745 (7th Cir.2008)).

B. The forfeiture of the *entire* Defendant *Res* without affording Claimant a hearing on the proportionality of the fine violated the Excessive Fines Clause.

The Excessive Fines Clause of the Eighth Amendment provides, "excessive fines [shall not be] imposed." (U.S. Const. Amend. VIII.) A "fine" means "'a payment to a sovereign as punishment for some offense.'" (*United States v. Bajakajian*, 524 U.S. 321, 327 (1998), quoting *Browning - Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)). The Excessive Fines Clause limits the government's power to punish with a fine. (*Austin v. United States*, 509 U.S. 602, 609–10 (1993)).

Here, the forfeiture of the Defendant *Res* constitutes a fine. (*See Bajakajian*, 524 U.S. at 328.) Hence, the fine may not be "excessive." (*Id.* at 334.)

Modern statutory forfeiture is a fine for Eighth Amendment purposes if it constitutes punishment even in part. (*Id.* at 331 n. 6, citing *Austin*, 509 U.S. at 621–22). CAFRA codified *Austin* in the General Rules for Civil Forfeitures. (18 U.S.C. § 983(g)). Said section provides,

> (g) Proportionality
>
> (1) The claimant under subsection (a)(4) may petition the court to determine whether the forfeiture was constitutionally excessive.
>
> (2) In making this determination, **the court shall compare** the forfeiture to the gravity of the offense giving rise to the forfeiture.
>
> (3) The claimant shall have the burden of establishing that the forfeiture is grossly disproportional by a preponderance of the evidence **at a hearing conducted by the court without a jury.**
>
> (4) If the court finds that the forfeiture is grossly disproportional to the offense it shall reduce or eliminate the forfeiture as necessary to avoid a violation of the Excessive Fines Clause of the Eighth Amendment of the Constitution.

(*Id.*) [Emphases added.]

1. Factors to consider in analyzing proportionality.

The factors to consider when determining whether a forfeiture is excessive are: (1) the essence of the crime and its relation to other criminal activity; (2) whether the defendant fit into the class of persons for whom the statute was principally designed; (3) the maximum sentence and fine that could have been imposed; and (4) the nature of the harm caused by the defendant's conduct. (*U.S. v. Malewicka*, 664 F.3d 1099, 1104 (7th Cir.2011), citing *Bajakajian*, 524 U.S. at 337–39; *United States v. Varrone*, 554 F.3d 327, 331 (2d Cir.2009)).

This case is a prime example of government speculation and conjecture leading to the zealous forfeiture of innocent owners' property. Here, the Record does not demonstrate the essence of a controlled substance crime or its relation to other criminal activities. There was no evidence adduced demonstrating that Claimants fit into the class of persons for whom the statute was principally designed to reach as there was no evidence of a controlled substance transaction whatsoever. Indeed, the only "evidence" offered was pure speculation, hunch, and conjecture.

Claimants cannot be fined for their conduct as there is a complete absence of evidence of any controlled substance transaction. Thus, there was no evidence of any criminal conduct of the Claimants. Nor was there

any direct evidence that the Defendant *Res* was derived from illegal conduct or even that the Defendant *Res* was intended to be used for an illegal purpose.

The record is also devoid of any analysis of the nature of harm allegedly caused by Claimants or the Defendant *Res*. Since there was no proved (or substantial) connection to any controlled substance transaction, no harm was caused by Claimants or the Defendant *Res*.

2. Section 983(g) requires a hearing.

Section 983(g) was enacted as part of CAFRA.[11] The forfeiture reforms added protections for claimants, raised the burdens on government, and was intended to curtail forfeiture abuse *by the government.*

Section 983(g) unambiguously provides for a *mandatory* hearing, stating, "the court shall compare the forfeiture to the gravity of the offense giving rise to the forfeiture," which under basic rules of construction means mandatory, not discretionary. (18 U.S.C. § 983(g)). Second, the statute provides claimant's burden shall be tested "at a hearing conducted by the court without a jury." (*Id.*) This issue raises a novel question for the court; Claimants contend this language *required*

[11] *See* PL 106-185 (HR 1658) Civil Asset Forfeiture Reform Act of 2000*;* 18 U.S.C. § 981*, et seq., ; United States v. $30,670.00 in U.S.C.*, 403 F.3d 448, 454 (7th Cir.2005) (Acknowledging the creation of Section 983 under CAFRA and a fundamental change in forfeiture law.)

the district court to perform a post-trial, bench hearing. Moreover, Claimants contend that the statutory language coupled with their constitution right to due process was violated by the failure to provide a hearing. (U.S. Const. Amend. V.)

3. A post-trial hearing is mandatory even if there is a favorable jury verdict for the government.

In the trial court, both Plaintiff and the district court placed substantial weight on the jury verdict. Claimant disagrees that this factor should be considered in the proportionality analysis at all.

First, considering that no trial court would even need to determine proportionality unless a verdict in favor of the government had been reached, it makes little sense to place weight on the jury's verdict. Thus, this "factor" would be the same in every single Eighth Amendment analysis.

Second, such a reading of Section 983(g) is not consistent with basic statutory interpretation because it would render Congress' reforms superfluous. (*TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001), quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). Congress is presumed to know the laws as interpreted by the courts prior to CAFRA. So when Congress enacted CAFRA, it used its constitutional authority under Articles I and II to reject the district courts' rubber-stamping of forfeiture verdicts. Instead it explicitly incorporated the Supreme Court's

interpretation of the Eighth Amendment requirements to prevent excessive fines and forfeitures by *requiring* a *post verdict* hearing.

Indeed, Congress specified the district court must conduct the hearing **without a jury.** This language is not surplusage and emphasizes that the trial court must consider the factors outlined in *Bajakajian, supra*, as opposed to focusing on the jury verdict itself. (*TRW*, 534 U.S. at 31.)

Third, the four *Bajakajian* factors do not include the jury verdict; instead, they focus on the defendants' conduct and potential harm. (*See supra, Malewicka*, 664 F.3d at 1104.) In other words, there is no fifth factor: "the jury verdict."

Fourth, any interpretation of the jury's general verdict would be pure speculation. Plaintiff objected to Claimants' special interrogatories and requested a general verdict. Thus, we can only speculate as to what the jury considered and what it found in its deliberations. For example, we have no idea whether the jury considered the Defendant *Res* to be proceeds of a narcotics transaction, monies intended to be used for an imagined transaction, or even monies to facilitate the exchange of a controlled substance. At best, we can only speculate as to what the Jury considered and found in its deliberations, which was all lumped together in one general verdict.

4. The district court's pre-trial restriction of the evidence and argument prohibited Claimants from arguing that the forfeiture was excessive.

In its post-trial ruling, the trial court mentioned a number of times that the jury trial afforded Claimants an opportunity to present evidence concerning the proportionality of the forfeiture. (*See e.g.* R. 339 at 24-26.) Respectfully, this is not accurate.

The trial judge failed to recall Claimants were forbidden from introducing evidence and arguing anything concerning the forfeiture due to a motion *in limine* that was granted. Plaintiff's motion *in limine* number five prohibited Claimants from making any argument regarding the unfairness of the forfeiture laws. (R. 349 at 16.) Indeed, the trial judge singled out this ruling with particularity and told counsel that if this ruling was violated, he would take specific steps to admonish counsel in front of the Jury. (*Id.*) Thus, it was crystal clear that Claimants' counsel was absolutely forbidden from approaching this subject.

Moreover, inherent in any proportionality argument is an argument that it would be unfair to forfeit the currency. Therefore, the district court's order forbade Claimants from raising any *dis*-proportionality argument during the jury trial. The only opportunity to make these arguments came post-trial at a hearing conducted before the trial court, which was denied.

* * *

CAFRA requires the trial court to conduct a proportionality hearing on the excessive of the forfeiture. (U.S. Const. Amend. V.) Because the forfeiture of the Defendant *Res* would be grossly inappropriate to any act claimed giving rise to the forfeiture, the trial court should have conducted a post-verdict hearing and provided Claimants an opportunity to present mitigating evidence and argument concerning the forfeiture. Claimants respectfully ask this Court reverse the district court and remand this matter with instructions to conduct a hearing on the issue of proportionality pursuant to congressional mandate.

IV. The district court erred in not enforcing a remedy for the unconstitutional search and seizure because the seizing officers have a pecuniary interest in the outcome of the forfeiture.

Throughout this proceeding, Claimants have preserved an objection to the district court's consideration of the dog sniff evidence notwithstanding this Court's ruling in *Marrocco I*. (US. Const. Amend. IV.) However, Supreme Court review was not possible because *Marrocco I* and *II* were interlocutory and did not result in a final judgment.

Claimants again object to this Court's decision (in *Marrocco I*) upholding the district court's finding of an unconstitutional search, yet eliminating exclusion of evidence as a remedy. We invite the Court to

revisit this assignment of error on the full Record of this case. Claimants respectfully maintain it was error not to exclude the fruits of the unconstitutional search. This is especially true when the unconstitutional seizure of the $100,120.00 results in the police agency keeping the money.

In the event this Court were to affirm the final judgment, Claimants wish to preserve this claim of error for potential review *via* a writ of *certiorari*. Therefore, Claimants maintain this Court and the district court erred in not suppressing the evidence of the dog sniff.

* * *

Conclusion

WHEREFORE, for the foregoing reasons, Claimants, Nicholas Marrocco and Vincent Fallon, by and through their attorneys, Komie and Associates, respectfully request this Honorable Court to enter an Order:

A. Reversing the trial court's rulings on the Jury Instructions and remanding with instructions to conduct a new trial consistent with this Court's determination of the jury instruction issues;

B. Reversing the trial court's ruling on Directed Verdict and remanding with instructions to enter judgment in favor of Claimants;

C. Reversing the trial court's ruling concerning Claimants' motion for a hearing on the proportionality of the forfeiture and remanding with instructions to conduct a Section 983(g) hearing;

D. Reversing the trial court's admission of the dog sniff and currency evidence pursuant to the Inevitable Discovery exception to the Fourth Amendment; and

E. For any other relief this Court determines justice demands.

Respectfully submitted,

Claimants, Nicholas Marrocco
and Vincent Fallon,
by and through her attorneys,
KOMIE AND ASSOCIATES

By: /s/ Stephen M. Komie

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312.263.2800

CIRCUIT RULE 30(d) CERTIFICATION

Pursuant to Circuit Rule 30(d), I hereby certify that the appendix to this Brief contains all the materials as required by Circuit Rule 30(a) and 30(b).

