Civil and Criminal Forfeiture Procedure

U.S. Department of Justice Publication
by U.S. Department of Justice, Asset Forfeiture & Money Laundering Section
January 2004
Electronic version scanned in by Forfeiture Endangers American Rights Foundation,
corrected December 24, 2004

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Part III - Excessive Fines

Case Outline

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I. Criminal and Civil Forfeitures Are Limited by the Excessive Fines Clause of the Eighth Amendment

- *United States v. Bajakajian,* 524 U.S. 321 (1998) (full forfeiture of unreported currency in a CMIR case would be "grossly disproportional to the gravity of the offense" unless the currency was involved in some other criminal activity);

- *Alexander v. United States,* 509 U.S. 544 (1993) (remanding criminal forfeiture under RICO to determine if forfeiture of business in pornography case was an excessive fine);

- *Austin v. United States,* 509 U.S. *602* (1993) (holding that all civil forfeitures are punitive at least in part and remanding for determination whether forfeiture of home from which cocaine was sold was an excessive fine); *but see Bajakajian, supra* (the Excessive Fines Clause applies to all punitive forfeitures, which includes all criminal forfeitures and some, but not all, civil forfeitures);

- *See Austin* (Scalia, J., concurring) (in a civil forfeiture case, the value of the property versus the seriousness of the offense is irrelevant; the excessive fines analysis must be based solely on the nexus between the property and the criminal offense);

- *Cf. Ewing v. California,* 538 U.S. 11 (2003) (policy judgments of the legislature in fixing the penalty for a given offense are "entitled to deference" when the court is weighing whether the penalty is grossly disproportionate to the gravity of the offense);

II. *Bajakajian* Applies to Civil Forfeiture

- *United States v. $273,969.04 U.S. Currency,* 164 F.3d 462 (9th Cir. 1999) *(Bajakajian* applies to CMIR forfeitures under section 5317, but not to Customs forfeitures under 19 U.S.C. § 1497);

- *United States v. Ahmad,* 213 F.3d 805 (4th Cir. 2000) *(Bajakajian* applies equally to criminal forfeitures and to civil forfeitures of non-instrumentalities);

- *United States v. $359,500 in U.S. Currency,* 25 F. Supp. 2d 140 (W.D.N.V. 1998) (civil forfeiture under section 53l7(c) is subject to same excessive fines analysis as the Supreme Court applied in *Bajakajian);*

- *United States v. Real Property...40 Clark Road,* 52 F. Supp. 2d 254 (D. Mass. 1999) *(Bajakajian* applies to civil forfeiture of facilitating property under sections 881 (a)(4), (6), and (7);

- *Cf. United States v. Mackby,* 339 F.3d 1013 (9th Cir. 2003) *(Bajakajian* applies to civil penalties under the False Claims Act);

- *But see United States* v. *$398,950 in U.S. Currency,* No. 87-0263-CIV-HOEVELER (S.D. Fla. Sept. 30, 1999) *(Bajakajian* does not apply to civil forfeitures in CMIR cases);

III. *Bajakajian* Applies to Criminal Forfeiture Beyond Drugs and Money Laundering

- *United States v. Young,* 2001 WL 1644658 (M.D. Ga. 2001) (criminal forfeiture in child porn case under section 2253 is punitive and therefore subject to the Eighth Amendment);

IV. *Corpus Delicti* Property / Instrumentalities

• Several courts suggest that it is unnecessary to engage in a proportionality analysis with respect to the forfeiture of instrumentalities because such forfeitures are purely remedial, not punitive, in nature and that therefore *Bajakajian* does not apply.

- *United States v. Ahmad,* 213 F.3d 805, 814 & n.3 (4th Cir, 2000) *(Bajakajian* limits *Austin's* application of the Excessive Fines Clause to all civil forfeitures that are punitive to some degree; the Eighth Amendment does not apply to the civil forfeiture of instrumentalities; the presence of an innocent owner provision in the forfeiture statute does not supersede the "instrumentalities inquiry");

- *United States v. 1948 Martin Luther King Drive,* 270 F.3d 1102 (7th Cir. 2001) *(dicta* suggesting that *Bajakajian* would not apply to any "truly *in rem"* forfeiture in which the claimant's conduct was not the basis for the forfeiture action);

- *United States v. Land, Winston County,* 221 F.3d 1194 (11th Cir. 2000) (without citing *Bajakajian* panel holds that excessive fines analysis does not apply to purely remedial forfeiture in gambling case under section 1955(d));

- *United States v. An Antique Platter of Gold,* 184 F.3d 131 (2d Cir. 1999) (section 545 forfeiture of contraband – e.g., illegally imported goods - is traditionally viewed as nonpunitive; therefore *Bajakajian* does not apply);

- *United States v. $273,969.04 U.S. Currency,* 164 F.3d 462 (9th Cir. 1999) (section 1497 forfeirures lie outside scope of excessive fines analysis; *Bajakajian* does not apply);

- *United States v. 1989 Plymouth Grand Voyager,* No. CIV 03-315- TUC-CKJ (CRP) (D. Ariz. Nov. 4, 2003) (vehicle used in alien transportation offenses constitutes an instrumentality and its forfeiture is therefore entirely exempt from limitation under the Excessive Fines Clause and 18 U.S.C. § 983(g));

- *But see United States v. One* 1997 *Ford Expedition,* 135 F, Supp. 2d 1142 (D,N.M. 2001) (Eighth Amendment applies to civil forfeiture of vehicle under 49 U.S.C. § 80303; disregarding statement in *Bajakajian* that civil forfeiture of instrumentality is punitive);

- *See* cases, *infra,* holding that the Eighth Amendment does not apply to the forfeiture of criminal proceeds.

V. CTR and CMIR Cases

Surprisingly, there has been little case law applying *Bajakajian* to failure to report cases. Thus, the degree to which mitigation is required to comport with the Eighth Amendment is still unclear:

- *United States v. Beras,* 183 F.3d 22 (1st Cir. 1999) (criminal forfeiture of entire $138,794 that defendant failed to declare on a CMIR form was unconstitutional under *Bajakajian;* on remand, district court must consider the harm caused by defendant's conduct, whether the money was derived from an illegal source, and what the maximum fine would be under the sentencing guidelines);

- *Olabisi* v. *United States,* 1998 WL 661459 (E.D.N.Y. 1998) *(Bajakajian* held that the forfeiture of $357,000 would be excessive; it does not follow that the forfeiture of $57,280 is excessive, and the court holds that it is not);

- *United States v. $273,969.04 U.S. Currency,* 164 F.3d 462 (9th Cir. 1999) *(Bajakajian* applies to civil CMIR forfeiture under section 5317; remanded for gross disproportionality analysis);

