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I. INTRODUCTION

In 1970, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act,[1] which allowed the United States government to subject to forfeiture, civilly, property that facilitated narcotics activity.[2] Pursuant to the statute, the government was not required to obtain a criminal conviction to secure the forfeiture; the action was to be brought *in rem* against the property, not against the alleged wrongdoer.[3] Since that time, Congress has expanded the scope of the government's power to bring civil forfeiture actions against property that either: (i) facilitates illegal activity,[4] (ii) constitutes the proceeds of illegal activity,[5] or (iii) is involved in illegal activity.[6]

In the 1993 case of *Austin v. United States*,[7] however, the Supreme Court held, contrary to six of the seven circuit courts that had ruled on the issue, that forfeitures pursuant to 21 U.S.C. § 881(a)(4) and (7)[8] are

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1. Pub. L. No. 91-513, 84 Stat. 1242 (1970).

2. *Id.* § 511, 84 Stat. at 1276 (codified as amended at 21 U.S.C. § 881 (1988 & Supp. V 1993)).

3. *Id.* Indeed, in an *in rem* action, the property itself is the defendant and the person contesting the forfeiture is referred to as the claimant. *See* FED. R. CIV. P. C(6) (Supplemental Rules for Certain Admiralty and Maritime Claims).

4. *See, e.g.*, 21 U.S.C. § 881(a)(4), (7) (1988).

5. *See, e.g.*, 18 U.S.C. § 981(a)(1)(B) (Supp. V 1993); 21 U.S.C. § 881(a)(6) (1988).

6. *See, e.g.*, 18 U.S.C. §§ 981(a)(1)(A), 1955(d) (1988 & Supp. V 1993).

7. 113 S. Ct. 2801 (1993).

8. 21 U.S.C. § 881(a)(4), (7) (1988) provides in relevant part:

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> . . . .
>
> (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9) . . . .

subject to analysis under the Excessive Fines Clause of the Eighth Amendment,[9] despite their civil *in rem* appellation.[10] Constitutional challenges to forfeitures, however, have not been limited to Eighth Amendment grounds.[11] Claimants who have been convicted of the activity giving rise to the forfeiture have also challenged forfeitures on Fifth Amendment double jeopardy grounds.[12] In making such arguments, claimants rely on, in addition to *Austin*, the Supreme Court's 1989 decision in *United States v. Halper*.[13] In *Halper*, the Supreme Court held that a disproportionate *civil* penalty sought by the government could constitute punishment for purposes of the Fifth Amendment's protection against double jeopardy.[14] Claimants also rely on a post-

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> . . . .
> (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment . . . .

Id.

9. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

10. *Austin*, 113 S. Ct. at 2812. Six circuit courts had ruled that an Eighth Amendment analysis did not apply. *See* United States v. Plat 20, Lot 17, 960 F.2d 200, 206-07 (1st Cir. 1992); United States v. 6250 Ledge Rd., 943 F.2d 721, 727 (7th Cir. 1991); United States v. 3097 S.W. 111th Ave., 921 F.2d 1551, 1557 (11th Cir. 1991); United States v. 107.9 Acre Parcel of Land, 898 F.2d 396, 400-01 (3d Cir. 1990); United States v. Santoro, 866 F.2d 1538, 1544 (4th Cir. 1989); United States v. Tax Lot 1500, 861 F.2d 232, 233-35 (9th Cir. 1988), *cert. denied*, 493 U.S. 954 (1989). The Second Circuit had held that an Eighth Amendment analysis did apply. *See* United States v. 38 Whalers Cove Drive, 954 F.2d 29, 35 (2d Cir.), *cert. denied*, 113 S. Ct. 55 (1992).

11. *See* United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993) (challenging forfeiture on Fifth Amendment due process grounds); Caplin & Drysdale v. United States, 491 U.S. 617 (1989) (challenging forfeiture on Sixth Amendment right to counsel grounds); United States v. Monsanto, 491 U.S. 600 (1989) (same); United States v. Dixon, 1 F.3d 1080, 1083-84 (10th Cir. 1993) (challenging forfeiture on Fourth Amendment grounds); LaSanta v. United States, 978 F.2d 1300, 1304-06 (2d Cir. 1992) (same).

12. The Double Jeopardy Clause reads: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V. A challenge to forfeiture on double jeopardy grounds was the issue in United States v. Halper, 490 U.S. 435 (1989).

13. 490 U.S. 435 (1989).

14. *See id.* at 448-49.

Austin decision, *Department of Revenue v. Kurth Ranch*,[15] which held that a state tax on convicted drug dealers constituted a second punishment[16] and, thus, violated double jeopardy protection. This article examines whether Fifth Amendment double jeopardy protections preclude the government from proceeding both criminally against a defendant and civilly against the defendant's property.