/s/ Stephen M. Komie
Stephen M. Komie
Komie and Associates
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Chicago, Illinois 60602
312.263.2800

CIRCUIT RULE 31(e) CERTIFICATION

Pursuant to Circuit Rule 31(e), I hereby certify that I have filed electronically versions of our brief and all available appendix items in non-scanned PDF format.

/s/ Stephen M. Komie
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Chicago, Illinois 60602
312.263.2800

CIRCUIT RULE 32 CERTIFICATION

I hereby certify that:

1. This brief complies with the type volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) because it contains ___ 16,843 ___ words.*

2. This brief complied with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5), 32(a)(6), and Circuit Rule 32(b), because it has been prepared using the WordPerfect X3 proportionally-spaced typeface Bookman Old Style with 13-point font in the text and 12-point font in the footnotes.

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* This Court's order of September 15, 2017 [Doc. 21], granted appellants' motion for leave to file an enlarged brief up to 17,000 words.

Table of Contents to Appendix

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6,1
Eastern Division

United States of America

Plaintiff,

v.

Case No.: 1:03−cv−03644
Honorable John J. Tharp Jr.

Funds in the amount of One Hundrend Thousand and One Hundred and Twenty Dollars

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Friday, January 29, 2016:

MINUTE entry before the Honorable John J. Tharp, Jr: Jury trial held and concluded. Jury returns a verdict of finding that the defendant property, Funds in the Amount of $100,120 in United States Currency, is forfeited to the United States. Enter judgment in favor of the United States of America. Claimant's oral motion to extend the time to file post−trial motions is denied; motions are due as provided in rules 50, 59, and 60. Civil case terminated. Mailed notice(air,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at ***www.ilnd.uscourts.gov***.

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS

United States of America,

Plaintiff(s),

v.

Funds in the amount of One Hundred Thousand and One Hundred and Twenty Dollars,

Defendant(s).

Case No. 03-cv-03644
Judge John J. Tharp

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☐ in favor of defendant(s)
and against plaintiff(s)

.

Defendant(s) shall recover costs from plaintiff(s).

☒ other: Jury finds that the defendant property, Funds in the Amount of $100,120 in United States Currency, is forfeited to the United States.

This action was *(check one)*:

☒ tried by a jury with Judge John J. Tharp presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☐ decided by Judge on a motion

Date: 1/29/2016

Thomas G. Bruton, Clerk of Court

Alberta Rone , Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FUNDS IN THE AMOUNT OF ONE HUNDRED THOUSAND AND ONE HUNDRED AND TWENTY DOLLARS, Defendant, NICHOLAS MARROCCO and VINCENT FALLON, Claimants.	)	No. 03 C 3644 Judge Tharp

DECREE OF FORFEITURE

This cause coming before the court on the United States of America's motion for the entry of a decree of forfeiture, and due notice having been given, and the court having been fully advised in the premises, this court finds as follows:

(a) This *in rem* civil forfeiture case was commenced on May 28, 2003, by the filing of a verified complaint;

(b) Process was duly served and notice was published by the United States Marshals Service as required at that time by Rule C of the Supplemental Rules Governing Certain Admiralty and Maritime Claims. Notice of this action was given to all known potential claimants including Nicholas Marrocco and Vincent Fallon, and Mr. Fallon's attorney of record at the time;

(c) On July 16, 2008, Nicholas Marrocco and Vincent Fallon filed a claim as to the defendant funds;

(d) On November 12, 2003, claimants filed an answer to the complaint. On April 6,

2004, claimant Nicholas Marrocco filed an amended answer to the complaint;

(e) To date, no other claim or answer has been filed for the defendant funds and the time for filing such a claim, answer, or other responsive pleading has since expired under applicable law;

(f) On January 25, 2016, a jury trial was held before this court;

(g) On January 29, 2016, the jury returned a verdict of forfeiture against the defendant funds;

(h) Pursuant to the jury's verdict, the United States has established by a preponderance of the evidence that the defendant funds were furnished or intended to be furnished in exchange for a controlled substance, are the proceeds from the sale of a controlled substance, or were monies used or intended to be used to facilitate narcotics trafficking in violation of 21 U.S.C. § 801, *et* seq.

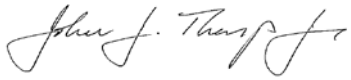
Accordingly, it is hereby ORDERED that:

1. A judgment of forfeiture is hereby entered against the defendant funds in the amount of $100,120. It is further ordered,

2. That, the foregoing defendant funds are hereby forfeit to the United States of America pursuant to 21 U.S.C. § 881(a)(6) and shall be disposed of according to law. It is further ordered,

3. That this court shall retain jurisdiction over this matter to take additional action and enter further orders as necessary to implement this order.

ENTERED:



JOHN J. THARP, Jr.
United States District Court Judge

DATED: 2/10/2016

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FUNDS IN THE AMOUNT OF ONE HUNDRED THOUSAND AND ONE HUNDRED TWENTY DOLLARS ($100,120.00), Defendant, NICHOLAS MARROCCO and VINCENT FALLON, Claimants.	)	No. 03 C 03644 Judge John J. Tharp, Jr.

MEMORANDUM OPINION AND ORDER

The long and tortured history of the case begins with the December 6, 2002 seizure of $100,120 (the "funds") from Vincent Fallon at Union Station in Chicago. The government seized the funds after, among other events, a drug-detection dog (named Deny; pronounced "Denny") alerted to a briefcase containing the currency. The United States filed this action for civil forfeiture of the funds, which, after over a decade of motion practice and two trips to the Seventh Circuit, recently proceeded to a five-day jury trial. The jury returned a verdict for the government, finding the defendant funds forfeit; the Court entered judgment for the government and a decree of forfeiture. The claimants, Nicholas Marrocco and Vincent Fallon, have filed a renewed motion for judgment as a matter of law under Rule 50(b), ECF No. 319, a motion for a new trial under Rule 59, ECF No. 320, and a motion to determine that the forfeiture is constitutionally excessive, ECF No. 321. For the following reasons, the motions are denied.

BACKGROUND

The evidence presented at trial substantially confirmed the facts narrated in the Seventh Circuit's September 19, 2013 Opinion. *See United States v. Funds in Amount of One Hundred Thousand One Hundred & Twenty Dollars ($100,120.00)*, 730 F.3d 711, 713-15 (7th Cir. 2013) ("*Funds II*"); *see also United States v. Marrocco*, 578 F.3d 627, 629-31 (7th Cir. 2009) ("*Funds I*"). This Opinion assumes familiarity with the earlier decisions and will summarize the facts only as relevant to the pending motions.

The thirteen-year history of this case is awash with pre-trial rulings, reversals and remands, and new or revised rulings. Upon the second remand from the Seventh Circuit and Judge Bucklo's transfer of the case, this Court issued a number of significant pre-trial rulings that acutely limited the government's case. Because, notwithstanding the Seventh Circuit's ruling in *Funds II*, the government had persisted in its argument that the reliability of dog-sniff evidence could not be challenged and had failed to contest the expert evidence the claimants offered, this Court held that the government forfeited any objections to the claimants' experts. *See United States v. Funds in the Amount of One Hundred Thousand & One Hundred Twenty Dollars ($100,120.00)*, 127 F. Supp. 3d 879, 882-84 (N.D. Ill. 2015) ("*Funds III*") ("[The government's] insistence on spitting into the wind [ ] has substantially damaged its case."). Because of the extensive delay in naming its own expert, the government also forfeited the opportunity to offer evidence establishing a scientific basis (known as the "Furton theory") to counter the claimants' defense that drug-dog alerts are meaningless because most American currency is tainted with residue from illegal narcotics. *Id* at 884-85; *see also id.* at 896-902 (denying government's motion to reconsider). Along the same lines, the Court precluded any opinion testimony by Officer King (Deny's handler) regarding what substance Deny alerted to (*e.g.*, methyl benzoate evaporating from the currency, as suggested by the Furton theory), either

in training exercises or in the field. *Id*. at 885-86. The Court also declined to reverse Judge Bucklo's prior ruling granting the claimants' motion to suppress Fallon's custodial statements made in the Amtrak office at Union Station (as well as the declaration that Fallon signed disclaiming an interest in the funds). *Id*. at 891-92; *see also id*. at 902-05 (denying government's motion to reconsider); *see also United States v. Funds in Amount of One Hundred Thousand & One Hundred Twenty Dollars*, 361 F. Supp. 2d 757, 762 n.1 (N.D. Ill. 2005) (Bucklo, J.), *rev'd on other grounds in Funds I*.

Additionally, the claimants won the vigorously contested debate concerning the jury instruction setting forth the elements the government was required to prove by a preponderance of the evidence, specifically whether the "substantial connection" language of 18 U.S.C. § 983 applies to each of the potential theories of forfeiture—that the funds were (1) furnished or intended to be furnished in exchange for a controlled substance; (2) the proceeds from the sale of a controlled substance; or (3) monies used or intended to be used to facilitate a controlled substances transaction. *See* 21 U.S.C. § 881(a)(6) (moneys subject to forfeiture). The government's proposed instruction only required proof of a substantial connection between the money and a controlled substance under the facilitation theory of forfeiture. *See* Gov. Prop. Inst. Nos. 25-27, ECF No. 273. The claimants' proposed elements instruction and argument on the instructions urged the Court to require the government to prove a substantial connection between the money and a controlled substance under any of the statutory forfeiture bases. *See* Cl. Prop. Inst. Nos. 26, 28, ECF No. 280.

After three rounds of discussion on this particular instruction (at the December 18, 2015 pre-trial conference, the January 22, 2016 pre-trial conference, and on January 28, 2016, prior to the close of the claimants' case), the Court concluded that the "substantial connection" language

in the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA") applies to all three theories of forfeiture. *See* Pub. L. No. 106–185, 114 Stat. 202 (2000) (codified as amended at 18 U.S.C. §§ 981, 983); *see also* 21 U.S.C. § 881(a)(6). The Court drafted a jury instruction on the elements, requiring the jury to find both a substantial connection between the funds and an unlawful controlled substance ***and*** that the funds were (1) furnished or intended to be furnished in exchange for a controlled substance; (2) the proceeds from the sale of a controlled substance; or (3) monies used or intended to be used to facilitate a controlled substances transaction. *See* Jury Inst. 6, ECF No. 311.