• Structuring cases:

- *United States v. Ahmad,* 213 F.3d 805 (4th Cir. 2000) (structuring is inherently more serious than a failure to report offense; it involves repeated, affirmative conduct, not a one-time omission; and it involves an innocent intermediary -the bank- therefore full forfeiture of the structured funds is not excessive under *Bajakajian);*

- *United States v. Ahmad,* 213 F.3d 805 (4th Cir. 2000) (suggesting, but finding it unnecessary to hold, that structured currency is an instrumentality of a structuring offense and that the Eighth Amendment does not apply to such cases);

- *United States v. Ahmad,* 213 F.3d 805 (4th Cir. 2000) (no Eighth Amendment violation in full forfeiture of structured funds where structuring offense was part of sophisticated conspiracy to commit a smuggling offense);

- *United States* v. *Ahmad,* 213 F.3d 805 (4th Cir. 2000) ("harm" caused by a structuring offense, when committed by a person handling money for a third party, includes the risk that by committing the offense the defendant has exposed the third party's money to forfeiture);

- *United States v. Contents of Account Number 901121707,* 36 F. Supp, 2d 614 (S.D.N.Y. 1999) (where claimant structured over $20 million, forfeiture of $210,000 was not excessive even though the money was not derived from an illegal source);

• *Bajakajian* does not apply where the money was from an illegal source::

- *United States v. U.S. Currency in the Amount of $898,719,00,* 2003 WL 21544283 (W.D. Mo. 2003) *(Bajakajian* does not bar full forfeiture under section 5317(c) of drug money transported into the United States without filing a CMIR.);

- *United States v. $97,253.00,* 2000 WL 194683 (E.D.N.Y. 2000) (if the undeclared funds in a CMIR case are drug proceeds there is nothing disproportional about forfeiting the entire amount, either because *Bajakajian* does not apply to the nonpunitive forfeiture of proceeds, or if it does apply, because the court compares the forfeiture to the gravity of the drug offense, not to the gravity of the CMIR violation);

- *Cf. United States v. Suarez,* 225 F.3d 777 (7th Cir. 2000) (sentencing case: manner in which money was packaged to avoid detection; defendant's false statement that she was not carrying more than $10,000, further false statement as to the source of the money, and lack of legitimate income supported conclusion that money was from an illegal source; "lying about the source gives rise to an inference that the source is illegitimate");

VI. Bulk Cash Smuggling

• The bulk cash smuggling statute, 31 U.S.C. § 5332, which was enacted in response to *Bajakajian,* has its own criminal and civil forfeiture provisions in subsections (b) and (c).

- *United States* v. *Garcia Gaxiola,* No. CR-02-1668-TUC-JMR (D. Ariz. July 24,2003) (applying the provisions of unenacted section 5332(d), court puts the burden on the defendant to show that the money had a legitimate source, and holds that mitigation is possible only if the defendant meets that burden; finding that the defendant met his burden, the court considers various mitigating and aggravating factors - the amount of currency, efforts to conceal it, whether the offense was part of a pattern, and efforts to obstruct justice - and concludes that the defendant should forfeit everything above the $10,000 he was not required to report);

• A law review article: entitled "Bulk Cash Smuggling and the Globalization of Crime" will be published in 2004 in the *Berkeley Journal of International Law.* An advance copy is available in the Published Articles section of AFML Online. The article discusses forfeiture under section 5332.

VII. Money Laundering Cases

A. Laundered proceeds:

- If forfeiture in a money laundering cases is limited to the criminal proceeds being laundered, it is never excessive. See cases, *infra,* holding that the forfeiture of proceeds is never excessive,

- *United States v. Moyer,* 313 F.3d 1082 (8th Cir. 2002) (forfeiture of amount fraudulently taken from pension plan and then laundered was not grossly disproportional to the offense, even though defendant was lawfully entitled to more than half of the money in the plan);

- *United States v. Loe,* 248 F,3d 449 (5th Cir. 2001) (forfeiture of portion of property traceable to laundered SUA proceeds is not disproportional at all, never mind “grossly disproportional");

- *United States v. One* 1988 *Prevost Liberty Motor Home,* 952 F. Supp. 1180 (S.D. Tex. 1996) (forfeiture of motor home purchased in the transaction in which SUA proceeds were laundered cannot be excessive);

- *United States* v. *Ladum,* 141 F.3d 1328 (9th Cir. 1998) (forfeiture of laundered proceeds of bankruptcy fraud not excessive because forfeiture deprives defendant of property he had no right to retain anyway);

B. Other property involved:

- *United States v. Wyly,* 193 F.3d 289 (5th Cir. 1999) (forfeiture of a $4 mi1lion business used to facilitate money laundering offense was not grossly disproportional to an offense involving only $175,000; Eighth Amendment analysis looks not just to the value of the forfeited property in comparison to the amount laundered, but to the scope and duration of the scheme, the harm caused, and the relationship of the property to the scheme);

- *United States v. Hill,* 167 F .3d 1055, 1072 (6th Cir. 1999) (maximum fine for money laundering is twice the amount laundered; therefore, forfeiture of less than twice the amount laundered cannot be excessive);

- *United States v. Matai,* 173 F.3d 426, 1999 WL 61913 (4th Cir. 1999) (unpublished) (Table) (forfeiture of inventory of clothing store as property used to facilitate a money laundering offense not excessive even though defendants laundered only $11,000 because the maximum fine is $500,000 under section 1956);

- *United States v. Hurley,* 63 F.3d 1 (1st Cir. 1995) (forfeiture of entire amount laundered even though defendant retained only a fraction as his commission is not excessive because it is "quite rational based on a proportionality analysis");

- *United States* v. *Tencer,* 107 F.3d 1120 (5th Cir. 1997) (forfeiture of both laundered proceeds and commingled clean money under facilitation theory not excessive in light of the amount laundered and duration of the offense);

- *United States v. Four Contiguous Parcels,* 191 F.3d 461, 1999 WL 701914 (6th Cir. 1999) (unpublished) (where defendant invests both clean and tainted funds in real property and does so to launder the dirty funds, forfeiture of the entire property including the portion traceable to the clean money, does not violate the Eighth Amendment);

- *United States v. Real Property Known as 1700 Duncanville Road,* 90 F. Supp. 2d 737, 742 (N.D. Tex. 2000), *aff'd* No. 00-10483 (5th Cir. Feb. 12,2001) (forfeiture of $300,000 real property not grossly disproportional, even though less than half the value was traceable to fraud proceeds, because the total loss to the victims exceeded $369,000);