II. DOUBLE JEOPARDY CONCERNS IN CIVIL CASES

One of the earliest cases that addresses the issue of double jeopardy in a civil action is *Helvering v. Mitchell*.[17] In *Mitchell*, the Court rejected a taxpayer's double jeopardy challenge to a monetary penalty for fraudulent avoidance of income tax following the taxpayer's acquittal on tax evasion charges. After reviewing the legislative history, the Court found that the monetary penalty was remedial and therefore outside the scope of double jeopardy concerns.[18] In two other cases, *United States ex rel. Marcus v. Hess*,[19] and *Rex Trailer Co. v. United States*,[20] the Supreme Court found the civil statutes at issue to be remedial and rejected the Fifth Amendment challenges,[21] reaffirming its reasoning in *Mitchell*.

United States v. One Assortment of 89 Firearms[22] was the first Supreme Court decision involving a double jeopardy challenge to a civil forfeiture action. In that case, the Supreme Court held that the Double Jeopardy Clause did not bar a civil *in rem* forfeiture action against certain firearms whose owner had been acquitted of charges that he knowingly engaged in dealing in firearms without a license.[23] The Court framed the issue in precisely the same manner as in *Mitchell*, *Hess* and *Rex Trailer*: "The question, then, is whether a . . . forfeiture proceeding is intended to be, or by its nature necessarily is, criminal and punitive, or civil and remedial."[24] After reviewing the legislative history and noting that the forfeiture statute was broader than the criminal statute, the Court found

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15. 114 S. Ct. 1937 (1994).

16. One court has incorrectly characterized a forfeiture action brought after a criminal action as a "successive prosecution" rather than a successive punishment. *See* United States v. 1978 Piper Cherokee Aircraft, 37 F.3d 489, 495 (9th Cir. 1994).

17. 303 U.S. 391 (1938).

18. *Id.* at 398-405.

19. 317 U.S. 537 (1943).

20. 350 U.S. 148 (1956).

21. *Id.* at 151; *Hess*, 317 U.S. at 551-52.

22. 465 U.S. 354 (1984).

23. *Id.* at 366.

24. *Id.* at 362.

the forfeiture to be remedial and rejected the double jeopardy challenge.[25]

The first successful challenge to a civil action on double jeopardy grounds was *Halper*.[26] In *Halper*, the government brought a False Claims Act[27] case against an individual who had defrauded the government out of $585 in Medicaid funds.[28] Because Mr. Halper submitted sixty-five false claims to obtain the reimbursement, and the False Claims Act allowed a recovery of $2000 for each false claim, the government sought a judgment of more than $130,000.[29] The Court held that because the amount of recovery so exceeded the amount of the fraud, plus the amount of the government's costs of investigation and prosecution, such a judgment constituted punishment:[30] "Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment."[31] The Court explained:

> The rule is one of reason: Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment. We must leave to the trial court the discretion to determine on the basis of such an accounting the size of the civil sanction the Government may receive without crossing the line between remedy and punishment.[32]

The Court, therefore, held that in those civil cases where the civil penalty is "so disproportionate" to the amount of the damages caused, the civil penalty may be considered punitive.[33] If deemed punitive in nature, the

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25. *Id.* at 365-66.

26. 490 U.S. 435 (1989).

27. 31 U.S.C. §§ 3729-3731 (1988 & Supp. V 1993) (providing for a civil penalty and damages to be assessed against a person who defrauds or attempts to defraud the government).

28. *Halper*, 490 U.S. at 438.

29. *See id.*

30. *See id.* at 449.

31. *Id.* at 448.

32. *Id.* at 449-50 (footnote omitted).

33. *Id.* at 450.

civil action would bar a subsequent criminal proceeding or be barred by a prior one. *Halper* marked a shift in the Court from its prior decisions involving parallel criminal and civil proceedings in which the Court had consistently found no double jeopardy bar because it found the civil statutes to be remedial.[34] Only one circuit court has applied the *Halper* standard to a forfeiture case. In *United States v. 38 Whalers Cove Drive*,[35] the Second Circuit found that a forfeiture of $68,000 worth of equity in a condominium, based on two cocaine sales totalling $250, was disproportionate, and thus constituted punishment for Eighth Amendment purposes.[36] The court held, however, that the punishment was not *grossly* disproportionate and therefore did not violate the Eighth Amendment.[37] Additionally, the court held that because the criminal prosecution was brought by the State of New York and not the United States government, there would be no double jeopardy implications in the federal civil forfeiture case.[38]