Despite the many rulings that severely constrained the government's case and increased its evidentiary burden, the jury nonetheless found for the government. The claimants now ask the Court to set aside the jury's verdict and enter judgment for them as a matter of law, or to grant them a new trial, or to reduce or eliminate the forfeiture as constitutionally excessive.

DISCUSSION

I. Rule 50(b) Motion for Judgment as a Matter of Law

Judgment as a matter of law is proper if "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a)(1). Rule 50(b) allows a party to renew a denied motion for judgment as a matter of law within 28 days of an adverse jury verdict. Fed. R. Civ. P. 50(b). In considering a Rule 50(b) motion, the court "construes the evidence strictly in favor of the party who prevailed before the jury and examines the evidence only to determine whether the jury's verdict could reasonably be based on that evidence." *Passananti v. Cook Cty.*, 689 F.3d 655, 659 (7th Cir. 2012). Although the court "must determine that more than a mere scintilla of evidence supports the verdict," it must not "make credibility determinations or weigh the evidence." *May v. Chrysler Grp., LLC*, 716 F.3d 963, 971 (7th Cir. 2013) (citations and internal quotation marks omitted). Rather, the role of the court is to

"decide whether a highly charitable assessment of the evidence supports the jury's verdict or if, instead, the jury was irrational to reach its conclusion." *Id*.

"Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion." *Passananti,* 689 F.3d at 660 (quoting Fed. R. Civ. P. 50(b), comm. note (2006 amend.)). At the close of the government's case, the claimants moved for judgment as a matter of law,[1] arguing that the evidence the government presented failed to establish a substantial connection between the funds and a controlled substance. The claimants highlighted that there had been no evidence of a drug transaction and that, therefore, there could not be any proceeds from such a transaction, nor had there been any evidence of a controlled substance for which the funds had been furnished or intended to be furnished. Without any such evidence, claimants argued that there was not a scintilla of evidence connecting the funds to a controlled substance, let alone substantially connecting them. Although the Court agreed that there had been no evidence of a specific drug transaction (no one expected any such evidence), the Court reminded claimants that the principal focus of this case since day one had been the positive alert by the drug dog. Citing the Seventh Circuit in *Funds II*, the Court explained that it was for the jury to determine the probative value of the dog-sniff and, therefore, denied the motion. The claimants renewed their motion at the close of all of the evidence, which the Court denied for the same reasons.

The claimants have now renewed their initial motion for judgment as a matter of law under Rule 50(b), reasserting their prior arguments that the government did not present any

[1] The claimants moved for a motion for directed verdict, which is treated as a motion for judgment as a matter of law. *See* Fed. R. Civ. P. 50(a) comm. note (1991 amend.) ("If a motion is denominated a motion for directed verdict or for judgment notwithstanding the verdict, the party's error is merely formal. Such a motion should be treated as a motion for judgment as a matter of law in accordance with this rule.").

evidence of a controlled substance offense. Mot. JMOL ¶¶ 6-8. The claimants also argue that the Court is limited to consideration of the evidence presented in the government's case-in-chief because they are renewing the motion they made at the close of the government's case.[2] Reply JMOL 1-3, ECF No. 335. It is unnecessary to decide whether the Court is permitted to consider evidence introduced outside of the government's case-in-chief because, even under the limited review of the evidence presented at the time of the original motion, the claimants have failed to establish that no rational jury could have rendered a verdict for the government.

In arguing that there was insufficient evidence to establish a substantial connection between the currency and drug trafficking, the claimants essentially ignore all of the evidence presented to show that the dog reliably alerted to currency tainted with the odor of various illegal narcotics. It is true enough that the government presented no scientific evidence as to what a dog actually is smelling when alerting to drug-tainted currency, but it presented detailed information

[2] It is not entirely clear whether, on a Rule 50(b) motion that is renewing a Rule 50(a) motion made at the close of the plaintiff's evidence, the Court is limited to considering the evidence presented at the time of the original motion. A number of courts deciding a renewed Rule 50(b) motion following a Rule 50(a) motion made at the close of the plaintiff's case have, without considering the question, merely recited the standard that "in entertaining a motion for judgment as a matter of law, the court should review ***all of the evidence in the record***." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (emphasis added); *see, e.g. Baugh v. Cuprum S.A. De C.V.*, No. 08 C 4204, 2015 WL 9304338, at *2 n.2 (N.D. Ill. Dec. 22, 2015) (Rule 50(b) motion renewing motion made at close of plaintiff's case-in-chief governed by "consider all evidence" standard); *Corcoran v. City of Chicago*, No. 10-CV-06825, 2015 WL 1345545, at *2 (N.D. Ill. Mar. 23, 2015) (same). *But see The Thomas D. Philipsborn Irrevocable Ins. Trust v. Avon Capital, LLC*, No. 11 C 3274, 2015 WL 5695861, at *1-2 (N.D. Ill. Sept. 28, 2015) (reciting "consider all evidence" standard from *Reeves* but concluding that "the evidence ***Plaintiffs presented*** was just enough to send the question to the jury" (emphasis added)). Because "[t]he standard for granting a renewed motion for judgment as a matter of law under Rule 50(b) is precisely the same as the standard for granting the pre-submission motion under Rule 50(a)," however, it follows that "the post-verdict motion for judgment can be granted only if the prior motion should have been granted." 9B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2537 (3d ed. 2008). That suggests that Rule 50(b) motions may consider only the evidence of record when the Rule 50(a) motion was made. *Cf.* Fed. R. Crim. P. 29 (where court has reserved decision on motion for judgment of acquittal, "it must decide the motion on the basis of the evidence at the time the ruling was reserved").

about Deny's training and reliability in locating drugs and drug-tainted currency from which it was perfectly rational for a jury to conclude that Deny alerted to the currency-stuffed briefcase because the currency it contained had been exposed to narcotics.[3] To support the reliability of Deny's positive alert, the government presented Michael Decker, a former canine trainer with the Chicago Police Department ("CPD"). Decker testified about his training to become a CPD canine and officer handler trainer and his experience training new odor detection dogs and conducting maintenance training for certified drug-detection dogs.[4] Decker explained that the CPD standards for certifying drug detection dogs were higher than those used by other national drug-detector-dog certification organizations, which included 560 total hours of training, 205 of which were spent on narcotics detection. Decker also testified that he taught each handler to keep a dog log, in which the handler recorded training and field exercises, to prove reliability of the dog and to help identify any training deficiencies. Specific to Deny, Decker testified that Deny's dog log showed 116 sniff searches in pre-certification training, in all of which Deny properly located the target, and a number of which involved searches for currency tainted with the odor of narcotics. With respect to currency searches, the dog log even showed a "money lineup," in which Deny searched and did not alert to untainted currency (*i.e.*, currency that the trainers had

[3] It bears noting that the claimants failed to exploit the government's lack of scientific testimony by presenting their expert witness, Dr. Woodford, whom they had advertised as an expert on odor science and canine olfaction training. *See* Cl. Mot. Lim. Ex. E, ECF No. 242-5. Dr. Woodford's testimony would have gone unrebutted at trial, but for unexplained reasons, the claimants did not call him to testify.

[4] The claimants objected that Decker's testimony was irrelevant as to Deny's training because Decker was not certified as a trainer until after Deny received his K-9 certification. Decker, however, testified that the training programs were the same when he was conducting the training in 2000 as when he went through the training program in 1995. Moreover, Decker testified that, once he became a trainer, he interacted with Deny on a monthly basis (approximately) for maintenance training exercises.

not exposed to the odor of narcotics), and then, in a subsequent search, Deny alerted to heroin-tainted currency.

Deny's handler, Officer Richard King, also testified about Deny's training as a narcotics detection dog over the course of approximately 20 weeks. King would give the command, "fetch dope," and Deny would begin searching for narcotics. Because Deny was trained as an aggressive indicator, when Deny located hidden drugs, he would scratch or bite at the source item. King testified about a number of entries in the dog log, explaining that Deny was trained to detect the odor of narcotics whether found on rags, in PVC pipes, burlap bags, glass jars, metal pipes, and on U.S. currency, and that Deny trained not only at the CPD canine training center but also in diverse locations such as a forest preserve, at a school, and at an auto pound. Deny's dog log of post-certification training for the relevant period of time (from mid-1998 through the date of the seizure of the funds) includes 81 positive alerts to illegal drugs, nine positive alerts to drug-tainted currency, and one negative alert to untainted currency. *See* Gov. Trial Ex. 4. King explained that the type of U.S. currency used in training exercises varied: sometimes the trainers used uncirculated currency obtained from the Federal Reserve and sometimes the trainers asked the officers to take money out of their wallets to use in the training exercises. According to King, he never knew where the drugs or tainted currency were hidden before he and Deny conducted a search.

King testified that on December 6, 2002, he and Deny were called to Union Station to do a money sniff. King directed the requesting officer (Amtrak police officer and Drug Enforcement Administration ("DEA") task force member Eric Romano) to hide the suspect money in the Amtrak "roll call" room (part of the Amtrak police office). After retrieving Deny from his car,

King unleashed Deny in the room and ordered Deny to "fetch dope." Deny searched the room for about a minute and indicated on a cabinet in which Officer Romano had hidden Fallon's briefcase containing the funds. King testified that Deny pulled the briefcase out of its hiding place and scratched at it[5]—the same behavior King observed Deny exhibit when locating drugs or tainted currency in training. King testified that he did not know where Romano had hidden the money before he and Deny conducted the search in the Amtrak police room.