- *United States v. Riedl,* 164 F. Supp, 2d 1196 (D. Haw. 2001) (forfeiture of real property worth $1.2 million, which was 12 times the maximum fine under the sentencing guidelines, not grossly disproportional where defendant intended to launder $2.6 million in drug proceeds), *affd,* 2003 WL 22805176 (9th Cir. 2003);

- *United States v. One*]997 *E35 Ford Van,* 50 F. Supp. 2d 789 (N.D. Ill. 1999) (money sent into the United States to promote terrorism in violation of section 1956(a)(2)(A) is an instrumentality of the crime; forfeiture cannot be excessive);

C. Sting cases:

- *United States v. Puche,* 350 F.3d 1137 (11th Cir. 2003) ($1.6 million money judgment representing value of sting money that Government recovered after it was laundered, plus value of untainted money that facilitated the offense, did not violate the Excessive Fines Clause; distinguishing *Bajakajian* as limited to reporting violations);

- *United States v. Riedl,* 164 F. Supp. 2d 1196 (D. Haw. 2001) ("the fact that the instant offense was the result of a 'sting' operation does not lessen the gravity of the offense"), *aff'd,* 2003 WL 22805176 (9th Cir, 2003);

- *United States v. $4,007,89].28 United States Currency,* No. CV-98-5762-WDK (C.D. Cal. Dec. 30, 1998) (forfeiture of full amount laundered by corrupt bank is not excessive even though forfeiture is based on section 984 and the Government recovered the laundered money in a sting operation);

VIII. Proceeds Cases

A. The Eighth Amendment does not apply to the forfeiture of proceeds, or if it does, the forfeiture is never "grossly disproportional to the gravity of the offense":

- *United States v. Real Property Located at* 22 *Santa Barbara Dr.,* 264 F.3d 860 (9th Cir. 2001) (the Eighth Amendment does not apply to the forfeiture of drug proceeds; all property traceable to such proceeds is forfeitable even though the property doubled in value due to appreciation);

- *United States v. Four Contiguous Parcels,* 191 F.3d 461, 1999 WL 701914 (6th Cir. 1999) (unpublished) (forfeiture of proceeds of illegal gambling not grossly disproportional to gravity of the offense);

- *United States v. Powell,* 2001 WL 51010 (4th Cir. 2001) (Table) (following *pre-Bajakajian* cases holding that the forfeiture of proceeds is never excessive; for this purpose, proceeds and property traceable to proceeds are the same thing);

- *United States v. 1948 Martin Luther King Drive,* 270 F.3d 1102 (7th Cir. 2001) (Eighth Amendment does not apply to forfeiture of property purchased with drug proceeds);

- *But see United States v. 3814 Thurman Street,* 164 F.3d 1191 (9th Cir. 1999) (forfeiture of proceeds of false bank loan application, or property traceable thereto, is excessive where bank suffered no loss); *but see id.* (Rymer, J., dissenting) (forfeiture of proceeds is never excessive; *Bajakajian* did not overturn *pre-Bajakajian* law on this point);

B. *Pre-Bajakajian,* all courts held that the forfeiture of proceeds is never excessive:

- *United States v. Real Property Located at 22 Santa Barbara Dr.,* 264 F.3d 860 (9th Cir. 2001) (the Eighth Amendment does not apply to the forfeiture of drug proceeds; all property traceable to such proceeds is forfeitable even though the property doubled in value due to appreciation);

- *United States v. Four Contiguous Parcels,* 191 F.3d 461, 1999 WL 701914 (6th Cir. 1999) (unpublished) (forfeiture of proceeds of illegal gambling not grossly disproportional to gravity of the offense);

- *United States v. Powell,* 2001 WL 51010 (4th Cir. 2001) (Table) (following pre-*Bajakajian* cases holding that the forfeiture of proceeds is never excessive; for this purpose, proceeds and property traceable to proceeds are the same thing);

- *United States v. 1948 Martin Luther King Drive,* 270 F.3d 1102 (7th Cir. 2001) (Eighth Amendment does not apply to forfeiture of property purchased with drug proceeds);

- *United States v. One Parcel of Real Property Known as* 16614 *Cayuga Road,* 69 Fed. Appx. 915, 2003 WL 21437207 (10th Cir. 2003) (the forfeiture of proceeds can never be constitutionally excessive); *United States* v. *One Parcel... Lot* 41, *Berryhill Farm,* 128 F.3d 1386 (10th Cir. 1997) (same, collecting cases);

- *United States v. Various Computers,* 82 F.3d 582 (3d Cir. 1996); *United States v. Tilley,* 18 F.3d 295 (5th Cir. 1994) (drug case); *United States* v. *Alexander,* 32 F.3d 1231 (8th Cir. 1994) (RICO case), *reaff'd following remand,* 108 F.3d 853 (8th Cir. 1997); *United States v. Wild,* 47 F.3d 669 (4th Cir. 1995);

- *In Re: Moffit, Zwerling* & *Kemler,* 846 F. Supp, 463 (E.D. Va. 1994);

- *United States v. $130,052.00 in U.S. Currency,* 909 F. Supp. 1506 (M.D. Ala. 1995) (the Eighth Amendment is not applicable to proceeds);

- *Hong v. United States,* 920 F. Supp. 311 (E.D.N,Y. 1996) (under *Austin,* Excessive Fines Clause does not apply to forfeitures that are purely remedial in nature; forfeiture of proceeds is purely remedial);

- *Cf. United States v. Dubose,* 146 F.3d 1141 (9th Cir. 1998) (mandatory restitution equal to the amount of victim's loss is not grossly disproportional to the offense, citing cases holding forfeiture of proceeds does not constitute an excessive fine);

C. Joint and several liability:

- *United States v. Candelaria-Silva,* 166 F.3d 19 (1st Cir. 1999) (holding even low-level participants in drug conspiracy jointly and severally liable for forfeiture of the full amount of the drug proceeds obtained does not violate the Excessive Fines Clause);

- *United States v. Bollin,* 264 F.3d 391 (4th Cir. 2001) (making minor participant jointly and severally liable for the full amount of a forfeiture judgment is not constitutionally excessive; for purposes of determining excessiveness, the gravity of the offense is measured not by the defendant's degree of culpability, but by the scope, duration, and complexity of the offense and the: maximum statutory penalty that could have been imposed);

- *United States v. Coleman Commercial Carrier, Inc.,* 232 F. Supp. 2d 201 (S.D.N.Y. 2002) (holding codefendants jointly and severally liable for $1 million money judgment in drug case does not violate the Eighth Amendment);

- *But see United States v. Van Brocklin,* 115 F,3d 587 (8th Cir. 1997) (money judgment equal to entire amount realized as proceeds of bank fraud scheme is excessive as applied to a minor participant who, unlike her codefendants, reaped little benefit personally);

IX. Facilitating Property

- Since *Bajakajian,* forfeitures in facilitation cases have been almost universally affirmed, but the criteria differ from case to case.

