IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Criminal No.: 1:05CR12
	)	
CHRISTOPHER J. BENYO,	)	
CHARLES E. JOHNSON, JR.,	)	
JOSEPH MICHAEL KENNEDY,	)	
JOHN P. TULI,	)	
KENT D. WAKEFORD and	)	
SCOTT E. WIEGAND,	)	
	)	
Defendants.	)	

REPLY MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT KENT WAKEFORD'S MOTION
TO VACATE *EX PARTE* RESTRAINING ORDER

No court in the United States has **ever** found that 28 U.S.C. § 2461(c) permits what the government seeks here - the pre-trial restraint of a defendant's untainted legitimate assets. Section 2461(c) is a statute which, by definition, applies only in cases where a defendant is charged with offenses for which Congress has not authorized criminal forfeiture – i.e. when the only forfeiture authorized is a civil forfeiture. It is incontrovertible that no federal court, even in the Fourth Circuit, has ever permitted the pre-trial restraint of untainted asserts in such cases.

In its reply brief, the Government tries to downplay the seismic shift in criminal law that recognition of its theory would portend, claiming that "it is well-settled that [28 U.S.C § 2461(c), 18 U.S.C. 981(a) and 21 U.S.C. § 853(p)] taken together allow for the pre-conviction, post indictment restraint of forfeitable assets." It then cites just one case in support of this "well-settled" law – a case in which the court explicitly found that these three statutes **do not** permit the pretrial restraint of untainted assets. Gov't Br. at p.7 *citing U.S. v. Causey*, 309 F.Supp.2d 917, 927 (S.D. Tex 2004).

REPLY ARGUMENTS

I. Congress has Never Authorized the Pre-Trial Restraint of Legitimate Assets

This Court should not allow itself to be deceived by the government's presentation of its theory as "well-settled." What the government seeks in this case is a dramatic and incredibly dangerous judicial expansion of existing forfeiture laws, far beyond what Congress has authorized or what any court has ever permitted. If the government's theory is correct, it would have the power to restrain the untainted life savings of any person accused of virtually any federal crime, based upon nothing more than the suspicions of a grand jury. While reasonable people could debated whether Congress *could* enact legislation to this effect without running afoul of the constitutional presumption of innocence and the right to due process, no one could reasonably contend that Congress has already done so.

Although it has never gone to the extreme position advocated by the government here, the Fourth Circuit is unique among the federal courts in permitting the pre-trial restraint of non-tainted assets in certain circumstance. Every other federal court to examine the issue has recognized that Congress has never authorized the pre-trial restraint of untainted assets under any circumstances. *United States v. Gotti*, 155 F.3d 144, 149 (2d Cir. 1998); *United States v. Riley*, 78 F.3d 367, 371 (8th Cir. 1996); *United States v. Ripinsky*, 20 F.3d 359, 363 (9th Cir. 1994); *In re Assets of Martin*, 1 F.3d 1351, 1359 (3d Cir. 1993); *United States v. Floyd*, 992 F.2d 498, 500 (5th Cir. 1993).

In contrast to the position it has taken in the present litigation, the Department of Justice itself has recognized that Congress has, much to the DOJ's dismay, not authorized the pretrial restraint of a defendant's legitimate assets. Over the past four years, the DOJ has repeatedly tried, and failed, to persuade Congress to amend the criminal forfeiture laws to permit such restraints.[1] In pursuant of that agenda, then Assistant Attorney General Michael Chertoff testified before Congress in late 2001 that

> It is important that the federal courts *be given* authority to restrain a criminal defendant's assets pending trial, so that he is not free to disburse his money before he is convicted and ordered to turn it over to the Government. It is meaningless to authorize the courts to enter post-conviction forfeiture judgments - as the current laws provide -- yet allow the criminal to send the money beyond the reach of the court in the months before he is convicted. (DOJ Anti-Terrorism Act of 2001, § 406).

Prepared Testimony of the Honorable Michael Chertoff, Assistant Attorney General, Criminal Division United States Department of Justice, to the Senate Banking Committee reported at http://www.fas.org/irp/congress/2001_hr/092601_chertoff.html. (emphasis added)

Assistant Attorney General Chertoff's testimony gives the lie the government's contention in this case. As observed by Mr. Chertoff's, the forfeiture laws in existence in 2001 did not authorize the pretrial restraint of a defendant's legitimate assets. However, since Congress has refused to expand the forfeiture laws to cover the legitimate assets of persons merely accused of a crime, the forfeiture laws today are the same as they were in 2001. Section 2461(c), the statute which the government now claims authorizes the pre-trial restraint of a criminal defendant's legitimate assets, had

