05-2969-cv

To Be Argued By:
DAVID X. SULLIVAN

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-2969-cv

HAROLD E. VON HOFE, KATHLEEN M. VON HOFE,
Claimant-Appellants,

PROPERTY, PARCEL OF, 32 MEDLEY LANE, BRANFORD, CT,
Defendant,

-vs-

UNITED STATES OF AMERICA
Plaintiff-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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The district court (Mark R. Kravitz, J.) had subject matter jurisdiction over this forfeiture action under 28 U.S.C. §§ 1345 and 1355. The district court entered a final decree of forfeiture on June 13, 2005, fully resolving all issues in this case. On June 10, 2005, the claimants filed a timely notice of appeal, *see* Fed. R. App. P. 4(a); this notice is treated as filed on June 13, 2005, *see* Fed. R. App. P. 4(a)(2). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUE PRESENTED FOR REVIEW

Whether the forfeiture of the defendant property was grossly disproportional to the gravity of the drug offenses at issue in this case.

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Preliminary Statement

Upon execution of a state search warrant on 32 Medley Lane, a residence in Branford, Connecticut, police discovered an elaborate indoor marijuana grow, including sixty-five marijuana plants at various stages of growth,

and a variety of other drug paraphernalia. As a result of this search, the State of Connecticut prosecuted the owners of the house, Harold and Kathleen von Hofe (the claimants in this action), on drug charges, and the United States filed the instant civil forfeiture action *in rem* against the residential property under the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), Pub. L. No. 106-185, 114 Stat. 202 (2000), codified at 18 U.S.C. § 983.

The district court tried this forfeiture case in two phases. In the first phase, a jury found that the defendant property was subject to forfeiture under 21 U.S.C. § 881(a)(7) and rejected Kathleen von Hofe's claim that she was an "innocent owner" under CAFRA. In the second phase, the trial judge held an evidentiary hearing on whether the forfeiture of the house was excessive in violation of the Eighth Amendment to the Constitution. After this hearing, the district court issued a lengthy opinion finding that the forfeiture was not grossly disproportional to the crime and hence did not violate the Constitution. *United States v. 32 Medley Lane*, 372 F. Supp. 2d 248 (D. Conn. 2005). (Appendix ("A") 31.) The district court *sua sponte* stayed execution of the judgment of forfeiture pending appeal.

On appeal, the claimants challenge the district court's ruling that the forfeiture of the defendant property was not constitutionally excessive. They further argue that the government's refusal to accept the monetary value of the defendant property immediately prior to trial violates the Eighth Amendment. The Court should reject each of these challenges and affirm.

Statement of the Case

On December 6, 2001, the United States of America filed a Verified Complaint of Forfeiture pursuant to 21 U.S.C. § 881(a)(7), alleging that the property located at 32 Medley Lane, Branford, Connecticut, was used to commit or to facilitate the commission of a violation of the Controlled Substances Act, 21 U.S.C. §§ 801 *et seq.* (A9-24.)

Over three years later, in January 2005, claimants Harold and Kathleen von Hofe jointly offered to have judgment entered against them for $248,000, the appraised value of the house. (A25.) When the government did not accept this offer, the case proceeded to trial.

After a two-day trial, on February 15, 2005, the jury returned a verdict finding that the defendant property was subject to forfeiture under 21 U.S.C. § 881(a)(7) because there was a substantial connection between the property and a violation of federal drug laws punishable by more than one year imprisonment. The jury further found that Kathleen von Hofe had failed to prove that she was an innocent owner of the property. (A7.)

On February 17, 2005, the district court (Mark R. Kravitz, J.) held an evidentiary hearing to consider the von Hofes' claim that the forfeiture was constitutionally excessive in violation of the Eighth Amendment. On May 31, 2005, the district court issued a Memorandum of Decision rejecting the von Hofes' claim. *See 32 Medley Lane*, 372 F. Supp. 2d at 260-72. (A49-72.)

The district court entered a final decree of forfeiture on June 13, 2005, Government Appendix ("GA") 1, and that same day, *sua sponte* ordered the judgment stayed pending appeal, (A8). The claimants filed a notice of appeal on June 10, 2005, (A76); under Federal Rule of Appellate Procedure 4(a)(2), this notice is treated as filed June 13, 2005.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

The facts, as developed at the trial and evidentiary hearing and as recited by the district court, are largely undisputed.[1]

A. Execution of the Search Warrant and Resolution of the State Charges

Claimants Harold and Kathleen von Hofe jointly owned the defendant property located at 32 Medley Lane in Branford, Connecticut, an unencumbered single family residence appraised at $248,000. *32 Medley Lane*, 372 F. Supp. 2d at 252. (A35.) At all relevant times, they resided at the defendant property with their two adult sons. Harold von Hofe was employed as a teacher, working with "at risk" children, in the Branford public school system;

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[1] For the Court's convenience, the government has submitted the complete transcripts from the jury trial and evidentiary hearing in a proposed appendix, along with a motion for leave to file the government's appendix.

his wife, Kathleen von Hofe, was a registered nurse at a local hospital. *Id.* (A35.)