- Courts tend to choose the least aggressive measure of the gravity of the offense that will allow them to affirm the forfeiture. Thus, there are a number of cases that affirm the forfeiture because the value of the property was less than the fine that could have been opposed under the sentencing guidelines, but there are few, if any, cases that reject a forfeiture on the ground that the value of the property was greater than the fine prescribed by the guidelines,

A. Cases using the sentencing guidelines to measure the gravity of the offense:

- *United States v. 817 N.E. 29th Drive. Wilton Manors,* 175 F.3d 1304 (11th Cir. 1999) (if the value of the property is less than the maximum statutory fine, a "strong presumption" arises that the forfeiture is constitutional; if the value of the property is within or near the permissible range offines under the sentencing guidelines, the forfeiture "almost certainly" is nonexcessive);

- *United States v. Sherman,* 262 F.3d 784 (8th Cir. 2001) (forfeiture of residence not excessive where value of house [$750,000] was less than the maximum fine under the sentencing guidelines; following *Wilton Manors);*

- *United States v. Moyer,* 313 F.3d l082 (8th Cir. 2002) (forfeiture of amount laundered in money laundering case almost certainly not excessive if it is only half of the maximum fine that could have been imposed under the sentencing guidelines);

- *United States v. Carpenter,* 317 F.3d 618 (6th Cir. 2003) (court should compare the value of the property not to the street value of the drugs actually confiscated on the property, but to the scope and sophistication of the entire drug operation; court may also look to the maximum fine as one factor in determining the gravity of the offense; forfeiture that is within the range specified by the sentencing guidelines - when the fines that could have been imposed on each codefendant are added together - is not grossly disproportional to the offense);

- *United States* v. *Young,* 2001 WL 1644658 (M.D. Ga. 200l) (following *Wilton Manors;* forfeiture of residence in which equity was within the range of the applicable fine under both the statutes and the sentencing guidelines was not excessive);

- *Yskamp v. DEA,* 163 F.3d 767 (3d Cir. 1998) (forfeiture of charter airplane used to transport 300 kilograms of cocaine not excessive given the amount of drugs, the applicable sentencing guideline, and the owner's culpability in failing to take reasonable precautions to prevent illegal use of its property);

B. Cases using the maximum statutory fine as the measure of the gravity of the offense:

- *United States v. Real Properly Known as* 415 *East Mitchell Ave.,* 149 F.3d 472, 477 (6th Cir. 1998) (comparing the forfeiture to the sophistication of the underlying crime and the potential statutory fine if the defendant had been prosecuted criminally);

- *United States v. Four Contiguous Parcels,* 191 F.3d 461,1999 WL 701914 *7 (6th Cir. 1999) (forfeiture of defendant's $49,884 investment in forfeited property not disproportionate considering the $500,000 available fine in the related criminal case);

- *United States v. Riedl,* 2003 WL 22805176 (9th Cir, 2003) (forfeiture 12 times the prescribed guidelines fine but within the aggregate statutory fine for five money laundering offenses was not excessive);

- *United States v. One 1998 Tractor,* 288 F. Supp. 2d 710 (W.D. Va. 2003) (applying the 4-part test: forfeiture of $80,000 used to transport contraband not excessive because it was well below the statutory maximum even though it was 8 times the rcconnnended fine under the guidelines);

- *United States v. Two Parcels of Real Property...101 North Liberty Street,* 80 F. Supp. 2d 1298 (M.D. Ala. 2000) (court compares the value of the property to the fines that could have been imposed);

- *United States v. Premises... Located at No. 162-A,* 1999 WL 395372 (D.V.I. 1999) (forfeiture of residence not disproportional to gravity of marijuana grow offense even though charges against owner were dropped; court weighs value of property in comparison with maximum fine and number of marijuana plants involved; following *East Mitchell Ave.);*

C. Other courts continue to incorporate various other factors into the analysis, such as the loss or harm to the victim, the value of drugs sold, the nexus of the property to the offense, or the duration and nature of the offense:

- *United States v. Wagoner County Real Estate,* 278 F.3d 1091 (10th Cir. 2002) (in civil forfeiture cases involving facilitating property, court must not look only to the gravity factors set forth in *Bajakajian,* but to the additional factors courts relied upon in pre-*Bajakajian* cases such as *Calle de Madero – including* the nature of the property, its benefit to the claimant, its value, and its connection to the offense);

- *United States v. Moyer,* 313 F.3d 1082 (8th Cir. 2002) (even if harm to the victim were the appropriate measure of the gravity of the offense, forfeiture of an amount equal to twice the victim's loss is not grossly disproportional);

- *United States v. One Parcel of Real Property Known as 16614 Cayuga Road,* 69 Fed. Appx. 915, 2003 WL 21437207 (10th Cir. 2003) (forfeiture of a residence used to facilitate drug trafficking was not an excessive fme where the district coun made detliled findings of fact demonstrating claimant's extensive and long-tenn use of property for large-scale marijuana cultivation and distribution);

- *United States v. One* 1998 *Tractor,* 288 F. Supp. 2d 710 (W.D. Va. 2003) (forfeiture of truck used to transport contraband cigarettes not excessive; the offense was more serious than *Bajakajian's* reporting offense because it involved affinnative acts rather than a single omission, and created more harm than a reporting offense by depriving the Government ofux revenue);

- *United States v. Real Property...40 Clark Road,* 52 F. Supp. 2d 254 (D. Mass. 1999) (not clear whether nexus or proportionality test will apply to facilitating property after *Bajakajian;* same nexus factors that establish substantial connection between property and offense-scope and duration of offense-satisfy Eighth Amendment analysis if nexus test is applied; forfeiture of facilitating property survives Eighth Amendment scrutiny under proportionality test where defendant conunittcd multimillion-dollar offense that could have resulted in long prison term in criminal case);

- *United States v. One* 1997 *Ford Expedition,* 135 F. Supp. 2d 1142 (D.N.M. 2001) (the multi-part proportionality analysis the Tenth Circuit adopted in *Calle de Madero* is still good law after *Bajakajian;* court must consider value and function of the property, other sanctions imposed on claimants, claimants' culpability, nature and scope of the crime, benefits realized by claimants, and maximum fine under sentencing guidelines);

- *United States v. One Parcel... 2030-32 Main Street,* 2000 WL 1336473 (D. Conn, 2000) (forfeiture of facilitating property not excessive where value of property was less than the value of the drugs sold);

D, The personal characteristics of the property owner should be irrelevant:

- *United States v.* 817 *N.E. 29th Drive, Wilton Mallors,* 175 F.3d 1304 (l1th Cir. 1999) the personal characteristics of the owner, the character of his/her property, and the value of any remaining assets are irrelevant);