[1] *See e.g.*, Section 26 of the DOJ's proposed Money Laundering Act of 2001; Section 319 of the DOJ's proposed United and Strengthening America Act of 2001; and section 204 of the Victory Act of 2003. None of these proposals, each of which would have permitted the pretrial restraint sought by the government here, was ever enacted.

been in effect for more than a year when Assistant Attorney General Chertoff testified before Congress about the DOJ's perceived need to amend the forfeiture laws to permit pre-trial restraint of legitimate assets. Contrary to the position espoused by the government in its opposition brief, the DOJ itself recognizes, and has represented to Congress, that §2461(c) does not give court's the authority to issue a pre-trial restraint of a defendant's legitimate assets.

II. *Billman* does not Require the Court to Restrain Untainted Assets

As already noted, the Fourth Circuit is unique among the federal courts in reading the criminal forfeiture laws as permitting the pre-trial restraint of legitimate assets. It came to this distinctive interpretation in *In re Billman*, 915 F.2d 916 (1991). As has oft been observed, hard fact make bad law, and the *Billman* case is a text book example of this. The defendants in *Billman* were charged with swindling $22 million from a community savings and loan bank causing it to collapse. One of the defendants, Billman, fled the country and transferred the ill-gotten gains to an offshore account while his co-defendant McKinney was apprehended and stood trial. When the government learned that Billman had wired half a million dollars to McKinney it sought to restrain the funds pursuant to 18 U.S.C. 1963. The district court denied the government's motion, finding that the government had not established that the money wired by Billman was the proceeds of the bank fraud and that the RICO forfeiture statute did not permit the pre-trial restraint of untainted assets. The Fourth Circuit, although expressing doubt about the district court's factual finding, determined that it was required on appeal to accept as true that the $500,000 was not RICO proceeds. It then turned to the pre-trial restraint provisions of § 1963 which unambiguously states that the only assets subject to pre-trial restraint were the actual proceeds of a RICO offense. Although it acknowledged that the plain wording of the applicable statute did not permit the restrain of anything other than RICO proceeds, the court determined that Congress must have also intended to give the court the power to issue pre-trial restraints of substitute assets since doing so would effectuate Congress' intent.[2] *In Re Billman* 915 F.2d at 920.

Although *Billman* has been roundly criticized by commentators[3] and by the courts of every other circuit to examine the issue, it remains the law in the Fourth Circuit. However, there are two critical limitations in its application which the government has disregarded. First, even if *Billman* were applicable to this case (which it is not since 2461(c) does not reach substitute assets), the decision about whether to issue a pre-trial restraint of legitimate assets is solely within the discretion of the trial court. The statute at issue here provides that

> Upon application of the United States, the court **may** enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section

21 U.S.C. 853(e)(1). (emphasis added). Thus, although *Billman* permits a court to enter a pre-trial restraint of a defendant's legitimate assets in certain situations, it leaves it to the discretion of the trial court as to whether or not to issue such an order. This was expressly recognized in *United States v. Najjar*, 57 F. Supp. 2d 205 (D. Md. 1999). In *Najjar*, the government, as it has in the present case, sought to grossly abuse the pre-trial restraint statutes by obtaining an ex-parte pre-trial restraining order of all the defendant's

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[2] The Fourth Circuit, in divining Congressional intent, apparently failed to note the legislative history of the statute in which Congress stated just the opposite - that the pre-trial restraint provision of 18 USC § 1963 "may not be applied with respect to other assets that may ultimately be ordered forfeited under the substitute asset provision." S. Rep. No. 97-520, 97th Cong., 2d Sess. 10 n.18 (1982).

[3] *See*, David Smith, *Prosecution and Defense of Forfeiture Cases* (2004 Ed.) at ¶ 13.02, p. 13-40.

legitimate assets, including a home he purchased before the commencement of the alleged RICO offense. The district court observed that while *Billman* authorized issuance of a pretrial restraint of Mr. Najjar's legitimate assets, it did not *require* that such assets be restrained. After finding that Mr. Najjar had not sought to abscond with the proceeds of the alleged crime, the Court exercised its discretion and declined to restrain his legitimate assets. *Najjar*. 57 F.Supp 2d at 209.

This highlights the second limitation on application of *Billman*. In *Billman*, the court justified its departure from the plain wording of the forfeiture statute by stating

> Although reference is made in subsection (d)(1) [authorizing pre-trial restraint] to property described in subsection (a) [RICO proceeds], we believe that *when, as here, the defendant has placed the assets specified in subsection (a) beyond the jurisdiction of the court*, subsection (d)(1)(A) must be read in conjunction with subsection (m) [substitute assets] to preserve the availability of substitute assets pending trial. In this way the purpose of § 1963(d)(1)(A) can be attained.