In 1993, the Supreme Court decided *Austin v. United States*.[39] Relying in part on *Halper*, the *Austin* Court held that forfeitures under 21 U.S.C. § 881(a)(4) and (7) constitute punishment subject to scrutiny under the Eighth Amendment's Excessive Fines Clause.[40] Thus, to the extent that the civil forfeiture and criminal prosecution are both punishment for the same activity, it would appear at first blush that the two penalties could constitute a violation of the double jeopardy bar. In *Kurth Ranch*, which relies heavily on *Halper*, a divided Supreme Court held that a Montana tax imposed on convicted drug dealers for the possession and storage of drugs constituted "a second punishment within the contemplation of a constitutional protection that has 'deep roots in our history and jurisprudence' and therefore must be imposed during the first

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34. The *Halper* Court also held that in determining whether constitutional safeguards attached to a civil proceeding, the double jeopardy protection was "intrinsically personal," serving "humane interests," and thus, applicable to certain civil penalty cases. *Id.* at 447.

35. 954 F.2d 29 (2d Cir.), *cert. denied*, 113 S. Ct. 55 (1992).

36. *Id.* at 38-39.

37. In *38 Whalers Cove Drive*, unlike *Austin*, the court focused its Eighth Amendment analysis on the Cruel and Unusual Punishments Clause rather than the Excessive Fines Clause. *Id.* For the text of the clauses, see *supra* note 9.

38. The court relied on the "dual sovereignty" doctrine, which precludes application of double jeopardy when two different sovereigns are imposing punishment. *See 38 Whalers Cove Drive*, 954 F.2d at 38.

39. 113 S. Ct. 2801 (1993).

40. *Id.* at 2812.

prosecution or not at all."[41] Indeed, in the aftermath of *Austin*, the government has been faced with challenges to civil forfeiture actions on double jeopardy grounds. A closer analysis, however, reveals that the Fifth Amendment's Double Jeopardy Clause may not present such a bar.

III. LIMITATIONS ON DOUBLE JEOPARDY

A. *Same Proceedings Exception*

In *Halper*, the Court took pains to except combined civil and criminal penalties sought in the same proceeding from its finding of double jeopardy. Specifically, the Court stated:

> Nor does the decision prevent the Government from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding. In a single proceeding the multiple-punishment issue would be limited to ensuring that the total punishment did not exceed that authorized by that legislature.[42]

The Court emphasized that the government's seeking

> the civil penalty in a second proceeding is critical in triggering the protections of the Double Jeopardy Clause. Since a legislature may authorize cumulative punishment under two statutes for a single course of conduct, the multiple-punishment inquiry in the context of a single proceeding focuses on whether the legislature actually authorized the cumulative punishment.[43]

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41. Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937, 1948 (1994) (quoting United States v. Halper, 490 U.S. 435, 440 (1989)). In one of the three dissenting opinions, Justice Scalia rejected *Halper*, stating that "[i]t is time to put the *Halper* genie back in the bottle," *id.* at 1959 (Scalia, J., dissenting), and that the Fifth Amendment protects against multiple *prosecutions*, not punishments, while the Eighth Amendment protects against cruel and unusual punishments and excessive fines. *Id.* (Scalia, J., dissenting).

42. *Halper*, 490 U.S. at 450-51 ("Where . . . a legislature specifically authorizes cumulative punishment under two statutes . . . the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.") (citing Missouri v. Hunter, 459 U.S 359, 368-69 (1983)) (footnote omitted).

43. *Id.* at 451 n.10. In United States v. Crook, 9 F.3d 1422 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1841 (1994), the Ninth Circuit reversed a downward departure from the sentencing guidelines based on forfeiture. *Id.* at 1427. In *Crook*, the court held that "the fact that a given offense may result in several types of punishment which are subject to constitutional limitations does not restrict the power of Congress to provide, within

Following *Halper* and *Austin*, two circuit courts have applied the "single proceeding" test to reject double jeopardy claims on civil forfeiture cases. In *United States v. Millan*,[44] the Second Circuit affirmed the district court's denial of a motion to dismiss the indictment on double jeopardy grounds when the appellants already had settled their forfeiture actions and thus been punished.[45] The court found that the forfeiture and criminal cases were part of one proceeding and, therefore, pursuant to *Halper*, not subject to double jeopardy protections.[46] The court made this determination based on its perception of the government's conduct in the two actions.[47] The court noted that

> warrants for the civil seizures and criminal arrests were issued on the same day, by the same judge, based on the same affidavit by the DEA agent. In addition, the Stipulation agreed to by the parties involved not only the seized properties of the civil suit, but also properties named in the criminal indictment that were under restraining order. Furthermore, the civil complaint incorporated the criminal indictment. Finally, the [appellants] were aware of the criminal charges against them when they entered into the Stipulation. Given these circumstances, we reach the conclusion that the civil and criminal actions were but different prongs of a single prosecution of the [appellants] by the Government.[48]

The *Millan* appellants also argued that the civil forfeiture and criminal cases had different docket numbers and therefore were different proceedings.[49] The court rejected this argument as well, stating that

> this factor . . . is not dispositive in determining whether the government is employing a single proceeding in its prosecution of a defendant. Civil and criminal suits, by virtue of our federal

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constitutional boundaries, how the various types of punishment are to be imposed." *Id.* at 1426 n.6. The Court also noted that "Congress has specifically provided that [forfeiture is a sanction] which may be imposed in addition to the sentence of imprisonment, fine, or probation" under the sentencing statute, 18 U.S.C § 3551(b) (1988). *Crook*, 9 F.3d at 1426 n.6.