On December 4, 2001, acting on a tip, local police and Drug Enforcement Administration agents executed a State of Connecticut search warrant at the defendant property. *Id.* (A36.) The officers who executed the warrant testified that upon entering the basement of the house, the smell of growing marijuana was strong and obvious. *Id.* (A36.) The officers seized the following items from the house pursuant to the warrant: sixty-five marijuana plants found in two "grow rooms" in the basement; two Hydra farm lights; one thermometer; one digital scale with marijuana residue; one green sealed jar with marijuana buds; two cardboard boxes containing cut marijuana; one homemade drying compartment containing hanging strings with marijuana residue; two brown paper bags containing "shake" (the discarded portion of marijuana plants); marijuana smoking pipes, seeds and other marijuana paraphernalia; three empty Ketamine bottles and several used syringes; miscellaneous potting materials and grow formulas; a large trash can containing potting soil; and a book entitled "Indoor Marijuana Horticulture." *Id.* at 252-53. (A36.); Stipulation of Law and Fact at 2-3 (Doc. #56) (Feb. 9, 2005). Many of these items were found in two "grow rooms" in the basement of the house, but several items -- including the green jar, the boxes of cut marijuana, the drying compartment, the scale, and the Ketamine bottles -- were found in other parts of the basement. Stipulation of Law and Fact at 2-3. Outside the home, near the garage, law enforcement officials found a

compost area containing shake. *32 Medley Lane*, 372 F. Supp. 2d at 253. (A36.)

At the time of the search, both claimants made statements to law enforcement agents. Mr. von Hofe admitted "that the marijuana grow belonged to him; that he had provided some of the marijuana that he grew to his friends and had also bartered the marijuana in return for work on his home; that he had sold marijuana on at least two occasions; that he provided one of his sons with access to the marijuana grow; and that Mrs. von Hofe was aware of the marijuana grow but did not smoke marijuana herself." *Id.* at 253. (A37.) Mrs. von Hofe "identified the marijuana grow as belonging to her husband and one of her sons." *Id.* at 254. (A38.)

As a result of the execution of the search warrant at their residence, Harold and Kathleen von Hofe were arrested and charged criminally in state court. In September 2003, Harold von Hofe pleaded guilty under the *Alford* doctrine to the sale of a controlled substance in violation of Conn. Gen. Stat. § 21a-277(b). *See generally North Carolina v. Alford*, 400 U.S. 25 (1970). He received a three-year suspended sentence and a one-year conditional discharge. *32 Medley Lane*, 372 F. Supp. 2d at 255. (A40.) At the same time, Kathleen von Hofe pleaded guilty under the *Alford* doctrine to possession of marijuana in violation of Conn. Gen. Stat. § 21a-279(c). She was sentenced to nine months, execution suspended, and a one-year conditional discharge. *Id.*

B. The Federal Forfeiture Action

On December 6, 2001, the United States filed a civil forfeiture action against the von Hofe home under CAFRA, by filing a Verified Complaint of Forfeiture and a Lis Pendens. The district court resolved the issues in this case in two steps: a jury trial and an evidentiary hearing on the constitutionality of the forfeiture. Prior to trial, however, in January 2005, Harold and Kathleen von Hofe submitted a joint offer of judgment, offering to have judgment entered against them for the full appraised value of the house of $248,000. (A25.) The government did not accept this offer and the case proceeded to trial.

1. The Jury Trial

In a two-day trial, the jury heard evidence on two issues in this case: (1) whether the property was subject to forfeiture under 21 U.S.C. § 881(a)(7), and (2) whether Kathleen von Hofe was an "innocent owner" within the meaning of CAFRA. On the first issue, the government was required to show, by a preponderance of the evidence, that "there was a substantial connection between the property and the offense," here, a violation of the federal narcotics laws punishable by more than one year's imprisonment. 18 U.S.C. § 983(c)(3); 21 U.S.C. § 881(a)(7). On the second question, Mrs. von Hofe was required to prove, by a preponderance of the evidence, that "she did not know of the conduct giving rise to the forfeiture." 18 U.S.C. § 983(d)(2)(A)(i).

During the trial, the government presented law enforcement testimony about the execution of the search warrant, the items seized from the house, and the statements made by the claimants at the time of the search. *See supra* at Part A. The government introduced into evidence photographs and a video tape of the defendant property, taken when the warrant was executed, that placed the marijuana operation and drug usage in close proximity to the bedroom Kathleen von Hofe shared with Harold von Hofe. (GA46-51). In addition, the government presented evidence about the unusual amount of electricity used to operate the indoor marijuana grow at the defendant property, the bright light emanating from the grow lights, and the noise created by the grow equipment. *32 Medley Lane*, 372 F. Supp. 2d at 252 n.7 (A35); GA 47, 173-75.