The testimony of Officers Decker and King provided a sufficient basis for the jury to conclude that Deny was capable of detecting the odor of currency that had been tainted with the odor of unlawful narcotics. Counsel for the claimants vigorously challenged Deny's reliability through cross-examination of the officers and presentation of its own dog training expert, but in doing so, they also reinforced the message to the jury that the reliability of dog alerts to currency is a question of how well the dog has been trained rather than an issue of scientific inquiry (and again, the claimants presented no scientific evidence about dog sniffs themselves despite the fact that the government was precluded from presenting such evidence). And while a jury might well have concluded that Deny's alert in this case was unreliable for reasons that the claimants

[5] The claimants attempted to impeach King regarding the location of the briefcase in the roll call room: King testified at trial that he could not recall the exact location of the briefcase in the roll call room, but that it was not in plain sight. Referring to King's earlier testimony at a hearing in front of Judge Bucklo, the claimants asked if King had testified that he did not believe that the briefcase was in a cabinet, at which point the government objected to the question as not impeaching, and the Court sustained the objection. The claimants also attempted, without great effect, to impeach Romano regarding the location of the briefcase: Romano testified at trial that he hid the briefcase in a wooden cabinet; he had previously testified at a hearing in front of Judge Bucklo that he hid the briefcase in a filing cabinet. Romano testified inconsistently, however, as to whether Deny searched the perimeter of the room before locating the briefcase or whether Deny immediately indicated on the cabinet with the briefcase, and as to whether Deny was able to partially open the door of the cabinet containing the briefcase. Regardless, any inconsistencies in the testimony of the witnesses at trial and during a suppression hearing more than a decade earlier did not undermine the testimony that King did not know the location of the briefcase, and that Deny found it quickly and alerted on it aggressively.

advanced (*e.g.*, that Romano or King had cued Deny; that the room in which the bag had been hidden had not been adequately cleaned; that Deny was not adequately proofed off competing odors), they could also reasonably reject those challenges based on Deny's unblemished record of locating drugs and drug-tainted currency and other objects both in training and in the field and the contrary testimony of King and Romano as to how the search was conducted. The claimants had every opportunity to present the deficiencies they perceived in Deny's training and deployment during the search, but the question of the reliability of Deny's alert was ultimately for the jury, as the Seventh Circuit made plain in *Funds II*, 730 F.3d at 727 (noting the "dispute[ ] of material fact impacting the question of whether Deny's alert demonstrates that the Funds recently were in contact with illegal drugs.").

Although testimony about Deny's alert, and dog alerts generally, was central at trial, the government also presented other evidence to satisfy its burden of proof. The government presented Agent Romano's testimony about his encounter with Fallon on the train. Romano, who testified based on his experience as an Amtrak police officer on the DEA task force, explained that Amtrak was an attractive transportation option for drug couriers because of the lack of baggage screening (at the time in 2002) and a rider's ability to limit interactions with other passengers by reserving a private sleeper car. He described the factors he looked for in identifying potential drug couriers—one-way travel, travel to drug "source" cities (like Chicago or Seattle), tickets purchased with cash and/or purchased within 72 hours of travel. Romano explained why he identified Nicholas Fallon as a person to monitor because Fallon's travel plans included each of the suspect factors—a one-way ticket from Chicago to Seattle in a private sleeper car purchased with cash two days before the trip. Romano further described his interaction with Fallon on December 6, 2002—that Fallon first said he was traveling to Seattle to

meet a lady friend, said he was not carrying any large amounts of currency, and said he was carrying a locked briefcase that he packed himself but for which he did not have the key. When Romano inquired further, Fallon admitted that he had $50,000 in the briefcase and that he was travelling to Seattle to put a down payment on a house, at which point Romano informed Fallon that he was taking the bag into custody.

The government also presented testimony of claimant Nicholas Marrocco in its case-in-chief. Marrocco testified that the defendant funds were his and that he had given them to Fallon to take to Seattle to deposit in a safe deposit box. According to Marrocco, the funds were intended for an investment in a bar or restaurant somewhere on the west coast (nothing about a down payment on a house); although he had discussed different opportunities with friends, Marrocco had not decided where he planned to invest the funds. Marrocco explained that, at the time, he was unaware of the availability of wire transfers and that he was more comfortable sending the money via train rather than taking it by car—despite the fact that Marrocco had never traveled by train before—because a car could breakdown, or by plane because he didn't like to fly and because one might be questioned about the money at the airport, which would delay your travels. After quibbling over the definition of "bundled," Marrocco admitted that he separated stacks of currency by denomination and wrapped them together with rubber bands, for a total of 20 bundles of cash (although only 19 bundles were recovered from Fallon in the briefcase).

As for the source of the funds, Marrocco testified that he had credit problems in college and, as a result, was unable to open a bank account. Marrocco explained that the funds were his cash savings from his employment over the preceding decade; he had worked at a pizza restaurant for eight years and became a partner in the business in 2002. The government

introduced Marrocco's tax returns and/or W-2s for the years immediately preceding the seizure, which showed total wages before tax of $40,500 in 1999, $39,000 in 2000, $35,000 in 2001, and take home pay of $6,993.95 in 2002 (the reduced amount resulting from the termination of Marrocco's employment at the pizza restaurant in April of 2002). *See* Gov. Trial Exs. 18-21. The government also introduced Marrocco's responses to interrogatories, in which he listed his monthly expenses, totaling $975 (plus $1400 in rent, which his parents paid), plus one or two vacations per year and a number of furniture purchases each exceeding $500.[6] *See* Gov. Trial Ex. 17. Marrocco also testified that his parents purchased a car for him in April 2002; he and his father each paid $1000 towards the down payment, and his mother made the monthly payments on the car (according to the testimony of Timothy Marrocco, Nicholas's father).

Taking this evidence in a light most favorable to the government, there is certainly more than a mere scintilla of evidence supporting the jury's verdict. It was not irrational for the jury to infer that it was more likely than not that the defendant funds were substantially connected to a controlled substance, based on (1) the positive drug-dog alert, supported by Decker's testimony of how CPD trains drug dogs and Deny's record in training and in the field, as well as King's testimony of Deny's behavior when alerting to illegal drugs and tainted currency in training as compared to the behavior Deny exhibited when he located the briefcase with the funds; (2) Romano's testimony that Fallon's travel plans matched those of drug couriers and Fallon's inconsistent explanations for his trip and regarding the contents of the briefcase; and (3) Marrocco's story (which the jury apparently found incredible) that he squirreled away over $100,000 in cash (because he couldn't get a bank account), which he then entrusted to Fallon to

[6] The government introduced the interrogatory responses into evidence in its case-in-chief through Marrocco but failed to question him about the specific amounts of his expenses. Nonetheless, the exhibit was entered into the evidence in the government's case-in-chief, and the jury had access to the information contained therein.

take to Seattle via train (to avoid the questioning and potential delay of a car trip or air travel) to deposit in a safe deposit box in an unidentified bank to use either for a down payment on a house or for an unspecified future business venture. It was not unreasonable for jurors to reject the inconsistent and improbable explanations that Fallon and Morocco offered to explain why Fallon was carrying in excess of $100,000 with him on a train or for the jurors to conclude that they resorted to those phony stories because the currency was indeed substantially connected to drug trafficking—"why else all the lies?" *Hutchens v. Chicago Bd. of Ed.*, 781 F.3d 366, 374 (7th Cir. 2015) (a reasonable jury might find employer's false explanations for adverse actions evidence of racial discrimination). As Learned Hand explained, the jury's impression of a witness's credibility "may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies." *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952); *see also, e.g.*, *Wright v. W.*, 505 U.S. 277, 296 (1992) (plurality opinion) ("if the jury did disbelieve [defendant], it was further entitled to consider whatever it concluded to be perjured testimony as affirmative evidence of guilt"); *Wilson v. United States*, 162 U.S. 613, 620-21 (1896) (jury had the right "to regard false statements in explanation or defense . . . as in themselves tending to show guilt"); *United States v. Bacon*, 598 F.3d 772, 776 (11th Cir. 2010) ("because [defendant] testified, the jury was free to disbelieve her and consider her statements as untruthful and as substantive evidence of her guilt"); *United States v. Chatmon*, 742 F.3d 350, 353 (8th Cir. 2014) ("jury could have inferred that the statement was false and that its falsity indicated consciousness of guilt"); *United States v. Jocic*, 207 F.3d 889, 893 (7th Cir. 2000) (if "a defendant decides to testify and deny the charges

against him and the finder of fact thinks he is lying, his untruthful testimony becomes evidence of guilt to add to the other evidence"); *United States v. Burgos*, 94 F.3d 849, 867 (4th Cir. 1996) ("Relating implausible, conflicting tales to the jury can be rationally viewed as further circumstantial evidence indicating guilt.").

The claimants' emphasis on *United States v. Funds in the Amount of $271,080*, 816 F.3d 903 (7th Cir. 2016) ("*$271,080*") is unpersuasive. *See* Mot. Add'l. Auth., ECF No. 324. The claimants highlight the Seventh Circuit's commentary on the government's lack of evidence connecting the *$271,080* claimants to drug trafficking. *Id*. ¶¶ 8-10 (citing *$271,080*, 816 F.3d at 909). Evidence of drug trafficking was not all that was missing from the government's case in *$271,080*, however; there was no evidence of the drug dog's training, methodology, or field performance and no evidence that the bundled currency or the list of dates and numbers were things a drug dealer would do. *$271,080*, 816 F.3d at 909. But most importantly (and the reason the court held that there was a fact issue preventing summary judgement), the government had not presented evidence to rebut the claimants' testimony and records showing that they legally earned the money. *Id*. at 908-09. Here, while there was no direct evidence that Marrocco or Fallon engaged in drug trafficking, there was evidence of Deny's training and reliability, evidence that Fallon's behavior matched that of drug couriers, and the jury's apparent rejection of Marrocco's testimony that he earned the funds legitimately.

Moreover, as the government points out, *$271,080* was decided on a motion for summary judgment; the Seventh Circuit reversed the grant of summary judgment for the government because "a jury reasonably ***could find*** that the government failed to meet its burden of proving by a preponderance of the evidence that th[e] money is substantially connected to drug trafficking." *Id*. at 908 (emphasis added). Here, a reasonable jury had a sufficient evidentiary

basis to support its finding that the government proved by a preponderance of the evidence that the funds were substantially connected to a controlled substance offense. Accordingly, the claimants' renewed motion for judgment as a matter of law is denied.

II. Rule 59 Motion for a New Trial

Federal Rule of Civil Procedure 59(a) provides for a new trial "if the jury's verdict is against the manifest weight of the evidence or if the trial was in some way unfair to the moving party." *Venson v. Altamirano*, 749 F.3d 641, 656 (7th Cir. 2014). The claimants assert that they are entitled to a new trial because of a number of errors: (A) the jury instructions on forfeiture were confusing and contradictory; (B) the Court refused to give the jury a spoliation instruction; (C) the additional instruction in response to the juror question prejudiced the claimants; and (D) the Court did not use the claimants' proposed verdict form with special interrogatories.

A. Jury Instructions on Forfeiture

The claimants argue that three of the substantive jury instructions on forfeiture, the "elements instruction" explained *supra* at 3-4, the "transaction instruction,"[7] and the "offense instruction,"[8] when read together, were contradictory and confusing to the jury.[9] As previously

[7] The transaction instruction read:

> To prevail in a civil forfeiture action, the plaintiff is not required to establish a substantial connection to a specific unlawful controlled substance transaction that occurred at a particular place and time. Rather, the plaintiff is required to prove by a preponderance of the evidence that there is a substantial connection to some unlawful controlled substance transaction.