Billman, 916 F.2d at 920 (emphasis added). Thus, the Fourth Circuit's determination that substitute assets were subject to restraint, despite the statute's plain wording to the contrary, was predicated upon the defendant having absconded with the actual criminal proceeds. As noted by the court in *Najjar*,

> [T]he Court of Appeals rested its decision in *Billman* on its conclusion that 'when . . . the defendant has placed the assets specified in subsection (a) beyond the jurisdiction of the court, subsection (d)(1)(A) must be read in conjunction with subsection (m) to preserve the availability of substitute assets pending trial.' Therefore, where the Defendant affirmatively acts to evade the reach of the forfeiture laws, the Fourth Circuit concluded that § 1963(d) should be read broadly to counter those attempts.

Najjar, 57 F.Supp2d 205, 209 (D. Md. 1999).

Here, there is no evidence that any of the defendants absconded with the retention bonus which, according to the government, represent the "proceeds" of the alleged conspiracy.[4] Indeed, neither Mr. Wakeford, nor Mr. Tuli are even alleged to have received anything such "proceeds" to abscond with.

Thus, even if *Billman* were applicable to this case, at most it would authorize, but not require, the issuance of the restraining order sought by the government. The rationale which lies at the heart of *Billman* is a desire to prevent a defendant from gaining by his affirmative acts to evade the reach of the forfeiture laws. That rationale has no application to Mr. Wakeford. Accordingly, even if the pre-trial restraint of Mr. Wakeford's legitimate assets was permissible in this case, the Court should exercise its discretion and decline to enter any such restraint.

III. Section 2461(c) does not Incorporate the Substantive Provisions of 21 U.S.C. 853.

In his main brief, Mr. Wakeford pointed out that at the same time it enacted 28 U.S.C. § 2461(c), Congress also amended the general federal criminal forfeiture statute (18 U.S.C. § 982) to add three new offenses to the list of crimes which could trigger a criminal forfeiture. Section 982 sets forth a carefully circumscribed list of statutes for which Congress has determined criminal forfeiture, including the sanction of

[4] The government's ominous sounding statement that Mr. Johnson's retention bonus was transferred to a Swiss bank account ignores the fact that the banking records attached to the government's brief show that these funds were immediately taken by Credit Suisse to pay a margin call owned by Johnson. The transfer of the assets to Credit Suisse evidences an effort by Mr. Johnson to pay his legitimate debts, not to evade the reach of the forfeiture laws.

substitute asset forfeiture, to be an appropriate penalty. Mr. Wakeford is not charged with any of the crimes on that list.

A forfeiture under § 2461(c) is simply not the same as a criminal forfeiture under § 982. When Congress simultaneously amended § 982 and § 2461, the former to add three new offenses and the latter to add several hundred offenses, it stands to reason that Congress viewed the forfeiture permitted under these statutes to differ in some key respect. The obvious difference is that § 982 is a criminal forfeiture law which specifically incorporates all of the *provisions* of 21 U.S.C. § 853, whereas § 2461(c) allows civil forfeitures to be grafted on to criminal indictments, but specifically provides that it adopts only the *procedures* of 21 U.S.C. § 853.

In its opposition brief, the government offers no explanation as to how it reaches the extraordinary conclusion that the section which calls for the forfeiture of substitute assets, 21 U.S.C. § 853(p), is a "procedure" and is therefore incorporated by section 2461(c). Section 853(p) is no more a procedure that § 853(a) which provides for the forfeiture of assets tainted by drug crimes. The substantive provisions of § 853 are those portions of the statute which define what assets are subject to forfeiture. The procedural provisions of § 853 are those portions which set forth the rules and procedures under which those assets may be forfeited or restrained

The issue of whether § 2461(c) permits pre-trial restraint of legitimate assets comes down to whether or not § 853(p) is substantive or procedural. If section 853(p) is substantive, then regardless of *Billman,* it does not apply to a § 2461(c) forfeiture. This issue was the primary focus of both Benyo and Wakeford's main brief's. With the motion hinging upon this issue, one would have expected the government to leave no stone unturned in seeking to establish that § 853(p) is procedural. However, the full extent of its analysis is one sentence on page 8 of its brief. The government's argument on this determinative issue consists of the sentence "And section 853(p) provides procedures governing forfeiture of substitute property."