Anthony Huneycutt, a former friend of the von Hofe sons, testified on behalf of the government. He stated that during 2001, the von Hofe sons were "involved in substantial drug use and that he regularly used drugs with the von Hofe sons at the von Hofe home." *32 Medley Lane*, 372 F. Supp. 2d at 253. (A37.) He testified that he knew about the marijuana grow in the von Hofe home basement and "that he had supplied Ketamine to the von Hofe sons in return for marijuana that had been grown in the family home." *Id.* Finally, he testified that on at least one occasion, he had purchased marijuana grown in the von Hofe home, paying approximately $200 for one half of an ounce of marijuana. *Id.*

Although Harold von Hofe did not testify or offer any evidence during the jury trial, Kathleen von Hofe testified before the jury. She acknowledged knowing that her husband and one of her sons used marijuana, but she denied knowing about the marijuana growing operation in her home. *Id.* She further denied making any statements to law enforcement acknowledging the existence of the marijuana grow. *Id.* at 254. (A38.) Finally, with respect to the Ketamine and the used syringes, Mrs. von Hofe "denied knowing that anyone in the house was abusing" the drug and explained the used syringes by stating that she had used them to apply medicine to her pets. *Id.*

After deliberating for less than one hour, the jury returned a verdict finding (1) that the government had proved that the property was subject to forfeiture, and (2) that Kathleen von Hofe had not shown that she was an innocent owner under CAFRA. *Id.* at 251, 254. (A34, 39.)

2. The Post-Trial Evidentiary Hearing On Constitutional Excessiveness

After the jury verdict, the district court held an evidentiary hearing (without the jury) to consider the claimants' petition to determine whether the forfeiture of the defendant property in its entirety was constitutionally excessive in violation of the Eighth Amendment. *See* 18 U.S.C. § 983(g)(1). The parties agreed that the district court could consider any evidence presented at this hearing, along with the evidence presented at the jury trial, in deciding the constitutional question. *Id.* at 251. (A34.)

Although Harold von Hofe declined to testify at the jury trial, he did testify at the evidentiary hearing. During his testimony, he admitted that he smoked marijuana daily and that he used other drugs, including Ketamine. *Id.* at 252 (A35-36); (GA351, 353.) He admitted that he received Ketamine from his sons, exchanging Ketamine for marijuana from his son in the defendant property. (GA354-55.) Furthermore, he admitted that he owned the syringes and Ketamine vials found in the house, (GA354, 384), and, contrary to the testimony of his wife at trial, that the syringes were not used for the family pets, (GA384).

Mr. von Hofe denied placing "shake" near the driveway (as discovered by law enforcement), but he admitted burying it in the backyard of the defendant property, rather than placing it in the garbage, to avoid detection by third parties. (GA368.) He admitted that he made his marijuana grow available to his son, Alaric. (GA348, 355); (A37.) Further, he admitted that he dispensed marijuana to his friends one or two times a week and smoked marijuana with them in the basement. (GA356); (A37.) Finally, Mr. von Hofe admitted that he transported marijuana seeds into the United States from Holland knowing that it was against the law. (GA342, 372.)

Like her husband, Mrs. von Hofe testified at the evidentiary hearing before the judge. She persisted in her claim, despite the jury verdict against her, that she was an innocent owner of the defendant property. (GA421.) She testified that the property had been appraised for approximately $248,000, and that she was willing to pay

that amount to the government to prevent the forfeiture. (GA419.) She acknowledged, however, that the $248,000 offered by the claimants to settle this case would be provided by her 91-year old father-in-law. (GA419-20.)

In a Memorandum of Decision issued on May 31, 2005, the district court found that with respect to both claimants, the forfeiture of the defendant property was not grossly disproportional to the offense and thus did not violate the Constitution. *32 Medley Lane*, 372 F. Supp. 2d at 260-72. (A31-73.) The court entered a final decree of forfeiture on June 13, 2005, but *sua sponte* stayed execution of the decree pending appeal. *Id.* at 272-73. (A72.) *See also* A8. The claimants filed a timely notice of appeal. (A76.)

SUMMARY OF ARGUMENT

Forfeiture of the claimants' interests in the defendant property was not grossly disproportional to the offenses giving rise to forfeiture. At trial, the government proved that the defendant property had a substantial connection to the violation of 21 U.S.C. §§ 841 and 846. Specifically, for over one year, Mr. von Hofe used his residence to manufacture and distribute marijuana to his son, his son's friends, his friends, and others. Although there was no evidence that Mrs. von Hofe was directly involved in the drug operation, she knew about it and allowed her home to be used for these purposes. These are serious offenses, and if claimants had been convicted under §§ 841 or 846, they would have faced significant penalties. Under the statute, they faced a maximum of twenty years'

imprisonment, and under the Sentencing Guidelines they faced fifteen to twenty-one months' imprisonment. Under either authority, they faced a maximum fine of $1,000,000. Furthermore, the harm to the community and society in general from the von Hofes' drug operation was substantial. In considering all of these factors, the claimants have not shown that forfeiture of their home (appraised at $248,000) was grossly disproportional to the offense. Thus, the forfeiture here does not violate the Eighth Amendment.

The government's refusal to accept the monetary equivalent of the real property subject to forfeiture does not alter this conclusion. Even considering the impact on the von Hofes, the forfeiture here was not grossly disproportional to the offense.

ARGUMENT

I. THE CLAIMANTS FAILED TO SHOW THAT THE FORFEITURE OF THE DEFENDANT PROPERTY WAS GROSSLY DISPROPORTIONAL TO THE OFFENSE.

A. Relevant Facts

The relevant facts are set forth above.

B. Governing Law and Standard of Review

The Eighth Amendment to the Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, as '*punishment* for some offense.'" *United States v. Austin*, 509 U.S. 602, 609-610 (1993) (quoting *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)).