Jury Inst. 6.

[8] The offense instruction read:

> To prevail in a civil forfeiture action, the plaintiff is not required to prove the claimant committed a controlled substance offense. The fact the claimant did not directly participate in any illegal activity involving any of the defendant properties is not a defense to the forfeiture of the defendant properties.

Jury Inst. 6.

explained, the elements instruction incorporated the claimants' arguments that the government must prove a substantial connection to a controlled substance under any of the three theories of facilitation in 21 U.S.C. § 881(a)(6). The claimants do not take issue with this instruction; instead, they argue that the transaction instruction and offense instruction undermined the elements instruction, effectively relieving the government of its burden to prove a substantial connection between the funds and a controlled substance offense.

The transaction instruction informed the jury that government did not need to link the funds to a specific controlled substance transaction at a given time and place, but only to some unidentified unlawful controlled substance transaction. The claimants assert that such an instruction liberated the government of the substantial connection requirement because it is impossible to prove a substantial connection to ***a transaction*** without proving ***the specific transaction***. Mem. in Supp. 3-4, ECF No. 322. Not so; lipstick on the collar lands a husband in the doghouse even if his wife does not know the sordid details of how it got there. Even post-CAFRA, there is no requirement that the government must prove the specifics of a particular transaction. *See* 18 U.S.C. § 981; *see also United States v. $242,484.00*, 389 F.3d 1149, 1160 (11th Cir. 2004) ("[The government] does not need to show a relationship between the property and a particular drug transaction—only that the property was related to some illegal drug transaction.").

[9] The government argues that the claimants never objected that these three instructions were confusing and contradictory and have, therefore, waived any such objection. Resp. Mot. New Trial 3-5, ECF No. 330. While the government is correct that the claimants did not use these specific terms, they voiced these same substantive objections to these instructions repeatedly each time the Court discussed the jury instructions. This satisfies Federal Rule of Civil Procedure 51(c)(1). *See Chestnut v. Hall*, 284 F.3d 816, 819 (7th Cir. 2002) (Rule 51 requires "that objections to jury instructions be made in a timely fashion and on the record, [and] also with sufficient specificity to apprise the district court of the legal and factual bases for any perceived defect."). Accordingly, the claimants have not waived their objections to these instructions.

As for the offense instruction, which informed the jury that the government was not required to prove that the claimants committed a controlled substance offense and that the fact that the claimants did not directly participate in illegal activity is not a defense to forfeiture, the claimants argue that it misstates the law because it contradicts the innocent owner defense. Under 18 U.S.C. § 983(d), a claimant can assert that he is an "innocent owner," meaning he did not know of the conduct giving rise to the forfeiture or upon learning of the conduct, he "did all that reasonably could be expected under the circumstances to terminate such use of the property." 18 U.S.C. § 983(d)(2)(A). The claimant bears the burden of proving that he is an innocent owner by a preponderance of the evidence. 18 U.S.C. § 983(d)(1).

The offense instruction did not negate the innocent owner defense; the innocent owner defense only comes into play once the government "has met its burden of proving the property is subject to forfeiture . . . and in that case the burden shifts to the claimant to prove legitimate ownership." *$271,080*, 816 F.3d at 908. At that point, the claimant raises the defense "that he did not know about the illegal use of his property." *Id*. Here, the claimants have never raised such an argument nor did they request an instruction on the innocent owner defense; rather, their theory has always been that the funds were legitimately acquired and never connected in any way to any illegal activity. This instruction, therefore, in no way undermined the claimants' arguments. *Cf. United States v. Sawyer*, 558 F.3d 705, 710 (7th Cir. 2009) ("A defendant is entitled to have a jury consider a proffered defense so long as that defense has a foundation in the evidence . . . .").[10]

[10] The claimants also assert that the offense instruction was prejudicial because the Court had granted the government's motion in limine preventing the claimants from highlighting the lack of criminal drug charges against, or convictions of, the claimants. *See* Reply Mot. New Trial 5-6; *see also* Plf. Mt. Lim. ¶ 4, ECF No. 275. The claimants made such an argument in closing without any objection by the government, however, which renders the point moot.

Reading the three instructions together, the jury was instructed that, to find for the government, it must find a substantial connection between the funds and some unlawful controlled substance offense, but that the government was not required to prove that the claimants (or anyone else) committed a specific controlled substance offense. This is an accurate statement of the law and is not contradictory or confusing. The motion for a new trial on this ground is denied.

B. Lack of a Spoliation Instruction

The Court addressed the claimants' request for a spoliation instruction long before trial, concluding that such an instruction was inappropriate given the law of the case, specifically Judge Bucklo's prior ruling that the claimants had failed to demonstrate that the government had failed to preserve the currency in bad faith. *See Funds III*, 127 F. Supp. 3d at 887-90 ("Notwithstanding this Court's disagreement with Judge Bucklo's prior ruling denying the claimants' spoliation motion, that ruling remains the law of the case because the claimants did not appeal it."); *see also* Min. Order Den. Mot., ECF No. 166 (Bucklo, J.) (Order denying motion in limine to exclude evidence of dog alert based on government's spoliation of the currency). The claimants acknowledge that this issue has been addressed twice already but argue that the law of the case doctrine is discretionary and urge the Court to reconsider. The law of the case doctrine promotes consistency, finality, and judicial economy by "presum[ing] that once a court has decided a particular issue in a case, the issue should not be reopened without good cause." *Boyer v. BNSF Ry. Co.*, No. 14-3131, 2016 WL 3094541, at *13 (7th Cir. June 1, 2016). A court is not prohibited "from revisiting an issue when there is a legitimate reason to do so, whether it be a change in circumstances, new evidence, or something the court overlooked earlier." *Id.*

Here, there has been no change in circumstances or new evidence since this Court decided the issue last year; the claimants are merely rehashing arguments they made in that motion. *See* Cl. Mot. Lim. ¶¶ 46-54, ECF No. 242. Moreover, this ruling has not caused a manifest injustice; the claimants were able to (and did) make arguments regarding the government's resources and ability to test the currency for drug contamination and highlighted the lack of scientific testing of the currency in this case. The jury heard such argument and rejected it. The Court will not revisit this decision.[11]

As to the claimants' argument that they were deprived of the opportunity to demonstrate that the serial numbers of the currency confirm Marrocco's testimony that he had been saving the funds for a decade, this argument has never been raised in the thirteen years the claimants have been litigating this case. It is not a manifest injustice that the claimants were unable to present an argument that has apparently just occurred to them after more than a decade of litigation. *See King v. Cooke*, 26 F.3d 720, 726 (7th Cir. 1994) (improper to present new legal theories in Rule 59 motion); *International Paper Co. v. Androscoggin Energy LLC*, No. 00 C 6215, 2005 WL 2429794, at *3 (N.D. Ill. Sept. 30, 2005) ("Rule 59(a) is not intended to allow parties to merely relitigate old matters or to present the case under new theories.").

C. Instruction in Response to Juror Note

During deliberations, the jury sent a note asking, "Did the CPD and Amtrack [sic] Police follow 'proper procedures' (in 2002) related to a drug related-confiscation? Or—were they required to send suspected items to a crime lab?" Jury Note, ECF No. 317. The government argued that the jury note asked two separate questions, the first, a Fourth Amendment question

[11] The Court notes that while the law of the case prevented the spoliation instruction the claimants desired, the law of the case doctrine was also the basis of this Court's decision to grant the claimants' motion to suppress Fallon's custodial statements. *See Funds III*, 127 F. Supp. 3d at 891-92.

regarding the legality of the seizure, and the second, an evidentiary question. Claimants' counsel proposed a response: "Members of the jury, you have received all of the evidence in this case. You must decide this case based upon the evidence heard in Court." Cl. Jury Inst. 50, ECF No. 338. The Court agreed that the claimants' proposed response was proper to the extent that the jury asked for additional evidence. With respect to the first portion of the note, however, the Court determined to the extent the jury was inquiring into the legality of the seizure, that it was not relevant to whether the funds were subject to forfeiture. The claimants objected to a separate response to the first portion of the note, arguing that the note constituted a single question focusing on the evidentiary issue of sending the funds to the crime lab and that, by informing the jury that the proper procedures issue was irrelevant, the jury would also conclude that whether the funds were sent to a crime lab was also irrelevant. *See* Cl. Mem. in Supp. 8-9. The Court drafted a proposed response to the first portion of the note, stating that the "legal issue" was not relevant, to which claimants' counsel indicated agreement. Excerpt Trial Day 5 Tr. at 12:9-13 ("Much better.").[12] The Court sent the following response to the jury:

> The question of whether "the CPD and Amtrak Police follow[ed] 'proper procedures' (in 2002) related to a drug related-confiscation" is a legal issue that is not relevant to your determination of whether the funds are subject to forfeiture. As to whether they were "required to send suspected items to a crime lab?" you have received all of the evidence in this case. You must decide this case based upon the evidence heard in Court.

Jury Note Resp., ECF No. 337.

This instruction did not prejudice the claimants by telling the jury "that [whether the funds were sent to a crime lab] was not relevant to their deliberations." Mem. in Supp. 9. To the

[12] Arguably, the claimants assent to the final version of the Court's response waived any objection, but the government does not assert waiver as to this issue.

contrary, the two-part response made clear that the jury note had been interpreted as involving two distinct issues: a legal issue (whether the police followed proper procedures) which was not relevant to the jury's deliberations, and an evidentiary issue (whether a crime lab report was required to determine the presence of drugs on the currency) which they had to resolve on the basis of the evidence introduced at trial. Rather than implying that both the proper procedures and crime lab issues were irrelevant, as the claimants maintain, the response expressly instructed the jury that the issues were separate and distinct. And even if, as the claimants maintain, the jurors intended only to ask an evidentiary question, telling them that a separate legal question was not relevant to their deliberations could not have prejudiced the claimants precisely because the response was bifurcated; the lack of relevance statement related only to the legal question, not the evidentiary question. Accordingly, the motion for a new trial on these grounds is denied.