- *United States v. Dieter,* 198 F.3d 1284 (11th Cir. 1999) (forfeiture of a medical license is not unconstitutionally excessive; the personal impact of the forfeiture on a specific defendant is not one of the factors the court considers in determining if a forfeiture is excessive under *Bajakajian);*

- *United States v. Two Parcels of Real Property... 101 North Liberty Street,* 80 F. Supp. 2d 1298 (M.D. Ala. 2000) (defendant's wealth and the effect of the forfeiture on the defendant are irrelevant to the Eighth Amendment);

- *But see United States v. 300 Blue Heron Farm Lane,* 115 F. Supp. 2d 525 (D. Md. 2000) (value of property in relation to maximum fine is not dispositive; scheduling hearing to consider whether marijuana claimant was growing was for medicinal use and impact of forfeiture on claimant's livelihood; *Bajakajian* overrules Fourth Circuit's nexus test in *Chandler);*

E. Facilitating property/third parties:

- *United States v. Collado,* 348 F.3d 323 (2d Cir. 2003) (forfeiture of grocery store owned by drug dealer's mother did not violate the Excessive Fines Clause; once it was established that the mother was not an innocent owner, the relevant factors concerned the gravity of the offense, not the owner's role in the offense);

- *United States v. One Parcel... 10380 SW 28th Street,* 214 F.3d 1291 (11th Cir. 2000) (forfeiture of residence worth $119,000 not excessive when compared to maximum statutory fine of $4 million; comparison is to the gravity of the wrongdoer's offense, not to the conduct of the claimant-spouse);

- *United States v. Lot Numbered One of the Lava/and Annex,* 256 F.3d 949 (10th Cir. 2001) (the measure of the gravity of the offense for purposes of the application of the Excessive Fines Clause is not the culpability of the third party owner of the property, but the seriousness of the crime that gave rise to the forfeiture in the first place);

- *United States v. One Parcel... 7079 Chilton County Road,* 123 F. Supp. 2d 602 (M.D. Ala. 2000) (forfeiture of residence worth twice the amount of the maximum sentence under the guidelines, but much less than the statutory maximum, is not grossly disproportional; guidelines fine may be ignored if the statutory maximum exceeds $250,000; that owner is a third party is irrelevant: "the personal impact of a forfeiture upon the claimants is not a factor in determining whether the forfeiture violated the Eighth Amendment");

- *United States* v., *One Parcel... 2526 Faxon Avenue,* 145 F. Supp. 2d 942 (W.D. Tenn. 2001) (forfeiture of residence worth $42,000 not grossly disproportional to use of the house to store $27,980 in drug proceeds; comparison is to amount of drug money stored, not to the culpability of the third party owner of the property);

- *United States* v. *Real Property... 464 Myrtle Ave.,* 2003 WL 21056786 (E.D.N.Y. 2003) (mother who was willfully blind to son's drug dealing out of mother's grocery store was not an innocent owner re: forfeiture under section 881(a)(7); forfeiture of the grocery store was not an excessive fine because her willful blindness meant claimant had violated 21 U.S.C. § 856(a)(2);

- *United States v. Property Identified as 1813 15th Street, N.W.,* 956 F. Supp. 1029 (D.D.C. 1997) (landlady's lack of personal involvement in drug activity did not make forfeiture of her building excessive);

X. RICO Cases

- *United States* v. *Najjar,* 300 F.3d 466 (4th Cir. 2002) (forfeiture of entire business and all of its assets under RICO was not excessive where the business was "conceived in crime and performed little or no legitimate business activity");

XI. Excessive Fines Analysis in Non-Forfeiture Cases

- *United States* v. *Mackby,* 339 F,3d 1013 (9th Cir. 2003) (civil penalty of$729,454 under the False Claims Act for submission of $331 ,000 in false Medicare claims was not excessive given the maximum statutory penalty, and the harm to the integrity of a Government program. even though services were actually provided);

XII. *Pre-Bajakajian* Cases Applying *Austin* to Facilitating Property

• First Circuit:

- *United States v. Gilberti,* 1995 U.S. App. LEXIS 4895 (1st Cir. Mar. 14, 1995) (unpublished) (forfeiture of residence not excessive where it was used repeatedly for storing drugs and planning and conducting drug transactions, and where potential fines greatly exceeded the value of the property);

- *United States v. Parcel of Real Property... 154 Manley Road,* 4 F. Supp. 2d 65 (D.R.I. 1998) (when defendant sells drugs from the family home the culpability factor is "great," while the harshness of the forfeiture is mitigated by the fact that it was defendant's choice to put his family in harm's way by using their home as the base for is drug operations; therefore, forfeiture was not excessive under the Ninth Circuit's test);

• Second Circuit:

- *United States v. Milbrand,* 58 F.3d 841 (2d Cir. 1995) (court must consider harshness of forfeiture - i.e., the value of the property and effect of forfeiture on third parties in comparison to gravity of the offense and the sentence that could be imposed-the nexus of the property to the offense, and the role of the owner);

- *United States v. Millar Elevator Service,* 77 F.3d 648 (2d Cir. 1996) *(Kenmore Hotel* case) (applying *Milbrand;* culpability prong satisfied even though owner was not the wrongdoer because he failed to take all reasonable steps to prevent illegal use of property; nexus prong satisfied because hotel provided seclusion and privacy for consummation of drug deals; harshness prong satisfied by comparing value of property to maximum criminal fine);

- *Ezennwa v. United States,* 1997 WL 63318 (E.O.N.Y, 1997) *(Milbrand* test satisfied because the plaintiff could have been fined much more than the amount forfeited and because there was a strong relationship between the forfeited property and the illegal conduct; plaintiffwas canying both heroin and the forfeited cash at the time of his attest);

- *United States v. All Right. Title and Interest in Real Property... Known as 143-147 East 23rd Street,* 888 F. Supp. 580 (S.D.N.Y. 1995);

- Fourth Circuit:

- The Fourth Circuit used a nexus test for civil forfeiture and a proportionality test for criminal forfeiture.