44. 2 F.3d 17 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994).

45. *Id.* at 19-20.

46. *Id.*

47. *Id.* at 20.

48. *Id.*

49. *Id.*

> system of procedure, must be filed and docketed separately. Therefore, courts must look past the procedural requirements and examine the essence of the actions at hand by determining when, how, and why the civil and criminal actions were initiated. In the instant case we note that the actions were both started on July 30, 1991, when arrest and seizure warrants were issued based on the same affidavit by a DEA agent. These warrants were issued as part of a coordinated effort to put an end to an extensive narcotics conspiracy. We therefore must conclude that the civil forfeiture suit and the criminal prosecution at issue here constituted a single prosecution against the [appellants].[50]

The Eleventh Circuit, in *United States v. 18755 North Bay Road*,[51] adopted the holding of the Second Circuit in *Millan*.[52] In *18755 North Bay Road*, the government brought a gambling charge and civil forfeiture action under 18 U.S.C. § 1955.[53] In rejecting the claim that double jeopardy barred the forfeiture case, the court held that

> the circumstances of the simultaneous pursuit by the government of criminal and civil sanctions against [the defendant] . . . falls within the contours of a single, coordinated prosecution. Applying Sections 1955(a) and (d), the statute provides for imposition of both criminal and civil penalties. As in *Millan*, . . . there is no problem here that the government acted abusively by seeking a second punishment because of dissatisfaction with the punishment levied in the first action. In *Halper*, the Court noted that "[s]ince a legislature may authorize cumulative punishment under two statutes for a single course of conduct, the multiple-punishment inquiry in the context of a single proceeding focuses on whether the legislature actually authorized the cumulative punishment." We therefore conclude that the civil forfeiture suit seeking [the defendant's] property which was used

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50. *Id.*

51. 13 F.3d 1493 (11th Cir. 1994).

52. *See id.* at 1499.

53. *See id.* at 1494. The statute provides, in relevant part:

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
>
> . . . .
>
> (d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. . . .

18 U.S.C. § 1955(a), (d) (1988).

in a gambling operation is not barred on the ground of double jeopardy.[54]

Such holdings demonstrate appreciation by the courts of Congress' intent to give the government an arsenal of weapons to combat certain crimes. The statutes, by their plain language, do not preclude civil forfeiture when there has been a criminal case.[55] Indeed, some courts have questioned forfeiture when there has been no criminal case relating to the underlying criminal activity.[56] When seeking forfeiture, the government may need to proceed civilly rather than criminally, such as when the wrongdoer is dead,[57] or when the property is held jointly[58] or in the name of a third party.[59]

The Ninth Circuit, however, has rejected the "single proceeding" rationale. In *United States v. $405,089.23*,[60] the court specifically rejected *Millan* and *18755 North Bay Road*, finding that they "contradict[] controlling Supreme Court precedent as well as common sense."[61] The court held that a civil forfeiture of narcotics proceeds commenced at the same time as the criminal case constituted a second proceeding with punitive intent[62] and characterized the government action as a

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54. *18755 N. Bay Rd.*, 13 F.3d at 1499 (quoting United States v. Halper, 490 U.S. 435, 451 n.10 (1989)) (footnote and citations omitted); *see also* United States v. 18900 S.W. 50th St., Civ. 93-30301/LAC (N.D. Fla. Sept. 19, 1994) (single prosecution where civil case filed after indictment but before sentencing).

55. *See, e.g.*, 18 U.S.C. § 1955. For the text of the statute, see *supra* note 53.

56. *See, e.g.*, United States v. All Assets of Statewide Auto Parts, Inc., 971 F.2d 896, 903 (2d Cir. 1992).

57. *See, e.g.*, United States v. Miscellaneous Jewelry, 667 F. Supp. 232, 236 (D. Md. 1987), *aff'd*, 889 F.2d 1317 (4th Cir. 1989) (holding that the personal representative of the deceased's estate has standing, as such, to challenge the forfeiture of the deceased's properties).