This is beyond facile. Section 853(p) consists of three paragraphs. The first two make the legitimate assets of the defendant subject to forfeiture upon the defendant engaging in certain specific acts. The third section gives the court the authority to order such assets to be brought into the jurisdiction so that they can be seized. While the third paragraph may be procedural in nature, it is not germane to the present motion. It is the first two paragraphs which make a defendant's legitimate assets subject to forfeiture. They define the assets which are subject to forfeiture and set forth the circumstances that their forfeiture may be ordered. These provisions create a substantive right in the government to obtain forfeit of assets, which, but for these provisions, would not be subject to forfeiture. By definition, these are substantive and not procedural.

The government has utterly failed to explain how the portions of § 853 which establish its right to obtain forfeiture of legitimate assets in drug cases constitutes a procedural element of that statute. Section 853(p) is clearly not a procedural rule. It is a substantive provision which makes legitimate assets subject to forfeiture under prescribed conditions. Congress expressly excluded all substantive provisions of § 853 from the scope of § 2461(c). It instead limited forfeitures under § 2461(c) to those assets forfeitable under the applicable civil forfeiture statute – none of which permit substitute asset forfeiture.

IV. Mr. Wakeford is Entitled to an Evidentiary Hearing to Challenge the Sufficiency of the Government's Forfeiture Claim.

The government acknowledges, as it must, that criminal defendants are entitled to an evidentiary hearing to challenge the *ex parte* pre-trial restrain of their legitimate assets when such a restraint implicates their ability to fund their defense to criminal charges. *U.S. v. Farmer* 274 F.3d 800, 804 (4th Cir 1998); *U.S. v. Modi*, 178 F. Supp 2d 658, 660 (W.D. Va. 2001); *U.S. v. Najjar,* 57 F. Supp. 2d 205 (D. Md 1999). At such a hearing, the defendant may obtain relief from the restraining order upon a proper showing that the grand jury erred in determining that there was probable cause to believe that the restrained assets were forfeitable. *U.S. v. Najjar,* 57 F. Supp. 2d 205 *citing, United States v. Jones,* 160 F.3d 641, 647 (10th Cir. 1998).

In order to obtain such a hearing, criminal defendant need only establish: 1) that he has no unrestrained assets with which to fund his defense and 2) that there is a basis for him to contend that the grand jury erred in finding his assets subject to forfeiture. *Id.* Neither of these factors presents a hurdle in this case.

The *ex parte* restraining order obtained by the government, by its own terms, states that it applies to all of Mr. Wakeford's assets. On its face, it prohibits him from using *any* of his assets to fund his defense to the criminal charges brought against him. As set forth in the affidavit submitted with Mr.Wakeford's main brief, he is unable to pay fees he owes to his counsel for legal services and for expenses which will be incurred in the defense of this case.[5]

[5] The government's observation that Mr. Wakeford has retained two law firms is irrelevant. As is necessary in a case of this complexity, Mr. Wakeford, like each of the other defendants in this case, has two attorneys working on his defense. These two attorneys happen to be from different law firms, a fact which does not increase Mr. Wakeford's legal expenses.

Mr. Wakeford has also shown that he has a good faith basis to challenge the sufficiency of the grand jury's determination that his assets are subject to forfeiture. As pointed out in Mr. Wakeford's main brief, the indictment does not allege, nor has the government submitted any evidence to establish that the retention bonus paid to the PPro defendants were 1) made in furtherance of the alleged conspiracy and 2) were reasonably foreseeable by Mr. Wakeford. In order to seek forfeiture from Mr. Wakeford, both of these elements must be present. Where as here, the defendant is not alleged to have received any proceeds of the alleged crime, is not alleged to have been aware that such proceeds existed and is not alleged to have assisted others in the supposed dissipation of those assets, by necessity the evidence available to him prior to a hearing is somewhat limited. Taking into account the constraints imposed by the nature of the government's forfeiture theory (under which Mr. Wakeford is not alleged to have known or done anything in connection with the assets being sought), Mr. Wakeford has easily established that he has a legitimate basis to contest the grand jury's supposed determination that all of his assets are subject to forfeiture.

CONCLUSION

For the reasons set forth herein, in his main brief and in the motion filed by defendant Benyo which he has separately adopted, Mr. Wakeford respectfully requests that the Court enter an order vacating the pre-trial restraint of his assets, or in the alternative, conduct an evidentiary hearing in which he can challenge the sufficiency of the grand jury's determination that all of his assets are subject to forfeiture.

Dated: February 15, 2005

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Reply Memorandum of Law in Support of Defendant Kent Wakeford's Motion to Vacate *ex parte* Restraining Order was delivered by fax and first-class mail postage pre-paid, this 15th day of February 2005 to:

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