- *United States v. Chandler,* 36 F.3d 358 (4th Cir. 1994) (proper measure of excessiveness is an instrumentalities test based on the nexus between the property and the offense; rejecting other factors as too subjective); *United States v. 152 Char-Nor Manor Blvd.,* 922 F. Supp. 1064 (D. Md. 1996) (applying *Chandler* to marijuana grow operation);

- *United States v. 5.382 Acres,* 871 F. Supp. 880 (W.D. Va. 1994) (nexus established where property served as the "nerve center" for the manufacture of amphetamines and the defendant stored and dried chemicals there and ft-equently negotiated drug deals there);

- *United States v. Wild,* 47 F.3d 669 (4th Cir. 1995) (in criminal forfeitures, court must balance value of the property against the gravity of the offense);

- *United States v. Ownby,* 926 F. Supp. 558 (W.D. Va. 1996) (applying *Wild,* court compares equity in forfeited property with maximum statutory fine; court also considers nexus factors: number of pornographic images found on the premises, period of time over which they were collected);

- Fifth Circuit:

- *United States v. Parcel of Real Property...* 155 *Acres,* 1996 WL 408845 (N.D. Miss. 1996) (following *Chandler;* property played an integral role in the cultivation, processing, and storage of marijuana), *aff'd,* 134 F.3d 368 (5th Cir. 1996) (Table);

- Sixth Circuit:

- *United States v. Certain Real Property... 11869 Westshore Drive,* 70 F.3d 923 (6th Cir. 1995) (cataloging all tests from other circuits and directing district courts to select the appropriate test to fit the facts in a given case);

- *United States v. Elder,* 90 F .3d 1110 (6th Cir. 1996) (leaning toward the proportionality analysis: because value of assets forfeited did not equal the fines that could have been assessed, forfeiture could not be so grossly disproportionate to the crime that it violated the Eighth Amendment);

- *United States v. Certain Real Property (2408 Parliament),* 859 F. Supp. l075 (E.D. Mich. 1994) (extensive use of property for marijuana grow operation);

• Seventh Circuit:

- *United States v. One Parcel of Real Estate... 25 Sandra Court,* 135 F.3d 462 (7th Cir. 1998) (the Eighth Amendment requires both instrumentality and proportionality analysis; but it is not necessary to determine the exact mix, since the forfeiture of property used for a marijuana grow satisfies both prongs);

• Eighth Circuit:

- *United States v. Myers,* 21 F.3d 826 (8th Cir. 1994) (forfeiture of farm not excessive where laundered funds used to pay for improvements and farm equipmcnt over long period);

- *United States v. 1181 Waldorf Drive,* 900 F. Supp. 1167 (E.O. Mo. 1995) (forfeiture of house as facilitating property in child pornography case - 18 U.S.C. § 2254 - not excessive where house was a "veritable cesspool" of sexually explicit material; court also takes into account seriousness of the offense and absence of impact on innocent occupants);

- *United States v. Premises Known as 6040 Wentworth Avenue,* 1996 WL 260745 (D. Minn. 1996) (unpublished) (forfeiture of house worth $60,000 was not excessive in comparison to the possible criminal fine under the sentencing guidelines), *aff'd,* 123 F.3d 685 (8th Cir. 1997);

- *United States v. Bieri,* 68 F.3d 232 (8th Cir. 1995) (court should consider extent and duration of the criminal conduct, gravity of the offense, value of the property) personal benefit reaped by defendant, defendant's culpability, and impact on innocent occupants; but forfeiture "cannot be excessive" where property is "roughly equal in value to the total dollar volume of the criminal activity" and the value is "far less than the legislatively authorized statutory fines");

- *United States v. Alexander,* 32 F.3d 1231 (8th Cir. 1994) (analysis requires consideration of the extent and duration of defendant's criminal activities, the gravity of the offense, the quantum or value of the property forfeited, the personal benefit reaped by defendant, defendant's motive and culpability, and the extent to which defendant's interest and the enterprise itself are tainted by criminal conduct);

- *United States v. Premises Known as 6040 Wentworth Avenue,* 123 F.3d 685 (8th Cir. 1997) (Eighth Amendment analysis is the same for civil and crimina1 cases; defendant has burden of showing gross disproportionality under *Bieri;* forfeiture of $60000 equity in residence not disproportionate given extent and duration of marijuana growing offense, maximum criminal fine, and value of the drugs; effect on innocent occupant not a factor where wife was aware of criminal activity);

- *United States v. One Parcel... 1512 Lark Drive,* 978 F. Supp. 935 (D.S.D. 1997) (forfeiture of marital residence was not grossly disproportionate given 2-year duration of criminal activity, maximum fine for the criminal offense, and street value of the drugs compared to the value of the property);

• Ninth Circuit:

- Note: *El Dorado County* and its progeny are probably no longer good law in the Ninth Circuit, *see United States v. Riedl,* 2003 WL 22805176 (9th Cir. 2003) (adopting 4-part test from *Thurman Street* and ignoring *El Dorado County); United States v.* 1989 *Plymouth Grand Voyager,* No. CIV 03-315- TUC-CKJ (CRP) (D. Ariz. Nov. 4, 2003) (applying 4-part test from *Thurman Street* and *Mackby,* and suggesting that *El Dorado County* was overruled by *Bajakajian);*

- *United States* v. *Real Property Located in El Dorado County,* 59 F.3d 974 (9th Cir. 1995) (court must compare tangible and intangible/subjective value of the property - e.g., whether it is the family home-and the hardship to the defendant-including effect on family and on defendant's financial condition - against the culpability of the owner and the harm caused by the illegal activity);

- *United States* v. *Real Property Titled in the Names of Kang and Lee,* 120 F.3d 947 (9th Cir. 1997) (defendant's direct role in profitable gambling offense over many years outweighs harshness factors; any claim that property had "intangible, subjective value" belied by claimant's attempt to sell property while forfeiture action was pending);

- *United States v. Real Property Located in San Joaquin County at 12900 East Peltier Road,* Civ. No. S-93-316 WBS\JFM (E.D. Ca1. Nov. 6, 1996) (unpublished) (harshness factors outweighed by claimant's direct role in the offense, continuing, nature of conduct, and value of property compared to value of drugs), *aff'd,* 131 F.3d 150, 1997 WL 724636 (9th Cir. 1997) (unpublished) (Table);

- *United States v.* 6625 *Zumirez Drive,* 845 F. Supp. 725 (C.D. Cal. 1994) (balancing the harshness of the penalty as felt subjectively by the defendant against the inherent gravity of the offense, but also considering whether the property played an integral part in the commission of the crime and whether the criminal activity involving the property was extensive in terms of time or spatial use);

- *United States v. $273,969.04 U.S. Currency,* 164 F.3d 462 (9th Cir. 1999) (instrumentality prong of Ninth Circuit test was eliminated by *Bajakajian;* it is now a pure proportionality test);

Tenth Circuit:

- *United States v.* 829 *Calle de Madero,* 100 F.3d 734 (10th Cir. 1996) (declining to adopt one-size fits all test; weight to be given to various factors - including nexus, proportionality, harshness, and culpability of the owner - depends on facts of given case; but leaning toward the nexus factors continuing use of property for drug activity outweighs effect of forfeiture on innocent children);