58. *See, e.g.*, United States v. Jimerson, 5 F.3d 1453, 1455 (11th Cir. 1993) (per curiam) (holding that a joint owner of forfeited property has standing to challenge such forfeiture, and, to defeat the government's interest, must demonstrate that her own interest is superior to the defendant's, or that she was a bona fide purchaser of the property).

59. *See, e.g.*, United States v. Delco Wire & Cable Co., 772 F. Supp. 1511, 1516 (E.D. Pa. 1991) (holding that a third party adversely affected by a criminal forfeiture has standing to challenge the validity of the forfeiture).

60. 33 F.3d 1210 (9th Cir. 1994).

61. *Id.* at 1216.

62. *Id.*

manipulation of the process.[63] Indeed, courts have held that an administrative forfeiture in which there is no claim made to the property and, thus, the investigative agency seizes the property without judicial process,[64] does not implicate double jeopardy protection.[65] Just when jeopardy attaches however, is subject to continuing dispute.[66] Thus, to the extent the civil forfeiture is part of a coordinated law enforcement effort, such forfeitures are not subject to double jeopardy challenges.

B. *Instrumentality Forfeitures*

The *Austin* decision dealt specifically with a narrow scope of statutes that provide for the forfeiture of property that facilitates narcotics trafficking.[67] It is uncertain whether the Court would characterize other civil forfeiture statutes as penalties. Indeed, Justice Scalia's concurring opinion in *Austin* contrasted instrumentality forfeitures from other types of forfeiture: "But an *in rem* forfeiture goes beyond the traditional limits that the Eighth Amendment permits if it applies to property that cannot properly be regarded as an instrumentality of the offense—the building, for example, in which an isolated drug sale happens to occur."[68]

Several cases have held that the forfeiture of an instrumentality does not constitute punishment, and therefore, such a forfeiture should not be subject to the double jeopardy bar. Even after *Halper* and *Austin*, the

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63. *See id.* at 1217; *see also* United States v. 1978 Piper Cherokee Aircraft, 37 F.3d 489, 495 (9th Cir. 1994) (civil forfeiture barred as a successive prosecution unless it can be predicated upon an act for which the defendant has not been previously tried).

64. 19 U.S.C. § 1609 (1988).

65. *See* United States v. Torres, 28 F.3d 1463 (7th Cir.), *cert. denied*, 115 S. Ct. 669 (1994); United States v. Inocencio, CR 94-054-TUC WDB (D. Ariz. Jan. 4, 1995); United States v. Walsh, No. CR 94-255 TUC RMB, 1994 U.S. Dist. LEXIS 19354 (D. Ariz. Dec. 20, 1994); United States v. Branum, No. CR 94-94-JO, 1994 U.S. Dist. LEXIS 18527 (D. Or. Dec. 20, 1994); United States v. Kemmish, 869 F. Supp. 803 (S.D. Cal. 1994); Crowder v. United States, No. 2:93CV00232, 1994 U.S. Dist. LEXIS 19356 (M.D.N.C. Oct. 6, 1994).

66. United States v. Barton, No. 94-35109, 1995 U.S. App. LEXIS 1016 (9th Cir. Jan. 20, 1995) (holding that no jeopardy attaches where defendant, undergoing criminal indictment and civil forfeiture proceedings concurrently, plea bargains to the criminal charge); United States v. Lenz, Criminal No. 93-1286-R, slip op. at 9 (S.D. Cal. Jan. 9, 1995) (holding that jeopardy attaches in civil forfeiture cases when the "case is submitted to the trier of fact for the ultimate determination of the case"); *Inocencio*, No. CR 94-054-TUC WDB, slip op. at 5 (holding that there is no jeopardy "until a trial is convened and evidence introduced").

67. *See* Austin v. United States, 113 S. Ct. 2801, 2810-12 (1993) (dealing specifically with 21 U.S.C. § 881(a)(4), (7)).

68. *Id.* at 2815 (Scalia, J., concurring in part and concurring in the judgment).

Second Circuit has recognized the continuing vitality of the instrumentality exception. In *United States v. $145,139*,[69] the Second Circuit rejected a double jeopardy challenge to the forfeiture of cash where the owner of the cash had failed to report it on the relevant United States Customs Service form.[70] The owner had previously pled guilty to violating 31 U.S.C. § 5316[71] and was sentenced to a prison term and a fine.[72] The court held that the cash was an instrumentality of the crime, and as such, forfeiture of the property was "remedial rather than punitive in nature."[73]

The *$145,139* court relied heavily on the Ninth Circuit's decision in *United States v. McCaslin*,[74] which was decided after *Halper* but before *Austin*. In *McCaslin*, the court rejected a double jeopardy claim as to the forfeiture of real property pursuant to 21 U.S.C § 881(a)(7), holding that

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69. 18 F.3d 73 (2d Cir.), *cert. denied*, 115 S. Ct. 72 (1994).