D. Lack of Special Interrogatories on the Verdict Form

The claimants assert that they were prejudiced by the Court's refusal to give the jury a verdict form with special interrogatories requiring the jury to affirm that they found a substantial connection between the funds and a controlled substance offense and to identify under which of the three theories they found the funds forfeit. *See* Cl. Prop. Jury Inst. 46, ECF No. 280. Whether to submit a special verdict form to the jury is committed to the Court's discretion. *E.E.O.C. v. Management Hospitality of Racine, Inc.*, 666 F.3d 422, 439-40 (7th Cir. 2012). They may be advisable in cases where multiple complicated and interrelated claims are submitted to a jury after a multi-week trial, *Huff v. Sheahan*, 493 F.3d 893, 905 n.14 (7th Cir. 2007), but that does not describe this trial; despite its procedural complexity, the dispute presented to the jury was simply whether it was more likely than not that the seized currency had a substantial connection to drug trafficking. Had the Court accepted the government's proposed elements instruction and

limited the substantial connection requirement only to the facilitation theory of forfeiture, then a special interrogatory would have been useful to ensure the jury found the dual requirements if it found under the facilitation theory. Here, however, the government was required to prove a substantial connection between the funds and a controlled substance under any of the three theories. Thus, it is not necessary to know under which theory the jury made its finding. The elements instruction clearly delineated the government's burden to prove two elements: (1) a substantial connection between the funds and a controlled substance offense and (2) that the funds fell under one of the three theories of forfeiture. Special interrogatories on the verdict form were not necessary, and the lack of such a form did not prejudice the claimants.

The claimants have not identified any error that prejudiced them so as to make the trial unfair, nor have they established that the jury's verdict was against the manifest weight of the evidence. The Rule 59 motion for a new trial is, therefore, denied.

III. Whether the Forfeiture is Constitutionally Excessive

Alternatively to the motions for judgment as a matter of law and for a new trial, the claimants ask that the Court determine that the forfeiture violates the Excessive Fines Clause of the Constitution and either reduce or eliminate the forfeiture. *See* Mem. in Supp. 18-21; *see also* U.S. Const. amend. VIII. Under 18 U.S.C. § 983(g), a claimant may petition the court to determine whether the forfeiture was constitutionally excessive. The claimant has the burden of proving that the forfeiture is grossly disproportionate to the offense giving rise to the forfeiture by a preponderance of the evidence. 18 U.S.C. § 983(g)(2)-(3).

The claimants argue that there is no evidence of the claimants' involvement with a controlled substance transaction and, therefore, any amount of forfeiture is disproportionate to their conduct and unconstitutionally excessive. That argument fails for the reasons already

discussed; the jury reasonably determined that the funds were substantially connected to a controlled substance offense. The forfeiture of funds that have a substantial connection to drug trafficking is not disproportionate to the conduct; it is directly proportional to the wrongful conduct. This is not a case in which, for example, a house or other valuable assets have been forfeited based on a tangential connection to an offense that permits forfeiture. *See, e.g., United States v. Abair,* 746 F.3d 260, 268 (7th Cir. 2014) (expressing doubt about the proportionality of the forfeiture of the entire value of a home based on a minor structuring offense that was not tied to other wrongdoing). Rather, this is a case where the currency forfeited was, the jury concluded, exchanged in drug transactions or used to facilitate drug transactions, and in a manner so closely tied to such transactions that the currency itself was tainted by the odor of the drugs—*i.e.,* "that the Funds recently were in contact with illegal drugs." *Funds II,* 730 F.3d at 727. To the extent that the currency represented the proceeds of drug transactions, forfeiture of those proceeds does not violate the Eighth Amendment. *See, e.g., United States v. Funds on Deposit at Bank One Chicago Account 1110010428312,* 393 F. App'x 391, 392 (7th Cir. 2010) ("forfeiting the proceeds of crime never violates the Eighth Amendment"); *United States v. Betancourt,* 422 F.3d 240, 250-51 (5th Cir. 2005); *United States v. Real Property Located at 22 Santa Barbara Drive,* 264 F.3d 860, 874-75 (9th Cir. 2001). It is difficult to imagine how the currency could have been used to "facilitate" such transactions other than to pay for the drugs, but even assuming such other means of facilitation, where it was so directly tied to the transaction that the currency was tainted with the odor of the drugs, there would plainly be a correlation between the value of the currency and the drugs. In that case, too, then, there would be nothing "excessive"—*i.e.,* unfairly punitive—about a forfeiture of the entire amount.

Further, and as already noted, the claimants did not put on a defense that they were innocent owners, which, if the jury had believed it, would have precluded the forfeiture, or at least have been a basis to argue that forfeiture was excessive when compared to the claimants' conduct. *See United States v. Malewicka*, 664 F.3d 1099, 1104 (7th Cir. 2011) (considering, among other factors, "the nature of the harm caused by the defendant's conduct" in determining whether a forfeiture was constitutionally excessive (citing *United States v. Bajakajian*, 524 U.S. 321, 337-40 (1998)). Here, the jury's verdict represents its conclusion that the funds were either (1) furnished or intended to be furnished in exchange for a controlled substance; (2) the proceeds from the sale of a controlled substance; or (3) monies used or intended to be used to facilitate a controlled substances transaction. Under any of the three theories, the forfeiture is not constitutionally excessive. The jury's verdict necessarily reflects the rejection of Marrocco's testimony about the origin of the funds, so his argument that any forfeiture was disproportionate to his wrongdoing cannot prevail.

The claimants' argue that the Court cannot consider the jury's verdict in making the proportionality determination because, to do so would merely be "rubber-stamping of forfeiture verdicts," Reply Const. Exc. 3, ECF No. 334, and would negate the language of Section 983(g), which states that the claimant "shall have the burden [of proof] . . . by a preponderance of the evidence at a hearing conducted by the court without a jury." 18 U.S.C. § 983(g)(3). As an initial matter, the notion that a jury trial on issues relevant to whether a forfeiture is disproportional deprives claimants of due process is not compelling; to the extent that the claimants had a jury trial on issues relevant to their proportionality claim, they received more process than they were due. "Even if the Court ultimately conducted a Section 983(g) hearing after any seizure and without a jury, having a jury weigh in on background circumstances setting up the hearing would

be of immense help." *United States v. $7,679.00 United States Currency*, No. 13-CV-1057A, 2016 WL 1258348, at *7 (W.D.N.Y. Mar. 31, 2016). A jury's findings as to the basis for forfeiture may be directly relevant to consideration of a challenge to the proportionality of the forfeiture under § 983(g). *United States v. Real Prop. located at 5294 Bandy Rd., Priest River, Bonner Cty., Idaho*, No. 2:12-CV-00296-CWD, 2014 WL 5513748, at *14 (D. Idaho Oct. 31, 2014) ("At this stage in the proceeding, the Court is without the benefit of the jury's findings on whether [the claimant] knew of, or was willfully blind to, his father's criminal activities on the Property. Those findings would directly relate to [the claimant's] culpability and are thus an essential prerequisite to any constitutional inquiry.").

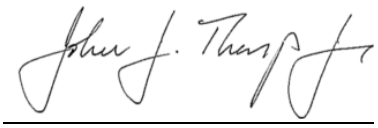
More significantly, this argument confuses the nature of the inquiry permitted by § 983(g). As claimants envision it, the § 983(g) inquiry would revisit the forfeiture finding itself lest the Court "rubber stamp" the jury's verdict. But § 983(g) does not license courts to make *de novo* determinations of whether any forfeiture was appropriate; it permits only challenges based on an argument that the value of the assets forfeited is grossly disproportional to the conduct that gave rise to the forfeiture (here, drug trafficking). Thus, § 983(g) does not promise the claimants a hearing to revisit the question of whether there was a substantial connection between the seized currency and drug trafficking; the jury's verdict already establishes that there was. What § 983(g) provides is an opportunity for claimants to challenge the amount of forfeiture in light of the conduct that gave rise to the forfeiture. Here, that translates to an argument that forfeiting currency that has a substantial connection to drug trafficking is grossly disproportional to drug trafficking.

There is no basis or need to hold a hearing on that question. As a textual matter, "shall" applies to the claimants' burden, not to the requirement that the court conduct a hearing. *See* 18 U.S.C. § 983(g)(3). Moreover, a hearing would be a waste of judicial resources; there is no additional evidence that the parties could present relevant to this determination that was not brought up in the preceding 13 years of litigation and which the claimants did not have an opportunity to present at trial. The claimants have had the opportunity to present evidence and argument at trial and through post-trial briefing and have been adequately heard by this Court; they identify no new evidence they would seek to present at a proportionality hearing. *See, e.g.*, *United States v. Real Prop. Located at 265 Falcon Rd., Carbondale, Williamson Cty., Ill.*, No. 08-700-JPG, 2009 WL 1940457, at *9 (S.D. Ill. July 7, 2009) ("because, as a matter of law, forfeiture of property worth $144,000 on which the [marijuana] grow operation was conducted is not grossly disproportionate to [claimant's] illegal conduct, the Court need not hold a hearing" on the proportionality of the forfeiture); *United States v. Six Negotiable Checks in Various Denominations Totaling One Hundred Ninety One Thousand Six Hundred Seventy One Dollars & Sixty Nine Cents*, 389 F. Supp. 2d 813, 823 (E.D. Mich. 2005) (no hearing required under CAFRA where parties addressed excessiveness issue in post-trial submissions).

* * *

In *Funds II*, the claimants argued, "Deny was not reliable. Claimants deserve an opportunity to put this question to a jury." Appellant Br. 31-32, No. 11-3706, ECF No. 17. They got that opportunity but lost. Because they have not provided the Court with any reason to overturn the jury's verdict, the claimants' motions for judgment as a matter of law and for a new trial are denied. Because the jury determined that the government met its burden of proving by a preponderance of the evidence that the funds were exchanged for a controlled substance, or were

the proceeds of or were used to facilitate a controlled substance transaction, forfeiture of the funds does not violate the Excessive Fines Clause of the Constitution; the motion to determine that the forfeiture is constitutionally excessive is denied.



Dated: June 24, 2016

John J. Tharp, Jr.
United States District Judge

testimony of another expert on another subject that might have some bearing on that expert's opinion. So I think that's permissible within the ambit of Rule 703.

So they need not be excluded. They're obviously subject to cross-examination on the point, but that's a decision claimant needs to make.

All right. Anything else?

MR. KOMIE: Whenever it's appropriate, motion for a directed verdict and whenever you have time to hear me.

THE COURT: This is your time.

MR. KOMIE: Okay.

Judge, you're now very familiar with the statutes of Title 21, I think it's 883 or 888.

THE COURT: 881(a)(6).