Thus, a forfeiture -- a payment in kind -- is subject to the limitations of the Excessive Fines Clause if it "constitute[s] punishment for an offense." *United States v. Bajakajian*, 524 U.S. 321, 328 (1998). The Supreme Court has held that civil *in rem* forfeiture under 21 U.S.C. § 881(a)(7),[2] the forfeiture statute at issue here, is a punishment subject to the Excessive Fines Clause. *Austin*, 509 U.S. at 619-22; *see also United States v. Milbrand*, 58 F.3d 841, 845 (2d Cir. 1995).

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[2] 21 U.S.C. § 881(a)(7) provides as follows: "The following shall be subject to forfeiture to the United States and no property right shall exist in them: 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."

In *Bajakajian*, the Supreme Court announced standards for considering whether a forfeiture is constitutionally excessive in violation of the Eighth Amendment. 524 U.S. 321. Although *Bajakajian* was an *in personam* criminal forfeiture case, its reasoning has been applied to civil *in rem* proceedings under 21 U.S.C. § 881(a)(7). *See United States v. Collado*, 348 F.3d 323, 328 (2d Cir. 2003) (applying *Bajakajian* to an *in rem* civil forfeiture pursuant to 21 U.S.C. § 881(a)(7)); *see also Bajakajian*, 524 U.S. at 332 n.6 (citing *Austin*, 509 U.S. at 621-622) (noting that "[b]ecause some recent federal forfeiture laws have blurred the traditional distinction between civil *in rem* and criminal *in personam* forfeiture, we have held that a modern statutory forfeiture is a 'fine' for Eighth Amendment purposes if it constitutes punishment even in part, regardless of whether the proceeding is styled *in rem* or *in personam*").

Under *Bajakajian*, the "touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." 524 U.S. at 334. Specifically, "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *Id.* This standard, drawn from the Supreme Court's Cruel and Unusual Punishment Clause cases, "reserves a constitutional violation for only the extraordinary case." *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003).

Two years after *Bajakajian*, Congress codified the "gross disproportionality" standard for *in rem* forfeitures when it enacted CAFRA. *See* 18 U.S.C. § 983(g)(4) ("If the court finds that the forfeiture is *grossly disproportional* to the offense it shall reduce or eliminate the forfeiture as necessary to avoid a violation of the Excessive Fines Clause of the Eighth Amendment of the Constitution.") (emphasis added). CAFRA further established that the proportionality issue should be decided by the court without a jury, and that the claimant has the burden of establishing a constitutional violation by a preponderance of the evidence. 18 U.S.C. § 983(g)(3) ("The claimant shall have the burden of establishing that the forfeiture is grossly disproportional by a preponderance of the evidence at a hearing conducted by the court without a jury.").

In evaluating whether a forfeiture is grossly disproportional to the offense, this Court (in a pre-CAFRA case) considered the factors evaluated by the Supreme Court in *Bajakajian*. *Collado*, 348 F.3d at 328. As explained by this Court, these factors include the following:

> (a) "the essence of the crime" of the respondent and its relation to other criminal activity, (b) whether the respondent fits into the class of persons for whom the statute was principally designed, (c) the maximum sentence and fine that could have been imposed, and (d) the nature of the harm caused by the respondent's conduct.

Id. (citing *Bajakajian*, 523 U.S. at 337-339). Although *Collado* is a pre-CAFRA case, the analysis is well-reasoned and appropriate. *See also United States v. 45 Claremont Street*, 395 F.3d 1, 6 (1st Cir. 2004) (considering *Bajakajian* factors to determine whether *in rem* civil forfeiture is grossly disproportional to offense).

Ignoring *Collado*, the claimants ask this Court to apply the standards for evaluating excessiveness previously announced in *Milbrand*. Claimants' Br. at 14-15. In that case, decided before *Bajakajian* and CAFRA, this Court adopted a multi-part test for considering excessiveness that "combin[ed] the principles of both instrumentality and proportionality." *Milbrand*, 58 F.3d at 847.

As the district court properly explained, however, the Supreme Court's decision in *Bajakajian* and Congress's enactment of CAFRA effectively removed the "instrumentality" factors from the constitutional excessiveness inquiry. *32 Medley Lane*, 372 F. Supp. 2d at 259. (A48.) Under CAFRA, the instrumentality factors are considered in "the initial jury trial portion of civil forfeiture proceeding, during which the Government must now prove to the satisfaction of the jury that there is a substantial connection between the property at issue and the crime involved." *Id.* (citing 18 U.S.C. § 983(c)(3)); *see also 45 Claremont Street*, 395 F.3d at 5 n.5 (noting that instrumentality test is satisfied once the government meets its burden under § 983(c)(3)).

This Court accepts the district court's factual findings unless clearly erroneous, and reviews the proportionality

determination *de novo*. *Bajakajian*, 524 U.S. at 336-37 & n.10.