70. *See id.* at 74-76.

71. The statute provides, in relevant part:

(a) Except as provided in subsection (c) of this section, a person or an agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent, or bailee knowingly—

(1) transports, is about to transport, or has transported, monetary instruments of more than $10,000 at one time—

(A) from a place in the United States to or through a place outside the United States; or

(B) to a place in the United States from or through a place outside the United States; or

(2) receives monetary instruments of more than $10,000 at one time transported into the United States from or through a place outside the United States.

(b) A report under this section shall be filed at the time and place the Secretary of the Treasury prescribes. The report shall contain the following information to the extent the Secretary prescribes:

(1) the legal capacity in which the person filing the report is acting.

(2) the origin, destination, and route of the monetary instruments.

(3) when the monetary instruments are not legally and beneficially owned by the person transporting the instruments, or if the person transporting the instruments personally is not going to use them, the identity of the person that gave the instruments to the person transporting them, the identity of the person who is to receive them, or both.

(4) the amount and kind of monetary instruments transported.

(5) additional information.

31 U.S.C. § 5316(a), (b) (1988).

72. *$145,139*, 18 F.3d at 74.

73. *Id.* at 76.

74. 959 F.2d 786 (9th Cir.), *cert. denied*, 113 S. Ct. 382 (1992).

such property was the instrumentality of the crime and therefore remedial.[75] Indeed, the court in *McCaslin* noted: "*Halper* has no application to the very ancient practice by which instrumentalities of a crime may be declared forfeit to the government. The forfeiture of such instrumentalities is 'independent of, and wholly unaffected by any criminal proceeding *in personam*.'"[76]

There appears now to be an evolving sliding scale on which property that facilitates illegal activity rises to the level of an instrumentality for forfeiture purposes. The Second Circuit has viewed the cash in a currency reporting case as an instrumentality and thus does not view the forfeiture of such cash as a punishment.[77] However, as Justice Scalia has suggested, real property cases may require a more fact-specific analysis in determining whether a property is an instrumentality of illegal activity.[78]

In *United States v. Rural Route 1*,[79] the district court rejected *McCaslin* as having been overruled by *Austin*, and held that real property could no longer be considered an instrumentality shielding its forfeiture from constitutional protections.[80] The court followed the Second Circuit's decision in *38 Whalers Cove Drive* in directing a *Halper*

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75. *See id.* at 788. *But see Austin*, 113 S. Ct. at 2811 (holding that forfeitures under § 881(a)(7) constitute punishment).

76. *McCaslin*, 959 F.2d at 788 (quoting Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 684 (1974)).

77. *See $145,139*, 18 F.3d 73. Dissenting in *$145,139*, Judge Amalya L. Kearse disagreed with the majority's conclusion that the unreported funds constituted an instrumentality:

> The traditional fiction of "instrumentality" takes on a surreal quality if the crime is a failure to report, and the unreported item itself, whose existence and presence may be entirely innocent and harmless, is characterized as "culpable" or as a "harmful object" simply because its existence has not been disclosed. I would conclude that where the target of forfeiture is not itself a means but is merely an item whose existence triggers the applicability of a requirement to report, the "instrumentality" analysis is inapposite.

Id. at 80 (Kearse, J., dissenting).

78. *See Austin*, 113 S. Ct. at 2814-15 (Scalia, J., concurring in part and concurring in the judgment) ("The question is not *how much* the confiscated property is worth, but *whether* the confiscated property has a close enough relationship to the offense.").

79. No. 90 C 4722, 1994 WL 48618 (N.D. Ill., Feb. 15, 1994).

80. *Id.* at *4.

hearing,[81] but specifically rejected the *38 Whalers Cove Drive* holding that real property could be considered an instrumentality.[82]

C. *Proceeds/Contraband Forfeitures*

Proceeds of illegal activity also are subject to forfeiture.[83] These forfeitures have been held to be remedial in nature, and therefore, not subject to double jeopardy analysis. The Fifth, Eighth and District of Columbia circuits held that because the forfeiture of proceeds is not punitive, double jeopardy is not implicated.[84] The Northern District of Illinois twice has held that such forfeitures do not implicate the Eighth Amendment because they are not punishment, as have federal courts in Alaska, California, New York, and Virginia.[85] In *United States v. $288,930*, the court reasoned as follows:

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81. *Id.* at *5.

82. *Id.* (stating that the court "depart[s] from *38 Whalers Cove* to the extent it describes the remedial goal of seizing real property as an instrumentality of the drug trade"); *see also* United States v. 38 Whalers Cove Drive, 954 F.2d 29, 37 (2d Cir.), *cert. denied*, 113 S. Ct. 55 (1992) (demonstrating that the government did not seek forfeiture on the ground that the property was an instrumentality of the drug trafficking).