- *United States v. One Parcel Property Located at Lot* 85, 100 F.3d 740 (10th Cir. 1996) (applying *Calle de Madero;* relying primarily on comparison of value of the property to the maximum authorized criminal fine);

- *United States* v. *One Parcel (Edmonson),* 106 F.3d 336 (10th Cir. 1997) (no Eighth Amendment violation based on comparison of the value of the property to the seriousness of the offense-three drug convictions – the amount of drugs buried on the property, and the maximum fine);

- *United States* v. *Deninno,* 103 F.3d 82 (10th Cir. 1996) (where currency, vehicle, and lab equipment were seized from premises where illegal drug manufacturing was taking place, forfeiture could not be excessive under *any* theory);

Eleventh Circuit:

- *United States v. One Parcel Property Located at 427 and 429 South Hall Street,* 74 F.3d 1165 (11th Cir. 1996) (forfeiture of real property worth $65,000 upheld because it facilitated selling drugs within 500 feet of a school);

- *United States v. Delgado,* 959 F. Supp. 1523 (S.D. Fla. 1997) (forfeiture of unreported currency in CMIR case upheld under proportionality test in light of aims of the statute, illegal source of money, and maximum fine; *Dean* distinguished on ground that money in that case was legitimately obtained);

- *United States v. One Parcel... 321 S.E, 9th Court,* 914 F. Supp. 522 (S.D. Fla. 1995) (adopting Justice Scalia's analysis; value of the property is irrelevant because otherwise drug dealers would use expensive property to commit illegal acts on the assumption that the more expensive the property, the more likely it would be immune from forfeiture); *Note:* The Eleventh Circuit subsequent1y adopted a different test in another case, *infra*..

District of Columbia Circuit:

- *United States v. Property Identified as 1813 15th Street N.W.*, 956 F. Supp. 1029 (D.D.C. 1997) (forfeiture of apartment building not excessive in light of long-term use of building and pervasiveness of illegal activity within the building;

XIII. Property That Appreciates in Value

- *United States v. Real Property... Parcel 03179-005R),* 287 F. Supp. 2d 45 (D.D.C. 2003) (forfeiture of property purchased with criminal proceeds does not violate the Excessive Fines Clause even if the property has substantially appreciated in value; to hold otherwise would reward a defendant who invested his criminal proceeds by allowing him to retain the capital gain);

- *United States v. Young,* 2001 WL 1644658 *2 n.3 (M.D. Ga. 2001) (forfeiture is not excessive just because value of defendant's property increased in value during the time the forfeiture action was pending due to his continuing to make repairs to the property);

XIV. Eighth Amendment Procedure

A. Standing to raise Eighth Amendment claim:

- *United States v. $100,348 U.S. Currency,* 157 F. Supp. 2d 1110 (C.D. Cal. 2001) (claimant does not have to be the owner of the property to raise an excessive fines claim under the Eighth Amendment);

B. Defendant has burden of making threshold showing of gross disproporrionality:

- Section 983(g)(3) of title 18) enacted as part of CAFRA, places the burden on the claimant to establish that the forfeiture is grossly disproportional to the gravity of the offense giving rise to the forfeiture:

- *United States v. Ahmad,* 213 F.3d 805 (4th Cir. 2000) (the party challenging the constitutionality of the forfeiture has the burden of demonstrating excessiveness); *United States v. Powell,* 2001 WL 51010 (4th Cir. 2001) (Table) (same, following *Ahmad* in criminal forfeiture case);

- *United States v. One 1970* 36.9' *Columbia Sailing Boat,* 91 F.3d 1053 (8th Cir. 1996) (claimant's failure to make threshold showing of gross disproportionality between the value of the property and the value of the drugs ends the court's Eighth Amendment inquiry);

- *United States* v. *Premises Known as 6040 Wentworth Avenue,* 123 F.3d 685 (8th Cir. 1997) (same for criminal forfeiture);

- *United States v. Alexander,* 108 F.3d 853 (8th Cir. 1997) (same) (because defendant has burden of making *prima facie* showing, he also has burden of establishing the value of the property forfcited);

- *United States v.* 829 *Calle de Madero,* 100 F.3d 734 (10th Cir. 1996) (after the Government establishes a nexus between the property and the offense, the burden shifts to claimant to demonstrate gross disproportionality);

- *United States* v. *$21,510 in U.S. Currency,* - F. Supp. 2d -,2003 WL 22753434 (D.P.R. Nov. 13, 2003) (declining to address Eighth Amendment issue because claimant did not make even a threshold showing of gross disproportionality);

C. The district court is required to make findings:

- *United States v. Wagoner County Real Estate,* 278 F.3d 1091 (10th Cir. 2002) (remanding for specific findings on each of the relevant factors, including maximum penalties for the offense, related criminal activity, harm caused, value of forfeited property, value of seized contraband, and impact of forfeiture on claimant);

D. Eighth Amendment challenge may not be raised pretrial:

- *United States* v. *Funds in the Amount of $170,926.00,* 985 F. Supp. 810 (N.D. Ill. 1997) (motion to dismiss civil complaint on Eighth Amendment grounds denied; court should not address excessive fines challenge until the Government has established forfeitability at trial);

- *United States* v. *Bulei,* 1998 WL 544958 (E.D. Pa. 1998) (motion to dismiss criminal forfeiture count denied as premature; Government must first establish forfeitability at trial);

- *United States* v. *$633.021.67 in U.S. Currency,* 842 F. Supp. 528 (N.D. Ga. 1993) (pretrial determination of yet- to-occur forfeiture would be premature);

- *United States v. One Parcel of Real Estate Located at 13143 S.W. 15th Lane*, 872 F. Supp. 968 (S.D. Fla. 1994) (excessive fines issues is not ripe for review until after judgment of forfeiture has been entered); *United States v. Ziegler Bolt and Parts Company,* 1995 WL 13448 (C.I.T. 1995) (same);

- *United States v. 2304 E. Highland Drive, Tucson, Arizona,* No. 98-CY-444-TUC-ACM (D. Ariz. Nov. 16, 2000) (court defers excessive fines issue until after it enters summary judgment for the Government on the merits, and then directs parties to submit briefing);

- *United States* v. *Contents of Account 4000393242,* No. C-I-OI-729 (S,D. Ohio Mar. 13,2002) (section 983(g)(1) provides that court must conduct Eighth Amendment review to determine if forfeiture "was" excessive; use of past tense means that determination is made only after there has been a finding of forfeiture; court cannot make disproportionality determination based only on a seizure and before any forfeiture occurs);

E. Claimant must raise Eighth Amendment claim in response to motion for summary judgment:

- *United States v. 47 West 644 Route 38*, 190 F.3d 781 (7th Cir. 1999) (claimant cannot hold back his excessive fines challenge until after motion for summary judgment is granted; challenge filed after entry of summary judgment is treated as Rule 59 motion for reconsideration);