C. Discussion

1. The *Bajakajian* Factors Show That Forfeiture Here Was Not Grossly Disproportional to the Offense

For both claimants, an evaluation of the *Bajakajian* factors demonstrates that this was not one of the "extraordinary cases" where the forfeiture was grossly disproportional to the offense. *Cf. Lockyer*, 538 U.S. at 77.

a. The Essence of the Crime

i. Harold von Hofe

For over one year, Harold von Hofe was involved in the manufacture and distribution of a controlled substance. Specifically, he admitted that he grew, used, and distributed marijuana at his home (the defendant property) for over one year. *32 Medley Lane*, 372 F. Supp. 2d at 260. (A36-37.) He admitted that he gave marijuana to his son and that he distributed marijuana to his friends once or twice a week. *Id.* Further, the district court found that Mr. von Hofe occasionally sold marijuana, that he bartered marijuana for work done on his house, and that he purchased Ketamine from Mr. Huneycutt with marijuana grown in his home. *Id.* at 260-61. This evidence of distribution is buttressed by the seizure from the house of

sixty-five marijuana plants and a digital scale with marijuana residue. In addition, the district court found that the marijuana produced by Mr. von Hofe "was of a high-grade and highly potent," and that "Mr. von Hofe was involved in the illegal use of Ketamine." *Id.* The claimants make no suggestion that any of these factual findings are clearly erroneous. *See Bajakajian*, 524 U.S. at 336 n.10 (factual findings must be accepted unless clearly erroneous).

Although Mr. von Hofe's marijuana operation may not have been a major operation, his conduct involved the manufacture and distribution of a controlled substance, and he eventually pleaded guilty to sale of a controlled substance in violation of Conn. Gen. Stat. § 21a-277(b). In addition, his conduct was intricately related to other criminal conduct, including the illegal use of Ketamine and the illegal transportation of marijuana seeds into the United States from Holland. *32 Medley Lane*, 372 F. Supp. 2d at 261. (A37.)

ii. Kathleen von Hofe

The government presented no evidence at trial that Kathleen von Hofe actively participated with her husband in his drug operation, but her conduct was still serious. She knowingly allowed her home to be used as the center for her husband's marijuana manufacturing and distribution operation. (A40.) She knowingly allowed her husband to cultivate and distribute marijuana -- to her son, to her son's friends, and to others -- from her home. *Id.*

Mrs. von Hofe asserted an "innocent owner" defense at trial, and indeed, she still describes herself as an "innocent owner" on appeal. *See* Claimants' Br. at 11. The jury, however, quickly rejected that claim, and the district court found that the jury's rejection was proper. *32 Medley Lane*, 372 F. Supp. 2d at 254. (A39.) As found by the district court,

> [T]he location of one of the marijuana grows was too close to her bedroom door, the odor of growing marijuana plants in the house was too strong, the marijuana shake found both in the house and in the compost area was too voluminous and too obvious, the noise generated from the grow lights was too loud, and the Medley Lane home itself (particularly the basement area where Mrs. von Hofe's bedroom was located) was just too small for this Court to find Mrs. von Hofe's claim of lack of knowledge to be credible.

Id.

For her role in this conduct, Mrs. von Hofe pleaded guilty to possession of marijuana in violation of Conn. Gen. Stat. § 21a-279(c).

b. The Persons for Whom the Statute was Principally Designed

As the district court noted, Mr. von Hofe, as a user and distributer of a controlled substance, is exactly the person for whom the drug laws were enacted. *See 32 Medley*

Lane, 372 F. Supp. 2d at 261 (citing *United States v. Shields*, 87 F.3d 1194 (11th Cir. 1996) (en banc) (prosecution for manufacture and conspiracy to manufacture marijuana grown in a home); *United States v. Bovee*, 291 F. Supp. 2d 557 (E.D. Mich. 2003) (same); *United States v. Smith*, 920 F. Supp. 245 (D. Me. 1996) (same); *United States v. Wegner*, 46 F.3d 924 (9th Cir. 1995) (prosecution for manufacture only)).

Furthermore, as the Supreme Court in *Austin* recognized, Congress enacted the forfeiture provision in 21 U.S.C. § 881(a)(7) in part to deter and punish those, like Mr. von Hofe, involved in the drug trade. *See Austin*, 509 U.S. at 620 (noting legislative history providing that forfeiture designed to be a "powerful deterrent" because "the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs").

With respect to Mrs. von Hofe, this Court has specifically recognized that she is precisely the party at whom the forfeiture statute at issue in this case is aimed. As this Court explained, in enacting 21 U.S.C. § 881(a)(7), "Congress intentionally placed a significant burden on owners to remain accountable for the legitimate use of their property." *United States v. 418 57th Street,* 922 F.2d 129, 132 (2d Cir. 1990).

c. The Maximum Sentence

In considering the "maximum sentence that could have been imposed," *see Bajakajian*, 524 U.S. at 338, this Court

should consider the potential maximum sentences provided by both the statute and the Sentencing Guidelines. *See id.* at 338, 339 n.14 (considering maximum sentence under guidelines and stating that "the other penalties that the Legislature authorized are certainly relevant evidence"). *See also United States v. Carpenter*, 317 F.3d 618, 628 (6th Cir. 2003) (considering both statutory maximums and sentencing guidelines), *reinstated in relevant part on rehearing en banc*, 360 F.3d 591 (6th Cir. 2004), *cert. denied*, 543 U.S. 851 (2004); *United States v. Ahmad*, 213 F.3d 805, 817 (4th Cir. 2000) (same).

i. Harold von Hofe

Here, although Mr. von Hofe was not charged with a federal offense,[3] he could have been charged with the manufacture of sixty-five marijuana plants in violation of 21 U.S.C. § 841(a).[4] The statutory maximum penalties for

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[3] A claimant does not have to be charged with the federal crime for which forfeiture is authorized and sought. *See, e.g.*, *Collado*, 348 F.3d at 325 (forfeiture of building when owner not charged with crime); *45 Claremont Street*, 395 F.3d at 2-3 (same). *See also United States v. 303 West 116th Street*, 901 F.2d 288, 292 (2d Cir. 1990) ("[C]ivil forfeiture under 21 U.S.C. § 881 need not be predicated on a federal criminal proceeding.").