83. 21 U.S.C. § 881(a)(6) (1988). The statute provides, in part:

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> . . . .
>
> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter . . . .

84. United States v. Alexander, 32 F.3d 1231 (8th Cir. 1994); SEC v. Bilzerian, 29 F.3d 689 (D.C. Cir. 1994); United States v. Tilley, 18 F.3d 295 (5th Cir.), *reh'g en banc denied*, 22 F.3d 1096, *cert. denied*, 115 S. Ct. 574 (1994).

85. *See* Maldonado v. United States, 94 Civ. 7120 (LBS), 1995 U.S. Dist. LEXIS 108 (S.D.N.Y. Jan. 6, 1995); United States v. 1472 Rimcrest Drive, No. CV 93-1084 H (AJB) (S.D. Cal. May 4, 1994); United States v. $11,561, No. A93-174 CV (JKS) (D. Alaska Apr. 20. 1994); *In re* Moffitt, Zwerling & Kemler, 846 F. Supp. 463 (E.D. Va. 1994); United States v. $45,140, 839 F. Supp. 556, 558 (N.D. Ill. 1993); United States v. $288,930, 838 F. Supp. 367, 370 (N.D. Ill. 1993). The analysis used in deciding whether a forfeiture is punishment under the Eighth Amendment is the same as the analysis used in deciding whether a forfeiture is punishment for Fifth Amendment purposes. *See, e.g.*, *38 Whalers Cove Drive*, 954 F.2d at 37-38; *see also Bilzerian*, 29 F.3d 689 (civil securities proceeding requiring the disgorgement of profits does not implicate double jeopardy concerns); United States v. Teyibo, No. 93 Cr. 698 (SWK), 1995 WL 60735 (S.D.N.Y. Feb. 14, 1995) (same).

> Unlike the property seized in *Austin*, which the claimant legally possessed, the property seized in this case is alleged to have been illegally acquired and possessed.
>
> The word "punishment" is defined as "a deprivation of property or some right." The forfeiture of legitimately owned property in *Austin* was a punishment because the claimant was deprived of the rights that the claimant had in the property. In this case, the forfeiture of allegedly illegally obtained property is not a punishment because the claimant does not rightfully own the forfeited property.[86]

In *United States v. $45,140*, the court characterized the proceeds of a narcotics transaction as contraband and, as such, held that forfeiture was remedial.[87] The court was careful, however, to limit as remedial only all money that the government specifically identified as proceeds. Forfeiture of any other currency, even that intended to be used to purchase drugs, was punitive. The court held that

> the verified complaint does not implicate the Excessive Fines Clause to the extent it seeks to forfeit money that, as proceeds of a drug sale, constitutes contraband. On the other hand, the allegation regarding the money as intended to be used to purchase drugs or to facilitate such purchase constitute a punitive forfeiture and thus do implicate the Excessive Fines Clause.[88]

Contrary to the majority of the case law, the Ninth Circuit, in *United States v. $405,089.23*, held that even a proceeds forfeiture commenced at the same time as the criminal case constitutes punishment.[89] Therefore, the subsequent criminal conviction violated the Double Jeopardy Clause. The court rejected the government's argument that the forfeiture of proceeds was remedial because it found that although the proceeds subsection[90] of the forfeiture statute is remedial, other subsections, such

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86. *$288,930*, 838 F. Supp. 367, 370 (N.D. Ill. 1993) (quoting BLACK'S LAW DICTIONARY 1234 (6th ed. 1990)); *see also* United States v. 92 Buena Vista Ave., 113 S. Ct. 1126, 1136 (1993) (holding that a claimant in a civil forfeiture case has standing to challenge a proceeds forfeiture under 21 U.S.C. § 881(a)(6) when such proceeds never were rightfully owned by the wrongdoer).

87. *$45,140*, 839 F. Supp. at 558; *see also* United States v. Haywood, 864 F. Supp. 502 (W.D.N.C. 1994) (forfeiture of property being laundered not punitive).

88. *$45,140*, 839 F. Supp. at 558.

89. *See* United States v. $405,089.23, 33 F.3d 1210, 1218-19 (9th Cir. 1994).

90. 21 U.S.C. § 881(a)(6) (1988). For the text of the statute, see *supra* note 83.

as the facilitation property subsections,[91] are punitive.[92] Citing *Austin* (a facilitation case), the court found that because part of the statute is punitive, the entire statute is punitive.[93] Thus, the circuits now are divided concerning the constitutional implications, even when the property subject to forfeiture is fairly characterized as proceeds.