F. Motion for summary judgment based on Eighth Amendment violation:

- *United States v. Six Negotiable Checks,* 207 F. Supp. 2d 677 (E.D. Mich. 2002) (claimant's motion for summary judgment on Eighth Amendment issue denied; it is premature to resolve:

Eighth Amendment issues when factors bearing on the gravity of the offense will be illuminated at trial);

- *United States v. Funds in the Amount of Sixty Four Thousand Dollars ($64,000),* 1999 WL 135299 (N.D. Ill. 1999) (where there is at least some evidence of illicit activity surrounding a CMIR offense, claimant's motion for summary judgment based on an excessive fines violation will be denied and the Government may amend the complaint to include a money laundering allegation under section 981 (a)(I)(A));

- *United States v. One* 1997 *Ford Expedition,* 135 F. Supp 2d 1142 (D.N.M. 2001) (Government's motion for summary judgment on Eighth Amendment issue premature; requires factual inquiry);

- *United States v. One Parcel...* 2526 *Faxon Avenue,* 145 F, Supp. 2d 942 (W.D. Tenn. 2001) (court disposes of Eighth Amendment issue pretrial by denying claimant's motion for summary judgment and holding that if forfeiture is ultimately entered, it *will not* be grossly disproportional);

- *United States v. $100,348 U.S. Currency,* 157 F. Supp. 2d 1110 (C.D. Cal. 2001) (if claimant raises Eighth Amendment claim in a motion for summary judgment, the court may reopen discovery to allow the Government to collect additional evidence relating to the connection between the property and other criminal acts, and the harm caused by the offense);

- *United States* v. $49,766 *in U.S. Currency,* No. 01-CV-0191E(Sc) (W.D.N.Y. Jan. 22. 2003) (court declines to enter summary judgment on a forfeiture based on a CMIR violation where claimant may be able to satisfy burden of proving that forfeiture of the full amount of the unreported currency would constitute an excessive fine);

G. Criminal defendant may not use section 2255 to challenge civil forfeiture on Eighth Amendment grounds:

- *Northrup v. United States,* 1998 WL 27120 (D. Conn. 1998) (section 2255 is for challenges to the sentence imposed by the court in the criminal case, not to fines imposed in separate civil proceedings);

H. Eighth Amendment issue is for the court, not the jury:

- *United States v. Derman,* 211 F.3d 175 (1st Cir. 2000) (trial court did not err in declining to offer defense counsel opportunity to argue Eighth Amendment issue to jury in a criminal case);

1. Court must mitigate forfeiture to avoid Eighth Amendment violation:

- *United States* v. *U.S. Currency in the Amount of $119,984.00,* 304 F.3d 165, 175 n.7 (2d Cir. 2002) (noting that *Bajakajian* does not bar forfeiture of some amount less than 100 percent of the seized currency but greater than zero when there is no connection to other illegal activity);

- *United States v. Real Property Located in El Dorado County,* 59 F.3d 974, 986-87 (9th Cir. 1995) (the court must limit a civil forfeiture to an appropriate portion of the asset to avoid an Eighth Amendment violation);

- *United States v. 18900 S.W. 50th Street,* Civ. No. 93-3030l/LAC (N.D. Fla. Sep. 19, 1994);

- *See United States v. United States Coin and Currency,* 401 U.S. 715, 731 (1971) (White, J., dissenting) ("We are not free to set aside a convictions or forfeitures at will. The forfeiture judgment must stand unless the Constitution commands otherwise,");

J. Punishments imposed by the state in parallel proceedings do not enter into the federal excessiveness analysis:

- *United States* v. 829 *Calle de Madero,* 100 F.3d 734 (10th Cir. 1996);

K. Collateral estoppel:

- *United States* v. *U.S. Currency in the Amount of $119,984.00,* 304 F.3d 165 (2d Cir. 2002) (Government is not collaterally estopped from contesting the legitimate source of unreported currency in a civil forfeiture case just because it did not object, in the sentencing phase of a parallel criminal case, to defendant's assertion that the money came from a legitimate source and was intended for a lawful purpose);

L. CMIR cases:

- *United States* v. *U.S. Currency in the Sum of $97,253,* 1999 WL 84122 (E.D.N.Y. 1999) (under *Bajakajian,* Government may introduce evidence of the source of the currency at trial because that evidence will be relevant to the post-trial Eighth Amendment determination);

- *United States v. Funds in the Amount of Sixty Four Thousand Dollars ($64,000), 1999* WL 135299 (N.D. Ill. 1999) (in denying claimant's motion for summary judgment on excessiveness grounds, court implies that nexus between undeclared property and other criminal activity is an issue for the jury at trial);

- *United States v. $100,348 U.S. Currency,* 157 F. Supp. 2d 1110 (C.D. Cal. 2001) (Government permitted to conduct discovery to determine if seized funds were connected to another crime, as that is relevant to the Eighth Amendment issue);

XV. Retroactive Application of *Bajakajian*

A. *Bajakajian* does not apply retroactively to closed civil forfeiture cases:

- *United States v. $265,522.00 in U.S. Currency,* 1998 WL 546850 (E.D. Pa. 1998);

B. Rule 60(b) motions:

- *United States v. $292,888.04 in U.S. Currency,* 1999 WL 1012320 (N.D. Cal. 1999) (excessive fines claims are not "cognizable" under Rule 60(b)(4);

- *United States* v. *$398,950 in U.S. Currency,* No. 87-0263-CIV-HOEVELER (S.D. Fla. Sept. 30, 1999) (Rule 60(b) motion asking court to apply *Bajakajian* to civil case cJosed for 10 years was not timely);

XVI. Discovery on Eighth Amendment Issue

- *United States v. $100,348 U.S. Currency,* 157 F. Supp. 2d 1110 (C.D. Cal. 2001) (court reopens time for discovery to allow Government to conduct discovery on factors bearing on the gravity of the offense before ruling on claimant's motion for summary judgment);

- *United States v. $104,768 in U.S. Currency,* No. 97-CV-5257 (RID) (E.D.N.Y. July 12, 1999) (unpublished) (where claimant asserts forfeiture of unreported currency is grossly disproportional under *Bajakajian* because money was derived from legitimate sources, court may compel claimant to authorize the IRS to disclose tax returns so that the Government can see if claimant ever reported such legitimate income);

- *United States v. U.S. Currency in the Amount of $119,984.00,* 304 F.3d 165 (2d Cir. 2002) (Government entitled to take deposition of defendant as part of civil discovery to determine; source and intended use of seized currency, and may be entitled to adverse inference if defendant declines to answer).