[4] He could also have been charged with conspiracy to manufacture a controlled substance in violation of 21 U.S.C. § 846. For purposes of this analysis, however, this potential charge is irrelevant because the penalties for conspiracy are the (continued...)

this offense are twenty years' imprisonment and a fine of one million dollars. *See* 21 U.S.C. § 841(b)(1)(C). Under the United States Sentencing Guidelines, assuming a base level of 14, U.S.S.G. § 2D1.1(c)(13), and a criminal history category of I, Harold von Hofe would have faced fifteen to twenty-one months in prison, Sentencing Table, and a maximum fine set at the statutory maximum of one million dollars, U.S.S.G. § 5E1.2(c)(4) (when the statutory maximum fine is greater than $250,000, the maximum fine table in the guidelines does not apply, but rather the court may impose a fine up to the amount authorized by statute).[5]

The one million dollar maximum fine applicable to Mr. von Hofe -- under both the statute and the Guidelines -- demonstrates that Congress considered drug trafficking, a

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[4] (...continued)
same as "those prescribed for the offense, the commission of which was the object of the . . . conspiracy." 21 U.S.C. § 846.

[5] Because Mr. von Hofe was never convicted of a federal crime, this Guidelines calculation is necessarily speculative. Moreover, because the Guidelines are no longer mandatory, but rather are merely advisory, *see United States v. Booker*, 543 U.S. 220 (2005), it is impossible to know with any certainty what type of sentence Mr. von Hofe would have received if he had been convicted of a federal drug offense. Nevertheless, the Supreme Court has directed courts to consider the proportionality of a forfeiture by comparing, *inter alia*, the size of the forfeiture with the *maximum* sentences available. Under these circumstances, the Guidelines provide a good benchmark for considering the maximum sentences.

serious offense demanding significant punishment. *See Bajakajian*, 524 U.S. at 336 ("judgments about the appropriate punishment for an offense belong in the first instance to the legislature"). Furthermore, these significant maximum available fines demonstrate that the forfeiture of Mr. von Hofe's one-half interest in his house (approximately $124,000) is not disproportional, much less grossly disproportional, to the offense.

ii. Kathleen von Hofe

Like her husband, Mrs. von Hofe's conduct subjected her to significant penalties under federal law. If she had been convicted under 21 U.S.C. § 846, she, like her husband, faced statutory maximum sentences of twenty years' imprisonment and a $1,000,000 fine. *See* 21 U.S.C. § 841(b)(1)(C). Under the Sentencing Guidelines, she would have faced fifteen to twenty-one months in prison, and a $1,000,000 fine. As compared to these penalties, the forfeiture of Mrs. von Hofe's interest in her house (approximately $124,000) is not grossly disproportional to the offense.

In discussing maximum penalties for Mrs. von Hofe, claimants focus on the charge to which she pleaded guilty, possession of marijuana. But to the extent this Court considers penalties for charges that were not presented to the jury, the more appropriate comparison is found in this Court's decision in *Collado*. In that case, this Court upheld the forfeiture of a building against the claim of the owner who was not charged with violating any federal (or state) drug laws. The owner, rather, had been found to be

"wilfully blind" to the drug deals her son transacted on the property. *Collado*, 348 F.3d at 328-28. When evaluating the forfeiture for excessiveness, this Court noted that the owner's conduct violated 21 U.S.C. § 856(a)(2), which "makes it illegal for a person to 'manage or control any building . . . as an owner . . . and knowingly and intentionally . . . make available for use . . . the building . . . for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance." 348 F.3d at 328 (quoting § 856(a)(2)). The Court upheld the forfeiture, finding that:

> a violation of this statute would have a direct relation to the extensive drug trafficking on her property, Collado would fit within the class for which the statute was designed, the potential statutory fine would exceed the value of the forfeited property, and the harm to the public arising from her willful blindness was substantial.

348 F.3d at 328.

Here, as in *Collado*, Mrs. von Hofe's conduct violated 21 U.S.C. § 856(a)(2). The maximum statutory penalties for a violation of this section are twenty years' imprisonment and a $500,000 fine. *See* 21 U.S.C. § 856(b). Under the Sentencing Guidelines, Mrs. von Hofe would face six to twelve months of imprisonment, and a fine of $500,000. *See* U.S.S.G. § 5E1.2(c)(4). Thus, even if this Court considers her conduct as a violation of § 856(a)(2), the forfeiture of her interest in the house is

still less than the maximum penalties authorized for the offense.

d. The Nature of the Harm Caused by the Conduct

The district court concluded that "the harm to the community from Mr. von Hofe's drug offense is substantial," *32 Medley Lane*, 372 F. Supp. 2d at 262, (A53); this conclusion is undoubtedly correct. Mr. von Hofe, by his own admission, was actively engaged in the drug trade out of his home, for over one year. Through this operation, he supplied marijuana to his son, to his son's friends, to his friends, and to contractors who did work on his house. *Id.* at 260. (A36-37.)