D. *The* Blockburger *Test*

In 1932, the Supreme Court, in *Blockburger v. United States*,[94] enunciated a test to determine when a second punishment is barred by the Double Jeopardy Clause. The Court held that there is no double jeopardy bar when the statutes under which a defendant is tried each require "proof of an additional fact which the other does not."[95] Two years ago, the Supreme Court reaffirmed the *Blockburger* test.[96]

Thus, to determine whether a forfeiture action would be barred by a prior criminal action, a court must determine whether all of the elements necessary to prove the criminal action were necessary to succeed in the forfeiture.[97] Further, each element necessary to succeed in the forfeiture action must be present to prove the criminal action. Generally, this will not be the case. In forfeiture actions pursuant to 21 U.S.C. § 881(a)(4) and (7), for example, the government need only prove that the property "facilitated" a narcotics transaction and need not prove any involvement by the defendant. In a criminal narcotics action, the government must prove that the defendant was knowingly involved in the narcotics distribution and need not prove any involvement of property.[98] Therefore, in cases involving 21 U.S.C. § 881(a)(4) and (7), a complete analysis under *Blockburger* likely will lead to the conclusion that double

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91. 21 U.S.C. § 881(a)(7) (1988). For the text of the statute, see *supra* note 8.

92. *$405,089.23*, 33 F.3d at 1220-22.

93. *Id.* at 1222; *see also* United States v. Sanchez-Cobarruvias, No. 94-0732-IEG, slip op. at 6 (S.D. Cal. Oct. 13, 1994) (forfeiture of guns under 22 U.S.C. § 401(a), as subject of smuggling offense, constitutes punishment).

94. 284 U.S. 299 (1932).

95. *Id.* at 304.

96. *See* United States v. Dixon, 113 S. Ct. 2849, 2856 (1993) (concluding "that where the two offenses for which the defendant is punished or tried cannot survive the 'same-elements' [or *Blockburger*] test, the double jeopardy bar applies").

97. *See Blockburger*, 284 U.S. at 304.

98. *See, e.g.*, 21 U.S.C. § 841 (1988 & Supp. V 1993).

jeopardy is not implicated.[99] The case law, however, involving such an analysis is developing.[100] Indeed, in a non-forfeiture context, the Supreme Court has granted *certiorari* and remanded for reconsideration, in light of *United States v. Dixon*,[101] a holding that prosecution for securities violations was barred by the prior imposition of $150,000 administrative sanction.[102] Three other courts have found, with little anaysis, that *Blockburger* does not insulate double jeopardy implications in a forfeiture context.[103] But a review of the elements demonstrates that double jeopardy may not be appropriately raised as a defense to facilitation forfeiture cases.

IV. CONCLUSION

The apparent black eyes suffered by the government in *Halper* and *Austin* may prove to be only surface wounds, at least, insofar as they involve challenges based on double jeopardy grounds to forfeiture. The "single proceeding" exception, exceptions for remedial forfeitures such as those involving proceeds, contraband and instrumentalities and, finally, the analysis of the necessary elements of the forfeiture case compared to the criminal case under the *Blockburger* "same elements" test, may preclude a finding that a forfeiture is barred on double jeopardy grounds. Thus, the one-two punch of the *Halper* and *Austin* decisions may have little impact on Fifth Amendment double jeopardy challenges to forfeiture.

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99. *See* United States v. Mayers, 957 F.2d 858, 860 (11th Cir.) (per curiam), *cert. denied*, 112 S. Ct. 2977 (1992) (holding that double jeopardy does not bar a criminal case and a civil penalty case when the two actions involve different elements of proof).

100. *But see* United States v. 18755 N. Bay Rd., 13 F.3d 1493, 1499 (11th Cir. 1994) (finding no *Blockburger* analysis *per se*, but broadly generalizing that, but for single proceeding analysis, criminal and forfeiture provisions of 18 U.S.C. § 1955 might lead to double jeopardy).

101. 113 S. Ct. 2849 (1993); *see supra* note 96.

102. Arizona v. Cook, 870 P.2d 413 (Ariz. Ct. App.), *vacated*, 115 S. Ct. 44 (1994).

103. United States v. 1978 Piper Cherokee Aircraft, 37 F.3d 489 (9th Cir. 1994) (civil forfeiture is greater offense with respect to the lesser included criminal offense); Oakes v. United States, Nos. CS-94-194-JLQ, CR-90-304-JLQ, 1994 U.S. Dist. LEXIS 18849 (E.D. Wash. Oct. 21, 1994) (rejecting the *Blockburger* analysis on the ground that a criminal offense is necessary to forfeiture); United States v. McCaslin, 863 F. Supp. 1299 (W.D. Wash. 1994) (holding, with no analysis, that civil forfeiture is based on the same offense for which the defendant was indicted under the *Blockburger* test).