MR. KOMIE: Yeah, 881(a)(6), and I think of probably all of the judges in the United States, you're the one who has actually drilled down and looked into the substantial connection aspect of it, too. So there are what I consider to be at this stage the requirement that there be some evidence to support all three theories with a substantial connection.

Now, I think you -- I think the Court would probably have to analyze this step by step through the three theories, but there has been no proceeds testified to. There has been no evidence offered on a drug transaction. I think even in opening statement the jury was told by the plaintiff that

there would be no evidence of a drug transaction.

In order to have proceeds, it's condition precedent, I would believe, that you have a transaction of some kind and an exchange of money for the drugs. And there has been no controlled substances offered into evidence here. So we don't have any evidence of a controlled substance been offered to the Court at this stage, which, of course, would go to theory one, which is furnished or intended to be furnished in exchange -- so in exchange is a sale or a barter or some kind of economic event -- for a controlled substance.

And then in the alternative, you have what are called proceeds traceable to an unlawful exchange for a controlled substance. So there would have to be some scintilla. I mean I think that was the word I heard at one point in my career, scintilla on the subject. And then the money was used or intended to be used to facilitate an unlawful narcotics transaction.

Now, if we think back to all of the witnesses that have come before us, there is no evidence of anybody's intention to use the money for an unlawful purchase of a controlled substance or narcotics trafficking. So I think if the Court would be -- and I don't mean to be presumptuous suggesting how the Court should do it, but I think the analysis has to be is there a substantial connection between the defendant funds and an unlawful controlled substance

offense.

My position here and both if we ever get to a jury instruction is if the answer is that that hasn't been satisfied at this point or it wouldn't be satisfied in the jury deliberations, then the case should come to an end because you can't make the connection with the other three.

But then if you go down and you get into the word "and" and you apply the rules of statutory construction where it is first you must have this before that and then you have to find this, too, the analysis, I believe, would go substantial connection and then have they put in sufficient evidence to meet the barrier that allows it to go to the jury which would be furnished or intended to be furnished in exchange for a controlled substance or, in the alternative, were proceeds traceable to an unlawful exchange for a controlled substance or money used or intended to be used to facilitate an unlawful narcotics transaction.

And I think if you search the record, and I've watched you take copious notes as the trial has been going on, if you even search your notes, I don't think you're going to find any evidence of any intent to conduct a transaction, any discussion of a transaction. What you basically have is what we were warned against by Judge Bauer in *U.S.A. v. 506,000*, is the government in this case has produced evidence that they've seized the money, and now they have turned and said okay,

Mr. Marrocco, we're going to use your finances to prove that it was intended or it was going to be used for a controlled substance transaction without any live evidence or witness that's going to say that in the courtroom.

And so I would ask Your Honor to search the record, search your collective memory of the testimony in this case, and, you know, maybe you don't agree with me, which is certainly your prerogative, but, you know, you might eliminate one or two of these because it will eliminate the problem in the jury room.

I mean, we've got three different theories here, and the government has not offered evidence on all three. And thank you for listening to me.

THE COURT: Any response?

MR. KUHN: The evidence presented, taken in the light most favorable to the government, a reasonable jury could clearly find that this was money related to a drug transaction, money used -- that was going to -- was going to be furnished for drugs, money that was the proceeds from a just prior sale of drugs, or money that by its own just characteristic as money which is exchanged for drugs would be used to facilitate that transaction.

We have Vincent Fallon who fits the profile of a drug courier. That's beyond dispute, and we have all the other information that Agent Romano got from him, his reaction to

questioning, you know, the one-way ticket, source city, paid for with cash, inconsistent answers, lying about what's in the bag, and he's got a locked bag that he doesn't have a key for. All that points to this was a drug courier route, which Agent Romano testified there was money going to and from Seattle from drug deals, either going up there to purchase or going up there to pay for drugs that had already been sold on consignment. I think that's -- that's clear and it's in the record.

And then we have -- we have a dog who was trained and based upon his training, he would act a certain manner when he found drugs, and he found them. And he found them and he acted this way every single time. And on this day, December 6th of 2002, he found drug -- he found -- using his power to find drugs, he went right to this money and he found it when no one who was working with him, neither him nor his handler knew where it was.

The only logical conclusion a reasonable juror could make is he smelled drugs on that money. And as Mr. Decker testified when he trained these dogs, he would taint money by not putting -- sprinkling some drugs on it. He would just put it next to the drugs. It would pick up the odor and it would keep that odor for a matter of days.

And that's what we have here. We have money tainted with the odor of drugs because it had just been near drugs in

the fairly recent past, which is all indicative of it was involved in a drug dealer -- a drug deal. The Court of Appeals in this case and the Court of Appeals in *$30,670*, which effectively overruled Mr. Komie's *$506,231*, has said that's enough.

The Court of Appeals remanded the case back here because there were questions of fact raised by the expert witnesses that Judge Bucklo did not address or did not credit properly. But the evidence we have put on in this case is enough to -- for a reasonable jury to find by a preponderance of evidence that this money is forfeitable to the United States under all three theories.

THE COURT: All right. There's no question there's not evidence, Mr. Komie, of a specific drug transaction. As we all know by this point, however, the issue is the -- and what the connection -- the evidence of connection to drug trafficking is, as offered in the government's case, is the dog sniff.

If there wasn't a positive alert by the dog, this case would not be brought. If there wasn't a positive alert by the dog, while suspicious the behavior of Mr. Fallon may have been, it is not necessarily suspicious -- the suspicion it gives rise to is broader than that the money must have been involved in drug trafficking. It could have been other forms of illegal activity. It could have been -- possibly there

could be legitimate explanations for it that nevertheless someone might be nervous about.

This case is about the probative value of the dog sniff. That's why it's back here. And the dog sniff has some probative value, as I explained or at least endeavored to explain in my opinion, that's been recognized by the Supreme Court and the Seventh Circuit, but that doesn't mean the dog sniff is dispositive, and that's why we're going to have expert testimony relating to that question. That's why we had the testimony that the government presented about the dog sniff.

If -- and ultimately, as I think is consistent with the Seventh Circuit's holding in Funds II, the second visit to the supreme -- or Seventh Circuit of this case, it's a question for the jury ultimately as to whether the conflicting evidence about the probative value of this dog sniff is sufficient to warrant a conclusion that these funds had been in close proximity with unlawful drugs. And that is the critical question.

If there is a basis to draw that inference and a dog sniff does provide some probative weight toward that question, then there is a basis to infer a substantial connection between the funds and drug trafficking.

If the jury concludes, however, that there is not, or the Court were to conclude as a matter of law, though, again,

I don't believe that's really open to me to -- at least so far as the record reflects at this point, to say there's no probative value of that dog sniff. So that's the jury question. That's why we're here.

So I'm going to deny the motion for directed verdict. We're back here for a jury trial to sort through the conflicting or contradictory evidence about the probative value of the drug dog sniff, and that's what I'm going to give the jury the opportunity to do.

All right. Okay. So your first witness is?

MR. KOMIE: Dr. Myers.

THE COURT: Dr. Myers, okay. Go ahead and take five minutes for comfort purposes, and then we will get started.

(Recess.)

THE COURT: All right. Are we ready to go?

MR. KOMIE: Still trying to get a copy of something.

THE COURT: Is that something you need right off the bat, Mr. Komie?

MR. KOMIE: Yes, sir.

THE COURT: Okay.

(Jury enters.)

THE COURT: All right. Ladies and gentlemen, as I told you, just before break, the government rested its case. Now the defense has the opportunity -- the claimants, excuse me -- have the opportunity to present any evidence they wish

JC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FUNDS IN THE AMOUNT OF ONE HUNDRED THOUSAND AND ONE HUNDRED TWENTY DOLLARS ($100,120.00), Defendant, NICHOLAS MARROCCO and VINCENT FALLON, Claimants.	)	No. 03 C 3644 Judge Tharp

JURY INSTRUCTIONS

Members of the jury, you have seen and heard all the evidence and arguments of the attorneys. Now I will instruct you on the law.

This is an action for forfeiture against $100,120 in United States Currency, which I am going to refer to in these instructions as "the funds." This legal proceeding is directed solely against the property which is the subject of the civil complaint—that is, against the funds—and is not directed against any person. The United States is seeking forfeiture of the funds pursuant to Title 21, United States Code, Section 881(a)(6). It alleges that the funds were furnished or intended to be furnished in exchange for a controlled substance, are proceeds from the sale of a controlled substance, or were moneys used or intended to be used to facilitate narcotics trafficking, in violation of federal controlled substance law. The United States has the burden of proof throughout the trial. The government must prove by a preponderance of evidence that it is more likely true than not true that the property is subject to forfeiture. If you find that the funds are subject to forfeiture, they will become the property of the United States.

Nicholas Marrocco and Vincent Fallon are the claimants in this trial. That is, they have filed claim to the property. Mr. Marrocco claims ownership of the funds at issue. Mr. Fallon claims a possessory interest in the funds, meaning that he claims that he had lawful possession of the funds when the United States took possession of the funds. Both claimants deny that the currency was used or intended to be used as the United States alleges. If you find that the funds are not subject to forfeiture, they will become the property of Mr. Marrocco.

Your only job as jurors will be to determine whether the government has proven by a preponderance of evidence that the property should be forfeited to the United States.

This job requires you to perform two duties. Your first duty is to decide the facts from the evidence in the case. This is your duty, and yours alone.

Your second duty is to apply the law that I give you to the facts. You must follow these instructions, even if you disagree with them. Each of the instructions is important, and you must follow all of them.

Perform these duties fairly and impartially. Do not allow sympathy or prejudice to influence you. You should not be influenced by any person's race, color, religion, national ancestry, or sex.

In this case, the plaintiff is the United States of America. The claimants are Mr. Marrocco and Mr. Fallon. All parties are equal before the law. Both the plaintiff and the claimants are entitled to the same fair consideration.

Nothing I say now, and nothing I said or did during the trial, is meant to indicate any opinion on my part about what the facts are or about what your verdict should be. During this trial, I have asked a witness a question myself. Do not assume that because I asked questions I hold any opinion on the matters I asked about, or on what the outcome of the case should be.

* * * * *

The evidence consists of the testimony of the witnesses, the exhibits admitted in evidence, and stipulations.

A stipulation is an agreement between both sides that certain facts are true.

In determining whether any fact has been proved, you should consider all of the evidence bearing on the question regardless of who introduced it.