As the district court explained,

> Drugs and the drug trade -- and especially the violence and devastation they inevitably bring -- represent a significant scourge on our communities. Mr. von Hofe and his sons were not the only ones harmed by his actions. We are all injured when members of our community set up drug manufacturing and distribution operations within our neighborhoods.

Id. (citations omitted).

Furthermore, while the government presented no evidence that Mrs. von Hofe was directly involved in the marijuana manufacture and distribution operation, the

evidence showed that she allowed her house to be used for this purpose, and allowed her husband to involve her son in the drug trade. Thus, "the harm to the public arising from her willful blindness was substantial." *Collado*, 348 F.3d at 328.

e. Conclusion

All of the *Bajakajian* factors in this case point to a conclusion that the forfeiture of the defendant property was not grossly disproportional to the offense. Mr. von Hofe was engaged in the manufacture and distribution of a controlled substance from his home, and Mrs. von Hofe knowingly allowed her house to be used for this purpose. As determined by the penalties established by Congress -- penalties established precisely for offenders like Mr. and Mrs. von Hofe -- these are serious offenses warranting serious punishment.

And although this case involves the forfeiture of the von Hofe home, and not just the monetary value of that home, *see 45 Claremont Street*, 395 F.3d at 6 (recognizing harshness involved with forfeiture of a home), this is precisely the remedy authorized by Congress. *See* 21 U.S.C. § 881(a)(7) (providing for forfeiture of real property). Moreover, while the von Hofes have lived in their home for many years, the forfeiture here will not displace any minor children. *Cf. 45 Claremont Street*, 395 F.3d at 6 (describing harshness of forfeiture of home when claimant lived there with four young children). In any event, Mr. von Hofe admitted to using his home as the

base for his drug operation, and as courts have repeatedly recognized, the harm to society from drugs is substantial.

In sum, the claimants have failed to show that the forfeiture here was disproportional, much less grossly disproportional, to the offense. *Cf. United States v. Bernitt*, 392 F.3d 873, 880-81 (7th Cir. 2004) (upholding forfeiture of $115,000 property when defendant faced maximum penalties of forty years in prison and $2,000,000 fine for manufacture of marijuana), *cert. denied*, 544 U.S. 991 (2005); *United States v. Heldeman*, 402 F.3d 220, 223 (1st Cir. 2005) (upholding forfeiture of $900,000 residence when statute and guidelines provided for maximum penalty of $6,000,000 and noting that "[s]ome circuits have treated a forfeiture of less than the statutory or guideline maximum as strongly suggesting or conclusive of compliance with the Eighth Amendment.") (citing cases).

2. The Government's Decision to Present its Case to a Jury Rather Than Accept the Monetary Value of the Defendant Property Did Not Violate the Eighth Amendment

The claimants allege that the government's failure to accept their offer of judgment for the full appraised value of their house violated the Eighth Amendment. Specifically, the claimants argue that the forfeiture here -- the taking of the von Hofe family home -- was designed to punish the von Hofes, and punishment, according to the

claimants, is prohibited by the Eighth Amendment. The claimants misread the law.

As a preliminary matter, the statute authorizing the forfeiture in this case expressly provides for the forfeiture of "real property." 21 U.S.C. § 881(a)(7). It does not provide for an alternative forfeiture of cash, much less *require* the government to accept the cash value of the property in lieu of the property itself. And indeed, as the Supreme Court explained in *Austin*, the whole point of this provision was to add a "powerful deterrent" -- the forfeiture of "*real property*" -- to the arsenal of sanctions designed to punish and deter those involved in the drug trade. *Austin*, 509 U.S. at 620 (emphasis added).

Moreover, the government did not violate the Eighth Amendment by taking the property as authorized by statute. While there is no dispute that civil *in rem* forfeiture under 21 U.S.C. § 881(a)(7) is *punishment* subject to the limitations of the Eighth Amendment, *see Austin*, 509 U.S. at 619-22; *Milbrand*, 58 F.3d at 845, as discussed in Part 1, *supra*, the forfeiture here was not constitutionally excessive because it was not grossly disproportional to the gravity of the offense.

In reliance on case law, the claimants argue, nevertheless, that the forfeiture violated the Constitution because it involved the taking of their family home. The cases they cite, however, do not bear the weight they put on them. Indeed *United States v. 829 Calle de Madero*, 100 F.3d 734 (10th Cir. 1996), a case relied upon by the claimants, actually supports the forfeiture here. In that

case, the Tenth Circuit -- in a pre-CAFRA and pre-*Bajakajian* case -- applied a mixed instrumentality and proportionality test to uphold the forfeiture of a family home. *Id.* at 739. The court explicitly considered the claimants' argument that the forfeiture was disproportionate because "the home has value far in excess of its monetary value because it is the place where they have lived and raised their family." *Id.* The court further noted that the forfeiture would be difficult because it "will displace the Claimants' three minor children from their family home." *Id.* at 739. Nonetheless, the court found that in evaluating the harshness of the forfeiture, the court could not rest solely on these factors. Specifically, the court also had to "consider the Claimants' deliberate and knowing use of the home in the criminal activity which gave rise to the forfeiture." *Id.*

Here, as in *829 Calle de Madero*, the claimants argue that the forfeiture of their home is especially harsh because it has a sentimental and emotional value as their home beyond its monetary value. Claimants' Br. at 18-19. But unlike that case, the forfeiture here will not displace any minor children. Thus, as in *829 Calle de Madero*, when the harshness of the forfeiture is weighed against the claimants' "deliberate and knowing use of the home in the criminal activity which gave rise to the forfeiture," the forfeiture, as in *829 Calle de Madero*, should be upheld. In sum, *829 Calle de Madero* does not support the claimants' argument that the government violated the Constitution by refusing to accept their offer of judgment.

The district court's decision in *United States v. 835 Seventh Street Rensselaer*, 820 F. Supp. 688 (N.D.N.Y.), *reconsideration granted in part*, 832 F. Supp. 43 (N.D.N.Y. 1993), is similarly unhelpful to the claimants. In that case, the court ruled that forfeiture of a family home under 21 U.S.C. § 881(a)(7) for the sale of 6.82 grams of marijuana at the home was a disproportionate sanction barred by the Cruel and Unusual Punishment Clause. As a preliminary matter, this case is distinguishable because the court applied a now-outdated test for evaluating gross disproportionality. The court in that case, decided long before CAFRA and *Bajakajian*, applied the gross disproportionality test from this Court's decision in *United States v. 38 Whalers Cove Drive*, 954 F.2d 29 (2d Cir. 1992). The *Whalers Cove* test, focusing on the gravity of the offense, the likely sentences to be imposed, and the likely sentences for the same crime in other jurisdictions, *id.* at 38, has now been displaced by the Supreme Court's analysis in *Bajakajian*.

Putting aside the legal standard, however, the *835 Seventh Street Rensselaer* decision is distinguishable on its facts. In that case, after facing state charges for the sale of 6.82 grams of marijuana and the possession of approximately 6 ounces of marijuana packaged for sale, the claimant faced the forfeiture of $69,778.01 in equity in his home, but a likely maximum fine for his conduct under the Sentencing Guidelines of $5,000. And while the court acknowledged that the statutory maximum fine would have been $250,000, it refused to use this figure in its proportionality analysis. Thus, according to the court, the size of the fine was grossly disproportionate to the likely

penalties for the conduct at issue, and indeed "border[ed] on being aberrational." *Id.* at 694. When considering this gross disproportionality, along with the potential impact on the claimant's family -- including the claimant's four children, three of whom were "severely handicapped" -- the court found a constitutional violation. *Id.* at 696-97 & n.9.

Here, unlike *835 Seventh Street Rensselaer*, there is no gross disproportionality between the maximum sentences and the size of the forfeiture. *See* Part 1.C., *supra*. Moreover, while the court in that case mentioned the impact of the forfeiture on the claimant's children, *see 835 Seventh Street Rensselaer,* 820 F. Supp. at 696 n.9, -- a concern not at issue in this case -- the court never suggested that the forfeiture of the home itself (as opposed to the cash value of the home) presented any constitutional concerns.

In this case, the claimants focus on the sentimental and emotional ties to their home, but those ties must be considered against the background of the record evidence in this case. Thus, while the claimants emphasize their sentimental attachments to their house, the evidence in this case shows that forfeiture will not displace any minor children, a factor often considered by courts, even when upholding a forfeiture. *See*, *e.g.*, *829 Calle de Madero*, 100 F.3d at 739; *45 Claremont Street*, 395 F.3d at 6. Moreover, the record here demonstrates that the von Hofes used their "family home" to engage in illegal drug activity: they grew, used, and distributed marijuana in their home, and used other illegal drugs, including Ketamine. And

because they chose to use their home for these purposes, the forfeiture of the family home falls squarely within the contemplation of Congress when it enacted 21 U.S.C. § 881(a)(7). *See 32 Medley Lane*, 372 F. Supp. 2d at 267 (A62) ("[I]n enacting 21 U.S.C. § 881(a)(7) Congress concluded that when real property is used to facilitate the manufacture or distribution of drugs, forfeiture -- even of a family home -- is appropriate, and this Court cannot say that in the circumstances of this case, the Constitution forbids that result.").

In recognition of the substantial harms from the drug trade, Congress has enacted harsh penalties for those who ply that trade. The district court noted that for many people without the means to own real property, these penalties often translate into lengthy terms of incarceration. *Id.* at 272. (A71.) Here, by contrast, the von Hofes stand to lose their family home. While this is undoubtedly a significant penalty, it is not grossly disproportional to the gravity of the offense. As the district court noted, "the great tragedy of drugs" is that "[t]hey indiscriminately destroy individuals, families and homes across the entire spectrum of our society." *Id.*

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: August 30, 2006

Respectfully submitted,

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 7,610 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

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ADDENDUM

18 U.S.C. § 983

. . .

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

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

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

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

(d) Innocent owner defense. --

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

by a preponderance of the evidence.

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

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

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

. . .

. . .

(g) Proportionality.--

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

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

(3) The claimant shall have the burden of establishing that the forfeiture is grossly disproportional by a preponderance of the

evidence at a hearing conducted by the court without a jury.

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

21 U.S.C. § 881(a)(7)

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(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.

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.