You will recall that during the course of this trial I instructed you that I admitted certain evidence for a limited purpose. You must consider this evidence only for the limited purpose for which it was admitted.

Certain things are not to be considered as evidence. I will list them for you:

First, if I told you to disregard any testimony or exhibits or struck any testimony or exhibits from the record, such testimony or exhibits are not evidence and must not be considered.

Second, anything that you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded.

Third, questions and objections or comments by the lawyers are not evidence. They have a duty to object when they believe a question is improper. You should not be influenced by any objection, and you should not infer from my rulings that I have any view as to how you should decide the case.

Fourth, the parties' opening statements and closing arguments to you are not evidence. Their purpose is to discuss the issues and the evidence. If the evidence as you remember it differs from what is said in opening statements or closing arguments, your memory is what counts.

Fifth, your notes are not evidence. Any notes you have taken during this trial are only aids to your memory. If you have not taken notes, you should rely on your independent recollection of the evidence and not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than the recollections or impressions of each juror about the testimony and exhibits.

Sixth, certain diagrams have been shown to you. Those diagrams were used for convenience and to help explain the facts of the case. They are not themselves evidence or proof of any facts.

* * * * *

You should use common sense in weighing the evidence and consider the evidence in light of your own observations in life.

In our lives, we often look at one fact and conclude from it that another fact exists. In law we call this "inference." A jury is allowed to make reasonable inferences. Any inference you make must be reasonable and must be based on the evidence in the case.

You may have heard the phrases "direct evidence" and "circumstantial evidence." Direct evidence is proof that does not require an inference, such as the testimony of someone who claims to have personal knowledge of a fact. Circumstantial evidence is proof of a fact, or a series of facts, that tends to show that some other fact is true.

As an example, direct evidence that it is raining is testimony from a witness who says, "I was outside a minute ago and I saw it raining." Circumstantial evidence that it is raining is the observation of someone entering a room carrying a wet umbrella.

The law makes no distinction between the weight to be given to either direct or circumstantial evidence. You should decide how much weight to give to any evidence. In reaching your verdict, you should consider all the evidence in the case, including the circumstantial evidence.

You must decide whether the testimony of each of the witnesses is truthful and accurate, in part, in whole, or not at all. You also must decide what weight, if any, you give to the testimony of each witness.

In evaluating the testimony of any witness, including any party to the case, you may consider, among other things:

- the ability and opportunity the witness had to see, hear, or know the things that the witness testified about;

- the witness's memory;

- any interest, bias, or prejudice the witness may have;

- the witness's intelligence;

- the manner of the witness while testifying;

- and the reasonableness of the witness's testimony in light of all the evidence in the case.

You have heard witnesses give opinions about matters requiring special knowledge or skill. You should judge this testimony in the same way that you judge the testimony of any other witness. The fact that such person has given an opinion does not mean that you are required to accept it. Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness's qualifications, and all of the other evidence in the case.

You may consider statements given by Eric Romano, Richard King, and Nicholas Marrocco, or by any other witness under oath before trial, as evidence of the truth of what these witnesses said in the earlier statements, as well as in deciding what weight to give their testimony.

With respect to other witnesses, the law is different. If you decide that, before the trial, one of these witnesses made a statement not under oath that is inconsistent with his or her testimony here in court, you may consider the earlier statement only in deciding whether his testimony here in court was true and what weight to give to his or her testimony here in court.

In considering a prior inconsistent statement, you should consider whether it was simply an innocent error or an intentional falsehood and whether it concerns an important fact or an unimportant detail.

Evidence has been presented to you in the form of written answers of one of the parties to written interrogatories submitted by the other side. These answers were given in writing and under oath before this trial in response to written questions. You must give the answers the same consideration as if the answers were made from the witness stand.

You may find the testimony of one witness or a few witnesses more persuasive than the testimony of a larger number. You need not accept the testimony of the larger number of witnesses.

The law does not require any party to call as a witness every person who might have knowledge of the facts related to this trial. Similarly, the law does not require any party to present as exhibits all papers and things mentioned during this trial.

It is proper for a lawyer to meet with any witness in preparation for trial.

* * * * *

Plaintiff alleges that the defendant currency is forfeitable as money involved or intended to be involved in unlawful drug trafficking. To succeed in this claim, plaintiff must prove each of two propositions by a preponderance of the evidence.

First, that there is a substantial connection between the funds and an unlawful controlled substance offense; and

Second, that the funds were:

(a) furnished or intended to be furnished in exchange for a controlled substance;

(b) proceeds traceable to an unlawful exchange for a controlled substance; or

(c) money used or intended to be used to facilitate unlawful narcotics trafficking.

As to this second proposition, the plaintiff need not prove that all three of these things are true about the funds; they are alternatives and you need conclude only that one of these three alternatives has been proved by a preponderance of the evidence.

If you find that plaintiff has proved both of these propositions (that is, the first proposition and one of the three alternatives that the second proposition includes) by a preponderance of the evidence, then you must find for the plaintiff. However, if you find that the plaintiff did not prove one or both of these propositions by a preponderance of the evidence, then you must find for the claimants.

When I say a particular party must prove something by "a preponderance of the evidence," or when I use the expression "if you find," or "if you decide," this is what I mean: When you have considered all the evidence in the case that bears on whether an allegation is true, you must be persuaded that it is more probably true than not true.

The phrase "proceeds traceable to an unlawful exchange for a controlled substance" means money obtained as the result of an unlawful controlled substance transaction.

The term "facilitate" means to make easier to accomplish.

To prevail in a civil forfeiture action, the plaintiff is not required to establish a substantial connection to a specific unlawful controlled substance transaction that occurred at a particular place and time. Rather, the plaintiff is required to prove by a preponderance of the evidence that there is a substantial connection to some unlawful controlled substance transaction.

To prevail in a civil forfeiture action, the plaintiff is not required to prove the claimant committed a controlled substance offense. The fact the claimant did not directly participate in any illegal activity involving any of the defendant properties is not a defense to the forfeiture of the defendant properties.

A "controlled substance offense" or an "unlawful controlled substance transaction" means conduct that involves the knowing possession with intent to distribute, or the knowing distribution, of a controlled substance.

You are instructed that marijuana, cocaine, heroin, ecstasy, and methamphetamine are controlled substances.

A person acts knowingly if he realizes what he is doing and is aware of the nature of his conduct, and does not act through ignorance, mistake, or accident.

A person possesses an object if he has the ability and intention to exercise direction or control over the object, either directly or through others. A person may possess an object even if he is not in physical contact with it and even if he does not own it. More than one person may possess an object.

A person "distributes" a controlled substance if he delivers or transfers possession of the controlled substance to someone else or causes a person to deliver or transfer possession of the controlled substance to another person.

To commit an unlawful controlled substance offense, an individual must know that the transaction involves some kind of a controlled substance, but not the specific controlled substance involved in the transaction.

* * * * *

Upon retiring to the jury room, you must select a presiding juror. The presiding juror will preside over your deliberations and will be your representative here in court.

During your deliberations, you must not communicate with anyone other than your fellow jurors, or provide information to anyone other than your fellow jurors, about this case. You cannot talk to anyone in person or on the phone, correspond with anyone, or electronically communicate with anyone about the case. All forms of communication are subject to this instruction, including email, text messaging, instant messaging, blogging, and posting on social media and networking platforms such as Facebook, Twitter, Tumblr, Instagram, or Snapchat. You may not use any electronic device, such as a cell phone, smart phone, computer, or tablet to communicate with anyone about this case. If anyone attempts to communicate with you about the case, through any of the methods I have listed or any others, you must inform me right away.

Also, you must not conduct any independent research about this case by any means. This means that you may not use any printed or electronic source to look up any information about the case. In other words, you should not consult any reference materials or search the Internet to obtain information about the matters in the case, or the individuals or corporations involved in the case, or to help you decide the case. You may not do any personal investigation, including using search engines or Internet maps, visiting any of the places involved in this case, or creating your own demonstrations or reenactments of the events which are the subject of this case.

The reason that you cannot communicate with anyone about the case or conduct your own investigation is that it is important that you decide this case based solely on the evidence presented in this courtroom, which has been seen and heard by all of your fellow jurors as well as the parties in the case. Permitting communications or investigation outside the courtroom would jeopardize the fairness of these proceedings because your verdict might then have been based on information that is not reliable or admissible, that the parties did not have an opportunity to address, and that your fellow jurors did not have the opportunity to consider.

I do not anticipate that you will need to communicate with me. If you do need to communicate with me, the only proper way is in writing. The writing must be signed by the presiding juror, or, if he or she is unwilling to do so, by some other juror. The writing should be given to the marshal, who will give it to me. I will respond either in writing or by having you return to the courtroom so that I can respond orally.

If you do communicate with me, you should not indicate in your note what your numerical division is, if any.

The verdict must represent the considered judgment of each juror. Your verdict, regardless of who it favors, must be unanimous.

A verdict form has been prepared for you. [See verdict form.]

You will have this form in the jury room, and when you have reached unanimous agreement on the verdict, your presiding juror will fill in and date the appropriate form, and all of you will sign it.

You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views, and listen to the opinions of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to reexamine your own views and change your opinion if you come to believe it is wrong. But you should not surrender your honest beliefs about the weight or effect of evidence solely because of the opinions of other jurors or for the purpose of returning a unanimous verdict.

All of you should give fair and equal consideration to all the evidence and deliberate with the goal of reaching an agreement that is consistent with the individual judgment of each juror. You are impartial judges of the facts.

PK

03cv3644 USA vs. $100120 US Currency

Court's Response to Juror Note #1:

The question of whether "the CPD and Amtrak Police follow[ed] 'proper procedures' (in 2002) related to a drug related-confiscation" is a legal issue that is not relevant to your determination of whether the funds are subject to forfeiture. As to whether they were "required to send suspected items to a crime lab?" you have received all of the evidence in this case. You must decide this case based upon the evidence heard in Court.

JR

03cv3644 USA vs. $100120 US Currency

CL - 50
response by claimant to jury note

members of the jury:

You have received all of the Evidence in this case. You must decide this case based upon the Evidence heard in Court

FILED
JAN 29 2016
JUDGE JOHN J. THARP, JR.
UNITED STATES DISTRICT COURT

Judge

CERTIFICATE OF SERVICE

The undersigned, deposes and states that a true and correct copy of the attached Appellants' Brief and Short Appendix has been served upon the below named party(ies), by filing said document in the CM/ECF system on the 3rd day of October, 2017.

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/s/ Stephen M. Komie

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